

Fordham International Law Journal

Volume 28, Issue 1

2004

Article 1

One-China Policy and Taiwan

Y. Frank Chiang*

*

Copyright ©2004 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

One-China Policy and Taiwan

Y. Frank Chiang

Abstract

In April 2003, the severe acute respiratory syndrome ("SARS") disease spread to the island of Taiwan. These statements, made by the general who assigned the R.O.C. government to assume the task of the post-surrender administration of Formosa, and those of the high governmental officials of the leading Allied Powers not only demonstrate that the R.O.C. government has not acquired title to the island of Taiwan by occupation for the State of China, but also attest to the existence of a rule in international law that if title to a territory of the defeated State is to be changed after a war, then it must be achieved by a territorial treaty. ... Because the modern State is based on territory, China's claim of sovereignty over Taiwan is necessarily predicated on its claim of title to the island of Taiwan. As analyzed herein, China never reacquired title to the island of Taiwan by any recognized means in international law: it did not acquire it under the Cairo Declaration; it did not acquire it by the Peace Treaty of San Francisco or any other treaty.

ARTICLES

ONE-CHINA POLICY AND TAIWAN*

*Y. Frank Chiang***

INTRODUCTION

In April 2003, the severe acute respiratory syndrome (“SARS”) disease spread to the island of Taiwan.¹ Not being a member of the World Health Organization (“WHO”), Taiwan could not receive information provided by the WHO for preventing the spread of the SARS diseases. Earlier, the government of the Republic of China (“R.O.C.”) in Taiwan applied to the WHO to become an observer at its annual meeting, the World Health Assembly (“WHA”), as it had done repeatedly in the past several years. On May 12, 2003, when the WHA opened its session in Geneva, the Assembly again rejected the R.O.C.’s application. The U.N. Press Club decided to hold a press conference² at the U.N. headquarters in New York City to discuss the

* © Y. Frank Chiang. This Article was first published as *State, Sovereignty, and Taiwan*, 23 FORDHAM INT’L L.J. 959 (2000). The current Article includes an update on developments since 2000. Portions of this Article are from *The Territorial State and Taiwan, in UNITED NATIONS’ CONTRIBUTIONS TO THE PREVENTION AND SETTLEMENT OF CONFLICTS* 83 (Kazuomi Ouchi & Maki Nishiumi eds., 2003) by this author.

** Professor of Law, Fordham University School of Law; J.D., 1965, University of Chicago; LL.M., 1962, Northwestern University; LL.B., 1958, Taiwan University. I am grateful to Mr. Erwin Condez, J.D., Fordham, Mr. Paul Wu, Ms. Li-Wen Chan, LL.M., Fordham, Ms. Huei Jung Chen, LL.M., Fordham, for their research assistance, to Mr. Charles C. Hsieh for providing some documents, and to Mr. David Chiang, J.D., Fordham, for his assistance in editing the draft. I also thank Fordham University School of Law for a summer research grant. All errors are mine.

1. The geographical term “Taiwan” in its strict sense refers to the island of Formosa, and in its broad sense, to a group of islands consisting of Formosa and a few surrounding islands, including the Pescadores (Penghu), Green Island (previously called Kashoto by the Japanese), and Lan (Orchid) Islet, but does not include Quemoy (Kinmen) or Matsu, two small islands off the Chinese coast. The word “Taiwan” in the political term “Republic of China in Taiwan” is used in its broad sense.

As used in this Article, the terms “Formosa” and “island of Taiwan” both refer to Taiwan in its broad sense, and the term “Taiwan” refers to the political entity existing on the island of Taiwan with a government called “the Republic of China.” Hence, the term “Republic of China” (“R.O.C.”) refers to the government of the political entity Taiwan.

2. The press conference took place on May 23, 2003. See *U.N. Bars Taiwanese Official From Briefing*, WASH. POST, May 24, 2003, at A22.

WHO's rejection of Taiwan in its efforts to gain entry into the organization. The Press Club invited an official from the Taipei Cultural and Economic Office, an informal consulate office of the R.O.C. government, to speak at the conference. When the R.O.C. official attempted to enter the U.N. building, Kofi Annan, the U.N. Secretary-General, barred him from entry "because of the organization's 'one-China' policy."³

It was not the first time that Kofi Annan, as the Secretary-General of the United Nations, had expressed his view regarding Taiwan. When a strong earthquake struck the central island of Taiwan in 1999, while people lay buried under the rubble, Annan said that the United Nations had to wait for the approval of the People's Republic of China ("P.R.C.") before sending a disaster assessment team to what he called "the Taiwan Province of China."⁴ Likewise, the WHO's website referred to Taiwan as the "Taiwan province, China."⁵

Kofi Annan's statements referring to the United Nation's "one-China policy" and the "Taiwan Province of China" reflect his view on Taiwan. His view calls into question the sovereignty over the island of Taiwan and its inhabitants. This Article will first review international law related to territories and then examine whether China has, by any recognized means in international law, acquired sovereignty over Taiwan. It will then review the U.S. government's position on title to the island of Taiwan and will examine Kofi Annan's statements to see if they represent the position of the United Nations. Finally, the Article will suggest a solution to the Taiwan problem.

I. TERRITORIALITY AND SOVEREIGNTY

A. *The Modern State*

The modern State is a product of Western civilization and

3. *Id.*

4. See *UN Sends Coordinating Rescue Team to Taiwan*, AGENCE FR. PRESSE, Sept. 22, 1999; Corky Siemaszko, *Taiwan Digging Out, Frantic Rescuers Hunt for Quake Survivors*, DAILY NEWS, Sept. 22, 1999, at 7.

5. See *World Health Organization Changes Travel Recommendation for Taiwan Province, China*, June 17, 2003 (changing a previous advisory that recommended postponing all but essential travel to Taiwan, in order to contain a spread of severe acute respiratory syndrome ("SARS")), available at <http://www.who.int/mediacentre/news/>; see also U.N. DAILY NEWS DIGEST, *WHO Urges Precautions in Labs After Worker in Taiwan, China, Gets SARS*, Dec. 17, 2003 (using the expression "Taiwan, Province of China"), available at <http://www.un.org/news/>.

was created in Western Europe.⁶ It evolved gradually from the medieval feudal States during the sixteenth and the seventeenth centuries.⁷

The modern State possesses two major characteristics.⁸ First, unlike its medieval predecessor, it is based on territory. In the European feudal system, the king ruled his kingdom by contract through his feudal vassals and did not directly rule the common people. The State was built on the king's control of his vassals rather than on territory. The king collected taxes from his vassals, who in turn collected taxes from the people under their rule. Hence, for the king, the outer limit of his domain was not important.⁹

Because the modern State rules its people directly, and collects their taxes from its subjects and often also on the lands, it has to define the territory in which they reside. The definition of the State's territory now includes boundaries and a frontier. This frontier creates a "hard shell" for the protection of the people within the territory.¹⁰ The State has the power and authority to govern not only its nationals but also aliens within its boundaries. On the other hand, the boundaries also create a limitation of the State's authority. It has no power or authority beyond its territory.¹¹ The term "territorial State" or "territoriality,"¹² as used in this Article, refers to the notion of the modern territory-based State.

Further, the modern State is a sovereign State.¹³ A sovereign State has two characteristics. Internally, it rules the subjects

6. See HEINZ LUBASZ, *THE DEVELOPMENT OF THE MODERN STATE* 1 (1964).

7. For a discussion on the development of the modern State, see Y. Frank Chiang, *State, Sovereignty, and Taiwan*, 23 *FORDHAM INT'L L. J.* 959, 962-63 (2000).

8. Other writers point out other characteristics of the modern State, such as the fact that it is governed by a system of law and that it recognizes a distinction between the State and society. See LUBASZ, *supra* note 6, at 2-3. These points are not discussed here because they are not relevant to this Article.

9. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 17 (1990).

10. See John H. Herz, *The Rise and Demise of the Territorial State*, in 9 *WORLD POLITICS* 473-74 (1957).

11. The territory of a State also includes its territorial sea as recognized by international law. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 2, 1833 U.N.T.S. 3, 397; see also REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 137-38 (4th ed. 2002).

12. For a discussion of the term "territoriality," see Herz, *supra* note 10, at 475-85.

13. For a discussion of the sovereign State, see Chiang, *supra* note 7, at 964-66.

or the peoples within its territory directly through its government. Externally, the State is autonomous and therefore not subject to other States or authorities.¹⁴

Sovereignty and the modern State are inseparable concepts.¹⁵ State autonomy, inherent in sovereignty, gives rise to the concept of equality among the States. That is, two States can engage in relations, e.g., diplomatic exchanges or concluding treaties, on equal footing. However, the concept of equality between States existed long before the formulation of the modern concept of sovereignty.

In the early days, the leaders of two or more groups of people who had the same interests entered into military alliance agreements against others groups. These leaders also divided territories by agreements.¹⁶ The agreements between the rulers of the kingdoms were called treaties. When two kings entered into an agreement or a treaty, the two were equal in their legal status.

After the end of the Thirty Years War in the seventeenth century,¹⁷ the princes of the Holy Roman Empire sought from the empire the capacity to enter into relations with others. They needed such capacity to enter into alliance treaties with other princes. In the Treaty of Westphalia, the Roman Emperor granted them the right and capacity to conclude such treaties.¹⁸

14. See LUBASZ, *supra* note 6, at 2.

15. See Chiang, *supra* note 7, at 962-65 (discussing the relationship between State and sovereignty).

16. See 12 NEW ENCYCLOPÆDIA BRITANNICA 316 (15th ed. 1994). When Emperor Charlemagne's son, Louis I, died in 840, Louis I's three sons, Charles, Lothair, and Louis, fought over the vast territory. See *id.* The war among the three brothers ended with the Treaty of Verdun in 843. See *id.* The treaty divided the empire into four parts. See *id.* The West Frankish Kingdom (*Francia Occidentalis*), consisting mostly of what is today France, went to Charles (later Charles I), who was considered the first true king of France. See *id.* The Middle Kingdom, consisting of the Low Countries, Alsace, Burgundy, northern Italy, Lorraine, Luxembourg, and Provence, went to Lothair (later Lothair I). See *id.* The Kingdom of East Franks (*Francia Orientalis*), consisting of the land east of the Rhein River and mostly of what is today Germany, went to Louis (later Louis the German). See *id.* The fourth part, consisting of the eastern tributary provinces, did not come under the direct rule of any brother. See *id.*

17. The conflict between Protestants and Catholics and between Lutherans and Calvinists led to the Thirty Years War. See 19 NEW ENCYCLOPÆDIA BRITANNICA 482-83 (15th ed. 1994). In 1648, the Catholic Emperor Ferdinand III, defeated by Protestant forces, signed the Peace of Westphalia, which consisted of a series of treaties. See *id.*

18. In the Treaty of Westphalia (1648), the Holy Roman Emperor formally granted the German princes the right to make alliances. The Holy Roman Empire became a meaningless entity. Germany was left with more than 260 sovereign States

Historians regard the granting of such capacity as conferring sovereign independence upon the princes of the Holy Roman Empire within the feudal structure of the empire.¹⁹ After the concept of the State changed from the ruler to the political entity,²⁰ treaties were then between two political entities, instead of between rulers. Only political entities with statehood may conclude a treaty with another political entity with statehood.²¹

Because each State is autonomous, a State is not subject to the rules imposed by other States. Each State therefore, in theory, has unlimited power. Such power, if not restrained, may encroach on the rights or interests of other States. Accordingly, international law emerged by consensus of the States to restrain or limit their own power.²² Thus, international law is created for self-limitation and self-regulation and the basis of international law is consent.²³

The level of equality inherent in the concept of sovereignty is meaningful only when a State deals with other States. Equal status with other States means that a State can enter into relations with other States on equal footing. Thus, the capacity to enter into relations with other States on equal footing becomes part of the concept of sovereignty and one of the features of the modern State. Diplomatic recognition of a State means that the recognizing State will deal with the recognized State on equal footing. Thus, the power of a State based on sovereignty is twofold: the power to rule or govern the people and the land within its territory, and the power and capacity to enter into relations with other States, including concluding treaties with other States.

and principalities headed by princes without an effective central government. See Treaty of Westphalia, Oct. 24, 1648, Holy Roman Emperor-King of France, at <http://fletcher.tufts.edu/multi/texts/historical/westphalia.txt> [hereinafter Treaty of Westphalia]; see also 19 NEW ENCYCLOPÆDIA BRITANNICA 482 (15th ed. 1994).

19. The Emperor himself lost sovereignty. See Herz, *supra* note 10, at 479.

20. See Chiang, *supra* note 7, at 961-63 (discussing the transformation of the State from a ruler to a political entity).

21. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2.1(a), 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention].

22. See HANNUM, *supra* note 9, at 19; see also Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1206 (1988).

23. See HANNUM *supra* note 9, at 19.

B. Sovereignty, Territoriality, and International Law

There are three principal sources of international law: (1) treaties, including international conventions; (2) international custom; and (3) the general principles of law recognized by civilized nations.²⁴ These sources are all based on the consensus of the States, albeit in different ways. Treaties and international conventions are the most explicit demonstration of consensus. They are signed by the contracting States. International custom arose out of the consensus of the States on State practices, or based on the writings of ancient writers. In his work, *The Law of War and Peace*, Hugo Grotius proved *a posteriori* that a body of international law is created by the common consent of the States.²⁵

The general principles of law recognized by civilized Nations also form a basis for the creation of international law where there is no international convention or custom. When a rule of international law is based on the general legal principles recognized by civilized Nations, the rule is also based on the consent of civilized Nations — the States. Samuel Pufendorf, in his book *The Law of Nature and Nations*,²⁶ used the method *a priori* to deduce logically from the rational and social nature of man, "certain universal legal principles" which were accepted by different societies and "binding . . . on all men." Such principles "could then be regarded as the basis of an international law."²⁷

The concept of sovereignty and the principle of territoriality are accepted by all States and form the following four basic principles of international law:

- (1) A State has sovereign power over its territory and the people within its territory.²⁸ The power of a State, however, ceases at its border. To avoid conflicts arising out of the concept of unrestrained sovereignty, the States limited the exercise of their sovereignty to territory within their

24. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1179; see also WALLACE, *supra* note 11, at 7-33.

25. See PETER STEIN, *LEGAL EVOLUTION, THE STORY OF AN IDEA* 3 (1980) (discussing *de iure belli ac pacis*).

26. See *id.* (discussing *de iure naturae et gentium*).

27. *Id.* at 3, 51.

28. See 1 LASSA OPPENHEIM, *INTERNATIONAL LAW: PEACE* 452 (H. Lauterpacht ed., 8th ed. 1955) ("The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority.").

- borders by consensus. Thus, exercising the police power in another State without the consent of the latter encroaches on the sovereignty of the other State.²⁹
- (2) A State has the capacity to conclude treaties and is bound by them. Each State is a sovereign and may enter into a relation, e.g., conclude a treaty, with another State on equal footing. Equal footing *does not* mean equal bargaining power. This is particularly true in a peace treaty concluding a war. The State is bound by the treaty which it has concluded with another State even though at the time of concluding the treaty, it was in a weaker bargaining position.
- (3) After a war, the victorious State may dispose of the territories of the defeated State. As stated before, the modern State is based on territory, which becomes one of the elements of a State.³⁰ A conflict between States often leads to a war. After the war, the victorious State may take the territory of the defeated State, which has limited or no bargaining power.³¹

The victorious State may annex the defeated State, although such instances are rare in modern times. In such a case, no treaty is needed or possible for taking the territory because the defeated State is extinct and the victorious State has no party with which to conclude a treaty. In most cases, the victorious State merely wants to take from the defeated State a piece of its territory. From the defeated State's point of view, ceding part of its territory to the victorious State is the price to pay in order to preserve the State.

- (4) Unless the victorious State annexes the defeated State by

29. See Barbara Crossette, *The Summit in New York: The Overview; Leaders Debate Broad New Role For U.N. Council*, N.Y. TIMES, Sept. 8, 2000, at A1. In recent years, an exception based on the new concept of human rights has evolved. See *id.* Under the new concept, if a State oppresses the people within its territory, another State may intervene in order to protect them. See *id.*; see also Richard Reeves, *United Nations: A Tale of Two Speeches*, TULSA WORLD, Sept. 24, 1999. For instance, the Allied Powers attacked Serbia's army in Kosovo in 1999. See WALLACE, *supra* note 11, at 263.

30. See Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1., 49 Stat. 3097, 3100, 165 U.N.T.S. 21; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (3d ed. 1987).

31. See, e.g., John Foster Dulles, The San Francisco Conference on Proposed Japanese Peace Treaty, Statement to the Press (Aug. 15, 1951), in DEP'T ST. BULL., Aug. 1951, at 347. At the Conference, John Foster Dulles, representing the United States, stated that "[t]he United States, which for [six] years has been and is the occupying power [in Japan], could practically do much as it wanted." *Id.*

State practice, particularly after the modern State is fully developed,³² taking or ceding a territory is accomplished by treaties. This is true even if a victorious State wants to acquire an enemy's territory which it occupied during the war. In 1828, Chief Justice Marshall in *American Insurance Co. v. Cantor*³³ said that "[t]he usage of the world is, if a [N]ation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace."³⁴ The State practice has developed into a customary international law requiring that if title to a territory of the defeated State is to be changed after a war, then it must be achieved by a treaty.³⁵

C. Territorial Treaties

A treaty may be of cultural, economic, military (i.e., defense alliances), political, or scientific in nature. There is also a type of treaty that changes the territories of the parties, e.g., delineating the territorial boundary, transferring the title to a territory, dividing, or abandoning a territory, which will be referred to as territorial treaties in this Article. Historically, major wars have ended through concluding peace treaties between the warring States.³⁶ Most peace treaties are also territorial treaties that reallocate territories of the parties.

32. King Louis II of East Kingdom (later the Holy Roman Empire) acquired Alsace by the Treaty of Mersen in 870. France acquired Alsace in the Treaty of Ryswick in 1697 and Lorraine by marriage in 1766. Germany reacquired Alsace and Lorraine by the Treaty of Versailles in 1871. After the First World War, France again acquired Alsace and Lorraine under the Treaty of Versailles of 1919. Acquisition of a territory by marriage is analogous to acquisition by a merger agreement. Other examples include: the Treaty of Paris (1898), concluded at the end of the Spanish-American War, in which Spain ceded Puerto Rico to the United States; the Treaty of Nanking (1842), concluded at the end of the Opium War, in which China ceded Hong Kong to the United Kingdom; and the Congress of Vienna (1815), concluded at the end of the Napoleon War, which settled the territories among the European States. See COLUM. ENCYCLOPEDIA (6th ed. 2001), available at www.bartleby.com/65 (last visited Oct. 4, 2004).

33. 26 U.S. 511 (1828).

34. See *id.* at 541.

35. See OPPENHEIM, *supra* note 28, § 216; see also GEORGE H. KERR, FORMOSA BETRAYED, 39 (1965) ("[S]overeignty could not be transferred until a peace treaty could be worked out, agreed upon, and signed."); Hague Convention Respecting The Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, § III, art. 55.

36. See, e.g., Treaty of Verdun (843); Treaty of Westphalia, *supra* note 18; Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 [hereinafter Treaty of Paris]; Treaty of

Territorial treaties have peculiar characteristics. By their nature, they are different from other types of treaties in many ways. First, territorial treaties are proprietary as well as contractual in nature, while other types of treaties are purely contractual. Such territorial treaties, like deeds in property law, involve a transfer of interest in land and affect the sovereign power of the parties to the treaties. Second, territorial treaties provide a final settlement of the territories between the parties. It has the characteristics of finality. Other types of treaties are forward looking. For instance, they may provide for cooperation in the future, or establish new rules of conduct between the contracting parties. Third, territorial treaties are self-executing. Unless otherwise agreed, they take effect immediately when they enter into force. Other types of treaties are usually executory, meaning that they provide promises to be carried out in the future. As discussed below, these characteristics form the bases of several aspects of territorial treaties.

A territorial treaty, in which a State cedes a territory to another State or renounces its title to a territory, provides a final settlement of the territory. Once the territorial treaty enters into force, the treaty's disposition of the territory becomes effective. A treaty of executory nature may be denounced by a party subsequent to the conclusion,³⁷ but a territorial treaty cannot be abrogated or revoked by one party alone,³⁸ no matter how unfair it seems.

The only way for the ceding State to regain the title to the ceded territory from the acquiring State is through another treaty. This rule is derived from the State practice and the char-

Versailles (1919); Treaty of Peace With Japan, Sept. 8, 1951, 136 U.N.T.S. 46 (entered into force Apr. 28, 1952) [hereinafter Peace Treaty of San Francisco].

37. For instance, in 1939, after Japan blockaded British and French concessions in Tientsin City, China, the United States denounced its treaty of commerce with Japan. See Brad DeLong, *Review of Akira Iriye's The Origins of the Second World War in Asia and in the Pacific*, available at <http://www.j-bradford-delong.net> (last visited Oct. 4, 2004); see also Ibiblio, *A Chronological Collection of Documents Relating to the U.S. Entry Into WWII*, available at <http://www.ibi8blio.org/pha/timeline/144chap4.html> (last visited Oct. 4, 2004).

38. Except, probably, on the ground of fraud in the execution or direct duress on the representatives who signed the treaty. Both are rare instances. See, e.g., David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 634 (1995) (providing an example of possible grounds for condemnation of a treaty because of coercion).

acteristics of a territorial treaty discussed earlier.³⁹ For example, Alsace and Lorraine have changed hands between Germany and France several times. Each time, this exchange was achieved by a treaty.⁴⁰

In a territorial treaty, only a party to the treaty can receive the title to a territory. No State which is not a party to the treaty can receive title to a territory disposed of by the treaty. This rule is derived from the general principles of law recognized by civilized Nations *a priori*. Under the general principles of law recognized by civilized Nations, when title to a piece of land is conveyed by the grantor in the deed, only a party to a deed can receive it.

Territorial treaties use precise and unambiguous words and language, such as "cede," "divide," "relinquish," or "renounce" to dispose of a territory. Since territorial treaties stipulate the final settlement between the parties, or the final disposition of territories, and they leave no room for doubt or dispute. In rare cases where there is a dispute on the meaning of a term or terms, the ordinary meaning of the words of the treaty and the intention of the parties control. This approach is the general rule of interpreting treaties,⁴¹ which was recognized and adopted by the 1969 Vienna Convention.⁴²

Territorial treaties bind States which are not parties to the treaties. Under customary international law, it is a general rule that only the parties to a treaty are bound by the treaty. A third party is not bound by the treaty because it has not consented to the treaty.⁴³ But, there are exceptions to this general rule.⁴⁴ Exceptions to the general rule are recognized by the Vienna Convention of 1969. Article 38 of the Vienna Convention provides that "[n]othing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third [S]tate as a custom-

39. See *supra* notes 25, 36-37 and accompanying text.

40. See *supra* note 32.

41. See WALLACE, *supra* note 11, at 240.

42. Vienna Convention, *supra* note 21, art. 2.1(a). The Convention essentially codified customary international law. See WALLACE, *supra* note 11, at 230. Article 31 of the Convention provides interpretive methodologies for all treaties. See *id.* at 240; see also Vienna Convention, *supra* note 21, art. 31.

43. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9-11 (2d ed. 1993) (discussing the principle of *pacta sunt servanda*).

44. See WALLACE, *supra* note 11, at 241-42 (discussing the principle of *pacta tertiis nec nocent nec prosunt*).

ary rule of international law, recognized as such."⁴⁵ One exception applies to territorial treaties.⁴⁶ The exception is that territorial treaties produce obligations which third parties must respect.⁴⁷ This exception is one of customary international law that has developed from long-held State practices that territorial treaties are rarely challenged by a third party. These principles and rules of international law will be the basis of the analysis that follows.

