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Article 1

State, Sovereignty, and Taiwan

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Abstract

Two separate statements made by the high officials of the two Chinese governments in 1999 call into question the sovereignty of Taiwan. These two statements relate to the sovereignty of Taiwan. The first raises the question whether Taiwan is a sovereign state. The second statement raises the question whether China has sovereignty over Taiwan. This Article concludes that although Taiwan is a civil society, it is not a state, and offers a solution in the form of a referendum by the people in Taiwan with an international guarantee of its result. The article suggests that the U.S. and other governments reformulate their foreign policy toward China and Taiwan in accord with the findings of the Article.

ARTICLE

STATE, SOVEREIGNTY, AND TAIWAN

*Y. Frank Chiang**

INTRODUCTION

Two separate statements made by the high officials of the two Chinese governments in 1999 call into question the sovereignty of Taiwan.¹ One statement was made by President Lee Teng-hui of the government of the Republic of China (or "ROC") on Taiwan on July 10, 1999 during an interview by German reporter, Dr. Guenter Knabe. He said that the relation between China and Taiwan is a "special state-to-state relation."²

The second statement was made by a government spokesman of the People's Republic of China (or "PRC") immediately after a severe earthquake struck the central part of the island of Taiwan on September 21, 1999. The U.N. Office for the Coordination of Humanitarian Affairs was planning to send a disaster assessment team to Taiwan when the PRC government notified Mr. Kofi Annan, the U.N. Secretary General, that the United Nations had to ask the PRC government for permission to dispatch an aid team to, as Mr. Annan called it, "the Taiwan Province of China."³

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1. Geographically, the term "Taiwan" in its strict sense refers the island of Formosa, and, in its broad sense, to a group of islands consisting of Formosa and a few surrounding islands, including the Pascadores (Penghu), Green Island (Kashoto, as Japanese called it), and Lan Islet (Lan Yu). The word "Taiwan" in the political term "The Republic of China on Taiwan" is used in its broad sense. As used in this Article, the terms "Formosa" and "The island of Taiwan" both refer to Taiwan in its broad sense, and the word "Taiwan" refers to the political entity existing on the island of Taiwan with a government that is called "the Republic of China" (or "ROC"). Hence, the term "the Republic of China" refers to the government of the political entity, Taiwan.

2. See *China Threatens Envoy's Trip*, GREENSBORO NEWS & RECORD, July 17, 1999, available in 1999 WL 6953820.

3. See Antonio Chiang, *Taipei Crisis, Beijing Opportunity*, INT'L HERALD TRIBUNE,

These two statements relate to the sovereignty of Taiwan. The first raises the question whether Taiwan is a sovereign state. The second statement raises the question whether China has sovereignty over Taiwan.

I. THE MODERN STATE, SOVEREIGNTY, AND INTERNATIONAL LAW

A. *The Origin of the State*

Since the questions relate to the statehood and sovereignty of Taiwan, a brief review of the concepts of the state and sovereignty is in order. Although in postulating the evolution of humankind and the origin of the state, some writers equate "state" with "civil society,"⁴ these two terms are different, not only in the process of their formation, but also after both have matured. Although a state may exist only in a civil society, not all civil societies are states.

The term "society" has been defined as "a community of people living in a particular country or region and having shared customs, laws and organizations."⁵ The definition indicates that people form a society in the place or region where they settle. This definition describes, however, a civil society, not a primitive one. Earlier writers also spoke of a "savage society,"⁶ referring to a society "when mankind derived their whole subsistence from the fruits . . . hunting, fishing, and their flocks . . . they had no dwelling place nor settled habitations . . . Such was the ancient manner of living till agriculture was introduced."⁷ It takes a long journey for an above described primitive society to evolve into a civil society. The process is a slow and a gradual one.

The creation of a state is different. The process is drastic rather than gradual. It is common that in a group of people, a

Sept. 27, 1999; *UN Sends Coordinating Rescue Team to Taiwan*, Sept. 22, 1999, AGENCE FRANCE-PRESSE, available in 1999 WL 25110592; Corky Siemaszko, *Taiwan Digging Out, Frantic Rescuers Hunt for Quake Survivors*, DAILY NEWS, Sept. 22, 1999, at 7.

4. "In the early eighteenth century, the usual explanation of the origin of the state, or 'civil society', as it was called, began by postulating an original state of nature, in which primitive man lived on his own." PETER STEIN, *LEGAL EVOLUTION, THE STORY OF AN IDEA* 1 (1980).

5. See OXFORD ADVANCED LEARNER'S DICTIONARY 1128 (5th ed., Oxford Univ. Press 1994) (providing definition of "society").

6. STEIN, *supra* note 4, at 20.

7. Antoine Yves Goguet, *De l'origine des lois, des arts, et des sciences, et de leurs progres, chez les anciens peuples*, in STEIN, *supra* note 4, at 21.

strong person eventually emerges as the leader. The leader in an early society might initially have acquired his position by consent of the people or by brute force. At a certain point of time, the leader became their ruler—either by declaring himself their king, (“I am the king”), or by proclamation of the people, (“Long live the king”)—and established a kingdom, a state.

When the concept of the state⁸ as we know today was formulated, the word “state” referred to the ruler.⁹ This meaning remained true after the modern concept of sovereign began to develop in the sixteenth century.¹⁰ Earlier political thinkers attempted to support or limit the authority of the rulers by theorizing the source of their authority. For many centuries, the theory of most writers, such as Thomas Aquinas,¹¹ was that the rulers of the people received their authorities from God and they were accepted without much question. During the sixteenth and seventeenth centuries, the theory of social contract, advocated by Thomas Hobbes¹² and John Locke,¹³ emerged and successfully replaced the theory of the theological source. In advocating the unlimited power and authority of the king under the theory of social contract, Hobbes regarded the ruler as the sovereign when he argued that the “state of nature must have been so dangerous and unpleasant for man that he would gladly agree to surrender all the freedom and power over himself, which he had hitherto enjoyed, to a *sovereign person* or body who was strong enough to protect him from its perils.”¹⁴ John Locke, who advocated that the power of the ruler was limited,¹⁵ also considered the king as the government when he said, “[C]ivil society was consciously created by rational men . . . who first

8. The word “state” derived from the French word *état* and the Latin word *status*. MERRIAM WEBSTERS COLLEGIATE DICTIONARY 1148 (10th ed. 1993).

9. HEINZ LUBASZ, *THE DEVELOPMENT OF THE MODERN STATE* 2 (1964); STEIN, *supra* note 4, at 2.

10. Jean Bodin wrote about sovereignty in 1577. See *infra* note 28 and accompanying text.

11. He lived from 1224-1274. For his political theory, see *THE POLITICAL IDEAS OF ST. THOMAS AQUINAS* 188, 191 (Dino Bigongiari ed., Free Press, New York, 1953).

12. He lived from 1588-1679. For a brief statement of Thomas Hobbes’ theory, see STEIN, *supra* note 4, at 2-3.

13. He lived from 1632-1704.

14. STEIN, *supra* note 4, at 2 (emphasis added).

15. John Locke, who supported the Glorious Revolution of 1688 that replaced the English king with another, . . . argued: “[T]he ruler was limited in what he could command his subjects to do, and these limitations were prescribed by nature.” *Id.* at 2-3.

agreed to combine in a community by one contract, and then, by another . . . agreed to entrust its government to a *ruler* chosen by themselves."¹⁶ Regardless of the source of the authority of a ruler, one of the main purposes for the creation of the state was protection of its people. A society, which has not formed a state, has no protection from outside invaders.

B. *The Modern State*

The modern state is the product of western civilization and was created in Western Europe.¹⁷ It was transformed gradually from the medieval feudal states during the sixteenth and the seventeenth centuries.¹⁸

The earlier discussed concept of the state is not static. Toward the end of the seventeenth century, about the time John Locke published his book advocating the theory of social contract, the concept of the state still referred to the king.¹⁹ When the modern state began to mature,²⁰ the term "state" began to refer to an abstract entity, such as a juristic person in private law, or an association or a corporation.²¹ As the modern state matured in the eighteenth century, the term "state" referred to a

16. *Id.* at 2.

