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## **The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum**

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### **1. Introduction**

The status of Taiwan has been one of the most intricate issues in both international law and international relations arenas for the past decades. The Taiwan question is essentially an extension of the “two Chinas” problem, which creates a dilemma for international law in accommodating the *de facto* existence of Taiwan under the vague concept of the one-China policy. Taiwan’s government, known officially as the Republic of China (ROC), was widely recognized as the only legitimate Chinese government until the United Nations General Assembly passed Resolution 2758 in 1971. This resolution replaced the ROC with its communist rival, the People’s Republic China (PRC) in the UN. After the deprivation of the UN seat had left Taiwan in a global legal vacuum, foreign states and international organizations have employed creative legal concepts in order to salvage the situation. In addition, from an international relations perspective, the Taiwan Strait, one of the most likely conflict zones in the Asia-Pacific region, has been dubbed the “Balkan Peninsula of the East.” The ROC-PRC, or cross-strait, situation is further aggravated by Taiwan’s key geo-strategic location, which has caused sovereignty over the island to remain the most sensitive issue in China-United States relations.

The Taiwan question and the so-called one-China policy must be discussed in tandem, given that they are closely intertwined in law and politics. This article will analyze the one-China legal challenges involving cross-strait relations and how these challenges have evolved over time. To this end, Section II will first provide an overview of the historical background of Beijing-Taipei relations. This article argues that the ROC on Taiwan never “ceased” to be a state following derecognition and the division of the nation of “old China” between two regimes, which possess separate statehoods. Facing this reality, both the ROC and the PRC have changed their previously once-rigid one-China policies and dealt pragmatically with cross-strait relations.

Moreover, foreign states have also followed various “divided state” formulas in the China case by recognizing the PRC as the *de jure* government of

China, but according *de facto* recognition to the ROC's authority over Taiwan. Section III will then analyze the framework for cross-strait talks and resumed talks on economic cooperation under the leadership of China's Hu Jintao and Taiwan's Ma Ying-jeou. This section demonstrates that a flexible interpretation of the one-China policy has led to a more constructive solution to the two sides' 60-year political and ideological gap. Section IV will examine Taiwan's participation in international organizations and the one-China obstacle it has encountered. The section will, in particular, analyze Taiwan's recent participation as an observer in the World Health Assembly (WHA), marking the first UN meeting the country has attended since it left the UN. Section V will conclude.

## 2. Historical Background: The Origin of the Taiwan Question

The Taiwan question originates from the two Chinas dilemma. Cross-strait relations can be divided into three stages. The first stage includes the period from 1895 to 1945, when cross-strait relations were "international relations" between China and Japan. The Republic of China, Asia's first constitutional republic, was founded by the Chinese Nationalist Party (Kuomintang or KMT) after it overthrew the Qing Dynasty in 1912. At the time of the ROC's birth, Taiwan was not within China's territorial scope, given that the previous Qing government ceded Taiwan "in perpetuity" to the Empire of Japan under the Treaty of Shimonoseki in 1895.<sup>1</sup>

The second stage of cross-strait relations, from 1945-1949, was purely domestic because both sides were under the jurisdiction of the ROC. During the Second World War, Chinese forces fought against Japanese invasion under the command of the highest leader of the ROC government, Generalissimo Chiang Kai-Shek. To outline the terms of Japan's surrender, the allied powers, including China, mandated that Taiwan, which "Japan has stolen from the

<sup>1</sup> Article 11 of the Treaty of Shimonoseki provides that "China cedes to Japan in perpetuity and full sovereignty the following territories [...] [including] the island of Formosa [...] and [t]he Pescadores Group [...]." It should be noted that the PRC and the ROC differ as to the legal status of the treaty. From the PRC's perspective, the treaty is characterized as an "unequal treaty" – signed under coercion, inconsistent with *jus cogens* and, consequently, invalid from the beginning. Following this logic, China never lost sovereignty over Taiwan, but simply "resumed" exercise of sovereignty of the island after Japan's surrender. The ROC did not challenge the validity of the treaty from 1945 to 1949, until its Declaration of War on Japan on December 9, 1941 denounced all bilateral treaties between the two nations, including, of course, the Treaty of Shimonoseki.

Chinese, [...] shall be restored to the Republic of China.”<sup>2</sup> This arrangement was unambiguously stated in the Cairo Declaration in 1943 and reconfirmed in the Potsdam Declaration in 1945. Japan, in its Instrument of Surrender, accepted the provisions prescribed by allied powers in September 1945, ending the long-lasting war. One month later, ROC forces officially took over Taiwan<sup>3</sup> and restored Taiwanese residents’ Chinese nationality. Following the conclusion of the San Francisco Peace Treaty between Japan and the allied powers in 1951, Japan and the ROC signed the Treaty of Taipei. Under these treaties, Japan reiterated that it renounced its claim to sovereignty over Taiwan.<sup>4</sup> Consequently, it is uncontested that from October 1945 to 1949, both Mainland China and Taiwan belonged to one nation: the ROC.

The Taiwan question did not occur as a major issue until 1949 when the Chinese Communist Party (CCP) founded the rival regime, the People’s Republic of China, led by Chairman Mao Zedong. The defeated ROC government fled to Taiwan. From 1949 to the present, cross-strait relations entered the third stage of a vague legal nature – neither international nor domestic. Despite the PRC’s claim that it had “succeeded” the ROC, the ROC on Taiwan enjoyed worldwide recognition for decades as the only legitimate government of China, in both the United Nations and the diplomatic circle. From the 1950s onward, the Soviet Union’s attempts to remove the ROC from the UN were consistently blocked by the Washington-led alliance. Nonetheless, the situation changed in the 1960s, as many pro-Beijing, newly-independent states were admitted into the UN and altered the dynamic of the Western-dominated

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<sup>2</sup> Stated in the Cairo Declaration. The Cairo Declaration and the Potsdam Declaration were jointly issued by the United States (Presidents Franklin Roosevelt and Harry S. Truman, respectively), the United Kingdom (Prime Minister Winston Churchill) and the ROC (Generalissimo Chiang Kai-Shek). Section Eight of the Potsdam Declaration, which reconfirmed the Cairo Declaration, provides that “[t]he terms of the Cairo Declaration shall be carried out [...]”

<sup>3</sup> Japanese forces in Taiwan surrendered to the representative of Chiang on October 25, 1945.

<sup>4</sup> Neither the ROC nor the PRC were invited to attend the San Francisco Peace Conference, due to disagreement between the US and the UK over China’s representation, as the former recognized the ROC, while the latter had switched recognition to the PRC. According to Article 2 of the Treaty of Taipei of 1952, “[i]t is recognised that under Article 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951 [...], Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratley Islands and the Paracel Islands.”