II. TITLE TO THE ISLAND OF TAIWAN

Discussion now turns to the question raised in the Introduction — whether China has sovereignty over the island of Taiwan and its inhabitants. As stated before, the modern State is contingent upon the concept of territory. A State has no sovereignty over a territory unless it has legal title to that territory. The historical events that changed or are claimed to have changed the title to the island of Taiwan will be examined below.

A. *The Treaty of Shimonoseki*

In 1894, Japan and China engaged in the Sino-Japanese War in which Japan defeated China. As a result, in 1895 the Ch'ing government of China signed a peace treaty known as the Treaty of Shimonoseki with Japan.⁴⁸ In this Treaty, China ceded the islands of Formosa and the Pescadores Group (together called Formosa or the island of Taiwan) "in perpetuity to Japan."⁴⁹ At first, Japan distinguished Formosa as a colony, but later incorporated the island as its territory proper.⁵⁰ As mentioned before, a

45. Vienna Convention, *supra* note 21, art. 38.

46. See WALLACE, *supra* note 11, at 242.

47. See *id.*

48. Treaty of Peace, Apr. 17, 1895, China-Japan, 181 Consol. T.S. 217 [hereinafter Treaty of Shimonoseki].

49. *Id.* art. 2. Article 2 of the Treaty of Shimonoseki provides:

China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon

(b) The island of Formosa, together with all islands appertaining or belonging to the said island of Formosa. (c) The Pescadores Group, that is to say, all islands lying between the 119th and 120th degrees of longitude east of Greenwich and the 23rd and 24th degrees of north latitude.

Id.

50. For instance, the Japanese government required all residents in Taiwan to adopt a Japanese surname in the 1940s. See Brian Lee Brubaker, Language Attitudes and Identity in Taiwan 18 (2003) (M.A. thesis, University of Pittsburgh) *available at*

peace treaty that transfers a territory to conclude a war is usual and binding.⁵¹ The victorious State acquires good title to the territory ceded under the treaty.

B. *Proclamations of the R.O.C. Government*

In September 1931, Japan began its expansion in Asia and sent its troops into northern China.⁵² By 1939, the Japanese armed forces had occupied a vast area of central and eastern China. In December 1941, the R.O.C. government declared war against Japan, and at the same time issued a proclamation abrogating all treaties with Japan, including the Treaty of Shimonoseki on the ground that the Treaty was "unequal."⁵³

The Treaty of Shimonoseki, however, is a territorial treaty. A unilateral proclamation to abrogate a treaty by a party to the treaty may be valid with respect to a treaty of executory nature, but it cannot effectively abrogate a territorial treaty. This is true even though the defeated State regards the treaty as unequal. A treaty in which a defeated State is forced to cede a territory is necessarily unequal because the defeated State is not in an equal bargaining position with the victorious State. The defeated State cedes the territory to end the war and save the State. The term "unequal treaty" is a political concept rather than a legal term recognized in international law.⁵⁴ No such treaty has ever been effectively abrogated or revoked on the ground of inequality in history. It follows that the proclamation of the Chinese government abrogating all treaties with Japan was ineffective with respect to the Treaty of Shimonoseki.

Furthermore, a territorial treaty cannot be abrogated or re-

<http://etd.library.pitt.edu/ETD/available/etd-08192003-082704/unrestricted/Brubakerthesis.pdf> (last visited Oct. 2, 2004) (discussing pressure placed on Taiwanese to assume Japanese surnames).

51. See *supra* notes 31-32 and accompanying text.

52. See EDWIN O. REISCHAUER, *JAPAN, PAST AND PRESENT* 170 (3d ed. 1964).

53. See THE PEOPLE'S REPUBLIC OF CHINA, *WHITE PAPER — THE ONE-CHINA PRINCIPLE AND THE TAIWAN ISSUE* (2002), available at <http://www.taiwandocuments.org/white.htm> (last visited Oct. 2, 2004) [hereinafter *2000 White Paper*].

54. For a discussion of unequal treaties, see GARY L. SCOTT, *CHINESE TREATIES: THE POST-REVOLUTIONARY RESTORATION OF INTERNATIONAL LAW AND ORDER* 85-99 (1975). "[N]one of these writers[, Grotius, Pufendorf, Vattel, and Wolf,] considered that inequality in treaties was in any way a cause for abrogation or a factor invalidating treaties." *Id.* at 86. See generally PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997: CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES* (1998); FARIBORZ NOZARI, *UNEQUAL TREATIES IN INTERNATIONAL LAW* (1971).

voked on the ground of a subsequent aggression of the other party to the treaty. In 1955, during the period of parliamentary debates on the sovereignty over Formosa in the British House of Commons, legal scholar Georg Schwarzenberger commented on the cession of Formosa by China to Japan in the Peace Treaty of Shimonoseki:

China had ceded Formosa to Japan by the peace treaty of Shimonoseki of April 16, 1895. In order to judge the validity of this cession subsequent developments in international law which may, or may not, have affected the validity of cessions achieved as the result of aggressive war must be disregarded. Thus, the validity of this cession can hardly be contested.⁵⁵

Neither the R.O.C. government, which issued the proclamation, nor the competing P.R.C. government can claim, on behalf of China, title to the island of Taiwan based on this proclamation.

In 1945, immediately after Japan surrendered to the Allied Powers, the R.O.C. government sitting in Chungking City, proclaimed that Taiwan was a province of China. As stated before, a victorious State in a war cannot acquire a territory of the defeated State by unilateral proclamation.⁵⁶ Accordingly, R. H. Turton, the Joint Under-Secretary of State for Foreign Affairs in Churchill's administration said, "[u]nilateral declarations could not affect the legal status of Formosa," referring to China's proclamation.⁵⁷

C. Cairo Declaration and Potsdam Proclamation

In 1941, Japan declared war against the United States, which then leading the Allied Powers, engaged Japan in the Pacific War.⁵⁸ In 1943, while the Pacific War was in progress, U.S. President Franklin D. Roosevelt, Prime Minister Winston Church-

55. Georg Schwarzenberger, Letter to the Editor, *Formosa And China, Examination of Legal Status*, TIMES (LONDON), Feb. 2, 1955. Schwarzenberger was a Reader in International Law at the University College of London. See *id.*

56. According to George Kerr, the Japanese did not consider China a victorious State. See KERR, *supra* note 35, at 61 ("[Japanese Military High Command] considered that Japan had not surrendered to 'China' but to 'Chungking,' where the Chinese and the Americans had their military headquarters.") (emphasis added).

57. See 536 PARL. DEB., H.C. (5th Ser.) (1955) 216.

58. General MacArthur recalled that "none of these powers [Russia and the United Kingdom] had been forthcoming with troops to fight the Pacific war when we [the United States] needed them. We had borne the burden with Australia . . ." DOUGLAS MACARTHUR, REMINISCENCES 291 (1964).

hill of the United Kingdom, and Generalissimo Chiang Kai-shek of China met in Cairo from November 22 to 26, 1943 to discuss the strategy for defeating Japan.⁵⁹ On December 1, 1943, the three governments issued a joint statement known as the Cairo Declaration.⁶⁰ The Cairo Declaration states, in part,

The Three Great Allies . . . covet no gain for themselves and have no thought of territorial expansion. It is their purpose . . . that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. . . . The aforesaid three great powers . . . are determined that in due course Korea shall become free and independent.⁶¹

In 1945, after Germany surrendered, U.S. President Harry Truman,⁶² British Prime Minister Winston Churchill,⁶³ and the Soviet Premier Joseph Stalin⁶⁴ conferred in Potsdam on the post-war disposition of Europe from July 17 to August 12. During the conference on July 26, the heads of governments of China, the United Kingdom, and the United States issued the Proclamation Defining Terms For Japanese Surrender, which as part of the Potsdam Declaration confirmed the Cairo Declaration with respect to the future of Formosa.⁶⁵ The Potsdam Proclamation states that “[t]he terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as

59. The U.S.S.R. (The Soviet Union), not at war with Japan then, was not represented at the Cairo Conference. See *Cairo Declaration*, in *NEW CYCLE IN ASIA* 29 (Harold R. Isaacs ed., 1947). Generalissimo Chiang Kai-shek became the President of the Republic of China on September 13, 1943.

60. See Cairo Declaration, 9 DEP'T ST. BULL., Dec. 1943, at 393 [hereinafter Cairo Declaration].

61. *Id.*

62. Harry S. Truman, the U.S. President (1945-1953).

63. Winston S. Churchill, the British Prime Minister (1940-1945); (1951-1955).

64. Joseph V. D. Stalin, the Soviet Premier (1941-1953).

65. The Potsdam Proclamation deals with the postwar disposition of Germany, Italy, Japan, Poland, etc. While Truman and Churchill signed the *Proclamation Defining Terms For Japanese Surrender*, President Chiang Kai-shek of the Republic of China, not in attendance at the conference, only concurred by despatch. See *Proclamation Defining Terms For Japanese Surrender* (July 26, 1945), DEP'T ST. BULL., July 1945, at 137 [hereinafter Potsdam Proclamation]. The United Kingdom was originally represented by Winston Churchill at the Potsdam Conference. Churchill resigned after losing a parliamentary election on July 26, 1945, and was replaced by new Prime Minister Clement Attlee. See 29 *NEW ENCYCLOPÆDIA BRITANNICA* 92 (15th ed. 1994).

we determine.”⁶⁶

The intention of the three government leaders expressed at the time of issuing these two declarations, that Formosa should be returned to China after Japan surrendered, is not questioned here. The nature and the legal effect of these declarations, which may affect the title to Formosa, will be discussed below.

First, the two declarations, by their nature, did not bind the declaring or their succeeding governments. A joint declaration of two or more governments, like a communiqué, is often used to express the common foreign policy or the common intent of those governments. Such declaration of common foreign policy or of common intent does not legally bind the declaring or the succeeding governments. It certainly does not have the characteristics of a contract in private law, creating a binding obligation on the governments, let alone on the States which the governments represent.⁶⁷

The Cairo Declaration was a statement of common intent of the three governments. Although the Cairo Declaration showed an intent to return Formosa to China, Winston Churchill, who took part in the Cairo Declaration, later emphatically said “[i]t contained *merely* a statement of common purpose.”⁶⁸ The Churchill administration Foreign Secretary, Anthony Eden, also said that the Declaration was “merely a statement of intention that Formosa should be retroceded to China after the war that never materialized.”⁶⁹ Similarly, in May 1955 the Joint Under-Foreign Secretary R.H. Turton of the Eden Administration, in responding to the questioning of a Labor Party member,⁷⁰ said

66. Potsdam Proclamation, *supra* note 65, ¶ 8, at 137.

67. For instance, one provision in the Potsdam Proclamation relating to the exclusion of certain Japanese officials after the war was not carried out, and no allied powers has challenged it. The Potsdam Proclamation contains a provision (Paragraph 6) that requires the removal and exclusion of Japanese officials “who have deceived and misled the people of Japan into embarking on world conquest” in public offices. *See id.* ¶ 6. The exclusion was removed promptly after the Peace Treaty of 1951 was concluded. *See* MACARTHUR, *supra* note 58, at 298.

68. 536 PARL. DEB., H.C. (5th ser.) (1955) 901 (emphasis added). Winston Churchill, who had been reelected Prime Minister, made the statement in response to the assertion of Rev. R. W. Sorensen, a Labor Party member, that Formosa should be handed over to the Chinese Communists under the Cairo Declaration. *See id.*

69. *Id.* at 159.

70. Geoffrey Bing asserted that “the Potsdam Declaration which re-affirmed the Cairo Declaration . . . was binding upon this Government.” 540 PARL. DEB., H.C. (5th ser.) (1955) 1869.

that "[t]he Cairo Declaration . . . was couched in the form of a statement of intention, and as it was merely a statement of intention, it is merely binding in so far as it states the intent at that time"71 Thus, the Cairo Declaration and the Potsdam Proclamation have no binding effect on the governments that made such declarations.

Second, the two declarations did not effectuate a transfer of title to Formosa. At the time when the two declarations were issued, Japan had not yet surrendered. The Allied Powers were winning the war, but had not yet defeated Japan. One cannot give something that one does not have. Even assuming, for the sake of argument, that the declarations were considered contractual promises to offer Formosa to China, they could not effectuate a transfer of Formosa to China. The three governments did not have title to Formosa and the Pescadores at the time of the declarations. Nor could they force Japan to transfer the title to Formosa and the Pescadores before Japan surrendered. Such transfer could have been made at a postwar settlement in a treaty *only* after Japan surrendered.

At a congressional hearing held in May 1951, General Douglas MacArthur said "[t]here were certain agreements that were entered into . . . at Yalta, and other places, but legalistically Formosa is still a part of the Empire of Japan,"72 implying that the Cairo Declaration did not effectuate a transfer of Formosa to China. The British Joint Under-Foreign Secretary R.H. Turton also said the "Cairo Declaration . . . cannot by itself transfer sovereignty. That document does impose certain *moral obligations* on those who take part in it, but it is not really germane to the present legal argument on what is or is not today the present sovereignty over Formosa."73

It may be true that, for a period after Japan surrendered, the Allied Powers intended that Formosa would be returned to China in a postwar settlement. They assigned the task of the post-surrender administration of Formosa to Chiang Kai-shek's R.O.C. government.⁷⁴ The R.O.C. government subsequently be-

71. *Id.*

72. *The General Declines to Say That the U.S. Has Lost the Initiative in Foreign Policy Matters* (Statement of General Douglas MacArthur before a Congressional hearing), N.Y. TIMES, May 5, 1951, at A7 [hereinafter *Gen. MacArthur's Statement*].

73. 540 PARL. DEB., H.C. (5th ser.) (1955) 1870 (emphasis added).

74. See *infra* note 95 and accompanying text.

came embroiled in a civil war with Chinese Communists, which later formed the P.R.C. government. After the Chinese Communists forced Chiang Kai-shek's government to Formosa in 1949, U.S. President Truman, in the *Statement on Formosa* of January 5, 1950, stated that "[i]n keeping with the [Cairo Declaration and the Potsdam Proclamation], Formosa was surrendered to Generalissimo Chiang Kai-shek and for the past four years the United States and the other allied powers have accepted the exercise of *Chinese authority* over the island."⁷⁵ U.S. Secretary of State Dean Acheson also said: "The Chinese have administered Formosa for four years [The] *authority* in that occupation . . . was regarded as in accordance with the commitments."⁷⁶ While it may be inferred from the above that the U.S. government intended that Formosa would be returned to China in a postwar settlement, these statements did not mean that China *had acquired* title to Formosa. In the statements, the U.S. government used the term "authority" or "authority over the island," and "authority in that occupation," rather than the term "sovereignty," so as not to imply that China had title to the territory.⁷⁷

It is possible that Truman and Acheson made the statements to explain away the responsibility for a possible loss of Formosa, in case the Chinese Communists overran the island.⁷⁸ Subsequently, however, the U.K. and the U.S. governments changed their positions on Formosa's sovereignty. They changed their positions because, by aiding North Korea's invasion of South Korea, the P.R.C. government violated the basic

75. *Text of Statement on Formosa*, N.Y. TIMES, Jan. 6, 1950, at A3 (emphasis added).

76. 540 PARL. DEB., H.C. (5th ser.) (1955) 1865. Acheson made the statement on January 5, 1950. *See id.* (emphasis added).

77. *See id.*

78. A Congressional report indicates that the U.S. government, at the time, prepared the way for the abandonment of Formosa to the Chinese Communists. The Report states:

25. *The State Department directive of December 23, 1949, was a policy statement calculated to prepare the way for the abandonment of Formosa to the Chinese Reds.* On December 23, 1949, the U.S. State Department issued hundreds of copies of a secret directive concerning the attitude to be adopted by our representatives abroad in respect to Formosa. . . . [T]his directive was an actual statement of policy on the part of the United States State Department in which we announced to our foreign representatives that Formosa was not of strategic importance to the United States and that its control by the Communist forces would not imperil our position in the Far East.

The Military Situation in the Far East: Hearing Before the Senate Comm. on Armed Services and Foreign Relations, 82d Cong. 30 (1951).

principles of non-aggression and no territorial ambitions proclaimed in the Cairo Declaration. In May 1951, British Foreign Secretary Herbert Morrison made the following policy statement in the House of Commons:

The Cairo Declaration also proclaimed the intention that Korea should in due course become free and independent. It also expressed acceptance of two principles: non-aggression and no territorial ambitions. . . . [T]he Prime Minister [Atlee] went on to remark [on December 14, 1950] that until China shows by her action that she is not obstructing fulfilment [sic] of the Cairo Declaration in respect of Korea and accepts the basic principle of that Declaration, it will be difficult to reach a satisfactory solution of this problem [of Formosa].⁷⁹

In February 1955, in rebutting a Labor Party member's assertion that Formosa should be handed over to the Chinese Communists under the Cairo Declaration, British Prime Minister Winston Churchill, who made the Declaration more than a decade before, said, "since [the Cairo Declaration] was made a lot of things have happened. The problem of Formosa has become an international problem in which a number of other [N]ations are closely concerned."⁸⁰ The following day, *The New York Times* printed the headline, "Cairo Formosa Declaration Out of Date, Says Churchill."⁸¹

The U.S. government also changed its position with respect to the sovereignty over Formosa because of Chinese aggression. One day after North Korea invaded South Korea,⁸² U.S. President Truman changed his position. On June 27, 1950, he issued the *Statement on Korea* in which he stated:

The [Communists'] attack upon Korea makes it plain . . . that communism has passed beyond the use of subversion to conquer independent [N]ations and will now use armed invasion and war. . . . [T]he occupation of Formosa by Communist forces would be a direct threat to the security of the Pa-

79. 478 PARL. DEB., H.C. (5th ser.) (1951) 2301-02.

80. 536 PARL. DEB., H.C. (5th ser.) (1955) 901.

81. Drew Middleton, *Cairo Formosa Declaration Out of Date, Says Churchill*, N.Y. TIMES, Feb. 2, 1955, at A1.

82. See 6 NEW ENCYCLOPÆDIA BRITANNICA 962 (15th ed. 1989); see also WORLD ALMANAC 476 (William A. McGeeveran Jr. et al. eds., 2004); Foreign Policies Toward Asia, A Television Interview with Sec'y Acheson (Sept. 10, 1950), in DEP'T ST. BULL., Sept. 1950, at 463 [hereinafter Acheson Interview].

cific area and to [U.S.] forces performing their lawful and necessary functions in that area.⁸³

Although the Chinese Communists had not yet formally entered the Korean War at the time,⁸⁴ U.S. President Truman regarded North Korea's invasion of South Korea as part of a broad Communist attack scheme, and considered the Chinese Communist's invasion of Formosa imminent. He ordered the U.S. Seventh Fleet to prevent any attack on Formosa by the Chinese Communists.⁸⁵ U.S. Assistant Secretary for Far Eastern Affairs Dean Rusk said over the Voice of America, "[t]he Chinese Communists took part in the preparations for the treacherous North Korean assault long before it was actually launched."⁸⁶ U.S. Secretary of State Acheson also changed his earlier position. In a television interview in September 1950, he said:

The Cairo Declaration . . . declares that Formosa should be returned to China. It also declares . . . that Korea should be free and independent. In most of the discussions that we have about Formosa, we are reminded about the Formosan part of the Declaration, and both the Chinese and the Russians forget about the Korean part of the Declaration. Surely, the Declaration of Cairo is an important factor to be taken into consideration in the future settlement. But the future settlement is for the future.⁸⁷

The following year, at the San Francisco Conference for signing the Peace Treaty, Japan was required to renounce her title to Formosa without designating a beneficiary. U.S. President Truman again reminded the conference delegates of the Communists' aggression.⁸⁸ Thus, it is clear that neither the R.O.C. government nor the P.R.C. government can claim title to the island

83. President Harry Truman, *Statement on Korea*, N.Y. TIMES, June 28, 1950, at A1.

84. The P.R.C. government sent a volunteer army (the "Chinese People's Volunteers") to the Korean Peninsula in October of 1950. See 16 NEW ENCYCLOPÆDIA BRITANNICA 143 (15th ed. 1989).

85. See *id.*

86. Our Contributions to the Peace, Statement by Dean Rusk, Assistant Sec'y for Far Eastern Affairs (Dec. 29, 1950), DEP'T ST. BULL., Jan. 1951, at 64 (stating that North Korea invaded South Korea in June of 1950).

87. Acheson Interview, *supra* note 82, at 463.

88. Truman said: "Unfortunately, today, the world is faced with new threat of aggression. Many of the countries represented here are now engaged in a hard fight to uphold the United Nations against international lawbreaking." Opening Address by President Truman (Sept. 4, 1951), in DEP'T ST. BULL., Sept. 1951, at 447.

of Taiwan for the State of China, based on the Cairo Declaration or the Potsdam Proclamation.

D. Post-Surrender Occupation by the R.O.C. Government

Immediately after Japan surrendered in August 1945,⁸⁹ U.S. President Truman appointed the commander of the South-West Pacific Forces, U.S. General Douglas MacArthur, as the Supreme Commander for the Allied Powers in the Pacific.⁹⁰ The U.S. Army, under the command of General MacArthur, occupied the major islands of Japan⁹¹ and the Okinawa islands. The United States also assumed the post-surrender operations in South Korea, leaving the operations in North Korea to the Soviet Union, which had declared war against Japan just a week before Japan surrendered.⁹² The United States, which occupied the Okinawa islands, could also have assumed the post-surrender operation in Formosa, which was a Japanese territory. But immediately after the Japanese surrender, the U.S. government wanted to recall its troops as soon as possible.⁹³ The war had lasted too long since the Japanese attack on Pearl Harbor. Most State Department officials believed that Formosa would be returned to China at a postwar settlement, pursuant to the Cairo Declaration.⁹⁴ Thus, under the direction of the U.S. government, the Supreme Commander for the Allied Powers, General MacArthur, assigned the task of accepting the surrender of the Japanese commanders in Formosa to Chiang Kai-shek.⁹⁵ On October 25, 1945, the Japa-

89. The Emperor of Japan announced the surrender to the people of Japan on August 15, 1945. See MODERN JAPAN, AN ENCYCLOPEDIA OF HISTORY, CULTURE & NATIONALISM 290 (James L. Hoffman ed., 1998).

90. See Incoming Message, WARX 49571, dated Aug. 14, 1945, from General Marshall to General MacArthur (on file with MacArthur Memorial).

91. The four major islands of Japan are Hokkaido, Honshu, Kyushu, and Shikoku. After Japan surrendered, the Soviet Union and the United Kingdom attempted, in vain, to divide Japan into several occupied zones, as the Allies had done in Germany. See MACARTHUR, *supra* note 58.

92. The Soviet Union declared war against Japan on August 8, 1945. See *Soviet War Declaration of War on Japan*, available at <http://metalab.unc.edu/hyperwar/PTO/Dip/sov-japan-neu.html> (last visited Oct. 3, 2004).

93. See KERR, *supra* note 35.

94. See *id.*

95. See *id.* at 44. British Foreign Secretary Anthony Eden stated that “[i]n September [of 1945], the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied Powers.” 536 PARL. DEB., H.C. (5th ser.) (1955) 159. In fact, the assignment was made at the direction of the State Department. Before Japan surrendered, General MacArthur received

nese Commander Ando Rikichi surrendered his authority in Formosa to the R.O.C. government's representative General Chen Yi, and the R.O.C. government assumed the post-surrender operation of Formosa.⁹⁶ On December 8, 1949, the R.O.C. government, having lost the civil war to the Communist Chinese, was forced to move its government seat to Formosa.⁹⁷ Since then, the P.R.C. government, which controls China proper⁹⁸ except Quemoy and Matsu islands, and the R.O.C. government, which occupies Formosa, have coexisted.