17. LUBASZ, *supra* note 9, at 1.

18. See GERHARD RITTER, ORIGINS OF THE MODERN STATE 19-28 (Die Neugestaltung Europas im 16. Jahrhundert, Berlin: Verlag des Druckhauses Tempelhof, 1950) (Heinz Lubasz, trans., in LUBASZ, *supra* note 9, at 13). During the medieval ages, feudalism prevailed as the main political system in Europe. Under the European feudal system, the king ruled his kingdom through his feudal vassals by contract. The feudal vassals, in turn, ruled their vassals, who directly ruled the people in their domains. In essence, the feudal king did not directly rule the people. The state was based on people (vassals), not on the territory. Such was the political system of France when the One Hundred Years War during the first part of the 14th century erupted. Finally, the French king, Charles VIII, succeeded in expelling the English from the most part of the European continent (except Calais) in 1453. From this victory, Charles VIII and his successors, helped by the new money economy, became powerful and began to deprive some feudal vassals of their power. From this change, a modern state would begin to emerge.

19. John Locke advocated that the power of the ruler was limited. Supporting the Glorious Revolution of 1688 that replaced the English king, he argued, "[C]ivil society was consciously created by rational men . . . who first agreed to combine in a community by one contract, and then, by another . . . agreed to entrust its government to a *ruler* chosen by themselves." STEIN, *supra* note 4, at 2 (emphasis added).

20. The development of the modern state was slow, and certainly did not begin in every state in Europe at the same time. For a discussion of the development of the modern state, see RITTER, *supra* note 18, at 19-28.

21. BARRY E. CARTER & PHILLIP R. TRIMBAL, INTERNATIONAL LAW 456 (Little Brown & Co., 2nd ed., 1995).

political entity with statehood. The establishment of the United States in the late eighteenth century may have also contributed to the formulation of the new concept of the state. The United States, being a republic, had no king. The ruling entity is not a person but a government, which is an abstract concept. The term "state" cannot refer to a tangible person, the king, or the ruler. In 1804, Napoleon Bonaparte still proclaimed to be the state when he uttered, "The state? It's me" (*L'état? C'est moi*). What he said was true, but only in the past.

There are two major characteristics of the modern state.²² First, the modern state is territorial. In the European feudal system, the king ruled his kingdom through his feudal vassals by contract and did not directly rule the common people. The state was built on the king's control of the vassals, not on the territory. The king collected taxes from his vassals, who, in turn, collected taxes from the common people. Hence, for the king, the outer limit of his domain was not important. In the modern era, the state rules its people directly, including collecting taxes, and it has to define the territory in which its people reside. To define its territory, the state now has a boundary and a frontier. This frontier creates a "hard shell" for the protection of its people within the territory.²³ The state has power and authority to govern not only its nationals, but also aliens within its boundary. On the other hand, the boundary also creates a limitation on the power and authority of the state. It has no power and authority beyond its territory.²⁴ This territoriality²⁵ of the modern state forms the basis of the part of international law that will be discussed later.

Second, the modern state is sovereign. The sovereign state has two features. Internally, it rules through its government, the subjects, or the people in its territory directly. Externally, the state is autonomous and, therefore, not subject to other states or

22. Other writers point out other characteristics of the modern state: (a) the modern state is governed by the system of law, and (b) in the modern state, the distinction between the state and society is made. These points are not discussed here because they are not relevant for this Article.

23. John H. Herz, *Rise and Demise of the Territorial State*, 9 *WORLD POLITICS* 473, 474 (1956).

24. The territory of a state also includes its territorial sea as recognized by international law.

25. For a discussion of the term territoriality, see Herz, *supra* note 23, at 473-85.

their authority.²⁶

C. Sovereignty

The English word "sovereign" is from the French word "soverain," which, in turn, is from the Latin word, "superanus." German dictionaries define sovereignty as "the highest state authority,"²⁷ indicating that state and sovereignty are inseparable concepts. A French writer, Jean Bodin, wrote about sovereignty in 1577,²⁸ almost half a century before Hugo Grotius' *The Law of War and Peace* appeared in 1625,²⁹ probably because at the time France had begun to transform into a modern state.³⁰

The concept of sovereignty has been attacked as "obsolete,"³¹ "a dead duck,"³² or "extinct,"³³ but has not been abandoned. From 1943 to 1994, 118 states,³⁴ *i.e.*, sovereigns, have been created, more than the number of states created in the history before World War II started.

The concept of state autonomy that is inherent in sovereignty gives rise to the concept of equality among states. That is, two states can engage in relations, *e.g.*, diplomatic exchanges or concluding treaties, on an equal footing. But, the concept of equality between states existed long before the modern concept of sovereignty was formulated. In the early days, the leaders of two or more groups of people, who had the same interest, entered into military alliance agreements against others. Leaders also divided territory by agreements.³⁵ The agreements between

26. LUBASZ, *supra* note 9, at 2.

27. *Die hoechste Staatsgewalt*. NEW WILDHAGEN GERMAN DICTIONARY 808 (Follett Publishing Company, 1965); CASSEL'S NEW GERMAN DICTIONARY 475 (1959).

28. *Six livres de la republique*. See INGRID DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 3 (Crane, Russak & Co., 1974); MICHAEL R. FOWLER & JULIE M. BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 36, n.15 (Penn. St. Univ. Press, 1995).

29. *De jure belli ac pacis*. See STEIN, *supra* note 4, at 3 (holding that Hugo Grotius was one of "most influential writers" in first half of 18th century).

30. See *supra* note 18 and accompanying text.

31. Hans J. Morgenthau, *The Intellectual and Political Functions of a Theory of International Relations*, in THE ROLE OF THEORY IN INTERNATIONAL RELATIONS 116 (Horace V. Harrison ed., 1964).

32. J.P. Nettl, *The State as a Conceptual Variable*, 20 WORLD POLITICS 560 (1968).

33. ALI KHAN, THE EXTINCTION OF NATION-STATES 193 (1996).

34. 3 NEW ENCYCLOPAEDIA BRITANNICA 464 (15th ed. 1994).

35. When Emperor Charlemagne's son, Louis I, died in 840, Louis I's three sons, Lothair, Louis, and Charles, fought over the vast territory. The war among the three brothers ended with the Treaty of Verdun (843). The treaty divided the empire into

the rulers of the kingdoms, the kings, were called treaties. When two kings entered into an agreement or a treaty, the two were equal in their legal status. Equal legal status between two states, however, did not mean that the two states had equal bargaining power.³⁶

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.³⁷ Thus, international law is created for self-limitation and self-regulation, and the basis of international law is consent.

The level of equality inherent in the concept of sovereignty is meaningful only when the state deals with other states. Equal status with other states means that the 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 a state. In diplomatic recognition, recognition of a state means that the recognizing state will deal with the recognized state on an equal footing. Thus, the power of a state based on sovereignty is twofold: (1) the power to rule or govern the people within its territory, and (2) the power and capacity to enter into relations with other states.

Only states have the capacity to enter into relations with other states or to conduct foreign affairs. A few centuries ago, treaties were concluded between two kings, or rulers. After the end of the Thirty Years War in the seventeenth century, the

four parts. The West Frankish Kingdom (*Francia Occidentalis*), consisting mostly of what is today's France, went to Charles (later Charles I), who was considered the first true king of France. The Middle Kingdom, consisting of the Low Countries, Lorraine, Alsace, Luxembourg, Burgundy, Provence, and northern Italy, went to Lothair (later Lothair I). The Kingdom of East Franks (*Francia Orientalis*), consisting of the land east of the Rhein River and of mostly what is today's Germany, went to Louis (later Louis the German). The fourth part, consisting of eastern tributary provinces, did not come under direct rule of any brother. 3 *NEW ENCYCLOPEDIA BRITANNICA* 316 (15th ed. 1994).