General Assembly.<sup>5</sup> In 1971, the UN General Assembly passed Albania-proposed Resolution 2758:

[...] Decides to *restore all its rights to the People's Republic of China and to recognize the representatives of its government as the only legitimate representatives of China* to the United Nations, and to *expel forthwith the representatives of Chiang Kai-shek* from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.<sup>6</sup> (emphasis added)

This resolution expelled the ROC, one of the UN's founding members, from the UN and forever changed the destiny of Taiwan. In less than a year, the ROC was compelled to leave almost all UN-affiliated agencies. The legal reason for this is simple. Resolution 2758 transferred the China seat to the PRC, leaving no room for the ROC. Even worse, the Nixon administration decided to sever relations with the ROC and recognize the PRC in 1979. The fact that most states followed the US's decision makes Taiwan the most renowned example of an unrecognized state or an entity *sui generis*. As of 2009, the ROC on Taiwan maintains diplomatic ties with only 23 countries in the world, most of which are in Africa and Latin America, and none are major.<sup>7</sup> The absence of recognition, which underpins legal challenges to the Taiwan question, further complicates cross-strait relations *vis-à-vis* the international community.

### 3. One China, Different Interpretations

Neither UN Resolution 2758 nor the ROC's loss of recognition from major states resolved the Taiwan question. These decisions clarified that the PRC is now the legitimate government of China, but they left it ambiguous as to whether Taiwan is part of the "China" that the PRC claims to represent. The Taiwan question is, in fact and in law, intertwined with the one-China policy.

<sup>5</sup> See Kirgis 1993, p. 179.

<sup>6</sup> Resolution on Representation on China, United Nations General Assembly, Oct. 25, 1971, G.A. Res. 2758, 26 GAOR Supp. 29 (A/8429), p. 2.

<sup>7</sup> These countries include: Europe (Vatican City); Africa (Burkina Faso, Gambia, São Tomé and Príncipe, Swaziland); Pacific (Kiribati, Marshall Islands, Nauru, Palau, Solomon Islands, Tuvalu); Latin America (Belize, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vi). Information of the ROC Ministry of Foreign Affairs, <http://www.mofa.gov.tw/webapp/ct.asp?xItem=11624&CtNode=1426&mp=1> (last visited Nov. 20, 2009).

There are three major theories across the political spectrum that I will discuss in order.

According to Beijing's one-China principle, the PRC succeeded the ROC as the sole government of China.<sup>8</sup> Put simply, the ROC was gone and Taiwan is now part of the PRC. Thus, Taiwan, deemed a "renegade province" occupied by illegal forces, has absolutely no international legal personality. This position is unfounded. First of all, the ROC, since its founding in 1912, has never ceased to be a state. Neither the Japanese occupation nor the creation of the PRC extinguished the ROC's statehood for even a day. The ROC has consistently met the statehood criteria under the Montevideo Convention on Rights and Duties of States, given that the nation possesses a permanent population, a defined territory, and a functioning government with the capacity to enter into foreign relations.<sup>9</sup> These parameters of the ROC may have changed over time, but they have never disappeared. With respect to the last "capacity" criterion, it may be argued that, as Taiwan's diplomatic relations are limited, the country lacks such capacity. Yet, this argument does not stand, because the ROC's diplomatic obstacle is due to the PRC's pressure over foreign states, which has led to the restriction of the ROC's foreign relations capacity.

Secondly, some may contend that the mere existence of statehood criteria set forth under the Montevideo Convention is irrelevant in the Taiwan case, because its failure to seriously assert its statehood precludes its characterization as a state.<sup>10</sup> This position ignores the fine difference between the two territorial concepts, Taiwan and the ROC. Given that the ROC's *de facto* jurisdiction extends only to Taiwan, these two political concepts have largely been merged in both international law and political discourse. However, it should be noted that, from a precise legal perspective, the province of Taiwan is part of the ROC, which has never failed to assert its statehood.

Thirdly, Beijing's one-China version, stating that Taiwan is part of the PRC, has never been accepted by foreign states. While foreign governments recognize the PRC as the legal government of China, they almost uniformly disagree with the PRC's territorial claim over Taiwan. That is why, in their respective

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<sup>8</sup> For the PRC's position on Taiwan, see two white papers issued by the Taiwan Affairs Office of the State Council: *The Taiwan Question and Reunification of China* (1993) and *The One-China Principle and the Taiwan Issue* (2000).

<sup>9</sup> For the past 60 years, the ROC on Taiwan has had a standing population of 23 million living on Taiwan and its outlying islands. The government has also functioned independently of the PRC.

<sup>10</sup> For example Crawford 2006, p. 219 ("[...] Taiwan is not a state because it still has not unequivocally asserted its separation from China and is not recognized as State distinct from China.").

joint communiqué with the PRC, the US and the UK simply “acknowledge,” Canada “takes note of,” and Japan “understands and respects” the PRC’s position that Taiwan is part of China.<sup>11</sup> These carefully chosen terms, used instead of the word, “recognize,” as well as negotiations history, directly refute the RPC’s claim of an “international consensus” that Taiwan is an inalienable part of China.

Finally, these foreign countries’ positions also imply that the ROC’s loss of recognition does not extinguish its statehood. Their positions are also consistent with the declaratory theory. Based upon this prevailing view of recognition, diplomatic recognition simply functions as the acknowledgement of a state, and no states can “by their independent judgment establish any competence of other states.”<sup>12</sup> Hence, the ROC’s existence is simply a fact; its statehood is by no means undermined by its lack of universal recognition. In other words, acceptance of the claim that the ROC lost its statehood by the loss of the UN seat or recognition inevitably leads to an ironical conclusion that the PRC did not “constitute” a state until the 1970s.

The second theory claims that Taiwan’s legal status has yet to be determined. According to this theory, neither the San Francisco Peace Treaty nor the subsequent Treaty of Taipei determine the sovereignty of Taiwan, because Japan, in these treaties, unilaterally relinquished its sovereign claim over Taiwan, but was silent as to which country the right would be transferred.<sup>13</sup> Taiwan’s status is, thus, undetermined. Moreover, since the ROC never gained title to Taiwan from these treaties, the PRC could not succeed the title from the ROC. As Taiwan’s “title vests in no state of the world,” its future should be determined by a plebiscite according to the self-determination principle.<sup>14</sup> Commentators continue to argue that although Taiwan was under illegal “military occupation” of Chiang’s forces for decades, the democratic process of Taiwan since the 1980s has transformed Taiwan’s undetermined status to an independent, but

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<sup>11</sup> See US-PRC Joint Communiqué on the Establishment of Diplomatic Relations (1979), UK-PRC Joint Communiqué Concerning Upgraded Diplomatic Relations (1972), Canada-PRC Joint Communiqué Concerning the Establishment of Diplomatic Relations (1970), Japan-PRC Joint Communiqué (1972); see also Green 1972, pp. 128-129 (“Our position, [...] which was made clear to Chinese from the start of the negotiations, is that the Canadian Government does nothing appropriate either to endorse or to challenge the Chinese government’s position on the status of Taiwan.”).

<sup>12</sup> Brownlie 2003, p. 88.