It is common for a victorious army in a war to occupy the territory of the defeated State. Territory, after all, is an important element of the defeated State. The occupation of an enemy's territory after the enemy surrenders pending a settlement, however, does not give the occupying State the title to the territory that it occupies.⁹⁹ As stated earlier, it has become a rule of customary international law that if title to a territory of the defeated State is to be changed after a war, then it must be achieved by a territorial treaty.¹⁰⁰ The war between Japan and the Allied Powers did not formally end until April 28, 1952, when the Treaty of Peace with Japan (the "Peace Treaty of San Francisco"),¹⁰¹ to which China is not a party, entered into force. The war between Japan and China did not end until August 5, 1952, when the Peace Treaty between Japan and China, repre-

from General Marshall on August 13, 1945 four proposed documents prepared by the U.S. government: (1) Directives to Chief Supreme Commander for the Allied Powers; (2) Proclamation by the Emperor of Japan; (3) Instrument of Surrender; and (4) General Order Number One. Upon Japan's surrender, General Marshall notified General MacArthur on August 14, 1945 that his directive as Supreme Commander became effective. *See supra* note 90 and accompanying text. General Order Number One was issued in the name of the Japanese Imperial General Headquarters by direction of the Emperor. It directed that "[t]he senior Japanese Commanders and all ground, Sea, air and auxiliary forces within China, excluding Manchuria, Formosa and French Indo China north of 16 degrees north latitude shall surrender to the Generalissimo Chiang Kai-Shek." Incoming Message, WARX 48672, dated Aug. 12, 1945, from General Marshall to General Headquarters, U.S. Army Forces Pacific (on file with MacArthur Memorial).

96. *See* KERR, *supra* note 35, at 78.

97. *See id.* at 365-66.

98. The term "China proper" refers to the territory legally owned by China, including two offshore islands, Quemoy (Kinmen) and Matsu. It does not include the island of Taiwan. *See supra* note 1.

99. *See supra* notes 32-35 and accompanying text.

100. *See id.*

101. *See* Peace Treaty of San Francisco, *supra* note 36.

sented by the R.O.C. government, entered into force.¹⁰² Thus, the occupation of Formosa by the R.O.C. government was, until the conclusion of the Peace Treaty of San Francisco, a military wartime occupation.¹⁰³ In May 1951, six years after assigning the task of the post-surrender administration in Formosa to the R.O.C. government, General MacArthur said, "Formosa is still a part of Japan."¹⁰⁴

Both Labor and Conservative Parties of the British governments also held the view that China did not acquire title to the island of Taiwan by occupation. In 1949, British Foreign Secretary Mayhew, in the Atlee (Labor Party) administration, said in the House that "the Chinese Nationalist authorities . . . are in control of the island [Formosa. However, any] change in the legal status of Formosa can only be formally effected in a treaty of peace with Japan."¹⁰⁵ In 1955, three years after the conclusion of the Peace Treaty of San Francisco, British Foreign Secretary Anthony Eden (Conservative Party) restated that "[i]n September, 1945, the administration of Formosa was taken over from the Japanese by Chinese forces [B]ut this was not a cession, nor did it in itself involve any change of sovereignty."¹⁰⁶

The Truman Administration's view was that by assigning the task of the post-surrender operation of Formosa to the R.O.C. government, the United States, as the leading power of the Allies, created an agency relationship between the Allied Powers as the principal and the R.O.C. government as the agent, pending a peace settlement.¹⁰⁷ In August 1950, after the United States sent the Seventh Fleet to the Taiwan Strait and provided military assistance to the R.O.C.'s Nationalists in Formosa, the Soviet Union circulated a paper to the members of the U.N. Security

102. China is not a party to the Peace Treaty of San Francisco. John Foster Dulles said, "[T]he Sino-Japanese War cannot be formally terminated at this occasion [the signing of the Peace Treaty of San Francisco]." Sec'y John Foster Dulles, Statements at the Second Plenary Session (Sept. 5, 1951), in DEP'T ST. BULL., Sept. 1951, at 458. The Treaty of Peace was signed between the R.O.C. government and Japan on April 28, 1952. Treaty of Peace with Japan, Apr. 28, 1952, P.R.C.-Japan, 163 U.N.T.S. 38 [hereinafter Treaty of Peace of 1952].

103. See *Am. Ins. Co. v. Canter*, 26 U.S. 511, 541 (1828) ("The usage of the world is, if a [N]ation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace.")

104. *Gen. MacArthur's Statement*, *supra* note 72, at A7.

105. 469 PARL. DEB., H.C. (5th ser.) 1679 (1949).

106. 536 PARL. DEB., H.C. (5th ser.) 159 (1955).

107. See *Statement on Korea*, *supra* note 83, at A1.

Council charging the United States with aggression against Formosa.

U.S. President Truman instructed U.S. Ambassador Warren Austin to deliver a letter to the U.N. Secretary-General, in which it stated:

The actual status of the island is that it is territory taken from Japan by the victory of the Allied Forces in the Pacific. Like other such territories, its legal status cannot be fixed until there is international action to determine its future. The Chinese Government was asked by the Allies to take the surrender of the Japanese forces on the island. That is the reason the Chinese are there now.¹⁰⁸

This was also the view of U.S. General MacArthur, who made the assignment. On May 4, 1951, in answering a question raised by the U.S. Chairman of the Senate Foreign Relations Committee, Senator Richard Russell, MacArthur responded, “[t]he Allies turned over . . . the administration and the *trusteeship* of Formosa to China, just as Japan was turned over to us, and it is still in that status.”¹⁰⁹

The British view was also that the R.O.C. government acted on behalf of the Allied Powers. In 1950, British Foreign Secretary Younger in the Atlee administration stated, “Formosa is still *de jure* Japanese territory and there is no Government of Formosa as such. Following on the surrender of Japan, the Chinese Government of the day assumed, with the consent of the remaining Allies, the provisional administration of the territory pending the final determination of its status at a peace settlement.”¹¹⁰ British Foreign Secretary Anthony Eden’s statement in the House in 1955 was even clearer: “[T]he administration of Formosa was taken over from the Japanese by Chinese forces *at the direction of* the Supreme Commander of the Allied Powers. The arrangements made with Chiang Kai-shek put him there on a basis of military occupation pending further arrangements, and did not of themselves constitute the territory Chinese.”¹¹¹

Thus, until the Peace Treaty of San Francisco entered into

108. Letter from Ambassador Austin to Sec’y-Gen. Lie, Aug. 25, 1950, DEP’T ST. BULL., Sept. 1950, at 412.

109. *Gen. MacArthur’s Statement*, *supra* note 72, at A7 (emphasis added).

110. 478 PARL. DEB., H.C. (5th ser.) (1950) 60.

111. 536 PARL. DEB., H.C. (5th ser.) (1955) 159 (emphasis added).

force in 1952, Formosa was *de jure* territory of Japan. The R.O.C. government occupied Formosa as an agent of the Allied Powers, pending a peace settlement. The agency relationship would have terminated if the title to Formosa had been transferred to China in a peace treaty under negotiation at the time.

The political leaders of the United Kingdom and the United States recognized the rule of international law that any change of title to a territory of the defeated State after a war is achieved by a treaty. In November 1949, while the R.O.C. government had occupied the island of Taiwan, British Foreign Secretary Mayhew, in answering a question in the House of Commons with respect to the eventual settlement of the Formosa issue, said: “[a]ny change in the legal status of Formosa *can only be formally effected in a treaty of peace* with Japan. But what the eventual settlement will be is a matter which His Majesty’s Government cannot decide alone.”¹¹² In July 1950, the succeeding British Foreign Secretary Younger stated that “because of the provisional nature of the present administration of Formosa, it is the hope of His Majesty’s Government that the disposal of Formosa will be decided, as has always been contemplated, in connection with the peace settlement, with Japan.”¹¹³

The U.S. view, as expressed by its high officials, also supports this rule. On June 26, 1950, immediately after North Korea invaded South Korea, U.S. President Truman proclaimed that “[t]he determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.”¹¹⁴ In August 1950, when the United States sent the Seventh Fleet to the Taiwan Strait to defend Formosa, the Soviet Union charged the United States with aggression against Formosa. The U.S. government rebutted, “[t]he United States has not encroached on the territory of China.”¹¹⁵ U.S. General MacArthur also shared the same view. On May 4, 1951, in answering a question posed by Senator Russell, asking whether “the status of Formosa [had] ever been finally determined by any formal treaty,” U.S. General MacArthur answered that it has not.¹¹⁶ “Legalistically [Formosa]

112. 469 PARL. DEB., H.C. (5th ser.) (1949) 1679 (emphasis added).

113. 478 PARL. DEB., H.C. (5th ser.) (1950) 60.

114. *Statement on Korea*, *supra* note 83, at A1.

115. Letter from Ambassador Austin to Sec’y-Gen. Lie, *supra* note 108, at 412.

116. *Gen. MacArthur’s Statement*, *supra* note 72, at A7.

is still a part of defeated Japan. The disposition of the various segments of the Empire of Japan has not yet been formally determined."¹¹⁷

These statements, made by the general who assigned the R.O.C. government to assume the task of the post-surrender administration of Formosa, and those of the high governmental officials of the leading Allied Powers not only demonstrate that the R.O.C. government has not acquired title to the island of Taiwan by occupation for the State of China, but also attest to the existence of a rule in international law that if title to a territory of the defeated State is to be changed after a war, then it must be achieved by a territorial treaty.¹¹⁸

The nature of the occupation of Formosa by the R.O.C. government before a postwar settlement is threefold. First, the R.O.C.'s occupation of Formosa is on behalf of the Allied Powers and lasts until the agency relationship terminates, in which event the R.O.C. government must cease the occupation of Formosa, unless the title to Formosa is transferred to the State of China in postwar settlement. If the title to Formosa had been subsequently transferred to the State of China in postwar settlement, then the R.O.C. government would have occupied it as the reigning government.

Second, the occupation of Formosa by the R.O.C. government does not give the R.O.C. government title to Formosa. The purpose of occupation of Formosa by the R.O.C. government was for a post-surrender operation, and for that purpose only. The authority of an agent is limited by its mandate given by the principal. The right of occupation of a territory and the right to its title are two distinct rights. For instance, in the Treaty of Paris of 1898 concluded after the Spanish-American War, Spain relinquished the title to Cuba and the United States was given the right of occupation pending final resolution without title.¹¹⁹

117. *Id.*

118. See *supra* notes 32-35 and accompanying text.

119. Treaty of Paris, *supra* note 36, at 1755. The Treaty provides:

Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

Third, the occupation of Formosa by the R.O.C. government does not give the P.R.C. government or the State of China title to Formosa. In occupying Formosa, the R.O.C. government acted as an agent of the Allied Powers, not of the P.R.C. government or of the State of China. Besides, the R.O.C. government did not acquire the title to Formosa for itself or for anyone else. There was no legal ground under which either the P.R.C. government or the State of China could have acquired title to Formosa based on the fact that the R.O.C. government occupied Formosa pending a postwar settlement. In the eyes of the law, "Formosa [was] still *de jure* Japanese territory."¹²⁰

E. *The Peace Treaty of San Francisco*

In August 1944, while the Allied Powers were engaged in war with the Axis both in Asia and Europe, the representatives of the governments of the United Kingdom, the United States, the Soviet Union, and the R.O.C. government met at Dumbarton Oaks, Washington, D.C., and had informal conversations on the formation of an international peace and security organization after the war to prevent a third world war.¹²¹ On April 25, 1945,¹²² at the U.N. Conference in San Francisco, the United Nations was formed.¹²³ China, represented by the R.O.C. gov-

Id.

120. 478 PARL. DEB., H.C. (5th ser.) (1950) 60.

121. See DEP'T ST. BULL., Aug. 1944, at 133. The meetings, which began on August 14, came to be known as the Dumbarton Oaks Conversations. See Hungdah Chiu, *The Right of The Republic of China and its 21 Million Chinese People to Participate in the United Nations*, 28 J. MARSHALL L. REV. 247, 248 (1994). The representatives of the United Kingdom and the United States spoke with the Soviet Union's representatives first, and then with the Chinese representatives separately. See *id.*

122. The date of the conference was set by U.S. President Franklin D. Roosevelt, the U.K. Prime Minister Winston Churchill, and the U.S.S.R. Marshal Joseph Stalin at the Crimea Conference held between February 4 and February 11, 1945.

123. See U.N. CHARTER; see also United Nations Conference on International Organization (Apr. 25, 1945), DEP'T ST. BULL., Apr. 1945, at 789. The Charter was signed on June 26, 1945 by 50 countries. The United Nations officially came into existence on October 24, 1945. See *The United Nations, About the United Nations*, available at <http://www.un.org/aboutun/history.htm> (last visited Sept. 30, 2004); see also RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS, THE ROLE OF THE UNITED STATES, 1940-1945*, 964 (1958) (providing in-depth coverage of the formation of the U.N. CHARTER). Before the date of the Conference, President Franklin Roosevelt died (April 12, 1945), and Vice President Harry S. Truman became the 33rd U.S. President. See JOSEPH N. KANE, *PRESIDENTIAL FACT BOOK* 215 (1999).

ernment, was one of the original members and also a member of the Security Council.

In August 1945, when U.S. General MacArthur (as the Supreme Commander for the Allied Powers) assigned the R.O.C. government to receive the surrender of the Japanese commanders in Taiwan, the R.O.C. government was still in control of a large part of China's territory. But, by 1949, that government had lost control over most of China's territory to the Chinese Communists in a civil war and taken refuge in Formosa, outside of China's territory. As stated earlier, the relationship between the R.O.C. government and the Allied Powers is an agency relationship. By international law, the Allied Powers, which defeated Japan, had the authority to dispose of Japan's territory, or rather to force Japan to dispose of part of her territory, though such disposition had to be formalized by a postwar peace treaty.

To prepare a postwar settlement, the Allied Powers began to prepare for a peace treaty. The United Kingdom and the United States assumed the task of drafting the treaty.¹²⁴ The drafts were distributed to other Allied Powers for comments, and exchanges of notes among the parties ensued. The Peace Treaty of San Francisco, as it came to be known, was signed on September 8, 1951,¹²⁵ between Japan and the Allied Powers.¹²⁶ China was neither a party nor a signatory to this treaty. Neither the R.O.C. government that occupied the island of Taiwan, nor the P.R.C. government that controlled China proper, signed on behalf of the State of China.

China did not acquire title to Formosa as a consequence of the Peace Treaty of San Francisco, which required Japan to dispose of some of her territory, for three reasons: first, the Allied Powers did not intend China to receive title to Formosa; second,

124. The United Kingdom and the United States each produced a text of its own before they jointly drafted a reconciled text. Sec'y John Foster Dulles, Statements at the Second Plenary Session, *supra* note 102, at 452-54.

125. See Peace Treaty of San Francisco, *supra* note 36.

126. The following countries signed the Peace Treaty with Japan as Allied Powers: Argentina, Australia, Belgium, Bolivia, Brazil, Cambodia, Canada, Ceylon, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Indonesia, Iran, Iraq, Laos, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, The Philippines, Saudi Arabia, South Africa, Syria, Turkey, United Kingdom, United States, Uruguay, Venezuela, Vietnam. See *id.*

China was not a party to the Treaty; and third, title to Formosa did not revert to China.

The first reason China did not acquire title to Formosa as a consequence of the Peace Treaty of San Francisco is that the Allied Powers did not intend China to receive title. Even though the R.O.C. government had administered the affairs of Formosa for six years when the Peace Treaty of San Francisco was concluded, the Allied Powers did not intend to confer title to Formosa to China in the Peace Treaty.

The Peace Treaty of San Francisco is a territorial treaty. The only provision that deals with the territory of Formosa is Article 2(b), which provides, "Japan renounces all right, title and claim to Formosa and the Pescadores."¹²⁷ China did not receive title to Formosa by any interpretation of the Treaty. There are two approaches in interpreting a treaty: the objective approach and the subjective approach.¹²⁸

Under the objective approach, i.e., by the plain and ordinary meaning of the treaty, China did not receive title to Formosa under the language of the Peace Treaty of San Francisco. The Treaty does not use the word "cede," which is the word customarily used in a territorial treaty to transfer a territory. Instead, it uses the word "renounce." The plain and ordinary meaning of the word "renounce" is "to give up,"¹²⁹ "to abandon."¹³⁰ It has the same meaning as the word "relinquish" employed in the Treaty of Paris between Spain and the United States.¹³¹ Moreover, the Peace Treaty of San Francisco does not mention any transferee. For that reason, no State could receive any right or title to Formosa under the Treaty according to its terms.

127. Peace Treaty of San Francisco, *supra* note 36, art. 2(b).

128. See WALLACE, *supra* note 11, at 239-40.

129. See MERRIAM-WEBSTER'S COLLEGE DICTIONARY 991 (10th ed. 1996) (defining *renounce* as "to give up"); see also OXFORD ADVANCED LEARNER'S DICTIONARY 991 (5th ed. 1995) (providing definition of *renounce* as "to abandon").

130. See OXFORD ADVANCED LEARNER'S DICTIONARY, *supra* note 129, at 991.

131. See Treaty of Paris, *supra* note 36. In the Treaty, Spain relinquished its sovereignty over Cuba. In January 1955, Secretary of State John Dulles, said, "[Formosa and the Pescadores] became part of the Japanese Empire in 1895. They continued as such for half a century, until they were *relinquished* by Japan as a result of her defeat in war . . ." Sec'y John Foster Dulles, Our Foreign Policies in Asia, Address before the Foreign Policy Association (Feb. 16, 1955), in DEP'T ST. BULL., Feb. 1955, at 329 (emphasis added).

Under the subjective approach of interpretation, i.e., the intention of the parties to the Peace Treaty of San Francisco, it is clear that the parties did not intend for China to receive title to Formosa. The United Kingdom and the United States had changed their positions with respect to the intent announced in the Cairo Declaration, and instead, decided to leave the future of Formosa undetermined. Accordingly, they wanted Japan to relinquish title to Formosa, but *did not* want China to receive it. The use of the word "renounce" in disposing the title to Formosa was not without careful deliberation of the drafters of the Peace Treaty of San Francisco.¹³² The government of the Soviet Union, in its memorandum to the U.S. Ambassador,¹³³ commented,

In the meantime the [U.S.] draft treaty and the memorandum of the United States of America of May 19 testify to the fact that the Government of the United States is going on with direct violation of the national rights of China with respect to its territory in refusing to fulfilling the Cairo agreement regarding the return of Taiwan island and the Pescadores Islands to China as well as with exclusion of China from preparation of a peace treaty with Japan.¹³⁴

Likewise, the government of India was fully aware that Formosa was not to be returned to China under the draft Peace Treaty of San Francisco.¹³⁵ In its memorandum to the U.S. Department of State,¹³⁶ the Indian government expressed its intent not to participate in the Peace Treaty of San Francisco, on the ground, among others, that,

[T]he Government of India attach[es] the greatest importance to the Treaty providing that the Island of Formosa should be returned to China. The time and manner of such return might be the subject of separate negotiations but *to leave the future of the Island undetermined*, in spite of past international agreements, in a document which attempts to regulate the relations of Japan with all Governments that were en-

132. See The San Francisco Conference on Proposed Japanese Peace Treaty (Aug. 15, 1951), DEP'T ST. BULL., Aug. 1951, at 346.

133. See Memorandum of the U.S.S.R., (June 10, 1951), U.S.S.R.-U.S., DEP'T ST. BULL., June 1951, at 138.

134. *Id.* at 142.

135. See India Refuses To Be Party to Treaty, Memorandum of India, Aug. 23, 1951, India-U.S., DEP'T ST. BULL., Sept. 1951, at 386.

136. See *id.*

gaged in the last war against her does not appear to the Government of India to be either just or expedient.¹³⁷

At the Conference in San Francisco for signing the Peace Treaty, John Dulles, who drafted the Treaty, referring to the disposition of Formosa, remarked,

[A]rticle 2 . . . merely delimit[s] Japanese sovereignty. [S]pecify[ing] precisely the ultimate disposition of each of the ex-Japanese territories . . . [w]ould have been neater. But . . . the Allies quarrel about what shall be done with what Japan is . . . required to give up The wise course was . . . leaving the future to resolve doubts by invoking international solvents other than this Treaty.¹³⁸

U.S. Secretary of State Dean Acheson, who presided at the Conference, added at the closing of the Conference, "[w]e signed this great treaty this morning, but we must live this treaty from this day on," well aware that the fate of Formosa was not decided by the treaty.¹³⁹ Thus, it was clear to all the States involved that the Allied Powers did not intend China to acquire the title to Formosa under the Peace Treaty of San Francisco.

The attitude of the United Kingdom and the United States toward the Taiwan problem has changed over the years. At the Cairo Conference of 1943, the U.S. President Franklin Roosevelt and the British Prime Minister Winston Churchill intended to return Formosa to China after the war with Japan ended. Subsequent to Japan's surrender, however, the two leading Allied Powers changed their position due to the aggression of the P.R.C. government, and simply required Japan to renounce her title to Formosa in the Peace Treaty.

The second reason China did not acquire title to Formosa as a consequence of the Peace Treaty of San Francisco is that China was not a party to the Treaty. Under the general rule mentioned earlier, only a party to the treaty can transfer or receive title to a territory in a territorial treaty. The Peace Treaty of San Francisco is more specific. Article 25 provides:

Subject to the provisions of Article 21, the present Treaty shall not confer any rights, titles or benefits on any State

137. *Id.* at 386 (emphasis added).

138. Sec'y John Foster Dulles, Statements at the Second Plenary Session, *supra* note 102, at 454.

139. *Id.* at 460.

which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favor of a State which is not an Allied Power as so defined.¹⁴⁰

According to Article 23, China was not a party to the Peace Treaty of San Francisco. Article 23 provides,

The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force to all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by the majority, including the United States of America as the principal occupying Power, of the following States, [here appear the names of such of the following States as signatories to the present Treaty] namely Australia, Canada, Ceylon, France, Indonesia, the Netherlands, New Zealand, Pakistan, the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.¹⁴¹

China is not mentioned in Article 23. It is not an Allied Power as defined in the first paragraph of Article 25, which provides that, “[f]or the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, *provided in each case the State concerned has signed and ratified the Treaty.*”¹⁴²

China could not receive title to Formosa under an exception to Article 25 either. The exception is in Article 21, which provides, “[n]otwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2”¹⁴³ Article 10 deals with the rights and interests of Japan *in* China, not with Japanese territories. Article 10 provides,

Japan renounces all special rights and interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901, and all annexes, notes and documents supplementary thereto, and agrees to the abrogation in respect to Japan of

140. Peace Treaty of San Francisco, *supra* note 36, art. 25, at 74.

141. *Id.* art. 23.

142. *Id.* art. 25 (emphasis added).

143. *Id.* art. 21.

the said protocol, annexes, notes and document.¹⁴⁴

Article 14 deals with reparations and acceptance of surrender,¹⁴⁵ not with territory. Thus, because China was not a party to the Treaty and not an Allied Power under the Treaty, China could not receive the title to a territory owned by Japan.

The third reason why China did not acquire title to Formosa as a consequence of the Peace Treaty of San Francisco is that the title to Formosa did not revert to China as a result of the Treaty.¹⁴⁶ Title to Formosa did not revert to China for two reasons. First, the Allied Powers did not intend that title to Formosa revert to China as a consequence of the Peace Treaty of San Francisco. Second, no provisions in the Peace Treaty of San Francisco can be interpreted to result in a reversion of title to Formosa to China. The Peace Treaty of San Francisco does not revoke the Treaty of Shimonoseki. The Treaty of Shimonoseki is a territorial treaty, which as stated before, cannot be revoked.¹⁴⁷ Nor does the Peace Treaty of San Francisco claim to do so. It does not even mention the Treaty of Shimonoseki.