36. For instance, the losing party to a war always has less bargaining power than the winning party. The losing party that surrenders unconditionally has no bargaining power at all.

37. Arthur M. Weisburd, *The Executive Branch and International Law*, 41 *VAND. L. REV.* 1205, 1205 (1998).

princes of the Holy Roman Empire sought from the empire such capacity to enter into relations with others. They needed such capacity to enter into an alliance with other princes. The Roman Emperor in the Peace of Westphalia granted them powers and capacity to enter into such alliances.³⁸ 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.³⁹ After the concept of the state changed from the ruler to the political entity, the treaty was then between two political entities. Only political entities with statehood could conclude a treaty with another political entity with statehood.

D. *International Law Based on the Concept of Sovereignty*

There are three principal sources of international law: international convention, international custom, and the general principles of law recognized by nations.⁴⁰ These sources are all based on the consensus of the states, albeit in different ways. Treaties or international conventions are most explicit on the consensus. They are signed by the contracting parties/states.

International custom arose out of the consensus of the states in state practices or based on the writings of ancient writers. Hugo Grotius proved *a posteriori* that a body of the international law is created by the common consent of the states in his

38. The conflict between Protestants and Catholics and between Lutherans and Calvinists led to the Thirty Years War in 1618. In 1648, the Catholic Emperor, Ferdinand III, defeated by Protestant forces, signed the Peace of Westphalia, which comprised of a series of treaties. The important provisions were:

1. Holy Roman emperor, Ferdinand III had (a) accepted French claim to Upper Alsace, (b) recognized the sovereignty of various German states, (c) formally granted the German princes the right to make alliance and choose their religions for themselves and their subjects (in Germany, only Bavaria remained Catholic), and (d) recognized Swiss independence (1648).
2. Spain recognized the independence of the Netherlands (1648), retaining, however, Spanish Netherlands (modern Belgium).
3. All signatories guaranteed the constitution of the Holy Roman Empire.

The Holy Roman Empire became a meaningless entity. Germany was left with 260 sovereign states and principalities headed by princes without an effective central government.

39. The Holy Roman Emperor himself lost the sovereignty. Herz, *supra* note 23, at 473-93.

40. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179; LUBASZ, *supra* note 9, at 1.

work *The Law of War and Peace*.⁴¹

The general principles of private law recognized by civilized nations also form a basis for the creation of international law where there is no international convention or custom. When the rules are based on the general principles recognized by all civilized nations, they have been accepted by civilized nations—the states. Samuel Pufendorf, in his book *The Law of Nature and Nations*,⁴² 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.”⁴³ Some basic principles of international law are deduced from the concept of sovereignty and territoriality⁴⁴ of the modern state, which are accepted by all states. The following are some of the principles:

- (a) Sovereignty and the state are inseparable. Every state is a sovereign. In international relations, a political entity without statehood has no sovereignty, and cannot enter into formal relations, *e.g.*, conclude treaties or diplomatic exchanges with a state.
- (b) Only a state may be a full member of the international society. Only political entities with statehood have sovereignty and are equal among each other. Thus, a political entity without statehood cannot be a full member of the international community.⁴⁵
- (c) The power of a state ceases at its border. To avoid conflicts arising out of the concept of unrestrained sovereignty, the states had, by consensus, limited the exercise of their sovereignty to territories within their borders. Thus, exercising the police power in another state without the latter’s consent encroaches on the sovereignty of the other state.
- (d) Each state has one and only one government. A state requires its government to exercise the state’s sovereignty. Because sovereignty is the highest state power,

41. See STEIN, *supra* note 4, at 4.

42. *De juri naturae et gentium*. *Id.* at 2.

43. *Id.* at 3.

44. The term refers to the concept that the modern state is a territorial state.

45. Palestine, not being a state, can only be an observer at the United Nations.

and there can be only one who is the highest, the sovereignty is indivisible. Accordingly, there can be only one government in a state, which represents the state and exercises its sovereign power.

The sovereign power of a state includes the power to conduct foreign affairs. An executive, usually the head of the state, has the power to conduct foreign affairs, including the power to enter into relations with other states, unless the head of the state is a ceremonial figure.⁴⁶ The power to conduct foreign affairs includes the power of diplomatic recognition. When a state wants to enter into a relation with another state for the first time, the former must first recognize the latter being equal and having the capacity to enter into such relation.

State recognition is different from recognizing a government. State recognition is recognition of another political entity as equal with the recognizing state, and signifies that the recognizing state is willing to enter into relations with the recognized state on equal footing.⁴⁷ State recognition is permanent and cannot be withdrawn unless the recognized state becomes extinct.

Government recognition is recognition by the recognizing state of a certain government as the legitimate representative of another state. This type of recognition may be withdrawn or re-

46. When the state referred to the king or prince, he, being the sovereign person, exercised the sovereignty, including the power to conduct foreign affairs. After the concept of the state shifted to the abstract political entity, the power to conduct foreign affairs is in the executive, usually head of the state, such as the President of the United States of America. *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552 (1942). If the head of the state, however, is a ceremonial figure, such as Queen of the United Kingdom or the President of Germany, then the head of the government possesses the power, e.g., the Prime Minister in the United Kingdom and the Chancellor in Germany. France presents a unique situation. There is ambiguity as to who, between the President of the Republic and the Prime Minister, has power to conduct foreign policy. The French Constitution does not specify whether the President or the Prime Minister has such power. General De Gaulle, at the time of establishing the Fifth Republic, said that foreign policy was a "reserved domain" of the President. In the 1986 Cohabitation between socialist president and RPR conservative prime minister, President Francois Mitterand introduced "shared domain." Lionel Jospin, present French prime minister, speaking in *Bir Zeit* on or about February 28, 2000, referred to the Islamic group Hezbollah army as "terrorists." President Jacques Chirac reminded him that the President conducts the foreign policy. (France 2 News television broadcast, Feb. 29, 2000).

47. For instance, Israel was recognized as a new state by other states in 1948 after Israel established statehood by Declaration of the Establishment of the State of Israel. See Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3 (1948).

puddiated. When a new state is just established, state recognition and government recognition occur simultaneously, and government recognition also implies state recognition.⁴⁸

International law writers have different views on the nature of the creation of a state. Oppenheim regards "the formation of a new State . . . a matter of fact, and not of law."⁴⁹ Some, on the other hand, held that the problem of the state is a "mixed question of law and fact."⁵⁰ Since states are subject to international law, they are legal entities under international law, albeit the law is not a positive law⁵¹ in the strict sense. But, unlike corporations or incorporated associations in private law, which are created by registration with a municipal authority, states are not created by registration. There is not and has never been an office for such registration, neither the League of Nations nor the United Nations.

Two theories have dominated when a state is created: the constituent theory and the declaratory theory. The two theories view the effect of diplomatic recognition in the creation of a state differently. The constituent theory holds that the statehood of a political entity derives from recognition by other states only.⁵² This is true, according to the theory, even though the political entity exists and has all the common characteristics of the states. The constituent theory has difficulties not only in theory, but also in its application.⁵³

The declaratory asylum theory holds that statehood is a legal status independent of recognition, which is declaratory

48. An example of this is Israel.

49. 1 OPPENHEIM 544 (8th ed. 1955).

50. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 4 (Clarendon Press, 1979) (explaining that some courts held that problem of state is "mixed question of law and fact.")

51. Positive law, in the view of John Austin, is "law set by political superiors to political inferiors" in his Lecture I, quoted in STEIN, *supra* note 4, at 72. H.L.A. Hart sees "[positive] law as coercive orders separate from morals." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958). For a discussion of positive law, see H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

52. OPPENHEIM, *supra* note 49, at 125. "A State is, and becomes, an International Person through recognition only and exclusively." For a discussion, see CRAWFORD, *supra* note 50, at 4.