<sup>13</sup> For example Chen / Reisman 1972, pp. 641-47; Crawford 2006, p. 208.

<sup>14</sup> Chen / Reisman, p. 654.

yet to be complete, state.<sup>15</sup> This theory is plausible, but it contains several logical flaws. First, the meaning of treaties can be determined by the golden rule of interpretation, the *Vienna Convention on the Law of Treaties*. When the terms of treaties are ambiguous, the interpretations of such treaties can resort to supplementary means, including “preparatory work” and “circumstances of [their] conclusion.”<sup>16</sup> When Japan signed these two treaties, the ROC government had exercised effective jurisdiction over Taiwan. This fact was well known to, and never challenged by, Japan and the international community. Even assuming that the San Francisco Peace Treaty fails to decide Taiwan’s status,<sup>17</sup> it cannot be ignored that Japan and the ROC signed the Treaty of Taipei in Taiwan in just the following year. The prime purpose of that treaty was to reestablish diplomatic relations between the two nations. It would be unconceivable that the ROC would agree to the treaty if Japan intentionally left Taiwan’s status unresolved. These situations surrounding the conclusion of the treaties render this theory unconvincing.

Secondly, this theory equates the “plebiscite” with Taiwan’s democratic process, including four direct presidential elections from 1996 to 2008<sup>18</sup> and argues that Taiwan has achieved independent status. The problem with this contention is that the ROC’s presidential elections can be interpreted as a self-determination plebiscite, given that the elections were conducted to elect ROC presidents and not to vote for independence. Even assuming that the elections functioned as the plebiscite, the theory fails to provide a clear answer regarding at what point the new state of Taiwan was born.

The third, and more sensible, theory categorizing the status of Taiwan and cross-strait relations is the divided state theory. China is currently divided between the PRC and ROC. Since 1949, the PRC on the Mainland and the ROC on Taiwan have co-existed under the “*de jure* roof of China.” Both govern-

<sup>15</sup> Chen 2008, pp. 493-496.

<sup>16</sup> See Articles 31 and 32 of the Vienna Convention on the Law of the Treaties.

<sup>17</sup> See also Roger C.S. Lin v. United States, 561 F.3d 502, 506 (C.A.D.C. 2009) (“But for many years, [...] since the signing the [San Francisco Treaty] itself [...], the Executive has gone out of its way to avoid making that determination, creating an information deficit for determining the status of the people on Taiwan.”); Sir Anthony Eden’s Statement, 536 HC Deb col 159 (wa), Feb. 4, 1955 (“The Peace Treaty [...] did not [...] transfer [Taiwan] to Chinese sovereignty, whether to the People’s Republic of China or to the Chinese Nationalist authorities. [Taiwan is], therefore, in the view of Her Majesty’s Government, territory the *de jure* sovereignty over which is uncertain or undetermined.”).

<sup>18</sup> The first direct presidential election for the 9th term ROC president took place in 1996. Ma Ying-jeou (KMT Candidate) won the most recent election and took office as the 12th term ROC president in 2008.



ments have shared sovereignty of the “old China,” but neither side exercised jurisdiction over the other. For the past 60 years, both sides have functioned as independent states with distinct international legal personalities. As I will argue, the laws of the ROC and the PRC have gradually overcome the legal challenges to the one-China principle by reaching a divided state consensus, which has also been supported by the judicial practice of foreign states.

### 3.1 Law of Taiwan, Republic of China

At the end of World War II, the ROC National Assembly, then based in Nanjing, passed the ROC Constitution in 1947. The outbreak of the civil war prompted the National Assembly to enact the *Temporary Provisions Effective During the Period of Communist Rebellion* in the following year. The goal of the Provisions was to extend the president’s power by freezing citizens’ constitutional rights. This was intended to enable the government to more effectively combat opposing Communist forces. As the name suggests, the Provisions show that the ROC regarded members of the PRC regime as illegitimate Communist rebels, with no legal status whatsoever under domestic law.

Nonetheless, throughout time, the Provisions were under heavy criticism for two reasons. First, the existence of the PRC on mainland China is a reality that cannot be denied. The Provisions, which treated the PRC as illegal, left no room for the two rival governments to negotiate. From a more pragmatic perspective, the Provisions prevented any possibility of a legal basis for governing relations between the two sides. For instance, there was no constitutional basis for penalizing illegal immigrants from Mainland China to Taiwan, given that, technically, Mainland residents are entitled to the right to free movement under the ROC Constitution. Second, the Provisions hindered the normal constitutional order in Taiwan, as the ruling party, Kuomintang, had relied on the Provisions as an excuse to decline to hold universal elections for members of the National Assembly and presidents.

Taiwan took an important step in 1991, when the National Assembly abolished the Provisions and passed *Additional Articles* to the Constitution. The amendments authorize the government to enact laws to govern cross-strait relations and, more profoundly, mandate that, prior to “national reunification,” elections for new National Assembly members will take place only in the ROC’s “free area.”<sup>19</sup> A reasonable interpretation of this term signifies the landslide change of the legal attitude towards the PRC. The ROC recognizes

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<sup>19</sup> Articles 1 and 10, The Additional Articles of the Constitution of the Republic of China (1991). The Additional Articles have been amended seven times and the current version was promulgated in 2005.

explicitly that the “one China” (that is the ROC) is comprised of two areas: the free area under the government’s control and the rest of the ROC (Mainland China), to which the ROC’s jurisdiction does not extend. The 1992 *Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area* (*Cross-Strait Statute*) further vindicates this view by distinguishing the “Taiwan Area” from the “Mainland Area.”<sup>20</sup> The *Cross-Strait Statute*, which lays the foundation of Taiwan’s China policy, provides an overall framework for administrative, civil and criminal matters arising from cross-strait matters. From a legal perspective, the ROC government, regardless of the ruling political parties, has followed the “one ROC, two areas” formula based on the divided state theory.

The one-China problem has also provoked judicial interpretations. In 1993, the ROC Constitutional Court was asked to define the scope of the ROC territory, which, according to the Constitution, “shall be within its existing legal boundaries.”<sup>21</sup> The Court avoided addressing this issue by finding that the issue is beyond judicial review based on the political question doctrine. The Court, nonetheless, was again asked a different question of a similar nature. Congress (Legislative Yuan) members requested that the Court interpret what categories of “international agreements” should be sent to the Legislative Yuan for deliberation. Finding it difficult to bypass this issue, the Court in its *obiter dictum* explained that because cross-strait agreements are not within the scope of international agreements this interpretation shall not apply to such agreements.<sup>22</sup> Logically speaking, if cross-strait agreements are not considered to be international, they must, therefore, be domestic. A more sound interpretation of these agreements should be referred to the Constitutional Court of Germany’s decision, which affirmed the constitutionality of the Basic Treaty concluded between the two Germanys. In the decision, the Court found that the Basic Treaty “is a treaty under international law” and governs “*inter se* relations” of Germany.<sup>23</sup> Comparable to the German case, cross-strait agreements also

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<sup>20</sup> Articles 1 and 2, respectively, of the Act Governing Relations Between Peoples of the Taiwan Area and the Mainland Area define “Taiwan Area” as “Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the Government” and “Mainland Area” as “the territory of the Republic of China outside the Taiwan Area.”