Article 2(b) of the Peace Treaty of San Francisco does not result in reversion.¹⁴⁸ The language in Article 2(b), in which Japan renounces her title to Formosa, and the language in Article 2(c), in which Japan renounces the title to part of the Sakhalin Island, are different and distinguishable.¹⁴⁹ With respect to Sakhalin and the islands adjacent to it, Article 2(c) provides that "Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905."¹⁵⁰ The reference to the Treaty of Portsmouth could have created an unexpected result if the leading Allied Powers did not intend the Soviet Union to acquire title to those territories. The rights and title renounced are specific, i.e., those acquired in the Treaty of Portsmouth from Russia. When Japan renounced all rights, title, and claim acquired in the Treaty of Portsmouth from Russia,

144. *Id.* art. 10.

145. *See id.* art. 14.

146. *See* Peace Treaty of San Francisco, *supra* note 36.

147. *See supra* notes 36-37, 51 and accompanying text.

148. *See* Peace Treaty of San Francisco, *supra* note 36, art. 2(b).

149. *See id.* arts. 2(b)-(c).

150. *Id.* art. 2.

these rights, title, and claim would terminate and title to these territories would revert to Russia, or its successor, the Soviet Union, if the Soviet Union had been a party to the Peace Treaty of San Francisco.¹⁵¹ Furthermore, with respect to the title to Formosa and the Pescadores, the Peace Treaty of San Francisco does not require Japan to renounce the rights, title, and claim which it acquired in the Treaty of Shimonoseki. In Article 2(b), Japan simply renounces the title and claim to Formosa and the Pescadores without reference to the Treaty of Shimonoseki. It does not require Japan to renounce her *rights and title acquired in the Treaty of Shimonoseki from China*. The language in Article 2(b) of this Treaty is similar to that in Article 2(f), in which “Japan renounces all right, title and claim to the Spratly Islands and the Paracel Islands.”¹⁵² In these two provisions, Japan renounces her claim to the territories without qualification and without any attempt to transfer their title, but leaving it unresolved.

Nor did the provision in Article 10 of the Peace Treaty of San Francisco result in a reversion of title to Formosa to China.

151. Article 2(c) could have resulted in a reversion of title of Southern Sakhalin to the Soviet Union only if the Soviet Union had been a party to the Peace Treaty of San Francisco. See Peace Treaty of San Francisco, *supra* note 36, art. 25; see also *supra* note 126. Although the Soviet Union was originally named a party to the Peace Treaty of San Francisco in Article 23, it refused to sign the Treaty. See Seokwoo Lee, *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11 PAC. RIM L. & POL'Y 63, 76 (2002). Since Japan surrendered to the Allied Powers, the Soviet Union has occupied the Kurile Island and Southern Sakhalin, as well as four small islands north of Hokkaido, which Japan claims to be her territories proper. See *id.* However, the Soviet Union, and its successor, the Russian Federation, will not acquire the title to Southern Sakhalin until it concludes a peace treaty with Japan. See *id.* The Soviet Union refused to sign the Peace Treaty of San Francisco, partly because the leading Allied Powers refused to put in Article 2(c) of the Treaty which states that title to these territories is explicitly transferred to the Soviet Union on the ground that the Soviet Union had not fulfilled the Yalta Agreement. See *id.* at 102-03. John Dulles explained as follows:

As regards South Sakhalin and the Kurile Island, the treaty carries out the provisions of the Potsdam surrender terms, the only agreement by which Japan and the Allied [P]owers as a whole are bound. So long as other Governments have rights under the Yalta Agreement which the Soviet Union has not fulfilled, there is at least questions as to whether the Soviet Union can, with “clean hands,” demand fulfillment of the parts of that agreement it likes.

Sec'y John Foster Dulles, Answer to Soviet Charges Against Japanese Treaty (Sept. 3, 1951), in DEP'T ST. BULL., Sept. 1951, at 462. If the leading Allied Powers intended the Soviet Union not to acquire title to Southern Sakhalin, as well as the Kurile Island, in the Peace Treaty of San Francisco, the intention would be more clearly expressed if Article 2(c) did not refer to the Treaty of Portsmouth. See Lee, *supra*, at 107-08.

152. Peace Treaty of San Francisco, *supra* note 36, art. 2(f), at 48.

Article 10, in which Japan renounces certain "special rights and interests . . . and agrees to the abrogation of certain documents," deals with Japan's rights and interests in China, not with the territory of Japan.¹⁵³

In summary, the Peace Treaty of San Francisco leaves the Treaty of Shimonoseki intact. It does not affect the validity of the Treaty of Shimonoseki, in which Japan acquired title to Formosa. The fact that the Treaty requires Japan to renounce title to Formosa indicates that it recognizes the validity of the Treaty of Shimonoseki.¹⁵⁴ For the three reasons discussed above, China undoubtedly did not acquire title to Formosa as a consequence of the Peace Treaty of San Francisco.

The Peace Treaty of San Francisco has two implications. First, the Treaty did not carry out the war time intention of the three governments announced in the Cairo Declaration. The Allied Powers, who signed the Peace Treaty of San Francisco, formally rejected the Cairo Declaration and the Potsdam Proclamation regarding the return of Formosa to China. British's Foreign Secretary Anthony Eden, stated in the House of Commons,

In the Cairo Declaration of November, 1943, the Allies stated that it was their purpose 'that all the territories which Japan has stolen from the Chinese such as . . . Formosa and the Pescadores, shall be restored to the Republic of China . . . ' This Declaration was a statement of intention that Formosa should be retroceded to China after the war. This retrocession has, in fact, never taken place¹⁵⁵

Second, the Peace Treaty of San Francisco did not terminate the agency relationship of the R.O.C. government and the Allied Powers. The status of the R.O.C. government as an agent of the Allied Powers was unchanged because China did not acquire title to Formosa as a consequence of the Treaty. Under the general principles of law recognized by civilized Nations, agency status does not change unless and until it is terminated.¹⁵⁶

153. *Id.* art. 10.

154. See Chiang, *supra* note 7, at 995.

155. 536 PARL. DEB., H.C. (5th ser.) (1955) 159.

156. The agency relationship may be terminated by mutual consent or by either party. In any event, the agent cannot retain the possession of the territory. See *generally* Gov't Guarantee Fund of the Republic of Finland v. Hyatt Corp., 95 F.3d 291 (3d Cir. 1996).

A U.S. policy maker confirmed that the agency status of the R.O.C. government was not terminated by, at, or after the signing of the Peace Treaty of San Francisco. In 1955, U.S. Secretary of State John Foster Dulles in Eisenhower's¹⁵⁷ administration said, "[i]n 1945, [t]he Republic of China was *entrusted* with authority over (Formosa and the Pescadores),"¹⁵⁸ and 'General Chiang [Kai-shek] was merely asked to administer them (Formosa and the Pescadores) for the Allied and associated powers pending a final decision as to their ownership.'¹⁵⁹ The British view was the same. In 1955, British Foreign Secretary Anthony Eden in the House stated that "[i]n September (of 1945), the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied powers The arrangements made with Chiang Kai-shek put him there on a basis of military occupation pending further arrangements."¹⁶⁰ In the same year, the British Joint Under-Foreign Secretary R.H. Turton, also said, "Formosa[']s sovereignty was Japanese until 1952. The Japanese Treaty entered into force, and at that time Formosa was being administered by the Chinese Nationalists, to whom *it was entrusted* in 1945, as a military occupation This military occupancy could not give [the Chinese Nationalists] legal sovereignty."¹⁶¹ In the words of British Prime Minister Winston Churchill, "Chiang Kai-shek . . . took refuge upon Formosa."¹⁶²

Both the U.K. and the U.S. views were expressed in 1955, four years after the conclusion of the Peace Treaty of San Francisco. It is clear that both leading Allies did not regard the R.O.C. government's agency status terminated by, at the time of, or after the Peace Treaty, notwithstanding that the R.O.C. government had continued to occupy the island of Taiwan. No official statement or act of the R.O.C. governments, the United

157. Dwight Eisenhower, the U.S. President (1953-1961).

158. See Sec'y John Foster Dulles, *Our Foreign Policies in Asia*, *supra* note 131, at 329 (emphasis added).

159. James Reston, *New Formosa Bid*, N.Y. TIMES, Feb. 7, 1955, at A1 (emphasis added).

160. 536 PARL. DEB., H.C. (5th ser.) (1955) 159.

161. 540 PARL. DEB., H.C. (5th ser.) (1955) 1871 (emphasis added).

162. 530 PARL. DEB., H.C. (5th ser.) (1954) 494. Churchill said, "Chiang Kai-shek who . . . was driven out of his country by a Communist revolution . . . and who took refuge upon Formosa, where he still remains [in 1954]." *Id.*

Kingdom, or the United States has terminated, or attempted to terminate, the agency relationship.

F. *The Post-Treaty Interpretations of the Leading Allies*

After the Peace Treaty of San Francisco was concluded, the governments of the two leading Allied Powers that signed the Peace Treaty, the United Kingdom and the United States, had occasion to interpret the Peace Treaty with respect to sovereignty over Formosa.¹⁶³ Both governments agreed that no State had acquired sovereignty over Formosa because the Peace Treaty of San Francisco merely left Formosa abandoned, leaving the sovereignty over Formosa undetermined.

The Eisenhower Administration regarded the sovereignty over Formosa as not settled by the Peace Treaty of San Francisco. In February 1955, when the United States signed a mutual defense treaty with the R.O.C. government, U.S. Secretary of State John Foster Dulles, in urging the U.S. Senate to ratify the Treaty, remarked, “[t]echnical sovereignty over Formosa and the Pescadores has never been settled. That is because the Japanese peace treaty merely involves a renunciation by Japan of its right and title to these islands. But the future title is not determined by the Japanese peace treaty, nor is it determined by the peace treaty which was concluded between the Republic of China and Japan.”¹⁶⁴

The U.K. government’s official position was the same — that China did not acquire Formosa in the Peace Treaty of San Francisco. In 1955, in response to a Laborite’s suggestion in the British House of Commons that Formosa should be handed over to Communist China pursuant to the Cairo Declaration, British Foreign Secretary Anthony Eden said:

[Formosa and the Pescadores] have been in Chinese Nationalist hands ever since the Japanese surrender in 1945. . . . [Formosa and the offshore islands Quemoy and Matsu] have always been treated as separate issues Formosa has never in this century been a part of China and the status of Formosa . . . was dealt with by the Treaty of San Francisco, signed by

163. The United Kingdom and the United States are the “cosponsors of the text.” Sec’y Dean Acheson, Opening Statement Before the San Francisco Conference (Sept. 5, 1951), in DEP’T ST. BULL., Sept. 1951, at 450.

164. Sec’y John Foster Dulles, Remarks at News Conference on the Purpose of Treaty with R.O.C. (Dec. 1, 1954), in DEP’T ST. BULL., Dec. 1954, at 896.

the [Atlee] Government. . . . The offshore islands [Quemoy and Matsu] have always been regarded, and are now regarded, by us as part of China. . . . [The] distinction which . . . the House should carefully maintain.¹⁶⁵

A week later, it was reported that British Prime Minister Winston Churchill, who participated in the Cairo Declaration, said that the future of the island was now an international problem and the question of its future sovereignty was left undetermined by the Japanese peace treaty.¹⁶⁶ British Foreign Secretary Anthony Eden confirmed Churchill's statement in the British House of Commons. Eden said:

[u]nder the Peace Treaty of April, 1952, Japan formally renounced all right, title and claim to Formosa and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the People's Republic of China or to the Chinese Nationalist authorities. Formosa and the Pescadores are therefore, in the view of Her Majesty's Government, territory the *de jure* sovereignty over which is uncertain or undetermined.¹⁶⁷

The British Joint Under-Foreign Secretary R. H. Turton reiterated the U.K. position in the House of Commons in May of 1955.¹⁶⁸ Likewise, British Prime Minister Churchill did not consider Formosa part of China when he said, "Chiang Kai-shek who . . . was driven out of his country by a Communist revolution . . . took refuge upon Formosa, where he still remains."¹⁶⁹ Thus, the two leading Allied Powers were in consensus on the meaning of the term of the Peace Treaty of San Francisco disposing the title to Formosa — that China did not acquire the title to Formosa as a consequence of the Treaty.

It is also significant that the two leading Allies agreed that the R.O.C. government had not acquired title to Formosa by occupation. Both governments made the statement that China had not acquired title to Formosa after the R.O.C. government had continued to occupy Formosa for five years subsequent to

165. 536 PARL. DEB., H.C. (5th ser.) (1955) 158, 160. The Treaty was signed on Sept. 8, 1951, and went into force on Apr. 28, 1952.

166. See Drew Middleton, *Cairo Formosa Declaration Out of Date, Says Churchill*, N.Y. TIMES, Feb. 2, 1955, at A1.

167. 536 PARL. DEB., H.C. (5th ser.) (1955) 159.

168. See 540 PARL. DEB., H.C. (5th ser.) (1955) 1871.

169. 530 PARL. DEB., H.C. (5th ser.) (1954) 494.

the conclusion of the Peace Treaty of San Francisco. Thus, it is beyond dispute that China has not acquired title to Formosa through the post Peace Treaty occupation by the R.O.C. government.

Since the governments of the two leading States made those statements, no factual or legal event has taken place that would have changed the legal status of Formosa and have given China title to Formosa.

G. *The Mutual Defense Treaty*

In 1949, Chiang Kai-shek and his R.O.C. government fled to the island of Taiwan after defeat at the hand of Chinese Communists. In 1954, in order to defend Chiang Kai-shek and Taiwan against the possible invasion by the P.R.C. government, the U.S. government and the R.O.C. government signed a mutual defense treaty.¹⁷⁰

The conclusion of the Mutual Defense Treaty did not effect a transfer of the island of Taiwan to China, according to U.S. Secretary of State John Foster Dulles. In February 1955, Dulles, urging the U.S. Senate to ratify the Treaty, rejected a suggestion that signing a mutual defense agreement with R.O.C. President Chiang Kai-shek would change the legal status of Formosa and the Pescadores and give the Nationalists (the R.O.C. government) sovereignty over them. Dulles said that the Eisenhower administration "does not regard the sovereignty of Formosa and the Pescadores as . . . settled and the [Mutual Defense T]reaty would not give General Chiang sovereignty over these islands."¹⁷¹ U.S. Senate Foreign Relations Committee Chairman, Senator Walter F. George, asserts the committee's "understanding" of the treaty as follows: "Senate approval of the Treaty would neither strengthen nor weaken the Chiang Government's [sic] claim to sovereignty over Formosa, the international status of which is yet to be decided."¹⁷²

The British interpreted the Mutual Defense Treaty in the same way. To a House member's argument that the United

170. See Mutual Defense Treaty, Dec. 2, 1954, U.S.-China (the R.O.C. government), 6 U.S.T. 433.

171. Reston, *supra* note 159, at A1.

172. William S. White, *Senate Approves Formosa Treaty*, N.Y. TIMES, Feb. 10, 1955, at A1.

States would give formal recognition of Formosa and the Pescadores as territories of the Republic of China by signing the Mutual Defense Treaty with the R.O.C. government, the British Joint Under-Foreign Secretary Turton in the Eden administration rebutted: "It is clear from what Mr. Dulles said at the time of signing of the Treaty that he was in no conflict with us on the legal interpretation of the position."¹⁷³

H. *Peace Treaties Between China and Japan*

After the conclusion of the Peace Treaty of San Francisco, Japan concluded two peace treaties with China — one, the Treaty of Peace, with the R.O.C. government in 1952,¹⁷⁴ and the other, the Treaty of Peace and Friendship, with the P.R.C. government in 1978.¹⁷⁵

The Treaty of Peace of 1952 signed by Japan and the R.O.C. government is not a territorial treaty because it does not dispose of a territory. Although the Treaty of Peace of 1952 ended the war between China and Japan, it does not address title to Formosa, but simply confirms Japan's disposition in the Peace Treaty of San Francisco. Article II of the Peace Treaty of 1952 provides:

It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco in the United States of America on September 8, 1951, Japan has renounced all right, titles and claim to Taiwan (Formosa) and Penghu (The Pescadores) as well as the Spratly Islands and Paracel Islands.¹⁷⁶

By recognizing that Japan had abandoned Formosa, the R.O.C. government accepted Japan's action as officially valid. Not only did the State of China not acquire the title to Formosa under the Peace Treaty of 1952, but the R.O.C. government, representing the State of China also formally accepted the disposition of Formosa by the Peace Treaty of San Francisco without claiming the island as China's territory. This result was confirmed by U.S.

173. 540 PARL. DEB., H.C. (5th ser.) (1955) 1865, 1870-71.

174. See Treaty of Peace of 1952, *supra* note 102. The R.O.C. government, in signing the treaty, represented the State of China.

175. Treaty of Peace and Friendship, Aug. 12, 1978, Japan-P.R.C., 1981 U.N.T.S. 269 [hereinafter Treaty of Peace and Friendship]. The P.R.C. government, in signing the treaty, represented the State of China.

176. See Treaty of Peace of 1952, *supra* note 102, art. II.

Secretary of State John Foster Dulles, who said, “[T]he future title is not determined by the Japanese peace treaty, nor is it determined by the peace treaty which was concluded between the Republic of China and Japan.”¹⁷⁷

The second treaty, the Treaty of Peace and Friendship, signed by Japan and the P.R.C. government¹⁷⁸ in 1978, does not confer Formosa’s title to China either. In 1972, before the conclusion of the Treaty of Peace and Friendship, the Japanese government and the P.R.C. government issued a Joint Communiqué in which the government of Japan stated that “it fully understands and respects the P.R.C. government’s stand that [Taiwan is a part of its territory] and that [the P.R.C. government] maintains its stand under the Potsdam Proclamation.”¹⁷⁹ This Joint Communiqué is not a territorial treaty. As discussed before, it cannot effect a transfer of a territory. The Treaty of Peace and Friendship signed by Japan and the P.R.C. government in 1978 is not a territorial treaty, and it does not even mention the Peace Treaty of San Francisco or Formosa.

Under the general principles of law, China did not acquire title to the island of Taiwan under either the two treaties between Japan and China, or the Joint Communiqué of the Japanese government and the P.R.C. government because Japan, having renounced her title and claim to the island of Taiwan in the Peace Treaty of San Francisco, no longer had any title or right to the island of Taiwan to give away at the time of concluding the two treaties or issuing the Joint Communiqué.

III. SOVEREIGNTY OVER TAIWAN

A. *China’s Claim of Sovereignty Over Taiwan*

Since the P.R.C. government was established in October of 1949,¹⁸⁰ it has claimed sovereignty over Taiwan, which has been occupied by the R.O.C. government since 1945, and to where the R.O.C. government has moved its seat in 1949 after its defeat

177. DEP’T ST. BULL., Dec. 1954, at 896.

178. See Treaty of Peace and Friendship, *supra* note 175.

179. Joint Communiqué of the Government of Japan and the Government of the P.R.C. (Sept. 29, 1972), available at <http://www.taiwandocuments.org/japan01.htm> (last visited Oct. 12, 2004).

180. The government was established on October 1, 1949. See Ma Feng, *A Nation Celebrates Its New Beginning*, TIME, Sept. 27, 1999, available at <http://www.time.com/time/asia/magazine/99/0927/beijing.html>.

in China proper. In an official statement, called *P.R.C. White Paper—The One-China Principle and the Taiwan Issue* (“2000 White Paper”),¹⁸¹ the P.R.C. government claims that “after replacing the government of the Republic of China in 1949, the government of the P.R.C. has become the sole legal government of China, enjoying and exercising sovereignty over the whole of China, including Taiwan.”¹⁸²

Because the modern State is based on territory, China’s claim of sovereignty over Taiwan is necessarily predicated on its claim of title to the island of Taiwan. In August 1950, the P.R.C.’s Foreign Minister sent a cablegram to the U.N. Secretary-General Trygve Lie, claiming that “Taiwan is an integral part of China.”¹⁸³ In the 2000 White Paper, the P.R.C. government formulated the term “one-China principle” in which it claimed that Taiwan is a part of China.¹⁸⁴

In general, the P.R.C. government claims the island of Taiwan on three grounds: historical ownership, abrogation of the Treaty of Shimonoseki, and the Cairo Declaration.¹⁸⁵ None of these grounds are valid in international law.

The first ground is historical ownership. It claims that the island of Taiwan was originally owned by China, and therefore, is now China’s territory. There is no rule in international law which lends support to such a claim. Regardless of the length of time during which China’s governments had effective control of the island of Taiwan, international law does not recognize a claim of a territorial title based on the historical ownership. If such a ground were valid for a claim of a territory, it would nullify all treaties in which territories were ceded.

The second ground that the P.R.C. government uses to claim the island of Taiwan is that the Treaty of Shimonoseki¹⁸⁶

181. *2000 White Paper*, *supra* note 53.

182. *Id.* at 11.

183. Cablegram from Chou En-Lai, Foreign Minister, P.R.C. to Sec’y-Gen. Trygve Lie, United Nations (Aug. 24, 1950), in DEP’T ST. BULL., Oct. 1950, at 607 [hereinafter *Chou En-Lai Cablegram*].

184. See *2000 White Paper*, *supra* note 53. The R.O.C. government also controls two small islands, Queymoy and Matsu, off the Chinese coast. These islands are not part of the island of Taiwan and are Chinese territories. See *supra* notes 1, 98.

185. See *Chou En-Lai Cablegram*, *supra* note 183.

186. See Treaty of Shimonoseki, *supra* note 48. In the Treaty, China ceded Formosa and the Pescadores (together called, the “island of Taiwan”) to Japan.

was abrogated.¹⁸⁷ The P.R.C. government claims that the R.O.C. government abrogated the “unequal” Treaty of Shimonoseki by a proclamation when “Japan launched an all-out war of aggression against China” in 1941.¹⁸⁸ As explained earlier, such a proclamation to abrogate the Treaty is not valid,¹⁸⁹ and a succeeding government cannot claim what its predecessor could not do. Furthermore, after a territorial treaty is concluded, a subsequent aggressive act of a party to the treaty, Japan, does not affect the validity of the treaty.¹⁹⁰

The third ground which the P.R.C. government claims as a basis for ownership of the island of Taiwan is the Cairo Declaration. The P.R.C. government claims that the Allies in the 1943 Cairo Declaration promised the return of Formosa and Pescadores to China after the war. Such ground is again unfounded. As explained before, the Cairo Declaration reflected wartime policy of the Allies. The Allies subsequently changed that policy, and in the 1951 Peace of Treaty of San Francisco, which overrode the Cairo Declaration, forced Japan to renounce title to the island of Taiwan without designating any transferee. It is ironic that in their repeated claim of title to the island of Taiwan, neither the P.R.C. government nor the R.O.C. government ever mention the Peace Treaty of San Francisco, which is the controlling document.

In summary, the P.R.C. government’s claim of title to the island of Taiwan is not justified under international law. As analyzed herein, China never reacquired title to the island of Taiwan by any recognized means in international law: it did not acquire it under the Cairo Declaration; it did not acquire it by the Peace Treaty of San Francisco or any other treaty. Furthermore, China has not acquired it by occupation. The R.O.C. government occupied the island of Taiwan, neither for the State of China nor for the P.R.C. government, but as an agent of the Allies. After the conclusion of the Peace Treaty of San Francisco, the R.O.C. government continues to administer the affairs of Taiwan on behalf of the Allies. This agency relationship has never been terminated.

187. See 2000 *White Paper*, *supra* note 53.

188. *Id.*

189. See SCOTT, *supra* note 54.

190. See *supra* note 55 and accompanying text.

B. *The U.S. Position on Taiwan*

As previously discussed, the position of the Truman and the Eisenhower Administrations, as well as that of the contemporaneous British governments, is that no State, including China, has acquired title to the island of Taiwan after World War II. While the islands of Quemoy and Matsu are China's territories, the island of Taiwan is not.