53. CRAWFORD, *supra* note 50, at 17-20. For instance, China would not be a state under the constituent theory until the middle of the 19th century. The theory does not indicate the number of states required to recognize a new political entity before the latter become a state. It does not explain the character of the agreements signed by the new political entity with other states before it becomes a state.

only.⁵⁴ This is currently the predominant view. According to this theory, territorial entities can, by virtue of their mere existence, acquire legal status and become states.⁵⁵ Both the Convention on Rights and Duties of States⁵⁶ ("Montevideo Convention") and the Restatement (Third) of the Foreign Relations Law of the United States⁵⁷ (or "Restatement") adopt this theory.

Article 1 of the Montevideo Convention provides that, "[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."⁵⁸ These qualifications have been interpreted to be the requirements for creating a state. Recognition by other states is not a requirement under the Montevideo Convention.⁵⁹ The term "capacity" in the last qualification prescribed in Article 1 means ability in fact,⁶⁰ rather than the legal ability, legal qualification, competency,⁶¹ or "the attribute of persons which enable them to perform."⁶²

54. *Id.* at 4.

55. *Id.*

56. See Convention, on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 21, 25 [hereinafter Convention]. This was adopted by the Seventh International Conference of American States.

57. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202, Comments a, b (3d ed. 1987).

58. Convention, *supra* note 56, art. 1.

59. A recent example is Macedonia. It declared independence from Yugoslavia in 1991, but was not recognized by any state until two years later. To date, only two states have recognized it. The ROC government established a diplomatic relations with Macedonia in 1999. The ROC government claims that it represents China, or part of China in Taiwan. Is Macedonia a state under the constituent theory? Many states refuse to recognize it because of Greece's objection to its name "Macedonia," not because of the legality as to its existence.

60. See OXFORD ENGLISH DICTIONARY 2 (2d ed. 1989) (defining "ability" as "holding power").

61. See BLACK'S LAW DICTIONARY 207 (6th ed. 1990) (defining "capacity").

62. See BLACK'S LAW DICTIONARY 261 (4th ed. 1957) (defining "capacity"). Interpreting the word "capacity" as "legal capacity" as a requirement of a state creates a circuitous problem. It is a general rule that a natural person acquires capacity to enjoy rights at birth. German Civil Code, BUERGELICHESGESETZBUCH, art. 1, (trans. by Chung Hui Wang), states that "[t]he capacity of natural persons to hold rights (*Rechtsfähigkeit*) begins at the completion of birth." Such capacity is not a requirement for a natural person. Rather, the capacity comes with the legal status of a person. Likewise, since sovereignty gives rise to the capacity to engage in relations with other states, only an established state has sovereignty to meet the requirement. Consequently, a political entity without statehood cannot meet the requirement.

The Restatement provides a similar rule.⁶³ Section 201 states, “[u]nder international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”⁶⁴ This definition prescribes the four elements⁶⁵ more as the characteristics of a state than as requirements, though the comments refer to them as requirements.⁶⁶

The declaratory theory holds that a territorial or political entity, by virtue of its mere existence, becomes a state and acquires the legal status of a state. The state exists by itself.⁶⁷ Few proponents of this theory, however, have treated the question of when a state comes to exist.

As suggested earlier, a political entity acquires statehood and becomes a state by a drastic process, not by a slow and gradual process of evolution. This process is a declaration of the establishment of a state. A political entity, which has the four qualifications prescribed in the Montevideo Convention,⁶⁸ does not become a state unless and until it declares that it is a state.

This requirement is derived from international custom. In state practice, such declaration may take a formal or an informal form. A formal declaration in the earlier days may be an oral declaration by a ruler to establish a kingdom. The leader or ruler of the people established his kingdom by declaring himself the king, or raised his hands high acknowledging his people’s proclamation, making him the king. Subsequently, a document called a “declaration of independence,” was often used.⁶⁹ There are ample historical precedents using such method: Switzerland from the Holy Roman Empire in 1499,⁷⁰ the Netherlands from

63. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202, Comment e (3d ed. 1987).

64. *Id.* § 201.

65. *See id.* § 202, Comments a, b (stating that subsections are (a) population; (b) territory; (c) government; and (d) capacity to engage with other States).

66. *Id.* § 201., Comment b; Reporter’s Notes 1 to § 202.

67. CRAWFORD, *supra* note 50, at 21.

68. The Restatement (Third) of the Foreign Relations Law of the United States (or “Restatement”) provides the similar rule. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202, Comments a, b (3d ed. 1987).

69. This form was used where the declaring entity was a colony or part of an existing state, *e.g.*, the United States of America in 1776.

70. 28 ENCYCLOPEDIA BRITANNICA 353 (15th ed. 1991).

Spain in 1648,⁷¹ the United States from England in 1776, and Belgium from the Netherlands in 1831.⁷² More than 100 states were established since World War II ended.⁷³ Most of them were established by a declaration of independence. Some were granted independence by their parent states. In such case, whether the parent state granted its colony independence at will or under pressure, the new state often declared the establishment of a state at the adoption of a constitution, if not before.⁷⁴ An informal declaration may be found in a treaty. In the seventeenth century, the Holy Roman Emperor granted the German princes the right to enter into alliances with others under the Peace of Westphalia.⁷⁵ Such right or capacity is a characteristic of sovereignty, and the German princes were then on considered sovereign.⁷⁶

The practice of establishing a state by making a declaration turned into an international custom in the twentieth century. This international custom has now turned into a rule. The idea that a declaration of the establishment of a state is necessary to create a new state may also be deduced from the general principles of law recognized by civilized nations *a priori*. After the modern state has fully developed and the term "the state" refers to a political entity, rather than the ruler, the state becomes an abstract concept,⁷⁷ not unlike a corporation in private law. Corporations and states are different from natural persons, although they all have legal personality. Natural persons are tangible. Once one becomes a person at birth, his or her existence is apparent and is never questioned. A corporation is intangible. It cannot be seen or touched. The creation of a corporation in all civilized societies that recognize such an institution is accomplished by registration in a public record. Until the registration, the corporation does not exist. Registration of a corporation, therefore, is an announcement by the incorporators to the soci-

71. 24 *Id.* at 888.

72. 14 *Id.* at 867.

73. 3 *Id.* at 464. About 118 states were established since 1943.

74. This form was also used in the establishment of the State of Israel in 1947, granted by the United Nations. The document is titled, "The Declaration of the Establishment of the State of Israel."

75. Peace of Westphalia, Oct. 24, 1648, art. 65.

76. Herz, *supra* note 23, at 473-93.

77. LUBASZ, *supra* note 9, at 1. Samuel Pufendorf called "state" "a moral person." CRAWFORD, *supra* note 50, at 6.

ety that the corporation has come into existence. Likewise, a state and a political entity are abstract concepts. A political entity with all the qualifications prescribed in the Montevideo Convention cannot transform itself into a state unless and until it declares that it is a state.

There are two characteristics of a declaration of the establishment of a state. First, it is a claim of statehood. Second, it is an announcement to the international community that the entity is a state from the time of the declaration. A political entity must itself claim statehood in order to become a state. The Comment in the Restatement states that, "[w]hile the traditional definition does not formally require it [claiming statehood], an entity is not a state if it does not claim to be a state."⁷⁸ An entity that does not assert itself to be a state cannot be a state, let alone expect recognition by other states.

The claim of statehood is based on the common will of the people residing in the territory, which may be explicit or implicit. In earlier days, people formed a society or a state, either to protect themselves or to promote their well being. According to the theories of both Hobbes and Locke, the people chose their leaders to form a state at their own will. If the people of a political entity have no desire to establish a state, then no other states can force them.⁷⁹ The common will of the people may be expressed in a referendum held solely for that purpose, as in East Timor in 1999.

A declaration of the establishment of a state is an announcement to the international society signifying that from that time onwards, the declaring entity is a state. The declaration implies that it is the common will of the people to establish a state. Unless otherwise indicated, the declaration takes effect instantly,⁸⁰ so that the political entity that has the other qualifications acquires statehood at the time of the declaration. Because the declaration is, by definition, the beginning of the state's existence, it does not have retroactive effect.

78. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201, Comment f (3d Ed., 1987).

79. A state set up by another state without the common will of the people will be void. For instance, the Japanese seized Manchuria and set up the Manchukuo state in 1931. 6 ENCYCLOPEDIA BRITANNICA 499; 16 *Id.* 137.

80. There has been no instance where a declaration for the establishment of a state was to take effect in the future.

II. INTERNATIONAL STATUS OF TAIWAN

A. *The Governments in Modern China*

During the era when the modern state was developing in Europe, there existed a large country in the Far East, which the United Kingdom and the United States called China.⁸¹ China⁸² was then ruled by a government called "the Ching dynasty" or "Ching government" that was established in 1644.

In 1911, the Nationalists led by Sun Yat-sen overthrew the Ching government and established the Republic of China.⁸³ After the end of World War II, the Chinese Communists defeated the ROC government and established the People's Republic of China⁸⁴ in 1949. Meanwhile, the ROC government led by its leader, Chiang Kai-shek, fled to Formosa, which the government had occupied since 1945. The two governments, the PRC government and the ROC government, have coexisted since 1949. While the former controls the mainland Chinese territory, the latter controls the island of Taiwan.

B. *The Republic of China*

In 1793, the King of England, George III, sent an envoy to the Emperor of China, Ch'ien Lung, to open trade with northern China.⁸⁵ Sending an envoy by one head of a state formally to present credentials to another head of state for the first time is a form of diplomatic recognition in international relations.⁸⁶ So, the sending of the envoy by the English king to meet the Chinese emperor constituted both recognition of China as a state and recognition of the Ching government as the legitimate gov-

81. The French called the country *La Chine*, the Germans called it *Das China*, and the Japanese *Seikoku*.

82. That country is what the Chinese today call "Chung-kuo," which means "Middle Country" in Mandarin. The people in China, however, did not call their country "Chung-kuo" until 1912, when the government of the Republic of China was established. The Manchus called the country *Ta Ching Ti Kuo*, or "The Great Ching Empire."

83. This is *Chung Hua Ming Kuo* in Chinese.

84. This is *Chung Hua Jen Ming Kung Ho Kuo* in Chinese.

85. The envoy was Macartney. JOHN K. FAIRBANK & EDWIN O. REISCHAUER, *CHINA, TRADITION AND TRANSFORMATION* 256-57 (Revised Edition, 1989). Ch'ien Lung Emperor reigned from 1736 to 1796. HERBERT A. GILES, *CHINESE-ENGLISH DICTIONARY* 23 (2d ed. 1912).

86. See HACKWORTH, 1 DIG. OF INT'L L. 167, 168 (1940); M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995* 87 (1997).

ernment of China.⁸⁷

In 1911, when the Nationalists established the ROC, they did not create a new state. The state was still China, only the government was different. Foreign loans to the Ching government were still considered the national debts of China and assumed by the new government, the ROC.⁸⁸ Thus, the recognition of the ROC by foreign states was not recognition of a new state, but recognition of the new legitimate government of China. Likewise, in 1949 when the Chinese Communists drove out the ROC government from China and established the People's Republic of China, they did not create a new state, only a new government. Their country was still China. The ROC government, which was forced to move to Formosa, did not create a new state either. As a matter of fact, the ROC government claimed for many decades after its relocation to Formosa that it remained the legitimate government of the state of China.

When the United Nations was created in 1945, the state of China was one of its original members, represented by the ROC government. The ROC government represented China in the United Nations until 1972. Even though the name "the Republic of China" occasionally is used as the formal name of the state, the state is actually China. The word "Republic" simply indicates the political system of the state. An analogy can be found in the

87. See HACKWORTH, *supra* note 86, at 167 (quoting BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 284 (2d ed. 1962)); see also Convention, *supra* note 56, art. 7. According to Fairbank and Reischauer, the Chinese Emperor regarded other countries' tributes, and Emperor Chien Lung praised King George III's "respectful spirit of submission." FAIRBANK & REISCHAUER, *supra* note 85, at 257. The Chinese Emperor lacked the concept of state equality and asked the English envoy, Macartney, to kowtow like emissaries from tribute countries, which he refused. The Chinese Emperor probably would not appreciate it if he was told that the English king would recognize China, and treat it as equal. Nevertheless, the visit should be considered recognition from the viewpoint of the English king.

88. See *Jackson v. The People's Republic of China*, 794 F.2d 1490, 1492 (11th Cir. 1986). "In 1911 the Imperial Government of China issued bearer bonds to assist in financing the building of a section of the Hukuang Railway The Republic of China made interest payments on the Hukuang bonds until mid-1930's" *Id.* at 1491. By paying interest on the bonds issued by the previous government, the ROC government acknowledged the debt created by the Ching government as the debt of the state of China, and it was obliged to pay. In 1947, the ROC government, through its Prime Minister, announced that "China pledges her honorable intention to repay those external loans the service of which was suspended in the course of the Sino-Japanese War." See Debra Tarnapol, *The Role of the Judiciary in Settling Claims Against the PRC*, 25 HARV. INT'L L.J. 355, 360, n.21 (1984).

state of France. The Republic of France is the name of the government and the term is sometimes used to indicate the state of France.⁸⁹ But, the state is France, which was established by Charles I in the ninth century.⁹⁰

Until 1971, when the General Assembly of the United Nations and its Security Council were in session, the nameplate on the desk where the ambassadors sent by the government of China sat stated "China," not "the Republic of China." Similarly, the nameplate on the desk where the French ambassadors sat stated "France," not "the Republic of France."⁹¹

In 1971, the U.N. General Assembly issued a resolution⁹² replacing the ROC with the PRC. There was no change of the membership. The member state was still China. The PRC did not join the United Nations as a new member. The question for the General Assembly was which government should represent the state of China, the ROC or the PRC. Because it was a question of representation and not of new membership, the matter was within the authority of the General Assembly to decide, without the need for a prior approval by the Security Council.⁹³ Today, the nameplate on the desk, at which the ambassador of the PRC to the United Nations sits, still states "China."

At present, in the U.N. document listing its members, it lists "China," not the PRC, as its member and indicates that China was admitted on October 24, 1945, a date prior to the establishment of the PRC government, which did not begin to represent the state of China until 1971.

After the establishment of the PRC, most states, except the Union of Soviet Socialist Republics ("USSR"), withheld recognition of the new government until 1964, when France recognized

89. 19 *NEW ENCYCLOPEDIA BRITANNICA* 524 (15th ed. 1994). The Fifth Republic of France was established in 1958.

90. *See supra* note 35.

91. Where a state was split into two independent states, and both states wanted to use the original state's name as part of their new state's name in order to retain their identity, the two states might use the government's name as the state's name to avoid the confusion. For instance, in 1945, Germany was split into two: The Federal Republic of Germany (West Germany), and the German Democratic Republic (East Germany), until 1990, during which the state's name and the government's names became the same.

92. U.N. G.A. Res. 2758, U.N. GAOR, 26th Sess., 1976th mtg. at 358 (1971).

93. Charter of the United Nations, June 26, 1945, art. 4, para. 2, 59 Stat. 1031, 1038, T.S. No. 993, 3 *Bevans* 1153.

it.⁹⁴ On December 30, 1978, the U.S. government, after a long period of resistance, finally granted recognition to the PRC and, at the same time, withdrew its recognition of the ROC.⁹⁵ The recognition of the PRC was recognition of a legitimate government, not recognition of a new state. The state was still China. Other states, which recognized the PRC, had to withdraw their recognition of the government of the ROC because, under international law, a state may have only one legitimate government. The withdrawal of recognition of the ROC as the legitimate government of China by the United States and other states certainly did not make either the ROC or Taiwan a state.