<sup>21</sup> Interpretation No. 328, Justices of the Supreme Court, Judicial Yuan (1993).

<sup>22</sup> Interpretation No. 329, Justices of the Supreme Court, Judicial Yuan (1994).

<sup>23</sup> Decision of the Federal Constitutional Court, Constitutionality of the Basic Treaty (1973).

regulate the two Chinas' "special state-to-state relationship"<sup>24</sup> under the ROC's one-China framework.

### 3.2 Law of People's Republic of China

The PRC's one-China policy was once as rigid as the ROC's, albeit in a diametrically opposing direction. The preamble to the PRC Constitution provides that "Taiwan is part of the sacred territory of the People's Republic of China" and stresses the "lofty duty" to reunify Taiwan with the mainland. Based on the PRC's interpretation, "one China" refers to the PRC, and Taiwan, as part of the PRC, is currently occupied by unlawful forces. Strictly speaking, these terms in the preamble conflict with the divided state theory because, in the PRC view, the ROC is simply a historic term and possesses no statehood under international law. However, based on the gradual evolvement of the legal development and judicial practice, the PRC's attitude towards the "one China equals the PRC" formula has fundamentally, albeit implicitly, changed. The major political impetus which prompted the change included two successive victories in Taiwan's presidential elections by the pro-independence Democratic Progress Party (DPP). The PRC came to realize that its one-China policy, which provides no equal status to its counterpart in Taiwan, has fueled the hostile attitude of the Taiwanese towards China and indirectly aided the DPP's election campaigns. From a macro policy perspective, the PRC then altered its strategy from "promoting reunification" to defensive "anti-independence" efforts. This change is reflected in its laws concerning Taiwan.

The most significant statute on Taiwan is the *Anti-Cessation Law* that the PRC National People's Congress passed in 2005. The purpose of the law is to authorize the government to take measures against Taiwan under particular circumstances. The passage of the law immediately resulted in large protests on the Taiwan side. However, the law, in fact, signifies a significant change of the PRC's perception of the Taiwan issue: for the first time, the PRC implicitly recognizes the current status of a divided China. Several aspects are noteworthy. First, the goal of the *Anti-Cessation Law* is to deter Taiwan independence and underline certain situations in which the government shall adopt "non-peaceful means and other necessary measures."<sup>25</sup> Nonetheless, the legal authority

<sup>24</sup> In an interview with Deutsche Welle Radio in 1999, former President Lee Teng-hui explained that the 1991 constitutional amendments limit the ROC's constitutional effects on Taiwan and recognize the legitimacy of the PRC on the mainland. He further characterizes "cross-strait relations as a state-to-state relationship or at least a special state-to-state relationship." Interview available at <http://www.taiwandc.org/nws-9926.htm>. The PRC was severely infuriated by Lee's "two-state theory."

<sup>25</sup> These situations were listed in Article 8 of the Anti-Cessation Act, including: "In the

under the law is simply redundant if the Taiwan issue is only a domestic one, as the PRC once asserted, because the prohibition of the use of force under international law would be unlikely to preclude the PRC from using force in its internal affairs.

Secondly, Article 2 of the law provides that “both the mainland and Taiwan belong to one China.” This is important language because the word “China” has been carefully chosen, rather than the “PRC,” as Beijing had consistently used. This implies that China includes not only the PRC but also Taiwan. Thirdly, based on Article 5, “[a]fter the country is reunified,” Taiwan may “enjoy a high degree of autonomy.” This provision means that Taiwan will follow the destiny of Hong Kong and Macau as a “special administrative region”<sup>26</sup> under Deng Xiaoping’s “one country, two systems” framework. A more important aspect of this provision is to acknowledge the reality that the current status of China is that of “not-yet-reunified.” Finally, Article 7 further calls for cross-strait talks based on “equal footing.” This position largely evolved from the PRC’s prior stance that the Beijing-Taipei relationship is one of a central government towards a local government. In sum, based on the analyses above, although the *Anti-Cessation Law* incurred negative political ramifications towards cross-strait relations, the legal significance ironically aligns the PRC’s one-China policy with the ROC’s policy.

The PRC’s judicial practice also affirms this pragmatic approach and acknowledges the ROC’s *de facto* authority over Taiwan. For instance, in 1998 and 2009, respectively, the PRC’s Supreme People’s Court issued judicial interpretations which stipulate that, once recognized by Chinese courts, Taiwanese courts’ civil verdicts will be given the same validity in China as Chinese judicial decisions.<sup>27</sup> This approach further influences the post-takeover Hong Kong court, which also decided to recognize a Taiwanese court’s bankruptcy order. The court recognized that although Taiwan is “under the *de jure* sovereignty of the PRC.”<sup>28</sup> As the court reasoned, to recognize orders by Taiwanese

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event that the ‘Taiwan independence’ secessionist forces should act under any name or by any means to cause the fact of Taiwan’s secession from China, or that major incidents entailing Taiwan’s secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China’s sovereignty and territorial integrity.”

<sup>26</sup> Article 31 of the PRC Constitution provides that “[t]he state may establish special administrative regions when necessary.”

<sup>27</sup> See Xinhua News Agency May 14, 2009.

<sup>28</sup> Chen Li Hung v. Ting Leu Miao, [2000] 3 H.K.C.F.A.R. 9, 21 (C.F.A.).

courts is not only “necessary as a matter of common sense and justice,” but also beneficial to the movement toward national reunification.<sup>29</sup>

The change of the interpretation of its one-China policy demonstrates the new generation of PRC leaders’ more pragmatic approach. Both the PRC and ROC governments have gradually shifted from the two ends of the political spectrum towards the middle, thereby bridging the legal gap between their one-China policies. Both Beijing and Taipei concede that the *de facto* situation of China is divided, particularly given that both recognized the importance of dealing with cross-strait matters “before” reunification. However, the key legal difference between the two sides, concerning the *de jure* status of the divided China, remains. Another significant divergence relates to the ultimate future of China. For the PRC, reunification is *the* option, whereas it is only *an* option for Taiwan.

### 3.3 Laws of Foreign States

Foreign states also faced the Taiwan question after they switched recognition to the PRC. Their practice can be characterized as the “one China, different interpretations” policy, which, in essence, applies the divided state theory to China. Foreign states officially conceded to Beijing’s one-China policy in diplomatic settings, but recognized the ROC’s authority both in fact and in law. This practice is not only reflected in their respective governments’ joint communiqués with the PRC, as mentioned above, but also in their judicial practices. The prime reason for this approach is pragmatism. The PRC in fact has no control over Taiwan and, hence, a framework must be developed to deal with foreign affairs concerning Taiwan. This approach also delicately overcomes the legal challenges caused by the switch of recognition to the PRC.