After the Peace Treaty of San Francisco entered into force, the Treaty was self-executory and became the supreme law of the land under the U.S. Constitution.¹⁹¹ The Treaty's disposition of title to the island of Taiwan binds the subsequent U.S. Administrations as the controlling law of the United States.¹⁹² Thus, title to the island of Taiwan cannot be changed by a policy of an Administration.

Although title to a territory cannot be changed by governmental policy, the policy toward China adopted by the U.S. government has profound consequences in international relations and politics. Political commentators and governmental officials often describe U.S. policy toward China as the "one-China policy."¹⁹³ Since these commentators and officials used the term one-China policy without defining it,¹⁹⁴ the P.R.C. government equates the one-China policy with its own one-China principle.¹⁹⁵ The P.R.C. government accused the U.S. government of violating China's sovereignty: first, when the U.S. government sold weapons to the R.O.C. government in Taiwan,¹⁹⁶ and sec-

191. See U.S. CONST. art. VI, cl. 2. The Constitution states that:

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 States, 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.

Id.

192. See *DeLima v. Bidwell*, 182 U.S. 1, 195 (1901).

193. See, e.g., Television Interview with Sec'y of Defense William Cohen (CNN television broadcast, Mar. 10, 2000).

194. See Robert Kaiser, *What We Said, What They Said, What's Unsaid*, WASH. POST, Apr. 15, 2001, at B1.

195. See *Anniversary of Shanghai Communiqué: Sino-US "Alliance" Has Increased Tension*, (BBC television broadcast, Mar. 3, 1982).

196. See *2000 White Paper*, *supra* note 53 at 15. "While the Chinese were willing to state their peaceful policy [toward Taiwan] in strong terms, they at first resisted any relationship between that policy and our arms sales to Taiwan. The Chinese resisted this relationship because of their view that *the sale of arms to Taiwan constitutes an interfer-*

ond, when it gave a visa to R.O.C.'s President Lee Teng-hui for a private visit to the United States.¹⁹⁷

The following review of U.S. policy toward China of various U.S. Administrations will reveal that the U.S. one-China policy is different from China's one-China principle in that the U.S.'s one-China policy does not, like the one-China principle, recognize that the island of Taiwan is China's territory.

Neither U.S. President John F. Kennedy,¹⁹⁸ who succeeded Eisenhower, nor U.S. President Lyndon B. Johnson,¹⁹⁹ who succeeded Kennedy, changed the U.S. position on title to the island of Taiwan. Both Administrations refused to recognize the P.R.C. as the representative government of China and blocked the attempts by the Soviet bloc to replace the R.O.C. government with the P.R.C. government in the United Nations. Yet, although both Administrations recognized the R.O.C. government seated on the island of Taiwan as the representative government of China, they never proclaimed the island of Taiwan to be China's territory.

Nor did U.S. President Nixon,²⁰⁰ who succeeded Johnson, agree with the P.R.C. government's claim that the island of Taiwan was China's territory. Nixon's policy toward China was expressed in the Shanghai Communiqué of 1972 ("Shanghai Communiqué").²⁰¹ A brief review of the circumstances under which the Shanghai Communiqué was issued provides some insight to the meaning of the statements made by the U.S. government in the Communiqué.

Immediately after the P.R.C. government was established, the U.S. policy toward the Communist regime was one of rejection and containment. When U.S. President Nixon took office in 1969, and throughout his presidency, the U.S. government

ence in China's internal affairs." John H. Holdridge, Address before the House Foreign Affairs Committee (Aug. 18, 1982), in DEPT. ST. BULL., Oct. 1982, at 19 (emphasis added).

197. See 2000 White Paper, *supra* note 53, at 9. Lee Teng-hui visited the United States in 1995. See Barbara Franklin, *China: Friend or Enemy?*, Lecture Before the Heritage Foundation (June 20, 1996), available at <http://www.heritage.org/research/asia/andthepacific/hl566.cfm>.

198. John F. Kennedy, the U.S. President (1961-1963).

199. Lyndon B. Johnson, the U.S. President (1963-1968).

200. Richard M. Nixon, the U.S. President (1969-1974).

201. Joint Communiqué (Feb. 27, 1972), in DEP'T ST. BULL., 1972, at 437 (emphasis added) [hereinafter Shanghai Communiqué].

recognized the R.O.C. government in Taiwan as the representative government of China, even though the P.R.C. government was in control of China proper. The United States also supported the R.O.C. government to represent the member-State China in the United Nations.

Nixon was the first U.S. President to change the U.S. policy toward the P.R.C. government, which was a former U.S. enemy in the Korean War, from containment to rapprochement, and establish official contact with the regime.²⁰² Nixon and the P.R.C. government's leaders at the time each had their own geopolitical and strategic reasons to be, or to at least look, friendly with each other.²⁰³ So, in July 1971, Nixon began a high-level dialogue with the P.R.C. government by sending Henry Kissinger, U.S. Assistant to the President for National Security Affairs, to meet with the P.R.C. government leaders in Beijing and negotiate a meeting of the two government leaders.

Nixon first changed his policy toward the question of China's representation in the United Nations. Since the early 1960s, debates had already taken place in the U.N. General Assembly on whether the P.R.C. government in Beijing should replace the R.O.C. government in Taipei occupying China's seat in the organization. By 1971, the P.R.C. government had been established twenty years and it was clear that it was impossible for the R.O.C. government to "recover the mainland," as Chiang had repeatedly claimed ever since he was forced to move to Taiwan. Realizing this, the Nixon Administration changed the policy toward the P.R.C. government. But, while Nixon wanted the P.R.C. government to occupy China's seat, both in the General Assembly and the Security Council, his intent was to create "dual representation" and retain the R.O.C. government in the General Assembly.²⁰⁴ In 1971, when the U.N. General Assembly convened, the proposal to replace the representatives of the R.O.C.

202. The geopolitical reasons for Nixon to establish some kind of informal relationship with China included a cease fire in Vietnam and an alliance with China against Soviet Union. For the reason in the background for the United States government and the P.R.C. government to make contact, see HENRY KISSINGER, *OBSERVATIONS: SELECTED SPEECHES AND ESSAYS* 141 (1982).

203. *See id.* at 141.

204. The U.S. draft resolution, in part, reads, "the General Assembly, 1. Hereby affirms the right of representation of the People's Republic of China and recommends that it be seated as one of the five permanent members of the Security Council; 2. Affirms the continued right of representation of the Republic of China." Ambassador

government with the representatives of the P.R.C. in China's seat was again made in October.²⁰⁵ The attempt to create dual representation in the United Nations was not successful. Nevertheless, the Nixon Administration voted for the motion to replace the R.O.C. with the P.R.C. The U.N. General Assembly then adopted Resolution No. 2758 to expel the representatives of the R.O.C. government.²⁰⁶

Although the United States voted for the Resolution, the United States did not change its position on the title to Taiwan. At a press conference on the morning after the adoption of the Resolution, a reporter asked U.S. Secretary of State William Rogers, "[I]sn't the vote an implicit acknowledgment that Taiwan is a province of China, and if so, what would we do if Peking now asked us to remove our troops from there?"²⁰⁷ Rogers replied, "Well, I don't want to speculate [about the P.R.C. government asking us to remove our troops from Taiwan]. We have made our position clear. Our policy is unaffected by this vote."²⁰⁸

The negotiations of Kissinger and the P.R.C.'s government

George Bush, Statements in the Plenary Session (Oct. 18, 1971), in DEP'T ST. BULL., Oct. 1971, at 549.

205. G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8439 (1971). The Proposal stated:

Restoration of the lawful rights of the People's Republic of China in the United Nations

The General Assembly, Recalling the principles of the Charter of the United Nations,

Considering that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that United Nations must serve under the Charter

Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

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 United Nations and in all the organizations related to it.

Id.

206. The Resolution is entitled, "Restoration of the Lawful Rights of the People's Republic of China in the United Nations." G.A. Res. 2758, GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8439 (1971) [hereinafter Resolution No. 2758].

207. Sec'y of State William Rogers, Statements at Press Conference Discussing United Nations' Decision on Chinese Representation, in DEP'T ST. BULL., Dec. 1971, at 541.

208. *Id.*

officials included drafting of a joint declaration to be announced when Nixon visited China. In February 1972, U.S. President Nixon and China's Premier Chou Enlai met in Beijing. After the meeting, the two leaders went to Shanghai where the two governments issued a prepared joint declaration, known as the Shanghai Communiqué.

The Shanghai Communiqué was a unique joint declaration in world politics and created a problematic U.S. foreign policy. It was unique because a joint declaration or communiqué by two governments traditionally expresses the common foreign policy or common view of the two governments on a foreign affair.²⁰⁹ In the Shanghai Communiqué, however, the two governments declared two different views on the same issue. It is problematic because the statements of the P.R.C. government contain a false claim and the statement made by the United States creates an ambiguity which subsequently allowed the P.R.C. government to make another false claim on the U.S. position toward Taiwan.

The P.R.C. government tried to use the occasion of Nixon's visit to recover whatever it had lost in the prolonged stalemate with the United States. After twenty years of stalemate between the two governments, the P.R.C. government wanted to show the world that it was the United States that gave in to end the stalemate. That Nixon, president of the most powerful Nation on Earth, would agree to go to China's capital was like an envoy of a tributary visiting the emperor and paying homage. As for the tribute, nothing could be better than the U.S. acceptance of the P.R.C. government's position on the Taiwan issue, which was, after all, the root of the stalemate.

In the text of the Shanghai Communiqué, a general introduction is followed by the P.R.C. government's and U.S. government's views on Korea, Taiwan, and Vietnam. On the Taiwan issue, the P.R.C. government stated,

The Chinese side reaffirmed its position: the Taiwan question is the crucial question obstructing the normalization of relations between China and the United States; the Government of the People's Republic of China is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; the liberation of Tai-

209. See Cairo Declaration, *supra* note 60; see also Potsdam Proclamation, *supra* note 65.

wan is China's internal affair in which no other country has the right to interfere; and all U.S. forces and military installations must be withdrawn from Taiwan. The Chinese Government firmly opposes any activities which aim at the creation of "one China, one Taiwan", "one China, two governments", "two Chinas", an "independent Taiwan" or advocate that the "status of Taiwan remains to be determined."²¹⁰

There are three basic positions in the P.R.C. government's statement. The first position is that there is only one State called China. Accordingly, the Republic of China is not a State and there is no other State also called China. The second position is that the government of the People's Republic of China is the sole legal government of China. Accordingly, the Republic of China is not the legal government of the State of China. The third position is that the island of Taiwan is China's territory. Since the term "province" refers to a territorial and administrative district of China, when the P.R.C. government claims that "Taiwan is a province of China," it claims that the island of Taiwan is China's territory. It is not clear what the statement "Taiwan . . . has long been returned to the motherland" meant from China's statements in the Shanghai Communiqué. Later, the P.R.C. government on February 21, 2000 issued the *2000 White Paper* which explained that Taiwan was returned to China in 1945.²¹¹ The *2000 White Paper* states, "[O]n October 25, 1945, the Chinese government [the R.O.C. at the time] recovered Taiwan and the Penghu Archipelago, resuming the exercise of sovereignty over Taiwan."²¹² This position is based on a false claim because as discussed earlier, China never regained title to the island of Taiwan after it ceded the island to Japan in 1895.

The P.R.C. government's statement is followed by that of the U.S. government, which was intended to be a response to the former. Nixon could not accept most of the P.R.C. government's positions; however, if he expected to be greeted by a former enemy with open arms, he could not reject all the positions asserted by his host. Of the three positions taken by the P.R.C. government, Nixon could accept only its first position "[T]here is only one [S]tate called China," because it was true. In 1972,

210. Shanghai Communiqué, *supra* note 201, at 437.

211. See *2000 White Paper*, *supra* note 53.

212. *Id.*

when the Shanghai Communiqué was being drafted, two governments, the P.R.C. and the R.O.C., coexisted and both claimed that there was only one China, even though each one claimed that it, not the other, represented China. The P.R.C. government's position in the text presented no problem to Nixon because the R.O.C. government in Taiwan did not intend to become another China,²¹³ and the U.S. government could not do anything about it.

On the P.R.C. government's second position, "the Government of the People's Republic of China is the sole legal government of China," Nixon had difficulty responding. Although the P.R.C. government had replaced the R.O.C. government representing China in the United Nations, the U.S. government at the time still recognized the R.O.C. as the legitimate government of China. The Nixon Administration could not accept the P.R.C. government's position. So, the United States decided not to mention what the legitimate government was in the text.

Nixon could not accept the P.R.C. government's third claim that Taiwan is China's territory either, even though the R.O.C. government also made the same claim. The R.O.C. government, as early as 1941, claimed that Taiwan was a part of China. In that year, the R.O.C. government unilaterally proclaimed the abrogation of all China's treaties with Japan, including the Treaty of Shimonoseki, in which China ceded the island of Taiwan to Japan. Although such a proclamation was not effective in international law, the P.R.C. government in the text of the Shanghai Communiqué claimed that Taiwan "has long been returned to the motherland."²¹⁴

Nixon could not accept the P.R.C. government's third position because he was aware of the disposition of the title to the island of Taiwan when the Peace Treaty of San Francisco was concluded. When John Foster Dulles, who was in charge of drafting the Treaty, was U.S. Secretary of State during the Eisenhower Administration, Nixon was the U.S. Vice President. As a staunch anti-Communist, Nixon must have been aware of the Eisenhower Administration's position on Taiwan. In addition,

213. See Warren I. Cohen, *On an Island, with Dreams of the Mainland*, L.A. TIMES, Mar. 28, 2004, at R13 (reviewing JONATHAN FENBY CARROLL, CHIANG KAI-SHEK: CHINA'S GENERALISSIMO AND THE NATION HE LOST (2004)). Chiang Kai-shek swore "to recover the Mainland" until his death in 1975.

214. See *supra* notes 211-12 and accompanying text.

when Nixon went to China in 1972, the Vietnam conflict had not yet ended. If Nixon was not ready to recognize a regime that had assisted the North Vietnamese in a military conflict with the United States as the legitimate government of China, he was even less willing to accept that regime's claim to Taiwan.

But Nixon, as mentioned, could not flatly reject all of the P.R.C. government's positions in the text without undermining his willingness to compromise. The closest word that Nixon thought of was "acknowledging" the positions taken by the Chinese. The final text in the Communiqué turned out to be, "[t]he U.S. declared: The United States *acknowledges* that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position."²¹⁵ In other words, the Nixon Administration only *took notice* of what "the Chinese on either side of the Taiwan Strait" claimed.²¹⁶ It was the extent to which Nixon was willing to meet with the P.R.C. government's demand. This point was confirmed later by the second Joint Communiqué issued by U.S. President Carter in 1979.²¹⁷ The U.S. statement indicated that Nixon, in drafting the statement, chose the words carefully, so as not to imply that the United States accepted or recognized the P.R.C. government's position that Taiwan is a part of China.²¹⁸ Nixon also avoided designating who the legitimate government was — the R.O.C. or the P.R.C. The statement refers to the two governing authorities as "all Chinese on either side of the Taiwan Strait."²¹⁹

The statement "[t]he United States Government does not

215. Shanghai Communiqué, *supra* note 201, at 437 (emphasis added).

216. This point is confirmed by Harvey Feldman, a retired ambassador and a senior fellow at the Heritage Foundation.

Because President Carter switched diplomatic recognition from Taipei to Beijing to gain an ally against the Soviet Union, successive administrations have said the U.S. follows a "one-China policy" But our "policy" is not at all like Beijing's "principle." Washington's "one-China policy" says we have diplomatic relations only with Beijing, though we maintain all other relations with Taipei, and we "acknowledge" China's claim to the island, but we make no statement about Taiwan's status.

Harvey Feldman, *Commentary: U.S. is Caught Between Two Governments Glaring Across a One-China Policy*, L.A. TIMES, Dec. 8, 2003, at B11.

217. See *infra* notes 229-31 and accompanying text.

218. See Shanghai Communiqué, *supra* note 201, at 437 (emphasis added).

219. *Id.* at 437-38.

challenge that position,"²²⁰ meant that the U.S. government did not deny that "all Chinese on either side of the Taiwan Strait" assert the same thing, namely that there is only one China.²²¹ It does not mean that the U.S. government agreed with the position taken by the Chinese on both sides of the Taiwan Strait. Although such interpretation is not apparent in the statement itself, it was also confirmed in the second Joint Communiqué issued by U.S. President Carter to be discussed.²²² Since the United States acknowledged, but did not necessarily agree with the P.R.C.'s position on Taiwan, the P.R.C.'s statements that "the liberation of Taiwan is China's internal affair in which no other country has the right to interfere; and all U.S. forces and military installations must be withdrawn from Taiwan" are irrelevant and require no response from the U.S. side.²²³

The Shanghai Communiqué established the U.S. policy toward China to date. The U.S. policy stated in the Shanghai Communiqué is said to be the one-China policy.²²⁴ In this policy statement, the Nixon Administration did not change the U.S. position that the island of Taiwan is not China's territory. However, despite Nixon's reservation, the P.R.C. government distorts the U.S. statement and claims that the U.S. government in the Shanghai Communiqué "recognizes" its claim that Taiwan is a part of China.

In fact, the term "one China" appeared in 1970, when the U.N. General Assembly debated which government should take China's seat.²²⁵ At the time, the P.R.C. government, which had attempted to replace the R.O.C. government in the United Nations, charged the Japanese and the U.S. governments with plotting to create two Chinas:²²⁶ the old China in China proper with

220. *Id.* at 438.

221. *Id.* at 437-38.

222. The Joint Communiqué on Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, (Jan. 1, 1979) [hereinafter Second Communiqué], available at <http://www.china.org.cn/english/china-us/26243.htm>.

223. See Shanghai Communiqué, *supra* note 201, at 437.

224. See Franklin, *supra* note 197.

225. On November 22, 1970, the then Japanese Ambassador, Min Aichi said "that Japan will continue to espouse the '[One]-China' policy despite closeness of the vote [in the U.N.]." See N.Y. TIMES ABSTRACTS, Nov. 22, 1970, at 9.

226. See N.Y. TIMES ABSTRACTS, Feb. 24, 1970, at 6.

Communist China charges US and Japan promote independence movement in Taiwan to foster policy of 2 Chinas; says they smuggled Peng Ming-min out

the P.R.C. as its government, and a new China on the island of Taiwan, with the R.O.C. as its government. Thus, the term "one-China" was originally used in connection with the conjectured recognition of a new State and simply meant a policy of not recognizing the R.O.C. as a second China.

Gerald Ford²²⁷ took over the presidency after Nixon resigned. Ford did not change the China policy established by Nixon. There was no occasion that required him to issue a policy statement on title to the island of Taiwan.

The Carter Administration was the first U.S. government that extended recognition to the P.R.C. as the representative government of China. On December 15, 1978, U.S. President Carter²²⁸ withdrew recognition of the R.O.C. and extended recognition to the P.R.C. as the representative government of China by establishing diplomatic relations with the P.R.C. government.

But it is important to note that in recognizing the P.R.C. government, the Carter Administration did not recognize China's claim over Taiwan. This position is clear in the policy statement made in the Joint Communiqué on Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China ("Second Communiqué").²²⁹ The Carter Administration again, like Nixon's, only "acknowledged" that China claimed title to the island of Taiwan. The Second Joint Communiqué states: "The United States of America and the People's Republic of China reaffirm the princi-

of country to enable him to continue his activities for Taiwan independence; charges USSR plays "extremely despicable role" in furthering movement; cites recent visit to Moscow by Newsweek (pub) correspondent and '69 visit to Taiwan by Soviet correspondent for London Evening News as further evidence of Soviet "plotting."

Id. See N.Y. TIMES ABSTRACTS, Apr. 19, 1970, at 8.

Canadian Minister Sharp reports Canada and China, in 14-month-old talks on establishing diplomatic relations, are "moving closer on main question of Taiwan;" at issue has been China's initial requirement that Canada back Peking's claim to Taiwan; Canada reportedly has convinced Peking that it has no secret desire for two-Chinas policy; Canadian position and possible courses of action reviewed; Canada seen more anxious than China to establish ties; further issues that remain to be resolved outlined.

Id.

227. Gerald R. Ford, the U.S. President (1974-1976).

228. James E. Carter, Jr., the U.S. President (1977-1981).

229. See Second Communiqué, *supra* note 222.

ples agreed on by the two sides in the Shanghai Communiqué, and emphasize once again that: *The government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.*²³⁰

The Carter Administration did no more than simply acknowledge that the P.R.C. government *maintained* the position that there is but one China of which Taiwan is a part. The Carter Administration, by saying that the Second Communiqué “reaffirm[s] the principles agreed on by the two sides in the Shanghai Communiqué,” meant that it continued to uphold the U.S. position in the Shanghai Communiqué. Thus, the Second Communiqué confirmed the interpretation that the statement in the Shanghai Communiqué stating “[t]he United States Government does not challenge that position” meant that the U.S. government did not deny the fact that “Chinese on either side of the Taiwan Strait” took the same position that Taiwan is part of China.²³¹ Carter did not accept or recognize the *position* taken by the P.R.C. government.

When the Carter Administration extended recognition to the P.R.C. government, the U.S. Congress was concerned for the security of the people in Taiwan. It enacted the Taiwan Relations Act to protect them, showing that the United States recognized that Taiwan was *not* a part of China.²³² The Taiwan Relations Act does not contravene the Treaty of San Francisco with respect to the disposition of the island of Taiwan (“Formosa and Pescadores”). Section 2(b) of the Act states,

(3) to make clear that the United States decision to establish diplomatic relations with the People’s Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means; (4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific are and of grave concern to the United States; (5) to provide Taiwan with arms of a defensive character; and (6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic

230. *Id.* (emphasis added).

231. Shanghai Communiqué, *supra* note 201, at 437-38.

232. See Taiwan Relations Act, Pub. L. No. 96-8, § 2, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. § 3301 (2004)).

system, of the people on Taiwan.²³³

If the island of Taiwan were China's territory, the P.R.C. government would be within China's sovereign power to take the island by any means, including using force.²³⁴ On the contrary, item (4) of Section 2(b) suggests that the island of Taiwan is not China's territory when it states "[the United States] consider[s] any effort to determine the future of Taiwan," including acquiring title to the island of Taiwan "by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific."²³⁵ Other provisions in the section are also inconsistent with the notion that China has title to the island of Taiwan or sovereignty over Taiwan. From this language, it can be concluded that the Taiwan Relations Act treats the island of Taiwan as a territory not owned by any State.

President Ronald Reagan,²³⁶ who succeeded Carter, continued to maintain the position that the island of Taiwan is not China's territory. But Reagan's attempt to work together with the P.R.C. government "in order to limit the Soviet Union's op-

233. Taiwan Relations Act, Pub. L. No. 96-8, § 2(b), 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. § 3301 (2004)).

234. The traditional view of sovereignty is that the State has absolute power to rule its people. See Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, Address as Part of the Robert L. Levine Distinguished Lecture Series*, 68 FORDHAM L. REV. 1, 4-6 (1999). In the twentieth century, under the doctrine of human rights, the sovereign power is not absolute. See Father Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477, 1486-89, 1497 (2001). In other words, under this doctrine, other States have the right to protect the people of a State which abuses human rights of its own people. But State practice has not uniformly accepted such doctrine. For instance, when the government soldiers of Yugoslavia (Serbia) killed the ethnic people in Kosova, a region within its own territory, the North Atlantic Treaty Organization ("NATO") intervened based on the doctrine of human rights of the ethnic people. On the other hand, when the Russian army killed Chechens in Chechnya, a region within its own territory, no other State intervened. See generally Fred Weir, *Summit Delegates in Istanbul Debate Russia's Chechen Attacks*, CHRISTIAN SCIENCE MONITOR, Nov. 18, 1999.

Chinese leaders think America already agrees that Taiwan is part of China . . . For the Chinese, that is half the battle . . . If the United States considers Taiwan as part of China, . . . then the United States must, ipso facto, recognize the sovereign right of China to use force to effect the unification of Taiwan with China.