Neither the U.S. executive branch, *i.e.*, the Department of State, nor the legislative branch, *i.e.*, the U.S. Congress, considers the ROC or Taiwan a state. That is why the U.S. Congress enacted the Taiwan Relations Act⁹⁶ (or "Act") to protect the interests of Taiwan. If the ROC or Taiwan were a state, then the U.S. government could have entered into a mutual defense treaty with it, instead of employing such a roundabout maneuver. The United States does not have the South Korea Relations Act or the Japan Relations Act. It does not need it because South Korea and Japan are states. These states and the United States have signed mutual defense treaties.⁹⁷ Some may say that the Taiwan Relations Act⁹⁸ treats Taiwan like a state. It is true that in the Act, Taiwan is treated like a state and enjoys some of the same prerogatives and courtesy accorded by the U.S. government to other states. But if the United States treats Taiwan like a state in the Taiwan Relations Act, the implication is that Taiwan is not a state, only similar to one.

The Taiwan Relations Act is U.S. domestic legislation, not a treaty. If the PRC government uses force against the people of Taiwan,⁹⁹ then the government of the United States has no

94. Jean-Luc Domenach, *Sino-French Relations: A French View in CHINA'S FOREIGN RELATIONS, NEW PERSPECTIVES* 87 (Chun-tu Hsueh, ed. 1982).

95. The United States established diplomatic ties with China and terminated them with Taiwan on January 1, 1979. See President's Memorandum for All Departments and Agencies: Relations with the People of Taiwan, reprinted in 1979 U.S.C.C.A.N. 36, 75.

96. Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 (1994).

97. Agreement between the United States and the Republic of Korea relating to military assistance, June 27, 1974. Mutual Assistance Agreement between the United States of America and Japan, March 8, 1954.

98. 22 U.S.C. § 3301 (1994).

99. It would be considered exercise of sovereignty beyond its border.

treaty obligation toward the ROC government or Taiwan to protect them, although the U.S. government will be required to carry out the obligations pursuant to the Taiwan Relations Act or other considerations.

Furthermore, the judicial branch of the United States does not consider the Republic of China or Taiwan a state either.¹⁰⁰ Two cases involving the application of the Warsaw Convention¹⁰¹ confirm this point. In the first case, *John Lee and Margaret Lee v. China Airlines Ltd.*,¹⁰² two passengers on a flight from Hong Kong¹⁰³ to San Francisco sued China Airlines in a U.S. federal court sitting in California for injuries caused by a sudden drop of the airplane of 31,000 feet in the air off the coast of California. The defendant argued that the U.S. federal court had no jurisdiction to try the case. The plaintiffs argued that the federal court had jurisdiction, and, if their action were dismissed for lack of jurisdiction, they would be compelled to bring the action abroad, either in Taiwan¹⁰⁴ or in Hong Kong,¹⁰⁵ where they would not receive an adequate hearing of their claims, because the Warsaw Convention would not apply to either Hong Kong or Taiwan. The court, in holding that it had no subject matter jurisdiction according to the Warsaw Convention, dismissed the action.¹⁰⁶ The court added that if they sued in either Hong Kong or Taiwan, "[t]he Warsaw Convention will figure prominently in the decision making process over there because both Hong Kong and *Taiwan* adhere to it."¹⁰⁷ The court's statement that "Taiwan adhere[s] to [the Warsaw Convention]," implies that Taiwan is a contracting party of the Warsaw Convention. It

100. One exception is *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc. et al.*, 954 F.2d 847, 853 (2d. Cir. 1992).

101. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

102. 669 F. Supp. 979 (C.D. Cal. 1987).

103. At the time, Hong Kong was still a territory of the United Kingdom. *Id.* at 980.

104. This is the carrier's principal place of business. *Id.* at 979.

105. Hong Kong was the passenger's place of destination, because the plaintiffs purchased round trip tickets in Hong Kong. *Id.*

106. The court said, "Under Article 28 of the Convention, an action can be brought under the terms of the Convention only in the following places: (1) the carrier's domicile; (2) the carrier's principal place of business; (3) the place where the ticket was purchased; or (4) the passenger's place of destination." *Margaret Lee*, 669 F. Supp. at 980. California was none of the locations mentioned above.

107. *Id.* at 984 (emphasis added).

should be noted, however, that while the PRC government has ratified and adhered to the Warsaw Convention in 1958, the ROC government has never ratified or adhered to the Warsaw Convention. Thus, the reason why Taiwan is a contracting party, according to the court, is that Taiwan is a part of China and covered by the Warsaw Convention.

The second case that held that Taiwan is not a state is *Atlantic Mutual Insurance Co. v. Northwest Airlines*.¹⁰⁸ In this case, Tacoma Boat Building Co. ("Tacoma") delivered some machinery to Northwest Airlines ("Northwest") for shipment from Milwaukee, Wisconsin, to Taipei, Taiwan. Tacoma claimed that certain parts of their machinery components were damaged due to Northwest's negligence during the air transport of the components. Atlantic Mutual Insurance Co.¹⁰⁹ and Tacoma jointly sued Northwest in Milwaukee for damages. In the federal court sitting in Milwaukee,¹¹⁰ the issue was whether the state court or the federal court had the subject matter jurisdiction to try the case. The plaintiffs, who argued that the state court had the jurisdiction, claimed that the Warsaw Convention did not apply and, thus, the federal court lacked subject matter jurisdiction. The defendant, Northwest, argued that the Warsaw Convention applied to the case and, thus, the federal court had jurisdiction. In reaching the conclusion that the Warsaw Convention applied, the federal court said that it had "federal subject matter jurisdiction . . . only if Taipei, Taiwan—the flight destination—also is a party to the convention."¹¹¹ Holding that Taiwan is a party to the convention, the court explained as follows:

Since 1949 to the present [1992], two governments—the Republic of China and the People's Republic of China [PRC]—

108. 796 F. Supp. 1188, 1191 (E.D. Wis. 1992).

109. It had paid Tacoma for the loss under an insurance policy.

110. The plaintiffs brought the case to the circuit court for Milwaukee County, Wisconsin, a state court that, at the defendant's motion, remanded the case to the federal court sitting in Milwaukee. *Id.* at 1189.

111. The court stated:

[T]he convention is applicable where . . . the contract of transportation (e.g., a plane ticket) involves travel from one 'High Contracting' party to another [A] High Contracting party is a state which is an original signatory to the convention or one which ratified the convention or filed declarations of adherence to the convention after it went into force. Further, a declaration of adherence to the convention by a state may include colonies or territories of that state.

Id. 1190-91 (citations omitted).

claim to be the sole legitimate government of "China," which both governments agree is comprised of mainland China and Taiwan. In reality, the Republic of China retains control only over the island of Taiwan while the PRC retains control over the mainland; neither government has asserted that they are two separate countries.¹¹²

The world community was compelled to determine whether the ROC or the PRC would receive formal recognition as the legitimate government of China. On December 30, 1978, the United States formally recognized the PRC as the sole government of China, in its entirety, and withdrew recognition from the ROC. Over 100 other nations and the United Nations have done the same.¹¹³

Although the government of the ROC has never adhered to the Warsaw Convention in its own name, the court accepted the defendant's argument that Taiwan was a party to this convention because of the declaration made by the PRC when it ratified the Warsaw Convention in July 1958. The PRC stated that the convention "shall of course apply to the entire Chinese territory including Taiwan" and the recognition of the PRC as the sole government of China by the United States despite the continued existence of the ROC.¹¹⁴ As these two cases demonstrate, U.S. courts do not consider the ROC or Taiwan a state either.¹¹⁵

C. Taiwan Under International Law

The reason that other states do not regard the ROC or Tai-

112. *Id.* at 1190 (citations omitted).

113. *Id.* (citation omitted).