The United States is the most renowned example. US administrations have consistently based their China policies on three US-PRC communiqués and the *Taiwan Relations Act* (TRA).<sup>30</sup> US President Barack Obama reiterated this position in his state visit to China in 2009.<sup>31</sup> Yet, it is noteworthy that the US version of the one-China policy is different from that of the PRC. As the most recent US-China Joint Statement indicates, the US government “follows *its* one

<sup>29</sup> Id. at 21 & 25.

<sup>30</sup> The three communiqués include the Shanghai Communiqué (1972), the Joint Communiqué on the Establishment of Diplomatic Relations (1979) and the 817 Communiqués. The US Congress passed the Taiwan Relations Act in 1979. The TRA provides that “[t]he absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan.” 22 U.S.C. § 3303 (2000).

<sup>31</sup> The White House, Office of the Press Secretary November 17, 2009a.

China policy.”<sup>32</sup> The key difference between the stances of the PRC and the US is that the latter has never recognized the PRC’s sovereignty over Taiwan.<sup>33</sup> Moreover, the US court has clearly pointed out that US-China diplomatic ties cannot be interpreted as the “acceptance of one another’s territorial claim.”<sup>34</sup> In fact, while the three joint communiqués normalized US-PRC relations, the TRA, passed by the Congress, was to mandate that the US government and courts regard Taiwan “as if derecognition has not occurred.”<sup>35</sup> According to the TRA, the US government not only established the *de facto* embassy – the American Institute in Taiwan – to maintain “non-official” relations with Taiwan, but the US courts have also consistently accorded Taiwan state status under the Act of State Doctrine and the Foreign Sovereign Immunity Act.<sup>36</sup> Additionally, the TRA prevents the PRC from succeeding the ROC’s embassy property, and the *ROC-US Treaty of Friendship, Commerce and Navigation* continues to be effective.<sup>37</sup> The US’s approach to the one-China policy, as the court pointed out, reaffirms the US-Taiwan “quasi government relations” and indicates the US’s “*de facto* recognition of Taiwan.”<sup>38</sup>

Other countries also share the US approach, even in the absence of statutes such as the TRA. For example, the United Kingdom, under its *Foreign Cor-*

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<sup>32</sup> The White House, Office of the Press Secretary November 17, 2009b (emphasis added). The Taiwan Relations Act was deliberately removed from the written Joint Statement. The PRC does not “recognize” the TRA, claiming that the provisions of the TRA (in particular, those concerning arms sales to Taiwan) directly contravene the US’s commitments of the one-China principle under the three joint communiqués.

<sup>33</sup> The Chairman of the American Institute in Taipei explained to Taiwan President Ma Ying-jeou that the United States “has never taken a position on the political status of Taiwan.” See [http://news.ifeng.com/taiwan/1/200911/1125\\_351\\_1449730.shtml](http://news.ifeng.com/taiwan/1/200911/1125_351_1449730.shtml) (Nov. 25, 2009, in Chinese).

<sup>34</sup> *Wong v. Ilchert*, 998 F.2d 661, 663 (9th Cir. 1993).

<sup>35</sup> *Dupont Circle Citizens Ass’n. v. D.C. Bd. of Zoning Adjustment*, 530 A.2d 1163, 1170 (D.C. 1987).

<sup>36</sup> 22 U.S.C. § 3305 (2000); *Millen Industries, Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 882 (D.C. Cir. 1988); *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910 (S.D.N.Y. 1993); *Chu v. Taiwan Tobacco & Wine Monopoly Bureau*, 30 F.3d 139 (1994).

<sup>37</sup> 22 U.S.C. § 3303(b)(3)(A) (2000). The PRC is therefore able to keep its embassy property, known as “Twin Oaks” that the country had purchased in 1947; *N.Y. Chinese T.V. Programs v. U.E. Enterprises, Inc.*, 954 F. Supp. 841, 847, 853–54 (D.N.J. 1996).

<sup>38</sup> *Chang v. Northwestern Mem’l Hosp.*, 506 F. Supp. 975, 978 n.3 (N.D. Ill. 1980).

*poration Act*, recognizes Taiwanese law as the law of a recognized state.<sup>39</sup> In addition, the British court ruled that Taiwan and China should be deemed separate countries, given their different “political boundaries”; hence, it was impermissible for the International Amateur Athletic Federation to exclude Taiwan based on its charter’s “one member for each country” provision.<sup>40</sup> Similarly, the Swiss court decided to grant Taiwan judicial assistance, ruling that the lack of bilateral diplomatic ties should not bar such assistance.<sup>41</sup>

The French court, which is even more unambiguous, dismissed the PRC’s intermediary appeal and held that, as “the Republic of China [...] is a Chinese state (*Etat Chinois*),” the absence of recognition does not hinder its legal standing to defend the right of its former embassy property.<sup>42</sup> Moreover, the German, Italian, and US courts have adamantly rejected the claim that the Warsaw Convention, to which the PRC is a party, should bind Taiwan, despite the PRC’s declaration that the convention “shall of course apply to the entire Chinese territory including Taiwan.”<sup>43</sup> The Canadian courts went even further. The court in Nova Scotia specifically recognized Taiwan as a “flag state” under the Law of the Seas and decided that Taiwan possesses exclusive jurisdiction over Taiwanese nationals in high seas.<sup>44</sup> In a subsequent case, the Quebec court upheld Taiwan’s sovereignty immunity claim. The court found that Taiwan meets all statehood criteria under the Montevideo Convention and that the Canadian government, despite its one-China policy, recognizes Taiwan’s “political independence” by its official dealings with Taiwan.<sup>45</sup>

These cases support the author’s assertion that foreign states have followed their own “one China, different interpretations” approaches. These states never agreed to the PRC’s one-China version regarding Taiwan’s status. Rather, they have applied the divided state formula to cross-strait relations by recognizing

<sup>39</sup> See Crawford 2006, pp. 202-203.

<sup>40</sup> *Reel v. Holder*, [1981] 3 All E.R. 321, 321-25.

<sup>41</sup> See generally Henzelin 2005.

<sup>42</sup> The property is located in Taiti (French Polynesia). *La République De Chine*, 2ème Chambre – Section B, Cour D’Appel De Paris, 07/02874 (Oct. 16, 2008), para. 3, p. 7.

<sup>43</sup> *Landgericht Mönchengladbach* (9 0 58/87) (Feb. 24, 1988), 1988 TRANSR 283; *Fratelli v. Thai Airways, Alitalia*, Tribunale di Naples, 23. 4. 1983 n. 2850, (1889) AIR L. 213; *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1145-47 (9th Cir. 1999).

<sup>44</sup> *Romania v. Cheng* [1997] N.S.R.2d 13, 45 (Can.), reprinted in *Chinese Yearbook of International Law and Affairs* 15, pp. 111-140 (1996-97).