The Honorable Robert E. Andrews & The Honorable Steve Cabot, *Two Congressmen Look at "One China"*, Address given at the Heritage Foundation (Sept. 16, 2003), available at www.heritage.org/asiaandthepacific/hl821.cfm.

235. Taiwan Relations Act, Pub. L. No. 96-8, § 2(b), 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. § 3301 (2004)).

236. Ronald Reagan, the U.S. President (1981-1989).

portunities for exploiting its military power" in Asia²³⁷ worried the R.O.C. government officials. In May 1981, Alexander Haig, the U.S. Secretary of State, who had already made plans to go to China, indicated in a speech that the Reagan Administration sought to improve its relations with China.²³⁸ In June 1981 when Haig was in Beijing, at a news conference after meeting with the Chinese leaders, he said

[I]t is apparent that the strategic realities which prompted reconciliation between the United States and China more than a decade ago are more pressing than ever Our common resolve to coordinate our independent policies in order to limit the Soviet Union's opportunities for exploring its military power has, likewise, grown stronger.²³⁹

Later, two more events made the R.O.C. government officials even more nervous. One was that in July 1981, John H. Holdridge, U.S. Assistant Secretary for East Asia and Pacific Affairs, testified before the U.S. House Foreign Affairs Committee on the possible sale of military weapons to China. He said, "[T]he U.S.-China relationship is a major component in our global and regional security policies We concluded that we should revise the regulations on international traffic in arms to permit the licensing of commercial sales to China on a case-by-case basis."²⁴⁰ The other was that China's Premier Zhao Ziyang and Foreign Minister Huang Hua met with U.S. President Reagan and U.S. Secretary Alexander Haig in Washington, D.C. in October 1981. It was widely reported that the two sides discussed the U.S. reduction of arms sales to Taiwan and possible sale of arms to China.

The fear of the R.O.C. government officials was not eased by a few comforting comments by U.S. government officials that the United States would continue its unofficial relationship with the people of Taiwan.²⁴¹ On June 16, 1981, in Beijing, Haig said "[r]egarding Taiwan, I explained [to the Chinese officials] that

237. Sec'y Alexander Haig, Remarks at New Conference, Beijing (June 16, 1981), in DEP'T ST. BULL., Aug. 1981, at 34-35.

238. See Sec'y Alexander Haig, Speech at St. Louis Town Hall Forum (May 29, 1981), in DEP'T ST. BULL., July 1981, at 13.

239. Sec'y Alexander Haig, Remarks at New Conference, *supra* note 237, at 35.

240. John H. Holdridge, U.S. Relations With China, Address before the House Foreign Affairs Committee (July 16, 1981), in DEP'T ST. BULL., Oct. 1981, at 38.

241. See *id.* (referencing Secretary Haig's visit to Beijing, June 14-17, 1981).

the unofficial relationship which has characterized the contacts between the people of the United States and the people of Taiwan since normalization of relations with the People's Republic of China will be continued, and this was understood."²⁴² On August 18, 1981, Holdridge also testified in a Congressional hearing that

[t]he Chinese insisted . . . that we agree to the ultimate termination of arms sales. We refused because the level of our arms sales must be determined by the needs of Taiwan, and we could not agree to a termination date, as the Chinese demanded, which might impair our ability to meet those needs.²⁴³

Either during the Chinese Premier's visit, or immediately thereafter, the Reagan Administration agreed with the P.R.C. government to issue another joint declaration.²⁴⁴ According to one account, during the negotiations between the Reagan Administration and the P.R.C. government for a joint declaration in the Summer of 1982, the R.O.C. government presented the Reagan Administration with six points that it wished the United States would use as guidelines in conducting the U.S.-Taiwan relations.²⁴⁵

To alleviate the fear of the R.O.C. government officials in Taiwan, the Reagan Administration delivered a letter to them containing a policy statement on July 14, 1982. The letter states six things that the U.S. government "would not accede to in any agreement with mainland China,"²⁴⁶ and came to be known as the Six Assurances. The Six Assurances offered by the U.S. government to the R.O.C. government are that, in dealing with the P.R.C. government, the United States would not: 1) set a date

242. Sec'y Alexander Haig, Remarks at New Conference, *supra* note 237, at 35.

243. John H. Holdridge, U.S.-China Joint Communiqué, Statement Before the House Foreign Affairs Committee (Aug. 18, 1982), in DEP'T ST. BULL., Oct. 1982, at 19.

244. See John H. Holdridge, Assessment of U.S. Relations With China, Address Before the National Council on U.S.-China Relations, New York (Dec. 13, 1982), in DEP'T ST. BULL., Feb. 1983, at 8 ("I need not review in detail the 10-month long negotiating or period leading up to the issuance of our August 17 joint communique."). This will put the approximate date beginning the negotiation for drafting the communiqué in October 1982, the month the Chinese Premier visited Reagan. See *id.*

245. See Taiwan Documents Project, *The "Six Assurances" to Taiwan* (July 1982), at www.taiwandocuments.org/assurances.htm.

246. Steve Lohr, *Taiwan Expresses Regret Over Communique*, N.Y. TIMES, Aug. 18, 1982, at A13.

for termination of arms sales to Taiwan; 2) consult with China on arms sales to Taiwan; 3) play a mediation role between P.R.C. and Taiwan; 4) revise the Taiwan Relations Act; 5) change its position regarding sovereignty over Taiwan; or 6) exert pressure on Taipei to enter into negotiations with Beijing.²⁴⁷

The assurance that “[t]he United States would not alter its position about the sovereignty over Taiwan”²⁴⁸ is the most crucial one for the issue here because sovereignty over a territory is based on title to the territory. This assurance meant that Reagan had not changed the long-held U.S. position on the island of Taiwan — that Taiwan was not China’s territory.

On August 17, 1982, the U.S. government and the P.R.C. government issued a joint communiqué called the Third U.S.-China Joint Communiqué on Arms Sales to Taiwan (“Third Communiqué”). The Third Communiqué reaffirmed what the

247. See Jay Chen & Deborah Kuo, *U.S. Congress Congratulates Taiwanese People on Successful Election*, WORLD REP., Mar. 29, 2000, available at 2000 WL 2360456. Rep. Benjamin Gilman (R-NY) praises Taiwan’s courageous democracy. See *id.*; see also Larry M. Wortzel, *Why the Administration Should Reaffirm the “Six Assurances” to Taiwan* (Mar. 16, 2000), at www.heritage.org/library/background/bg1352.html. There are different versions of the Six Assurances. Wortzel describes the Six Assurances as:

the United States: [1.] *Had not agreed* to set a date for ending arms sales to the Republic of China on Taiwan; [2.] *Had not agreed* to hold prior consultations with the Chinese government on arms sales to the Republic of China on Taiwan; [3.] *Would not play* any mediation role between Taiwan and China; [4.] *Had not agreed* to revise the 1979 Taiwan Relations Act; [5.] *Had not altered* its position regarding sovereignty over Taiwan; and [6.] *Would not exert* pressure on the Republic of China on Taiwan to enter negotiations with the People’s Republic of China.

Wortzel, *supra*.

The Taiwan Documents Project lists the Six Assurances as follows:

1) The United States would not set a date for termination of arms sales to Taiwan; 2) The United States would not alter the terms of the Taiwan Relations Act; 3) The United States would not consult with China in advance before making decisions about U.S. arms sales to Taiwan; 4) The United States would not mediate between Taiwan and China; 5) The United States would not alter its position about the sovereignty of Taiwan which was, that the question was one to be decided peacefully by the Chinese themselves, and would not pressure Taiwan to enter into negotiations with China; 6) The United States would not formally recognize Chinese sovereignty over Taiwan.

The “Six Assurances” to Taiwan, *supra* note 245.

248. *The “Six Assurances” to Taiwan*, *supra* note 245. See *Implementation of the Taiwan Relations Act: Hearing and Markup Before the House Comm. on Foreign Affairs and its Subcomm. on Human Rights and Int’l Orgs. and on Asian and Pacific Affairs of the H.R.*, 99th Cong. 127-31 (1986) (statement of Martin Lasater, Dir. of Asian Studies, Heritage Found.). See Don Oberdorfer, *China Sees Diplomatic Victory in Pact; Gradual Cut for Taiwan Pledged*, WASH. POST, Aug. 18, 1982, at A1.

Shanghai Communiqué and the Second Communiqué did — notwithstanding the P.R.C. government's claim to the island of Taiwan, the United States simply took notice of what the P.R.C. government claims. In the Third Communiqué "the United States of America *acknowledged the Chinese position that there is but one China and Taiwan is part of China.*"²⁴⁹

It then stated that respecting each other's sovereignty has been the principle guiding U.S.-China relations since the Shanghai Communiqué. The Third Communiqué conveyed that the United States and China's

[r]espect for each other's sovereignty and territorial integrity and non-interference [in] each other's internal affairs constitute the fundamental principles guiding [U.S.]-China relations. These principles were confirmed in the Shanghai Communiqué of . . . 1972 and reaffirmed in the Joint Communiqué [of] . . . 1973.²⁵⁰

In the Third Communiqué, the United States asserted that it "has no intention of infringing on Chinese sovereignty and territorial integrity, or interfering in China's internal affairs . . ." ²⁵¹ Yet, the U.S. government said that it would continue "its arms sales to Taiwan," even though the sales "[would] not exceed, either in qualitative or quantitative terms, the level of those supplied in recent years . . ." ²⁵² Thus, in the eyes of the Reagan Administration, arms sales to Taiwan did not "infring[e] on China's sovereignty and territorial integrity . . ." ²⁵³

After the Third Communiqué was issued in August 1982, the P.R.C. government changed the course of its foreign policy. It began to adopt a foreign policy which stressed identification with the Third World and even resumed a dialogue with Moscow.²⁵⁴ The new development made the Reagan Administration unhappy. So Reagan planned to send George Shultz, who succeeded Alexander Haig as U.S. Secretary of State, to China "for what we hope will be serious, constructive, and wide-ranging talks with the Chinese leadership."²⁵⁵ Henry Kissinger, in com-

249. Second Communiqué, *supra* note 222.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *See* Holdridge, Assessment of U.S. Relations With China, *supra* note 244, at 8.

255. *Id.*

menting on the forthcoming visit of Shultz to Beijing, stated that Schultz could not change the legal position on Taiwan, which undoubtedly included title to the island of Taiwan. He said,

The Shultz visit cannot finally resolve the Taiwan issues. In the Shanghai Communiqué of 1972, the accord on normalization of 1979, and even more explicitly in the Communiqué of 1982, the United States has repeatedly committed itself to the proposition that there is only one China and that it would not support any variety of a two-China solution. Moreover, the United States has already recognized Peking as the government of all of China. In the process, both sides have had to make painful adjustments on such issues as [U.S.] arms sales.

The future of Taiwan must now be left to historical processes, and for the Chinese on both sides of the Taiwan straits to work out in their own subtle ways as Chinese leaders themselves have affirmed But formal diplomacy has exhausted the subject; *the legal framework cannot be stretched further.*²⁵⁶

U.S. President George H.W. Bush²⁵⁷ succeeded Reagan in 1989. He was in office less than a year when the Tiananmen Square incident occurred. On June 4, 1989, the P.R.C. government sent the Chinese army into Beijing to suppress a civilian demonstration and killed numerous students who had gathered in the city days before.²⁵⁸ Bush harshly criticized the P.R.C. government. He said, "It is clear that the Chinese Government has chosen to use force against Chinese citizens who were making a peaceful statement in favor of democracy. I deeply deplore the decision to use force against peaceful demonstrators and the consequent loss of life."²⁵⁹ The relationship between the U.S. government and the P.R.C. government was at a low point. But the Bush Administration did not announce any specific China policy. So, officially the Administration did not change the previous U.S. position on Taiwan.

256. Henry Kissinger, *Mr. Shultz Goes to China: What Should Come Out of This Trip*, WASH. POST, Jan. 30, 1983, reprinted in HENRY KISSINGER, OBSERVATIONS: SELECTED SPEECHES AND ESSAYS, 1982-1984 145 (1985) (second emphasis added).

257. George H.W. Bush, the U.S. President (1989-1993).

258. See Nicholas D. Kristof, *China Tightens Grip with a Ban on Groups Calling for Democracy*, N.Y. TIMES, June 13, 1989, at A10.

259. George H.W. Bush, President's Statement (June 3, 1989), in DEP'T ST. BULL., Aug. 1989, at 75.

U.S. President William J. Clinton,²⁶⁰ who succeeded Bush in 1993, was probably the most pro-P.R.C. president in postwar U.S. history. But he did not appear to be supportive of the P.R.C. before he became president. When he campaigned for the presidency, Clinton accused President Bush of “coddling dictators,” referring to Bush’s China policy.²⁶¹

The R.O.C. government in Taiwan scheduled a presidential election in March of 1996. The contest was between Lee Teng-hui, as the candidate of the ruling Nationalist Party (or Kuo Ming Tang (KMT)), who was in favor of ultimate unification of Taiwan and China, and Peng Ming-Min, who as the candidate of the Democratic Progressive Party was pro-independence. To intimidate the voters in Taiwan, and to discourage them from voting for Peng, the P.R.C. government conducted a missile exercise and shot seven or eight missiles toward the island of Taiwan. As a show of force, Clinton sent an aircraft carrier to the Taiwan Strait.

But Clinton changed his attitude afterwards, largely due to the pressure of U.S. companies and trade groups. He changed his China policy from rapprochement to cooperation. In 1997, Clinton considered the P.R.C. government a “strategic partner.”²⁶² He shocked the conservatives and the R.O.C. government officials by announcing his policy toward China in 1998. In June of 1998, Clinton made an official trip to China. During the visit, Clinton announced his policy before a group of Chinese college students in Shanghai, later called the “Three No’s Policy.”²⁶³ The Three No’s Policy is, “[n]o [U.S.] support for an independent Taiwan, no recognition for a separate Taiwan Government and no support for Taiwan’s entry into international organizations.”²⁶⁴ The Three No’s Policy is Clinton’s version of the one-China policy.²⁶⁵

260. William J. Clinton, the U.S. President (1993-2001).

261. *Clinton Easing Up on China*, COM. APPEAL, Aug. 24, 1994, at 2A.

262. E.J. Dionne, Jr., *China Policy Full of Contradictions*, DENV. POST, Apr. 10, 2001, available at <http://www.brookings.edu/printme.wbs?page=/Pagedefs/c7c1d214d3c2ff3a7ff2e680a141465.xml>. See Patrick E. Tyler, *The U.S.-China Slide: A Relationship Strained by Trade Tension Could Worsen Further Over Taiwan*, N.Y. TIMES, May 23, 1995, at A10.

263. See Philip Shenon, *No Policy Turn, U.S. Assures Taiwan Again*, N.Y. TIMES, July 7, 1998, at A9; see also Herman Pan, *Washington Post Editorial Finds “Noes” Fault with Clinton*, CENT. NEWS AGENCY (TAIWAN), July 2, 1998.

264. *Id.*

265. U.S. Secretary of Defense William Cohen, called it a one-China policy. See

Clinton's Three No's Policy was criticized by the conservative groups in the United States as selling out Taiwan to the P.R.C. The Clinton Administration quickly assured the leaders of the R.O.C. government that there was no policy change.²⁶⁶ A careful analysis of the languages in the Three No's Policy does not come to the conclusion that the Clinton Administration recognized China's claim to the island of Taiwan. The Three No's Policy does not deal with title to the island of Taiwan. The first "no" statement, "no [U.S.] support for an independent Taiwan," simply means that the United States will not actively support an independence movement in Taiwan. It does not say that the island of Taiwan is China's territory.

The second "no" statement, "no recognition for a separate Taiwan Government," does not deal with title to the island either. It means that the U.S. government will not recognize two Chinese governments at the same time. In international law, a State has one representative government, and only one. Since 1979, when the Carter Administration shifted recognition of China's government from the R.O.C. to the P.R.C., the U.S. government no longer recognizes the R.O.C. as China's representative government.²⁶⁷ Therefore, it is not possible for the United States, or other States that recognize the P.R.C. government, to also recognize the R.O.C. government. Even if this statement meant that the United States would not recognize an independent government of Taiwan, it would still not affect the ownership of the island of Taiwan.

The third "no" statement, "no support for Taiwan's entry into international organizations," certainly has nothing to do with territory. It is the corollary of the first and the second "no"

Jonathan S. Landay, *Cohen Reiterates U.S. "One-China" Policy, Urges Beijing, Taipei to Calm Down*, KNIGHT RIDDER WASH. BUREAU, Mar. 17, 2000.

266. See Shenon, *supra* note 263, at A9.

During a meeting in Shanghai last week, Mr. Clinton appeared to make a concession to his Chinese hosts by making a public declaration of a policy known as the "three no's"—no [U.S.] support for an independent Taiwan, no recognition for a separate Taiwan Government and no support for Taiwan's entry into international organizations.

"Nothing that the President said in China changes our relationship with Taiwan," said P.J. Crowley, a White House spokesman.

Id.

267. Taiwan Relations Act, Pub. L. No. 96-8, § 2(b), 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. § 3301 (2004)).

statements. The first two “no” statements assume that Taiwan is not a State. Because membership of international organizations requires an entity to be a State, Taiwan cannot be a member of any international organization. Thus, although the Three No’s Policy was criticized as a policy that appeased the P.R.C. government, it does not change the United States’ position on title to the island of Taiwan.

Notwithstanding the one-China policy, the Clinton Administration still wanted to protect Taiwan from the P.R.C.’s invasion. The R.O.C. government in Taiwan scheduled a presidential election in March of 2000. The contest was among three candidates from three different political parties. Two of the candidates, who respectively represented the Nationalist Party (KMT) and the People First Party, a splinter of the former, were anti-independence. The third candidate, who represented the Democratic Progressive Party, was pro-independence. To intimidate the voters in Taiwan again and discourage them from voting for the pro-independence candidate, the P.R.C. government issued the *2000 White Paper*.²⁶⁸ In the *2000 White Paper*, the P.R.C. government threatened to use force against Taiwan if the “total unification of the country . . . [is] postponed indefinitely.”²⁶⁹

Although the Clinton Administration adopted the policy of “constructive engagement” toward the P.R.C. government,²⁷⁰ it continued to maintain the U.S. position on Taiwan. In order to assuage the P.R.C. government, U.S. Secretary of Defense William Cohen stressed, “We have a one-China policy that we continue to support.” But when Cohen was asked if the United States would defend Taiwan militarily if the P.R.C. government were to attack, he replied, “We also are committed under the Taiwan Relations Act to provide defensive equipment and support [to Taiwan].”²⁷¹ As discussed before, the Taiwan Relations Act does not recognize the P.R.C.’s claim that the island of Taiwan is China’s territory.²⁷²

When U.S. President George W. Bush²⁷³ took office, he

268. See generally *2000 White Paper*, *supra* note 53.

269. *Id.* at 10, 17. See Landay, *supra* note 265.

270. See Otto Kreisher, *Defense Chief Urges “Constructive Engagement” with China Continue*, SAN DIEGO UNION-TRIB., Mar. 25, 2000, at A16.

271. *Id.* See Landay, *supra* note 265.

272. See *supra* notes 232-35 and accompanying text.

273. George W. Bush, the U.S. President (2001-present).

changed the U.S. attitude toward the P.R.C. government. He called the P.R.C. government a “strategic competitor,” replacing Clinton’s term “strategic partner.”²⁷⁴ In April 2001, not too long after he took office, Bush pledged in a televised interview to do “whatever it took to help Taiwan defend herself.”²⁷⁵

However, he changed his attitude toward the P.R.C. government after the September 11th event. On September 11, 2001, when Al Qaeda groups attacked the United States with commercial airplanes, the situation changed. Bush changed his strategic attitude and approached China for assistance.

At one point, a Bush Administration official sounded a false alarm. In May 2002, Paul Wolfowitz, U.S. Deputy Secretary of Defense, delivered a speech at the Brookings Institute on U.S. policy toward China. In the speech, he said that the United States “has no intention, no desire to separate Taiwan from the mainland.”²⁷⁶ The speech caught the attention of political observers because the statement “seemingly means that the U.S. Government recognizes Taiwan is part of China.”²⁷⁷ Wolfowitz clarified his statement a few days later. On his way to Singapore on May 30, 2002 for a security meeting, when reporters asked him whether his speech at Brookings Institute indicated that the Bush Administration had changed the policy toward China, he flatly denied it. Wolfowitz said,

That’s very good caution against any improvisation. I mean the president (George W. Bush) has been very clear. And we have a very clear statement. I appreciate actually the opportunity to say it emphatically. The president said from the beginning we have a one-China policy. It basically rests on two propositions. One is that we do not support Taiwan independence, but just as strongly and, I believe, central to the whole notion, we oppose the use of force.²⁷⁸

So Bush’s one-China policy rests on two propositions: the

274. See Dionne, *supra* note 262; see also ISSUES 2000: EVERY PRESIDENTIAL CANDIDATES’ VIEW ON EVERY ISSUE. MORE HEADLINES: GEORGE W. BUSH ON CHINA, at http://www.issues2000.org/Celeb/More_George_W_Bush_China.htm (last visited Oct. 15, 2004); Kreisher, *supra* note 270, at A16.

275. Kelly Wallace, *Bush Pledges Whatever it Takes to Defend Taiwan*, at <http://www.cnn.com/2000/ALLPOLITICS/04/24/bush.taiwan.abc/> (last visited Sept. 9, 2004).

276. U.S. Against Taiwan Independence, Defence Official Wolfowitz Says, BRIT. BROADCASTING CORP., May 31, 2002.

277. *Id.*

278. *Id.*

United States does not support Taiwan independence, and the United States opposes the use of force by the P.R.C. government to take Taiwan.

The R.O.C. government in Taiwan scheduled a presidential election in March of 2004. The contest was between President Chen Shui-bian, the incumbent who represented the Democratic Progressive Party, and Lian Chan, who represented the anti-independence Nationalist Party (KMT). President Chen in December 2003 announced that the government would conduct a referendum pursuant to the Referendum Law to coincide with the presidential election. The P.R.C. government condemned the proposed referendum claiming that it was a move toward independence.

On December 9, 2003, Chinese Premiere Wen Jiabao met with U.S. President Bush in Washington. Bush, in front of Wen, rebuked President Chen Shui-bian of the R.O.C. government for proposing to hold the referendum. After the meeting, Bush said, "we oppose any unilateral decision by either China or Taiwan to change the status quo [of Taiwan's relationship with China]. And the comments and actions made by the leader of Taiwan indicate that he may be willing to make decisions unilaterally that change the status quo, which we oppose."²⁷⁹ It was reported by a senior administrator after the meeting that the U.S. President did tell the Chinese Premiere "in no uncertain terms" that the United States "would have to get involved if China tried to use coercion or force to unilaterally change the status of Taiwan."²⁸⁰

Although the language used by U.S. presidents, either to please the P.R.C.'s leaders or to rebuke the leaders in Taiwan, sounds unfriendly to the R.O.C. government or to Taiwan, it does not lend color to China's claim over the island of Taiwan. U.S. House Representative Steve Chabot said, "so long as one China is not understood to mean that Taiwan is part of China, then I have no problem with it at all."²⁸¹

279. Lin Chieh-yu & Charles Snyder, *Chen Still Defiant After Bush Rebuke*, TAIPEI TIMES, Dec. 11, 2003, at 1, available at <http://www.taipetimes.com/News/front/archives/2003/12/11/2003079111>.

280. *Id.*

281. Robert E. Andrews & Steve Chabot, *Two Congressmen Look at "One China"*, HERITAGE FOUND., Feb. 6, 2004, available at <http://www.heritage.org/research/asiaandthepacific/hl821.cfm>.