114. *Id.* at 1191. The court stated that it "is not vested with the power [to review]" the executive branch's recognition of the PRC as the sole government of China. *Id.*

115. One exception is *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc. et al.*, 954 F.2d 847 (2d Cir. 1992), in which the court concluded that Taiwan was a nation. The court could have reached the same conclusion by applying the Treaty of Friendship, Commerce and Navigation between the Republic of China and the United States, which, as the President's Memorandum issued at the time the United States shifted the recognition to the PRC government, states: "Existing international agreements and arrangements in force between the United States and Taiwan shall continue in force." U.S. Code Cong. & Admin. News 75. In *Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service*, 177 F.3d 1142, 1144-46 (9th Cir. 1999), the Ninth Circuit Court of Appeals decided the applicability of the Warsaw Convention to the territory of Taiwan based on "the political departments' position that Taiwan is not bound by China's adherence to the Warsaw Convention" without "independently determin[ing] the status of Taiwan." *Mingtai*, F.3d at 1142.

wan as a state is because the ROC government has never declared the establishment of a new state, separate from China. It asserts itself to be the government that represents the state of China, or more recently part of the state of China.¹¹⁶

When Lee Teng-Hui was elected for a second term, he reasserted in his May 20, 1996 inauguration speech the one-China policy.¹¹⁷ Under this policy, there is only one China state and Taiwan is the part of the China state. It is clear to most other states that the PRC government in Beijing, rather than the ROC government in Taipéi, represents the state of China and exercises its sovereign power.¹¹⁸

But, President Lee Teng-hui at times also claimed that "the Republic of China is a state with independent sovereignty."¹¹⁹ His contradictory claims on the status of Taiwan contributed to the creation of a society which is, as a reporter describes it, "in a schizophrenic environment."¹²⁰ Since the sovereignty of a state is indivisible, a state can have only one government that exercises its sovereign power. The ROC government's insistence on the one-China policy can only reinforce the PRC government's claim that Taiwan is a renegade province.

116. The Constitution of the ROC provides in its amended Article 2 (adopted by the 2nd sess. of the Third National Assembly at its 32nd plenary meeting on July 18, 1997, and promulgated by the President of ROC on July 21, 1997) that "[t]he president and the vice president shall be directly elected by the entire populace of the free area of the Republic of China." Additional Articles of the Constitution of the Republic of China (visited April 16, 2000) <<http://www.oop.gov.tw/roc/charter/eadded.htm>> (on file with the *Fordham International Law Journal*).

117. In the inauguration speech, he stated that both sides of the Taiwan Strait should seek unification of the country. The one-China policy is a policy that advocates that there is only one China and Taiwan is a part of China. When President Lee Teng-hui advocated reunification of the state, he restated his one-China policy. "Mr. Lee . . . added 'China is a country divided and under separate rule,' implying there was only one China." F.J. Khergamvala, *Taiwan's Lee To Be Sworn in Today*, HINDU, May 20, 1996, at 2.

118. As of March 2000, only 29 states recognize the ROC government as the legitimate government of China and have diplomatic relations with that government. They are: Belize, Burkina Faso, Chad, Costa Rica, Dominica, Dominican Republic, El Salvador, Gambia, Grenada, Guatemala, Haiti, Honduras, Liberia, Macedonia, Malawi, Marshall Island, Nauru, Nicaragua, Panama, Papua New Guinea, Paraguay, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Solomon Islands, Swaziland, and Tuvalu.

119. Interview of the ROC President Lee Teng-hui by Dr. Guenter Knabe, Head of Deutche Welle Asia Programs (Deutche Welle television broadcast, July 10, 1999) [hereinafter President Lee Teng-hui Interview].

120. Patrick E. Tyler, *The China and Taiwan Problem; How Politics Torpedoed Asian Calm*, N.Y. TIMES, Feb. 11, 1996, at 1.

In dealing with other states or in participating in the world society, Lee Teng-hui and his government do not assert statehood either. The ROC government participated in the Olympic Games¹²¹ and the Asia Pacific Economic Cooperation ("APEC") under the name of "Chinese Taipei,"¹²² not the ROC, and certainly not "China."

In its attempt to rejoin the United Nations, the ROC government does not apply as a new member, but challenges the U.N. resolution that replaced it with the PRC government to represent China in the United Nations.¹²³ It has for many years asked friendly governments to put a request for returning to the United Nations on the U.N. General Assembly's agenda. In 1998, the ROC government requested to revoke those sections of U.N. Resolution 2758 that excluded it from the United Nations and to restore to the ROC their rights at the United Nations and the organizations related to it by allowing the ROC to participate in the United Nations. In 1999, the ROC government amended its request to return to the United Nations solely to represent the people of Taiwan.

All attempts by the ROC government to rejoin the United Nations have failed. The failure has been attributed to the objections of the PRC government representing the state of China in the United Nations. But, there is also a legal aspect of those attempts that made the ROC government's request repugnant to the principles of international law. The United Nations is an organization formed by states, and only states may be members. As stated earlier, sovereignty is indivisible. Only one government can represent a state, even if two governments in different parts of the state have *de facto* control of the state and, therefore, are two political entities. The ROC government asked the United Nations to allow the state of China to be represented by two governments. International law does not permit such representation. It is not surprising that the U.N. Secretary General, Kofi Annan, took China's side and called Taiwan: "The Taiwan province of China."¹²⁴

121. Jacques de Lisle, *The Chinese Puzzle of Taiwan's Status*, ORBIS, Jan. 1, 2000, at 35

122. *Taiwan WTO Entry See To Be Delayed Until Mid-next Year*, CHINA NEWS, Dec. 9, 1999, available in 1999 WL 17736320; Lisle, *supra* note 121, at 35.

123. U.N. G.A. Res. 2758, U.N. GAOR, 26th Sess., 1976th mtg. at 358 (1971).

124. See Chiang, *supra* note 3; *UN Sends Coordinating Rescue Team to Taiwan*, *supra* note 3.

The ROC government also does not claim to be a state either in its application to join the World Trade Organization¹²⁵ ("WTO").¹²⁶ The WTO is a trade organization developed from the General Agreement on Tariff and Trade¹²⁷ ("GATT"). After World War II, in order to promote world trade, twenty-three states signed the GATT. Initially, all signatories were states. However, some members, particularly the United Kingdom and France, had overseas territories, which, due to their special, geographical, and economical conditions, would have hardship if they were subject to the same customs duty and other import regulations as their parent states. Therefore, GATT was amended to add a type of membership called, "customs territories." This type of membership permits these overseas territories to join as members and to be treated differently from their parent states. The United Kingdom was a member of the GATT and made Hong Kong a customs territory for it to join the GATT as a separate member. The United Kingdom did this before it handed Hong Kong over to China pursuant to an international agreement of 1985.¹²⁸ In 1995, GATT transformed into the WTO.

The ROC government has applied for membership to GATT and, subsequently, to the WTO for many years. Although President Lee Teng-hui claims that the ROC is a state with independent sovereignty, when his government applies to join the WTO as a member, it does not apply as a state. It cannot apply in the name of "China," because a great majority of the member states do not regard the ROC as the legitimate government of China. It does not apply under the name of the ROC because it

125. Agreement Establishing the Multilateral Trade Organization ("World Trade Organization"), Dec. 15, 1993, 33 I.L.M. 13 (1994).

126. Deborah Shen, *ROC Reinforces WTO Entry Bid*, FREE CHINA J., Dec. 13, 1996, at 2.

127. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1950).

128. See 22 U.S.C. § 5712(3) (1994) (providing that "The United States should respect Hong Kong's status as a separate customs territory"); 22 U.S.C. § 5713(3) (1994) (stating that "The United States should continue to recognize Hong Kong as a territory which is fully autonomous from the United Kingdom and, after June 30, 1997, should treat Hong Kong as a territory fully autonomous from the People's Republic of China with respect to economic and trade matters"); 22 U.S.C. § 5722(a) (1994) (allowing U.S. President to suspend laws of United States with respect to Hong Kong if President "determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States.").

is the name of a government and it does not claim that it is a state. Thus, the ROC applies as a custom territory called, "The Customs Territory of Taiwan, Penghu, Kinmen and Matsu."¹²⁹ Because President Lee Deng-Hui and his government apply only as a customs territory, the ROC does not claim that it is a state in the international community. On July 9, 1999, in an interview by a German TV reporter, President Lee Teng-hui said: "The Republic of China has been a sovereign state since it was founded in 1912. The 1991 amendment to the Constitution (promulgated in 1947 in Nanjing, China) designated the cross-strait relation as a special state-to-state relationship. Consequently, there is no need of declaring independence."¹³⁰ The day after the interview was broadcast, many newspapers printed exciting headlines, claiming that Lee Teng-hui advocates two Chinas.