<sup>45</sup> *Parent v. Singapore Airlines Ltd.*, [2003] R.J.Q. 1330; see also Elias 2004.



the PRC as the government of China, but continuing to accord *de facto* recognition of the ROC's sovereignty over Taiwan.

#### 4. Cross-Strait Talks and Recent Developments

As discussed above, both Beijing and Taipei have adopted more flexible interpretations of their one-China policies. Although the PRC and the ROC never officially recognized each other, as the two Germanys did during the *Ostpolitik* era in the 1970s, the two Chinese regimes have at least come to an era of “non-denial” of each other's *de facto* existence in bilateral relations, thereby leaving room for negotiations with their counterpart.

From a legal perspective, to either the PRC or the ROC, the other side of the Taiwan Strait is neither a completely foreign state nor a purely domestic territory. Consequently, both sides established specific agencies to deal with cross-strait affairs. These agencies are China's Taiwan Affairs Office under the State Council and Taiwan's Mainland Affairs Council under the Executive Yuan.<sup>46</sup> However, because government-to-government negotiations would inevitably create an impression of official recognition of each other, both China and Taiwan respectively created so-called “white glove,” semi-official organizations – namely, the Association for Relations Across the Taiwan Strait (ARATS) and the Strait Exchange Foundations (SEF) – to deal with cross-strait affairs. The first ARATS-SEF talk took place in Singapore in 1993 and concluded with four agreements on notarized letters, registered mail and basic frameworks for cross-strait talks and exchanges.<sup>47</sup>

##### 4.1 Cross-Strait Economic Integration

However, due to the pro-independence stances of prior Taiwan presidents, the ARATS-SEF meetings were suspended until KMT candidate Ma Ying-jeou came into office in 2008. Ma's China-friendly policy, based on his acquiescence to the 1992 consensus of “one China with different interpretations,”<sup>48</sup>

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<sup>46</sup> As Chinese government agencies are under the control of the Chinese Communist Party, the Director of the Taiwan Affairs Office also serves as the head of the CCP Central Committee's Taiwan Affairs Office.

<sup>47</sup> Note that the first “unofficial” talk was held by the Red Cross Societies of Taiwan and China in 1990. Both societies concluded the Kinmen Agreement on the expatriation of illegal immigrants and criminal suspects.

<sup>48</sup> The alleged “consensus” results from correspondences between the ARATS and the SEF on the one-China principle. The PRC has consistently insisted on the consensus as the precondition to resume cross-strait talks.



escalated cross-strait exchanges. In just one year, three ARATS-SEF meetings were held, at which various agreements that make regular, direct air and sea transport possible were finalized.<sup>49</sup> The two sides also signed a Memorandum of Understanding on financial cooperation to open each other's financial markets.<sup>50</sup> Currently, Beijing and Taipei are even negotiating a free trade agreement (FTA), usually referred to as the Economic Cooperation Framework Agreement (ECFA), to further liberalize trade barriers.<sup>51</sup> The ECFA will relax Taiwan's WTO-inconsistent restrictions on Chinese products and enable Taiwanese industries to further expand their operation in China. The ECFA, therefore, will be a landmark agreement that makes two political rivals "normal trading partners."

These recent developments on cross-strait affairs are due to the fact that cross-strait economic integration proved to be inevitable. China's same language and lower-labor-cost market provides an attractive platform for Taiwanese factories. In fact, from a global trade perspective, China and Taiwan are partners rather than competitors, given that industries from both sides are usually compatible and interdependent. The newly coined "Chiwan" phenomenon actually refers to the competitiveness of products that are "made by Taiwan but made in China."

The statistics show that the total cross-strait trade volume skyrocketed from \$5 billion USD in 1990 to \$105 billion in 2008.<sup>52</sup> The share of trade with China accounts for 21 per cent of Taiwan's total trade and, moreover, Taiwan has become the 7<sup>th</sup> largest source of China's foreign direct investment.<sup>53</sup> The "no haste, be patient" policy that Taiwan adopted in 1996 in an attempt to curb the "China investment fever" largely failed, because the policy forced Taiwanese companies to go underground by investing in China through their foreign shell companies. The Taiwan government was unable to oversee the

<sup>49</sup> For instance, previous cross-strait charter flights were required to make a stopover in a "third place," usually Hong Kong or Macau. These ARTS-SEF meetings, also referred to as "Chiang-Chen talks," took place in July 2008 (Beijing), November 2008 (Nanjing) and April 2009 (Taipei). For information on agreements concluded at the meetings, see <http://www.mac.gov.tw/np.asp?ctNode=5891&mp=3>.

<sup>50</sup> The China Post November 17, 2009. This MOU also marks the first document signed by "official" government agencies (financial supervisory bodies) of China and Taiwan.

<sup>51</sup> Introduction to the ECFA, see <http://www.ecfa.org.tw/intro.php> (in Chinese).

<sup>52</sup> Table 6: Estimated Total Trade between Taiwan and Mainland China (1987-2009), Mainland Affairs Council.

<sup>53</sup> Table 8: The Shares of Cross-Strait Trade in Taiwan Total Foreign Trade (1984-2009) & Table 30: Mainland China Realized Foreign Direct Investment by Country (Area) (2006-2009), Mainland Affairs Council.

cash flow of these companies and, therefore, lost tax revenues. Additionally, because of Taiwan's restrictions on investments in China, both foreign and local enterprises gradually shifted their operations to China and Southeast Asia (for example Vietnam and the Philippines). This situation is expected to be aggravated by the FTA between China and the Association of South-east Asian Nations (China-ASEAN FTA), to be completed in 2010, because China-made products will enjoy zero-tariff treatment in the ASEAN market and vice-versa.<sup>54</sup> These negative consequences and pressures from domestic industries prompted Taiwan's new government to liberalize trade with China in an attempt to assist local companies in gaining entry to the Chinese market, while maintaining their headquarters and R&D operations in Taiwan.

These economic developments have salient legal and political implications. First, in cross-strait economic talks, both Beijing and Taipei have pursued "strategic ambiguity" regarding the one-China principle, similar to their pragmatic approaches toward legal developments. The two governments have avoided making sovereign disputes an obstacle to economic cooperation. This can be demonstrated in some technical matters. For example, on agreements concluded between the two sides, the "year" section at the bottom of these agreements is intentionally left blank. The reason for this is that official Taiwanese documents are dated according to the ROC Year (1912 as the first year of the ROC), which Beijing finds sensitive. Another example is that it became customary for government officials to attend ARATS-SEF meetings as "consultants," thus striking a delicate balance between efficiency and keeping the meetings unofficial in nature.