Based on the analysis of U.S. policy toward China, the one-China policy advocated by U.S. Administrations is different from the one-China principle advocated by the P.R.C. government. The P.R.C.'s one-China principle has three propositions: there is but one China; the P.R.C. government is the legal government of China; and Taiwan is China's territory. The United States' one-China policy contains only the first two propositions.

The U.S. government has not, as the P.R.C. claims, recognized that the island of Taiwan is China's territory. The P.R.C. government distorts the meaning of United States' one-China policy, when it equates United States' one-China policy with its own one-China principle.

C. U.N.'s Position on Taiwan

Discussion now turns to Kofi Annan's two statements relating to Taiwan mentioned at the beginning of this Article. The first statement referred to "the Taiwan Province of China."²⁸² The second referred to "the organization's one-China policy."²⁸³ As Secretary-General of the United Nations Kofi Annan is the official representative of the organization. An examination of the United Nations' positions toward China and Taiwan is essential, therefore, to determine if Annan's statements truly represent the United Nations' positions.

1. China's Representation in the United Nations

a. China as a Member of the United Nations

China's role in the United Nations is undoubtedly important, being both a founding member of the General Assembly and a permanent member of the Security Council. When the United Nations was formed in September 1945, the organization was intended to consist of States: political entities with statehood.²⁸⁴ China became a member of the United Nations and

282. See *supra* note 4 and accompanying text.

283. Colum Lynch, *U.N. Bars Taiwanese Official from Briefing*, WASH. POST, May 24, 2003, at A22.

284. The U.S. government wanted to invite all States, except the Axis States, to join the United Nations. The United States even invited some political entities, such as India, which at the time had not yet gained sovereignty, but were in the process of becoming States. See JOHN N. PETRIE, *AMERICAN NEUTRALITY IN THE 20TH CENTURY: THE IMPOSSIBLE DREAM* (Inst. for Nat'l Strategic Stud., McNair Paper 33, Jan. 1995).

one of five permanent members of the Security Council.²⁸⁵

The R.O.C. government represented the member State China in the United Nations until 1971. In 1945, when the United Nations was formed, the government of China was the R.O.C. with its seat in Nanjing. The R.O.C. government continued to represent China after it had lost actual control of China proper in a civil war in April 1949. After losing the war, the R.O.C. government took refuge on the island of Taiwan.

The Western Nations initially refused to recognize the P.R.C. government. After the P.R.C. government was established in October 1949, States of the Soviet bloc immediately recognized the new regime as the representative government of China. But the Western Nations refused. They regarded the new P.R.C. regime as a satellite of the Soviet Union, which plotted to create a political hegemony in the world. The invasion of South Korea by North Korea in June 1950 was seen as a plot of the P.R.C. regime.

Ever since the P.R.C. government was established, it has made two claims in the United Nations. The first claim is that the P.R.C. government, not the R.O.C. government, is the legitimate government of China and is entitled to represent the State of China in the United Nations. The second claim is that the island of Taiwan, which has been occupied by the R.O.C. government, is China's territory despite the fact that China has never reacquired the island of Taiwan after the Treaty of Shimonoseki.

As to the first claim, with respect to representation in the United Nations, the P.R.C. attempted to replace the R.O.C. as the representative government of China for twenty-two years. In September 1950, a year after the P.R.C. government was established, Cuba proposed to include in the General Assembly agenda a discussion of the question of China's representation. The General Assembly established a Special Committee consisting of seven members to consider the question.²⁸⁶ In December 1950, the General Assembly adopted a resolution recommending that the representation question "should be considered in the light of the Purposes and Principles of the Charter

285. See U.N. CHARTER art. 7, ¶ 1.

286. See G.A. Res. 490, U.N. GAOR, 5th Sess., 277th plen. mtg., Supp. No. 20, at 153, U.N. Doc. A/1775 (1950).

and the circumstances of each case,"²⁸⁷ but did not deal directly with the question of China's representation.

During the 1951 and 1952 General Assembly sessions, no proposal to discuss China's representation was made in the General Assembly. This was probably because the U.N. armed forces were fighting the P.R.C.'s "volunteer army" in the Korean Peninsula,²⁸⁸ and no State would have thought it appropriate to raise the question.

After the Korean War ended, a proposal to include the question of China's representation in the General Assembly agenda was made each year from 1953 through 1960 by a member of the Soviet bloc. Each time the proposal was rejected.²⁸⁹

In 1961, when a similar proposal was made again, the U.S. government invoked an article under the U.N. Charter to create a procedural barrier for any proposal to change the representation of China in the United Nations. The General Assembly adopted a resolution proposed by the U.S. government to designate the representation question as an *important question* under the U.N. Charter.²⁹⁰ Important questions require a two-thirds

287. G.A. Res. 396, U.N. GAOR, 5th Sess., 325th plen. mtg., Supp. No. 20, at 98, U.N. Doc. A/1775 (1950).

288. On June 27, 1950, the Security Council resolved to "[r]ecommend[] that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." S.C. Res. 83, U.N. SCOR, 474th mtg. at 85, U.N. Doc. S/1511 (1950). On July 7, it then resolved to "[r]ecommend[] that all Members providing military forces and other assistance pursuant to . . . Security Council resolutions [82 (1950) and 83 (1950)] make such forces and other assistance available to a unified command under the United States of America." S.C. Res. 84, U.N. SCOR, 476th mtg. at 85-86, U.N. Doc. S/1588 (1950).

289. See G.A. Res. 800, U.N. GAOR, 8th Sess., 432d plen. mtg., Supp. No. 17, at 225, U.N. Doc. A/2630 (1953); G.A. Res. 903, U.N. GAOR, 9th Sess., 473d plen. mtg., Supp. No. 21, at 171, U.N. Doc. A/2890 (1954); G.A. Res. 990, U.N. GAOR, 10th Sess., 516th plen. mtg., Supp. No. 19, at 231, U.N. Doc. A/3116 (1955); G.A. Res. 1108, U.N. GAOR, 11th Sess., 580th plen. mtg., Supp. No. 17, at 159, U.N. Doc. A/3572 (1956); G.A. Res. 1135, U.N. GAOR, 12th Sess., 686th plen. mtg., Supp. No. 18, at 245, U.N. Doc. A/3805 (1957); G.A. Res. 1239, U.N. GAOR, 13th Sess., 755th plen. mtg., Supp. No. 18, at 151, U.N. Doc. A/4090 (1958); G.A. Res. 1351, U.N. GAOR, 14th Sess., 803d plen. mtg., Supp. No. 16, at 235, U.N. Doc. A/4354 (1959); G.A. Res. 1493, U.N. GAOR, 15th Sess., 895th plen. mtg., Supp. No. 16, at 184, U.N. Doc. A/4684 (1960).

290. The General Assembly "[d]ecides, in accordance with Article 18 of the Charter of the United Nations, that any proposal to change the representation of China is an *important question*." G.A. Res. 1668, U.N. GAOR, 16th Sess., 1080th plen. mtg., Supp. No. 17, at 296, U.N. Doc. A/5100 (1961) (second emphasis added).

majority vote of the members present.²⁹¹

From 1962 to 1964, every year when a proposal was made in the General Assembly to replace the R.O.C. government with the P.R.C. government in the United Nations, the General Assembly adopted a resolution making the question of China's representation in the United Nations an *important question*.²⁹² But each time the proposal did not receive the required two-thirds vote.

A crucial change in international politics took place in 1965 when France broke her diplomatic ties with the R.O.C. and extended her recognition to the P.R.C. government. France was the first non-communist State to recognize the new government. Soon other Western Nations began to follow. Attempts to replace representatives of the R.O.C. with representatives of the P.R.C. failed in the U.N. General Assembly in 1967,²⁹³ 1968,²⁹⁴ and 1969²⁹⁵ because the proposals still did not receive the two-thirds vote.

By 1970, about half of the U.N. members recognized the P.R.C. government as the legitimate government of China.²⁹⁶ In September 1970, the U.S. government changed its policy and was willing to allow representatives of the P.R.C. government to take China's seat in the General Assembly and the Security Council, if the representatives of the R.O.C. government remained in the General Assembly.²⁹⁷ The P.R.C. government, on the other hand, insisted that it would take over China's seat only if the representatives of the R.O.C. government were expelled

291. See U.N. CHARTER art. 18, ¶ 2 ("Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting.").

292. For the Soviet Draft Proposal, see Adlai E. Stevenson, United Nations Rules Out Change in Representation of China, Plen. Statement Before the General Assembly (Dec. 1 & Dec. 14, 1961), in DEP'T ST. BULL., Jan. 1962, at 117.

293. See G.A. Res. 2271, U.N. GAOR, 22d Sess., 1610th plen. mtg., Supp. No. 16, at 241, U.N. Doc. A/6716 (1967).

294. See G.A. Res. 2389, U.N. GAOR, 23d Sess., 1724th plen. mtg., Supp. No. 18, at 116, U.N. Doc. A/7218 (1968).

295. See G.A. Res. 2500, U.N. GAOR, 24th Sess., 1808th plen. mtg., Supp. No. 30, at 213, U.N. Doc. A/7630 (1969).

296. There were 125 members at the 1970 U.N. General Assembly plenary session. The R.O.C. government "is recognized diplomatically by more than 60 of the members of this organization." Christopher H. Phillips, Twenty-fifth General Assembly Rejects Move to Change Representation of China in the U.N., Plen. Statement Before the General Assembly (Nov. 12, 1970), in DEP'T ST. BULL., Dec. 1970, at 734.

297. See *id.*

from the United Nations.²⁹⁸ The U.S. government refused to accept the P.R.C.'s condition, and again proposed that the representation question was an *important question*.²⁹⁹ The proposal was adopted by a narrow margin this time.³⁰⁰ And Albania's proposal to expel the representatives of the R.O.C. which followed, was again defeated.³⁰¹

b. Resolution No. 2758

The turning point for the question of China's representation was 1971. The U.S. government again suggested dual representations of China: both the P.R.C. and the R.O.C. governments were represented in the U.N. General Assembly.³⁰² In September 1971, when the General Assembly convened, the General Committee³⁰³ proposed a General Assembly agenda which in-

298. *See id.* at 733-34.

299. Resolution 2642 of the General Assembly, entitled "Representation of China in the United Nations," was adopted by the 1913th plenary session of the General Assembly on November 20, 1970. *See* G.A. Res. 2642, U.N. GAOR, 25th Sess., Supp. No. 28, at 6, U.N. Doc. A/8028 (1970).

Recalling the recommendation contained in its resolution 396 (V) of 14 December 1950 that, whenever more than one authority claims to be the Government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the purposes and principles of the Charter of the United Nations and the circumstances of each case,

Recalling further its decision in resolution 1668 (XVI) of 13 December 1961, in accordance with Article 18 of the Charter, that any proposal to change the representation of China is an *important question*, which, in General Assembly resolutions 2025 (XX) of 17 November 1965, 2159 (XXI) of 29 November 1966, 2271 (XXII) of 28 November 1967, 2389 (XXIII) of 19 November 1968 and 2500 (XXIV) of 11 November 1969, was affirmed as remaining valid, *Affirms again* that this decision remains valid. 1913th plenary meeting 20 November 1970.

Id.

300. The vote was 66 for and 52 against, with 7 abstentions. *See* Taiwan Documents Project, *Resolution on the Representation of China in the United Nations* (Nov. 20, 1970), at <http://www.taiwandocuments.org/un2642-XXV.htm>.

301. The vote was 51 for and 49 (including U.S. vote) against, with 25 abstentions. *See* Phillips, *supra* note 296, at 735 n.2.

302. On August 2, 1971, Sec'y of State William Rogers said at a press conference, "The United States accordingly will support action at the General Assembly this fall calling for seating the People's Republic of China. At the same time the United States will oppose any action to expel the Republic of China . . ." William Rogers, Sec'y Rogers Announces U.S. Policy on Chinese Representation in the U.N., Statement to News Correspondents (Aug. 2, 1971), in DEP'T ST. BULL., Aug. 1971, at 193.

303. The General Committee's function is to recommend the General Assembly agenda.

cluded both Albania's proposal,³⁰⁴ calling for the representatives of the P.R.C. government to take China's seat, as well as for the expulsion of the representatives of the R.O.C. government from the United Nations, and the United States' proposal calling for "the continued right of representation of the R.O.C."³⁰⁵ The U.S. proposal to make the question of expelling the representatives of the R.O.C. government an *important question* was not successful this time.³⁰⁶

At the end of the debates, when the proposed resolution of Albania was put to a vote on October 25, 1971, it was adopted.³⁰⁷ Resolution No. 2758 states,

The General Assembly . . . *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.³⁰⁸

304. See Resolution No. 2758, *supra* note 206; see also Phillips, *supra* note 296, at 735 n.2.

305. The Resolution is entitled, "The Representation of China in the United Nations." The U.S. draft resolution, in part, reads, "*The General Assembly . . . 1. Hereby affirms the right of representation of the People's Republic of China and recommends that it be seated as one of the five permanent members of the Security Council; 2. Affirms the continued right of representation of the Republic of China.*" George H.W. Bush, *U.N. Votes to Seat People's Republic of China and Expel Representatives of Republic of China*, Plen. Statement Before the General Assembly (Oct. 18, 1971), in DEP'T ST. BULL., Nov. 1971, at 549.

306. See *id.* at 556 n.3.

307. The votes were 76 for 35 against. See *id.*

308. Resolution No. 2758, *supra* note 206. Resolution No. 2758 states in full:

The General Assembly,

Recalling the principles of the Charter of the United Nations,

Considering that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that United Nations must serve under the Charter,

Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

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 United Nations and in all the organizations related to it.

Id. See Phillips, *supra* note 296, at 735 n.2.

The Resolution became effective immediately, and the representatives of the R.O.C. government left the U.N. building.

From October 25, 1971 on, the P.R.C. government has represented China in the U.N. The U.S. government, however, continued to recognize the R.O.C. government as the legitimate government of China until 1979.³⁰⁹ As of November 2004, only twenty-six small States continue to recognize the R.O.C. as the representative government of China.³¹⁰

2. The U.N. Position on Title to the Island of Taiwan

The second claim that the P.R.C. government made in the United Nations is that the island of Taiwan is China's territory and the United States has therefore violated China's territory. Immediately after North Korea attacked South Korea, U.S. President Truman sent military contingents to the island of Taiwan.³¹¹ On August 24, 1950, Chou En-Lai, the P.R.C.'s Minister of Foreign Affairs, sent a cablegram to the U.N. Secretary-General Trygve Lie, claiming that Taiwan was part of China and the U.S. action was an armed act of aggression on China's territory.³¹² In the cablegram, Chou En-Lai said,

On 27 June this year, President Truman of the United States of America announced the decision of the United States Government to prevent with armed forces the liberation of Taiwan by the Chinese People's Liberation Army. Meanwhile, the United States Seventh Fleet move toward the strait of Taiwan, followed by the arrival in Taiwan of contingents of the United States in an open encroachment on the territory of the People's Republic of China. This action on the part of

309. See Ruan Ming, *Time to Put an End to Fallacy of "One China"*, *TAIPEI TIMES*, Nov. 14, 2003, available at <http://taiwansecurity.org/TT/2003/TT-141103-1.htm>.

310. These Nations are: Belize, Burkina Faso, Chad, Costa Rica, El Salvador, Gambia, Grenada, Guatemala, Haiti, Holy See, Honduras, Kiribati, Malawi, the Marshall Islands, Nicaragua, Palau, Panama, Paraguay, Sao Tome and Principe, St. Christopher and Nevis, St. Vincent and the Grenadines, Senegal, the Solomon Islands, Swaziland, Tuvalu, and Vanuatu. See Ministry of Foreign Affairs, *Republic of China, ROC's Embassies; Consulates and Representatives*, at <http://www.mofa.gov.tw/webapp/lp.asp?ctNode=695&CtUnit=30&BaseDSD=30> (last visited Nov. 14, 2004).

311. The next day, the United Nations went to war with North Korea. The Security Council, by a resolution, recommended that its members "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack." S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/INF/5/Rev.1 (1950).

312. "Taiwan is an integral part of China." Cablegram from Peiping Foreign Minister to Sec'y-Gen. Lie (Aug. 24, 1950), *DEP'T ST. BULL.*, Oct. 1950, at 607.

the United States Government is a direct armed aggression on the territory of China and a total violation of the United Nations Charter.³¹³

The P.R.C. government based its claim to the island of Taiwan on historical ownership and the Cairo Declaration. Chou En-Lai continued,

Taiwan is an integral part of China. This is not only a fact based on history, confirmed by the situation since the surrender of Japan, but it is also stipulated in the Cairo Declaration of 1943 and the Potsdam Communiqué of 1945 as binding international agreements which the United States Government has pledged itself to respect and observe.³¹⁴

The U.N. Secretary-General did not reply to Chou En-Lai's cablegram, probably because the cablegram did not ask the United Nations to take any action against the U.S. government.

a. The United Nations and the Treaty of San Francisco

The United Nations is bound by the territorial dispositions of the Peace Treaty of San Francisco for four reasons. The first reason is the United Nations' obligation under general principles of international law. As stated earlier though, in general a third party which is not a party to a treaty is not bound by the treaty; a third party State *is* bound by a territorial treaty under the customary international law.³¹⁵ International organizations such as the United Nations, though not parties to the Peace Treaty of San Francisco, are also bound by the Treaty's territorial arrangement.³¹⁶

The second reason is the nature of territorial treaties. The only way for the United Nations to express its position is by voting either in the General Assembly or in the Security Council. In international law, title to a territory cannot be decided by unrelated third party States in any way. There are only a few recognized ways to acquire a territory in international law, and a vote by unrelated third party States, even in the United Nations, is not one of them.

313. *Id.*

314. *Id.*

315. See *supra* notes 25, 36-37 and accompanying text.

316. See Vienna Convention, *supra* note 21, art. 38; see also WALLACE, *supra* note 11, at 206.

The third reason is the incapability of the United Nations to take a position on title to a territory. The United Nations has no power or right to take a position on title to a territory. *The United Nations is an organization formed by sovereign States to maintain international peace and security. It is not empowered by the U.N. Charter or otherwise to decide the territory of States.*

The fourth reason is the United Nations' obligation toward its members. The United Nations, unlike a corporation in municipal law, is loosely formed by sovereign States and has no will of its own. It makes decisions only by collective actions. Its resolution or position on a matter reflects the collective will or position of its members.

The United Nations cannot take the position that the island of Taiwan is China's territory. Any collective decision of the United Nations on a position on title to the island of Taiwan different from the territorial disposition of the Peace Treaty of San Francisco would contravene the collective will of its members who signed the Treaty in 1951. All forty-nine Allies that signed the Treaty were U.N. members at the time when the total members of the United Nations numbered only sixty. That means that when the Treaty was signed, more than four-fifths of the U.N. members were parties to the Treaty and were therefore bound by it. To abandon the Treaty of San Francisco, an equal proportion of the members would have to disavow the Treaty.

A brief review of the discussions in the Security Council and the General Assembly will show that neither organization has taken the position that the island of Taiwan is China's territory.

b. The Security Council's Position

The Security Council never took the position that the island of Taiwan is China's territory. Almost at the same time that the P.R.C. Minister of Foreign Affairs sent the cablegram to the U.N. Secretary-General, the Soviet Union also accused the United States of violating China's territory. It circulated a paper to the members of the U.N. Security Council accusing the United States of aggression against Formosa.³¹⁷

The U.S. government retorted that the island of Taiwan is not China's territory and that U.S. action did not violate China's

317. See Warren R. Austin, Position on the Formosan Question, Letter to U.N. Sec'y-Gen., Trygve Lie (Aug. 25, 1950), in DEP'T ST. BULL., Sept. 1950, at 411.

territory. U.S. Ambassador Warren Austin delivered a letter to the U.N. Secretary-General stating, "The United States has not encroached on the territory of China."³¹⁸ "The actual status of the island," the letter continued, "is that it is territory taken from Japan by the victory of the Allied Forces in the Pacific. Like other such territories, its legal status cannot be fixed until there is international action to determine its future."³¹⁹

Although the U.K. government was not involved in the accusations by China and Soviet Union, the United Kingdom's position at the time was the same as that of the United States — the island of Taiwan had not been returned to China under the Cairo Declaration. This position was reflected in British Prime Minister Atlee's remark in December of 1950. He said in the House that "until China shows by her action that she is not obstructing fulfilment of the Cairo Declaration in respect of Korea and accepts the basic principle of that Declaration, it will be difficult to reach a satisfactory solution of this problem [of Formosa]."³²⁰

The only time the conflict between the P.R.C. government and the R.O.C. government was ever brought before the Security Council was in 1950. In September 1950, after the P.R.C.'s repeated threats to invade the island of Taiwan, the U.N. Security Council received a complaint of the P.R.C.'s imminent armed invasion of Taiwan. Upon receipt of the complaint, the Security Council passed a resolution to postpone the decision, however, without characterizing the nature of the dispute as domestic or international. The resolution first "noted the declaration of the People's Republic of China regarding the armed *invasion* of Formosa" and then decided "to defer consideration of [the] question until the first meeting of the Council."³²¹ Thus, although the Security Council did not take any position with respect to title to the island of Taiwan, it did not treat the P.R.C.'s intended invasion of Taiwan as a pure domestic matter.

The Security Council has no authority to deal with a pure domestic matter of any State.³²² The U.N. Charter does not em-

318. *Id.* at 412.

319. *Id.*

320. 487 PARL. DEB., H.C. (5th ser.) (1951) 2301-02.

321. S.C. Res. 87, U.N. SCOR, 506th mtg. at 87-88, U.N. Doc. S/1836 (1950) (emphasis added).

322. This is the case unless the Security Council is requested by a government that

power the United Nations or the Security Council to “intervene in matters which are essentially within the domestic jurisdiction of any [S]tate.”³²³ The Security Council’s primary function is “[t]o maintain *international* peace and security.”³²⁴

The Security Council considered the P.R.C.’s imminent invasion of Taiwan an international matter. That the Security Council did not reject the complaint as a pure domestic matter outright proves the point. Additionally, the term “invading” used by the Security Council in its resolution “not[ing] the declaration of the People’s Republic of China regarding the armed *invasion* of the island of Formosa”³²⁵ implies that the P.R.C. was about to send its armed forces into territory other than its own.³²⁶ In May 1951, the British Foreign Secretary Herbert Morrison said, “the problem of Formosa has now become an international problem.”³²⁷

The Security Council considered the intended invasion of Taiwan an international matter because it did not consider the island of Taiwan China’s territory. The conflict between the R.O.C. and the P.R.C. governments was a domestic matter. The uprising of the Chinese Communists against the R.O.C., China’s reigning government, was a revolution. After the Communists established the P.R.C. government, the fighting between the two regimes was a civil war. Thus, the P.R.C.’s attempt to overthrow the R.O.C. government by force was a domestic matter. Yet the P.R.C.’s intended “armed invasion of the island of Taiwan” was an international matter, not because of the P.R.C.’s intention to crush the R.O.C. government in Taiwan by force, but because of its announced intention to send its armed forces *outside* of its own [S]tate into a foreign territory — the island of Taiwan.

is unable to keep peace within its own territory. In 1999, leaders of East Timor invited (requested) the United Nations to send a peace keeping force to maintain the peace and supervise the referendum. See *East Timor Under Siege*, N.Y. TIMES, Sept. 8, 1999, at A22; see also Stefanie Frease, *Playing Hide and Seek with Int’l Justice: What Went Wrong in Indonesia and East Timor*, 10 ILSA J. INT’L & COMP. L. 283, 285 (2004).

323. The U.N. Charter provides, “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state” U.N. CHARTER art. 2, ¶ 7.

324. U.N. CHARTER art. 1, ¶ 1 (emphasis added).

325. S.C. Res. 87, U.N. SCOR, 506th mtg. at 87-88, U.N. Doc. S/1836 (1950).

326. “Invasion” defined as “the act of an army entering another country by force in order to take control of it.” OXFORD ADVANCED LEARNER’S DICTIONARY, at <http://www1.oup.co.uk/elt/oald/bin/oald2.pl> (last visited Dec. 1, 2004).

327. 487 PARL. DEB. H.C., (5th ser.) (1951) 2302.

c. The General Assembly's Position

As earlier discussions on the question of China's representation show, the U.N. General Assembly never decided that the island of Taiwan is China's territory. The debates in the U.N. General Assembly were about the right to represent the people in China. The question of China's representation in the United Nations arose after the R.O.C. government moved to the island of Taiwan. The issue before the General Assembly was who should represent the 700 million people inhabiting China proper in the United Nations. For twenty-two years, from October 1949 to October 1971, the R.O.C. government represented the people inhabiting China, whom it did not rule, in the United Nations.

Not once was the issue of the title to the island of Taiwan before the General Assembly. This Article has discussed in detail the debates on the question of China's representation from 1950 to 1971 in the United Nations for the purpose of demonstrating that not one time did the discussion turn to whether China had title to the island of Taiwan. When the General Assembly adopted Resolution No. 2758, members of the General Assembly voted on only one issue: whose representatives should sit in China's seat.

d. Kofi Annan's Statements

The analysis above of the U.N. resolutions on China's representation, as well as the claim made by the P.R.C. government in the United Nations, proves that since the formation of the United Nations neither the Security Council nor the General Assembly ever took the position that the island of Taiwan is China's territory.

Kofi Annan's reference to "the Taiwan Province of China" means that the island of Taiwan is China's territory. The reference was not supported by international law or any resolution of the United Nations. His reference simply echoed the claim of the P.R.C. government, and was an incorrect characterization of Taiwan.

With respect to Annan's reference to "the organization's one-China policy" as the reason to bar the R.O.C.'s official from entering the U.N. headquarters to speak at the Press Club conference, Annan used the term one-China policy without defining

it. The U.N. policy which he referred to could only derive from U.N. Resolution No. 2758 of 1971 because, after that Resolution, no debate or any other resolution has been made either in the General Assembly or in the Security Council concerning the R.O.C. government or Taiwan. Without at least a formal discussion, the United Nations cannot have a "policy."

So the question for Annan was that when the R.O.C. official attempted to enter U.N. headquarters, whom did this official represent, the P.R.C. government or the people of Taiwan? He could not be a representative of the P.R.C. government because he was not an official of the P.R.C. government and, according to the newspaper account, he did not claim to be a representative of the P.R.C. government or China.

The representative was invited by the U.N. Press Club to express the view of Taiwan which had been denied its application for the status of an observer at the WHA. Whether the R.O.C. official presented himself as a representative of the governing authority of Taiwan or the people of Taiwan, the only reason Annan refused to allow the R.O.C. official to enter was that Annan viewed the island of Taiwan as China's territory. That view, as this Article points out, was incorrect and "the organization's one-China policy" was given as an improper or fictitious reason to bar the person.

Annan, as the chief executive of the United Nations, is obliged not to make any statement that misrepresents the U.N. position, especially when such statement is not supported by international law, under which the institution was formed and operates. Although his label, "the Taiwan Province of China," cannot legitimize China's claim to the island of Taiwan, it may mislead others in international politics.

D. *Taiwan as a Territorial Entity*

There are three implications from the conclusion that China has not acquired title to the island of Taiwan. The first implication is that China has no sovereignty over Taiwan. A modern State's sovereignty is based on ownership and control of territory. This concept is known as *territorial sovereignty*. Any sovereignty of China over Taiwan must be based on title to the island of Taiwan. And since China has not acquired title to the island of Taiwan, it has no sovereignty over the island of Taiwan

and its inhabitants. The one-China principle advocated by the P.R.C. government is correct in its claims that there is only one China and the P.R.C. is its representative government, but is wrong in its claim that Taiwan is a part of China.

The second implication is that under international law, the Taiwan issue is not a domestic issue for the state of China. Selling weapons to Taiwan or sending contingents to the island by the United States does not encroach on China's sovereignty or territory. This also means that the United Nations or other States may rightfully intercede to prevent an invasion of the island of Taiwan.

The third implication is that the island of Taiwan has an unusual status; it may be described as a territorial entity. The Peace Treaty of San Francisco put Taiwan in an unusual situation. As explained before, a territorial treaty, by its nature, provides final settlement of title to a territory. When the Allied Powers forced Japan to abandon title to the island of Taiwan without making any reservations in the Peace Treaty of San Francisco, both Japan and the Allied Powers lost the power and right to dispose of the island. Therefore, the island is no longer owned by any State and has not been subject to any sovereignty since then. This is true even though the Allied Powers retained the authority to control the island under the principle of agency by appointing the R.O.C. government to administer Taiwan.

Taiwan is not a State.³²⁸ Not all civil societies are States. A society in a territory may be a political entity, yet be neither a State, nor subject to any sovereignty. Taiwan is not a State because it has never declared the establishment of statehood.³²⁹ Half a century after the conclusion of the Peace Treaty of San Francisco, Taiwan has developed into an unusual society: a society which is neither a State, nor subject to any sovereignty. This Article has referred to such a territory and its society as a *territorial entity*.

Such a situation is not unique to Taiwan. Cuba was also at one time a territorial entity. In the Treaty of Paris between the United States and Spain, signed after the end of the Spanish-American War, Spain relinquished her title to Cuba.³³⁰ Even

328. For a discussion of the statehood of Taiwan, see Chiang, *supra* note 7.

329. For a discussion on the requirements of the modern State, see *id.*

330. The Treaty of Paris of 1898 between the United States and Spain after the

though Cuba was thereafter briefly occupied by the United States until Cuba established statehood, the territory and the society in it were not under any sovereignty.³³¹ Palestine, being in a similar situation, is also a territorial entity.³³²

The occupation of Cuba by the United States after the Spanish-American War and the occupation of the island of Taiwan by the R.O.C. government are similar in that the occupation was authorized in both cases. In the former, the occupation was authorized by a treaty, while in the latter, the occupation was authorized by the United States as the victorious State that defeated Japan. Although the Peace Treaty of San Francisco contains no provision with respect to the post-treaty administration of the affairs of Taiwan, it is presumed that the R.O.C. government, which was authorized by the United States as its agent to conduct a military occupation of the island of Taiwan, is to continue the administration of the island. This is true because there has never been a directive by the United States or the Allied Powers changing the mandate of the R.O.C. government. While the United States withdrew from Cuba soon after Cuba established statehood, the R.O.C. government has since administered the affairs of Taiwan for more than fifty years.

With respect to the island of Taiwan, the term "Allied Powers" or "Allies" in this Article essentially refers to the United States. To clarify, in describing the Second World War and the

end of the Spanish-American War provides, "Spain relinquishes all claim of sovereignty over and title to Cuba." Treaty of Paris, *supra* note 36, at 1754.

331. Article I provides:

Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

Treaty of Paris, *supra* note 36, at 1754.

332. Palestine, which is not a State, is under the administration of the Palestine Administration. The territory of Palestine is not owned by any State, but the lands where Palestinians reside are people's property owned by the society of Palestinians. See James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT'L LAW 307 (1990). But see Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT'L LAW 301 (1990). East Timor was once in a similar situation. Its inhabitants voted for independence in the August 1999 referendum and is not under any sovereignty. Pending a preparation for establishing statehood under the U.N. administration, the territory belongs to the people and is owned by the people of East Timor collectively. See Daniel Fitzpatrick, *Land Issues in a Newly Independent East Timor*, DEP'T OF THE PARL. LIBRARY (Austl.), Research Paper 21 (2001).

Peace Treaty of San Francisco, this Article has referred to the victorious States over Japan as Allied Powers or Allies. But it is clear that it was the United States that fought with and defeated Japan.³³³ It was to the United States that Japan surrendered.³³⁴ It was the United States that, as the victorious State, won the right to dispose of Japan's territory as it wished.³³⁵ It was the United States that assigned Chiang Kai-shek's R.O.C. government to *occupy* and *administer* the island of Taiwan on its behalf.³³⁶ So, fifty years later, the R.O.C. government still acts as an agent of the United States. The passage of time will not change, and has not changed, the legal relationship of agent and principal.

IV. A SOLUTION FOR THE TAIWAN PROBLEM

The U.S. one-China policy is against the interests of the people of Taiwan because it is ambiguous. Although the U.S. position is that the island of Taiwan is not China's territory, each Administration has interpreted and acted upon the policy differently. In recent years, Clinton Administration and Bush Administration officials even announced "no Taiwan independence" or "no support for Taiwan independence."³³⁷ Such policy statements have created a misunderstanding of U.S. policy toward Taiwan, by mistakenly being interpreted as the U.S. government acquiescing to or recognizing China's claim over Taiwan.³³⁸

The one-China policy is against the interests of the people of Taiwan because it does not solve nor offer to solve the prob-

333. See MACARTHUR, *supra* note 58, at 291 and accompanying text.

334. See KERR, *supra* note 35 and accompanying text; see also Incoming Message, WARX 48672, *supra* note 95.

335. See Dulles, The San Francisco Conference on Proposed Japanese Peace Treaty, *supra* note 31.

336. See *supra* notes 158-61 and accompanying text; see also Incoming Message, WARX 48672, *supra* note 95.

337. See Darryl N. Johnson, U.S.-Taiwan Relations: Building on Success, Address Before the American Institute in Taiwan, Twenty-Second Annual Joint Business Conference (Nov. 10, 1998), available at <http://ait.org.tw/en/news/officialtext/viewer.asp?ID=1998111701&GROUP=BG>; see also Charles Snyder, U.S.' Taiwan Policy in Doubt: Academic, TAIPEI TIMES, Dec. 4, 2003, available at <http://www.taieitimes.com/News/front/archives/2003/12/04/2003078256>.

338. See *China Says It Will Not Use Nuclear Weapons Against Taiwan*, N.Y. TIMES, Sep. 3, 1999, at A3 ("The threats have been met by concern from the United States, which recognizes Beijing's claim to the island but is bound by [U.S.] law to aid Taiwan's defense.").

lem of Taiwan. The policy has solved China's representation problem in the United Nations, but it does not provide any relief to Taiwan because the island of Taiwan is not part of China. It is time that the U.S. government develops a Taiwan policy — one that provides a permanent solution to the Taiwan problem.

Some solutions have been suggested by the Allies in the past. At one time, they suggested that the Taiwan problem be solved by the United Nations. U.S. President Harry S. Truman³³⁹ suggested that the Taiwan problem should be considered by the United Nations. In June 1950, President Truman stated in his *Statement on Korea* that “[t]he determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.”³⁴⁰ In August 1950, Truman instructed the U.S. Ambassador to the United Nations, Warren Austin, to deliver a letter to the U.N. Secretary-General recommending the United Nations to consider the question of Formosa. The letter said, “The United States would welcome United Nations consideration of the case of Formosa. We would approve full United Nations investigation here or on the spot. We believe that United Nations consideration would contribute to a peaceful, rather than a forceable [sic] solution of that problem.”³⁴¹ On September 21, 1950, U.S. Secretary of State Acheson, in requesting the “question of Formosa” to be included on the U.N. General Assembly agenda for consideration, said, “The United States believes . . . that the future of Formosa and of the nearly 8 million people inhabited there should be settled by peaceful means in accordance with the Charter of the United Nations.”³⁴² In May 1951, before the signing of the Peace Treaty of San Francisco, U.S. President Truman, facing the possible invasion of Formosa by the Communist Chinese army, took the position of shielding Formosa with the U.S. Seventh Fleet until its status could be set-

339. Harry S. Truman, the U.S. President (1945-1953).

340. Truman, *Statement on Korea*, *supra* note 83.

341. Austin, *supra* note 317, at 412.

342. Discussion of the item was, at the proposal of the United Kingdom, adjourned *sine die*. See Memorandum from the Office of Legal Advisor, Dep't of State, to the Director of the Office of Republic of China Affairs (July 13, 1971), available at <http://www.heritage.org/Press/Events/loader.cfm?url=/Commonspot/security/getfile.cfm&PageID=56573>; see also J.P. Jain, *The Legal Status of Formosa: A Study of British, Chinese and Indian Views*, 57 AM. J. INT'L L. 25, 30 n.19 (1963).

ted through consideration by the United Nations.³⁴³

The United Kingdom also, at one time, wanted to refer the Taiwan problem to the United Nations for solution. In November of 1950, British Foreign Secretary Ernest Davies in the Attlee Administration stated in the House of Commons, "The main aim of His Majesty's Government is to help in securing a generally acceptable and peaceful solution of the Formosan problem Naturally we shall take advantage of any opportunity which may arise within the United Nations to bring about a solution."³⁴⁴

In May of 1951, the Attlee Administration again expressed the desire to refer the Taiwan problem to the United Nations. During the Korean War, British Foreign Secretary Herbert Morrison said in the British House of Commons, "In the view of His Majesty's Government, [the problem of Formosa] is a question which could usefully be considered by the United Nations at the appropriate time."³⁴⁵

Similarly, the Conservative Party, which succeeded the Labor Party, expressed the same view in 1952. The House members agreed with British Foreign Secretary Major Beamish in the Churchill Administration that "the future of Formosa should be settled by the United Nations and not by force of arms."³⁴⁶

Winston Churchill, who changed his position after making the Cairo Declaration, also supported a solution of the Formosa problem by the United Nations. In 1954, after being reappointed as British Prime Minister for the second time, Churchill said in the British House of Commons, "Nor do I see any reason why at some subsequent date Formosa should not be . . . placed in the custody of the United Nations."³⁴⁷

After the conclusion of the Peace Treaty of San Francisco, the Allies suggested the creation of the State of Formosa to solve the Taiwan problem. In 1955, the government of the United Kingdom made the suggestion.³⁴⁸ It further suggested that both China and the new State of Formosa be included in the United

343. See *Gen. MacArthur's Statement*, *supra* note 72, at A7.

344. 478 PARL. DEB., H.C. (5th ser.) (1950) 174.

345. 487 PARL. DEB., H.C. (5th ser.) (1951) 2302.

346. 496 PARL. DEB., H.C. (5th ser.) (1952) 1027.

347. 530 PARL. DEB., H.C. (5th ser.) (1954) 494.

348. In January 1955, British Foreign Secretary Anthony Eden suggested the establishment of the State of Formosa. See Drew Middleton, *Britain's Formosa Solution Is Two Chinas*, *Both in U.N.*, N.Y. TIMES, Jan. 29, 1955, at A1.

Nations.³⁴⁹ The *New York Times* reported, "It is said on good authority that the [British] Government would not be doing this without some sign from President Eisenhower and Secretary of State Dulles that they, too, consider that this is the only long-term solution now apparent."³⁵⁰

Although the island of Taiwan is no longer owned by any State, the island has become the *people's property*, a concept derived from the Roman law concept of *res humani iuris* or "things subject to human dominion."³⁵¹ *People's property* is property owned by a society or, more specifically, the people of the society as a whole.

It has been half a century since the conclusion of the Peace Treaty of San Francisco. It is now too late for the United Nations or for the Allied Powers, including the United Kingdom or the United States, to decide the future of Taiwan. It is time that the political future of Taiwan, like East Timor, be decided by its inhabitants.³⁵²

The idea that the future of Taiwan should be determined by its inhabitants has been supported in the past. In 1951, to the question of whether the wishes of the people of Formosa would be taken into account in determining its future, British Foreign Secretary Morrison in the Atlee Administration replied, "I think it is clearly desirable that the wishes of the inhabitants of Formosa should be taken into account."³⁵³ The British Conservative Party, which succeeded the Labor Party, also expressed the same view. British Foreign Secretary Major Beamish of the Churchill Administration, in reminding members of the House not to overlook the views of the Formosans themselves, said, "Article 73 of the United Nations Charter . . . lays it down clearly that territories detached from enemy States come under the trusteeship section where . . . 'the principle is laid down that the interests of the inhabitants of these territories are paramount.'"³⁵⁴

349. *See id.*

350. *Id.* at 2.

351. Gaius in Book II, Section 2 states, "The first division of things is into two classes: things subject to divine dominion, and things subject to human dominion." GAIUS, *ELEMENTS OF ROMAN LAW* 157, 158 (Edward Poste trans., 2nd ed. 1994). Section 10 states, "Things subject to human dominion [*res humani iuris*] are either public or private." *Id.*

352. *See* Frease, *supra* note 323, at 285.

353. 487 PARL. DEB., H.C. (5th ser.) (1951) 2302.

354. 496 PARL. DEB., H.C. (5th ser.) (1952) 1027.

The position of the United States was once the same, albeit not explicit. In answering the questions of the Soviet government on the Peace Treaty with Japan, the U.S. government stated that the

Cairo Declaration of 1943 stated the purpose to restore "Manchuria, Formosa and the Pescadores to the Republic of China." That Declaration, like other wartime declarations such as those of Yalta and Potsdam, was . . . subject to any final peace settlement where all relevant factors should be considered. The United States cannot accept the view, apparently put forward by the Soviet Government, that the views of other Allies not represented at Cairo must be wholly ignored. Also, the United States believes that *declarations such as that issued at Cairo must necessarily be considered in the light of the United Nations Charter*, the obligation of which prevail over any other international agreement.³⁵⁵

The statement undoubtedly refers to Article I of the U.N. Charter which describes as one of its purposes: "To develop friendly relations among [N]ations based on the principle of equal rights and *self-determination* of peoples."³⁵⁶

The doctrine of self-determination has been a heated issue during the twentieth century, especially after World War II.³⁵⁷ The doctrine can be traced to the eighteenth- and nineteenth-century ideology of nationalism³⁵⁸ and has been strengthened by the twentieth century's concept of human rights. In its historical context, the doctrine of self-determination means determination by a group of people with the same social, ethnic, and cultural background inhabiting one area, or living in a territory within a

355. Answer to Soviet Questions on Principles for Japanese Treaty, Aide-Mémoire Delivered to J.A. Malik, Soviet Rep. to the U.N. (Dec. 27, 1950), in DEP'T ST. BULL., Jan. 1951, at 65-66 (emphasis added).

356. U.N. CHARTER art. 1, ¶ 2 (emphasis added).

357. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 44-47 (1995). Antonio Cassese states:

[S]elf-determination is a powerful expression of the underlying tensions and contradictions of international legal theory: it perfectly reflects the cyclical oscillation between positivism and natural law, between an emphasis on consent, that is, voluntarism, and an emphasis on binding "objective" legal principles, between a "statist" and a communitarian vision of world order.

Id. at 1.

358. See HANNUM, *supra* note 9, at 27; see also OTTO HINTZE, *The Emergence of the Democratic Nation-State*, in THE DEVELOPMENT OF THE MODERN STATE 69 (Heinz Lubasz ed., 1964).

State, of their own political future, including establishing a State of their own by a referendum or other methods.³⁵⁹

An issue in international law is whether a minority group within a State has the right of self-determination against the wishes of the sovereign State. If self-determination is recognized as a *right* in international law, then it sets a limitation on the sovereign power of the governing State.³⁶⁰ The international community for the most part supports the principle of self-determination.³⁶¹ International conventions concluded after World War II also embrace this principle.³⁶² In practice, most of the new Nations which were established after World War II were created out of European and U.S. colonies in the name of self-determination.

While the people of Taiwan may choose to hold a referendum — the procedure frequently used in self-determination — to decide their own political future, they do not have to rely on the doctrine of self-determination. They do not face the problem that most minority groups seeking self-determination face — challenging the sovereignty of a controlling State, i.e., breaking free from a ruling Nation. The people of Taiwan would not be challenging the sovereign power of any State, including China, should it decide to establish a State by a referendum or other means because it is not under the sovereignty of any State.

Although Taiwan has held general elections, a general election, including the election of the president, does not necessarily reflect the common wish of the people regarding their political

359. See HANNUM, *supra* note 9, at 36.

360. Although some States are not as ready to recognize such a right for minority groups of people who reside in their main territories, e.g., Russia for Chechens, Turkey for Kurds. See Anatol Lieven, Letters-Review, NAT'L INTEREST, Winter 2000 (reviewing Zbigniew Brzezinski, *Living with Russia* (Fall 2000)), available at http://www.findarticles.com/p/articles/mi_m2751/is_2000_Winter/ai_68547483/print (last visited Nov. 18, 2004).

361. See William R. Cumming, *Self-Determination and National Security Concerns*, at <http://faculty.ils.edu/~manheimk/ns/cumming.htm> (last visited Nov. 8, 2004).

362. See U.N. CHARTER art. 1; see also *Int'l Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; see also *Int'l Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3. Article 1 of the two Covenants provides, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *Int'l Covenant on Civil and Political Rights*, *supra*; *Int'l Covenant on Economic, Social and Cultural Rights*, *supra*.

future, i.e., whether they wish to establish statehood. In a general election, voters, in casting their votes, choose a candidate or candidates based on various issues, including the character of the candidate. A referendum, on the other hand, is a procedure by which the people express their common wish by voting on one issue. Therefore, the only way for the people of Taiwan to express freely and clearly their common wish regarding their political future is by a referendum on that single issue.

Since the P.R.C. government was established in 1949, it has claimed sovereignty over Taiwan for the last fifty years and has threatened to use force to "reunite" Taiwan with China. During Taiwan's presidential election in 1996, the P.R.C. government intimidated the voters in Taiwan with threats of the use of force if they did not vote for the candidate of its choice. In 2000, the P.R.C. government, in its *2000 White Paper*, again threatened to use force against Taiwan if the R.O.C. government further delayed the "reunification" talks. Under such circumstances, the people of Taiwan could not express their will freely in a referendum.

The United States has contributed to the predicament of the people of Taiwan. It forced Japan to abandon the island of Taiwan in the Peace Treaty of San Francisco, but permitted the R.O.C. government to continue its occupation of the island, leaving the political status of Taiwan unsettled. Recent public statements of U.S. officials that the U.S. government does not support Taiwan independence, and that the U.S. government opposes a referendum in Taiwan, do not help to solve the Taiwan problem. These statements are not consistent with the U.S. position on title to the island of Taiwan after the Second World War. The United States, as the leading power of the one-time Allied Powers, has a moral obligation today to support a referendum in Taiwan for the people to determine their political future.

The United Nations can also play a small but important role in the Taiwan problem.³⁶³ While the United Nations cannot decide the fate of Taiwan, the United Nations should administer a referendum in Taiwan on a single question, i.e., the political future of Taiwan. There are such precedents. East Timor was one

363. See Charles Hill, *Why East Timor Matters*, Hoover Digest (2000), available at <http://www.hooverdigest.org/001/hill2.html> (last visited Nov. 18, 2004).

of them.³⁶⁴ In order to assure that the people of Taiwan may express their will freely without fear of military threats by the P.R.C. government, the United States and the rest of the world should guarantee that the result of the referendum will be respected and protected by all States. Such a solution to the Taiwan problem is consistent with the U.N. Charter and International Covenant on Civil and Political Rights.³⁶⁵

CONCLUSION

This Article, by applying the principles of international law, analyzed the Cairo Declaration, the occupation of the R.O.C. government, the Peace Treaty of San Francisco, and other historical events with respect to the rules of international law and concluded that China has not reacquired title to the island of Taiwan after the Treaty of Shimonoseki. Thus, China has no sovereignty over the island of Taiwan and its people. The one-China principle that the P.R.C. government advocates is flawed in its proposition that Taiwan is part of China. The one-China policy that has formed U.S. foreign policy toward China for the last three decades is not the same as the one-China principle held by the P.R.C. government; it is at best vague, and at times misleading.

This Article has offered a solution for the Taiwan problem — a referendum by the people of Taiwan to be conducted by the United Nations with an international guarantee of its result.

364. See Frease, *supra* note 322, at 284-85; see also Fitzpatrick, *supra* note 332, at 3-4.

365. See *supra* note 362.