Secondly, international rules play an increasingly important role in cross-strait matters. In this regard, China's position on the cross-strait FTA, ECFA, is significant. Although both China and Taiwan acceded to the WTO, China was reluctant to see Taiwan as an equal member and insisted that cross-strait trade matters, as domestic affairs, should be dealt with only on a bilateral basis. Nonetheless, the recent discourse of the Chinese leadership shifted this view when they agreed with their Taiwanese counterparts that the ECFA should be concluded under WTO rules.<sup>55</sup> The shift of the PRC's position represents an implied compromise between the two governments. On the Taiwan side, the Congress will be unlikely to agree to the ECFA if it does not indicate "equal status" between the two sides under international norms. From the Chinese perspective, China can refer to the example of the *Mainland-Hong Kong Closer Economic Partnership Arrangement* (CEPA)<sup>56</sup> and unilaterally explain

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<sup>54</sup> See Weichen October 22, 2009.

<sup>55</sup> Deming November 13, 2009.

<sup>56</sup> The Mainland-Hong Kong CEPA was signed in 1993. A similar "arrangement"

that the ECFA, similar to the CEPA, can be concluded under the WTO framework and does not contravene the one-China principle. The Chinese leadership was also well aware that the ECFA will accelerate cross-strait economic ties, which will provide an essential impetus for future, if possible, political integration. Therefore, based on these considerations, both sides came to a consensus under which cross-strait economic relations will be governed by WTO norms.

#### 4.2 Taiwan's International Space

The practice of leaving the one-China ambiguous with flexible interpretations does not automatically apply to political affairs involving Taiwan's status in the international arena. In other words, the warming of Beijing-Taipei economic ties does not necessarily overcome the foreseeable one-China bottleneck of cross-strait talks concerning Taiwan's international space. The new "flexible policy" that Taiwan's President Ma advocates departs from that of former President Chen Shui-bian, who aimed at getting Beijing's diplomatic allies to defect towards Taipei at any cost.<sup>57</sup> Chen's policy, notoriously known as the "dollar policy," not only entrenched corruption in small states, but also caused a severe backlash from China and undermined US-Taiwan relations.

To seek a diplomatic truce, Ma intends to rectify the zero-sum diplomatic problem by improving relations with China while increasing Taiwan's international space. For Taiwan, diplomacy is an extension of the cross-strait policy. Recent economic talks and the ECFA, thus, fall within Ma's agenda. In fact, due to the China factor, Taiwan's FTA efforts have had little progress. Despite its economic power, Taiwan has essentially been excluded from regional integration in Asia. As of 2009, Taiwan concluded FTAs with its five Latin American allies,<sup>58</sup> but their bilateral trade volume accounts for only 0.18 per cent of Taiwan's total foreign trade.<sup>59</sup> In the author's view, the ECFA is envisaged as

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(instead of "agreement," which usually refers to documents signed between two sovereigns) was signed between China and Macau. Introduction to the CEPA, see <http://www.tid.gov.hk/english/cepa/>. To avoid being "downgraded" to the status of Hong Kong, Taiwanese officials have insisted on using the word "agreement" to refer to the ECFA and that the two sides should use their official titles under the WTO, namely, China and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).

<sup>57</sup> The China Post November 11, 2008.

<sup>58</sup> Taiwan concluded FTAs with Panama (effective in 2004), Guatemala (effective in 2006), Nicaragua, El Salvador and Honduras (effective in 2008), Free Trade Agreement, Central America FTA Production Center, [http://www.centralamericaproduct.org/eng/site\\_content.php?site\\_content\\_sn=106](http://www.centralamericaproduct.org/eng/site_content.php?site_content_sn=106) (last visited November 20, 2009).

<sup>59</sup> The China Times October 16, 2009.

the key to the FTA door. Taiwan expects that FTA talks with its major trading partners – in particular, the US, Japan and Singapore – will accelerate if they observe that the “chilling effect” of the China factor is diminishing.<sup>60</sup> This approach will also impose a new one-China test for Beijing. If China decides to obstruct Taiwan’s FTA efforts, as it did previously, it will inevitably undermine the mutual trust that supports recent economic cooperation.

The one-China principle in international organizations is even more complex. In reality, the equal status in cross-strait talks does not apply to asymmetrical Beijing-Taipei relations in global politics. The divided state formula followed in domestic legal systems makes it difficult to circumvent the sovereign state membership requirement in almost all UN agencies.<sup>61</sup> The prime reason that Taiwan holds membership in 28 international organizations, mostly non-UN-affiliated, is that these organizations have “creative” membership requirements.<sup>62</sup> For instance, Taiwan joined the Asia-Pacific Economic Cooperation (APEC) as an “economy,” the WTO as a “separate customs territory,” and the Extended Commission for the Conservation of Southern Bluefin Tuna as a “fishing entity.” These various membership requirements bypass the one-China obstacle and acknowledge the pragmatic need to incorporate Taiwan into international norms. However, the one-China issue will continue to incur renewed challenges to the state requirement in other organizations.

In fact, Taiwan’s lack of representation in the UN system has posed a security threat to the international community. For instance, although the Taipei Flight Information Region covers 12 international flight routes, Taiwan has been unable to receive updated technical information from the International Civil Aviation Organization. This also had a devastating consequence in 2003, when the SARS outbreak left 73 dead in Taiwan, partially as a result of the absence of contact with the World Health Organization (WHO).<sup>63</sup>

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<sup>60</sup> See, for example, The China Post May 9, 2008. In addition, since 2005, Taiwan has sought to join the P4 FTA between New Zealand, Singapore and Brunei Darussalam. Despite the FTA’s “open-access” provision, the parties found it too “sensitive” to support Taiwan’s accession. APEC Forum, Progress of APEC Economic Integration and Taiwan’s Participation, PPT Slides, p. 11 (in Chinese).

<sup>61</sup> For instance, Article 4 of the UN Charter provides that UN membership is available “to all other peace-loving *states*.” Emphasis added.

<sup>62</sup> Taiwan’s Memberships in International Inter-Governmental Organizations, Ministry of Foreign Affairs, <http://www.mofa.gov.tw/webapp/ct.asp?xItem=32178&CtNode=1442&mp=1> (last visited November 20, 2009).

<sup>63</sup> Chronology of the SARS Outbreak, in: Taiwan Yearbook 2005, <http://www7.www.gov.tw/todaytw/2005/TWtaiwan/ch08/2-8-10-0.html> (last visited Nov. 22, 2009) (in Chinese). In addition, as a non-UN member, Taiwan is unable to join UN-sponsored treaties. Taiwan has followed the “unilateral compliance” approach with regard

To overcome these obstacles and to strengthen Taiwan's international standing, the ROC has sought UN membership and asked the UN to review Resolution 2758 since 1993, but these applications were consistently blocked from being listed on the General Assembly's agenda.<sup>64</sup> Taiwan's various efforts to join the WHO from 1997 also suffered the same result. These diplomatic defeats, to a large extent, have prompted an increase in public resentment toward China. The PRC was aware that Taiwan's diplomatic frustrations are likely to lead to anti-China movements, which benefit the pro-independence Democratic Progress Party in election campaigns. To the PRC, dealing with the KMT, a familiar rival, is strategically safer than dealing with the DPP, an unpredictable stranger. Hence, the KMT-CCP Party Talk in 2005 first addressed the issue of Taiwan's participation in international activities. Both sides agreed to negotiate relevant issues, with priority given to the WHO.<sup>65</sup> In 2009, the WHO Secretariat issued an invitation to Taipei to attend the World Health Assembly, the WHO governing body, as an "observer."<sup>66</sup> The 62nd WHA Assembly, therefore, marks the first official UN-related activity that Taiwan has attended since it was ousted from the UN in 1971.

Some may claim that Taiwan's participation in the WHA signifies a diplomatic breakthrough and that this formula should be followed with regard to other UN agencies. This assertion is an oversimplification. It is true that, given the improved cross-strait relations, Taiwan's efforts to join international organ-

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to these treaties. For instance, in 2009, the Legislative Yuan ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (which the ROC signed before it left the UN) and passed the Enforced Law concerning these two covenants. Through its diplomatic allies, Taiwan "deposited" the instruments of ratification in the UN.

<sup>64</sup> See, for example, *Participation Proposal* (2005) and *Peace Proposal* (2005), reprinted in Chinese (Taiwan) Yearbook of International Law and Affairs 23, pp. 104-119 (2005). In 2009, Taiwan did not ask its allies to submit its UN accession proposal. The government now focuses on "meaningful participation" in UN special agencies, including the World Meteorological Organization, the World Bank, the Food and Agriculture Organization, International Maritime Organization and the International Civil Aviation Organization.

<sup>65</sup> See Point 4, Lien-Hu Meeting: Communiqué on April, 29, 2005, Liberty Times, available at <http://www.libertytimes.com.tw/2005/new/apr/30/today-fo3.htm>. (in Chinese).

<sup>66</sup> The invitation letter from Dr. Margaret Chan, WHO Director-General, states that "I wish to invite the Department of Health, Chinese Taipei, to attend the 62nd World Health Assembly as an observer." This is the first official UN document that addresses Taiwan as "Chinese Taipei," instead of "Taiwan, Province of China." Lien-Ho Bao, at A1 (April 30, 2009, in Chinese).

izations have made certain progress. Nonetheless, these developments by no means untie the one-China legal knot. First, the WHA observer status does not directly touch upon the WHO's state requirement. It should be noted that the WHA currently has six observers, including a sovereign state (the Holy See), a state-like entity (the Palestine Liberation Organization or PLO) and three international organizations. The composition of these observers leaves the Taiwan's status ambiguous. Hence, either Beijing or Taipei may adopt its own favorable interpretation. In this regard, the domestic laws' "one China, different interpretations" approach is applied in the international context. However, not all UN agencies allow observers, and even those admitting observers may not have a similarly ambiguous composition.

Secondly, it should be noted that, different from "permanent observer" status in the UN General Assembly,<sup>67</sup> WHA observer status is conditional on the WHO Secretariat's annual invitation. In other words, Taiwan's observer status may largely hinge on the development of cross-strait relations. Finally, the most important issue may be when and how the two sides will push the one-China envelop. It may be accurate to state that, given China's acquiescence, Taiwan's "flexible policy" has enlarged its international space. Yet, because of domestic pressure, the democratically elected government will continue to pursue its international claim. The real question is where China's "red line" stands. To further accelerate cross-strait integration, the political issue of Taiwan's status in the international arena is inevitable. The legal challenges imposed by the one-China principle that have evolved in the past few decades can only be overcome by the political wisdom of the two Chinas.

## 5. Conclusion

The Taiwan question is the legacy of the "two Chinas" problem. UN Resolution 2758 on "representation of China" does not halt the diplomatic battle between the PRC and the ROC. Rather, this resolution led to renewed legal challenges to the so-called one-China policy in both the cross-strait and international arenas. This article argues that the ROC's state status was never extinguished as a result of derecognition. In past 60 years, the PRC and the ROC, which possess separate statehoods, have co-existed under the *de jure* roof of China. Facing the reality of divided state status, both Beijing and Taipei have gradually altered their once-rigid one-China policies. They both remanded the

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<sup>67</sup> The Holy See and the PLO are also UN General Assembly's "non-member state and entity" observers. Permanent Observers, see <http://www.un.org/en/members/non-members.shtml> (last visited November 22, 2009).

laws, paving the way for cross-strait negotiations. Foreign states have also recognized the divided China situation. This is demonstrated by the state practice that recognizes the PRC as the Chinese government, but declines to concede the PRC's position on Taiwan. It is also evident in their treatment of Taiwan as though derecognition did not occur.

Resumed cross-strait talks focusing on economic cooperation also demonstrate both sides' pragmatic approaches to the one-China principle. The increasing warm-up of Beijing-Taipei ties largely accelerates the legalization of cross-strait integration and increases stability in East Asia. Taiwan also enlarges the scope of its substantive foreign relations. Despite these positive developments, the article finds it overconfident to conclude that the pragmatic approach to the one-China policy will resolve the Taiwan question. The future challenge remains as to how to accommodate Taiwan in UN-affiliated agencies under their state-only membership requirements. This challenge, albeit of a legal nature, will hinge upon the political development of cross-strait relations and will continue to be a core test for both sides of the Taiwan Strait.

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## AKTUELL IM BWV

Adolf-Arndt-Kreis (Hrsg.)

### Recht regiert die Welt – fragt sich nur welches?

– Vom Völkerrecht der Staaten zum Weltbürger- und Menschenrecht –



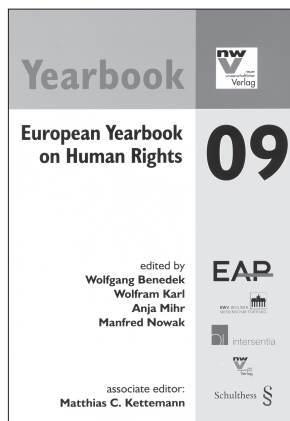
Immer dringlicher stellt sich die Frage, welche Steuerungsmöglichkeiten das Recht in seinen fragmentierten Rechtsregimen auf verschiedenen Ebenen entfalten kann, um zu verwirklichen, was universelle Geltung beansprucht: die Austragung von Interessengegensätzen und Konflikten unter Wahrung der Menschenrechte mit Hilfe des Rechts. Die internationale Gemeinschaft und ihre supranationalen Institutionen wie auch die privaten Global Players (u. a. NGOs) stehen hier in der Verantwortung.

Wie ist es um den Schutz der Menschenrechte in der internationalen Wirtschaftsordnung bestellt? Mit welchen Mitteln kann ihnen dort mehr zur Durchsetzung verholfen werden? Welche Rolle spielen internationale Gerichtshöfe? Wie kann es gelingen, Macht weltweit zu zähmen, Machtgegensätze auszugleichen und eine Weltgemeinschaft zu errichten, die sich den Regeln der Menschlichkeit und wechselseitiger Achtung unterwirft?

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Wolfgang Benedek, Wolfram Karl, Anja Mihr, Manfred Nowak (Eds.)

### European Yearbook on Human Rights 09



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