The statement, "special state to state relationship," is not a declaration of independence or a declaration of the establish-

129. In a statement accompanying the application of the Republic of China to join the General Agreement on Tariff and Trade ("GATT") and the World Trade Organization ("WTO"), it states that "[t]he Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter referred to as "Chinese Taipei") is preparing to accede to the General Agreement on Tariffs and Trade (GATT), which itself has been reorganized into the World Trade Organization."

130. President Lee Teng-hui Interview, *supra* note 119. The following is part of the interview broadcast on Deutche Welle:

Knabe: You are considered as a renegade province by Beijing's government. That is, of course, a permanent intimidation and threat from the Mainland. How are you coping with these dangers?

Lee: The historical fact is, that since the establishment of Chinese Communist regime in 1949, it has never ruled the territory under the ROC—Republic of China, Taiwan, Penghu, Kimmoi, and Matsu. The 1991 constitutional amendment had designated cross-strait relation as special state-to-state relationship, rather than an internal relationship between a legitimate government and a renegade group or between a central government and local government.

Knabe: Declaring Taiwan as an independent state seems to be no realistic option. Beijing's "one country two systems" is not acceptable for the majority of the people in Taiwan. Is there any compromise between these two positions. And if there is one, what does it look like?

Lee: The Republic of China has been a sovereign state since it was founded in 1912. In 1991 amendment to the Constitution (promulgated in 1947 in Nanjing, China) designated cross-strait relation as special state to state relation. Consequently, there is no need to declare independence.

Id. After the program showing the interview, the anchorman, Brian Thomas, asked Dr. Knabe, "Based on your discussion with President Lee, did you get the impression that he was prepared to declare independence?" *Id.* Knabe replied, "I think not. He stopped short of doing that." *Id.*

ment of a state. First, a declaration for the establishment of a new state is a solemn statement. The modern custom is to make the statement in a government document officially executed and published, not made casually to a foreign reporter in an interview. Second, the content of the statement itself does not indicate the statement to be a declaration of the establishment of a new state. On the contrary, Lee Teng-hui's statement that there is no need to declare independence negates any interpretation that the statement is itself a declaration of independence. Third, subsequent statements of Lee Teng-hui indicate that he had no intention of declaring the creation of a new state in the interview. On July 20, 1999, Lee Teng-hui said, while explaining the "special state-to-state relation" to the representatives of a local International Rotary Club, "[t]he government is not engaged in the Taiwan independence [movement]. Without equal status (between two banks of the Taiwan Strait) in a negotiation, problems, such as smuggling of drugs and guns, or of the Foot-and-Mouth disease¹³¹ are difficult to resolve." In making the "special state-to-state" statement, Lee Teng-hui was just seeking an equal footing in negotiation with the PRC government.

Lee Teng-hui's statements in his July 9, 1999 interview raise two questions. First, he said that the 1991 amendment of the Chinese Constitution, which was promulgated in 1947 in Nanjing, China, designated the relation between China and Taiwan as a special state-to-state relation. But, no constitutional scholar or official in Taiwan, including Lee Teng-hui, has ever said or claimed that the ROC became a state since 1991. Lee Teng-hui himself, in his inauguration speech in 1996, still advocated the one-China policy. Why did he suddenly announce that the relation between the two banks of the Taiwan Strait was a state-to-state relation since 1991?

The second question—if the ROC is already a state, as Lee Teng-hui claims, when did it become a state? Was it established in 1912, when the ROC was established, as he often claims and also claimed in the interview? Was it established in 1991 when the Chinese Constitution was amended? Or, was it established on July 9, 1999, when he made the "special state-to-state" state-

131. This is a contagious disease carried by animals from China. Deborah Kuo, *In Taiwan FMD Spreads to Chiayi, Officials Say Milk Safe*, WORLD NEWS CONNECTION, Jan. 24, 2000.

ment? There is no state in history whose leader is so confused as to the time his state was established.

Senator Frank H. Murkowski dismissed the suggestion that by President Lee Teng-hui's statement about cross-strait relations, "Taiwan has virtually declared independence."¹³² A Comment to the Restatement states that "Taiwan might satisfy the elements of the definition [of a state], but its authorities have not claimed it to be a state, but rather part of the state of China."¹³³

III. SOVEREIGNTY OVER TAIWAN

A. *Sovereignty Based on Territory*

The discussion will now turn to the second question raised in the introduction—whether China has sovereignty over Taiwan. As stated before, the modern state is contingent upon the concept of territory. Territory is, therefore, one of the elements of a state.¹³⁴ The victorious states of a war, in which the defeated state has surrendered unconditionally, may impose any conditions for the surrender, including annexation of the defeated state, although in modern times such instances are rare. In most cases, the victorious states merely wanted to take from the defeated state a piece of its territory, which sometimes was the source of dispute between the warring states.

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. Taking or ceding a territory has always been accomplished by treaties,¹³⁵ particularly after the modern state fully developed. Thus, a treaty to cede a territory concluded at the end of a war is binding, however unfair it may seem. No such treaty has ever been effectively revoked on the ground of unfairness.

B. *Territorial Treaties*

A treaty may be political, economic, military (*i.e.*, defense

132. *US Senator Sees No Change in Taiwan's China Policy*, CENTRAL NEWS AGENCY, July 17, 1999, available in 1999 WL 17720726.

133. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201, Comment f (3d Ed., 1987).

134. Convention, *supra* note 56, art. 1.

135. See, e.g., Herz, *supra* note 23.

alliances), cultural, or scientific. 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 called territorial treaties in this Article. Historically, major wars ended by concluding peace treaties between the warring states.¹³⁶ Most peace treaties are also territorial treaties that reallocate territories of the parties.

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, while other types of treaties are purely contractual in nature. Such treaties, like land deeds in private law, involve a transfer of interest in land and affect the sovereign power of the parties to the treaties. Second, territorial treaties are self-executing. They take effect immediately unless otherwise indicated. Other types of treaties are usually executory, *i.e.*, promises or some acts to be carried out in the future. Third, territorial treaties provide a final settlement of the territories between the parties. Other types of treaties are forward looking; for instance, they might provide for cooperation in the future or they might establish new rules of conduct between the contracting parties.

These characteristics formed the basis of some rules on territorial treaties. The following are some of the rules:

Rule 1. No territory owned by a state can be taken away or transferred without a treaty. This is true even if a warring state has occupied the territory of an enemy state during the war. U.S. Supreme Court Chief Justice John Marshall in *American Insurance Co. v. Cantor*,¹³⁷ said, “[t]he usage of the world is, if a nation 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.”¹³⁸

Rule 2. In a territorial treaty, only a party to the treaty can acquire the title to a territory. The transferee of a territory must be a party to the treaty.

136. *See, e.g.*, The Treaty of Verdun (845); Peace of Westphalia (1648); Treaty of Paris (1898); Treaty of Versailles (1915); The Peace Treaty of San Francisco (1950); *see also Herz, supra* note 23.

137. 1 Pet. 511 (1828).

138. *Id.* at 541.

Rule 3. Territorial treaties cannot be revoked unilaterally. Once the title to a territory is transferred by a treaty, the only way the transferor can regain the title to a territory is by way of another treaty. Alsace and Lorraine have changed hands between Germany and France several times. Each time it was done by treaty.

Rule 4. The victorious state in a war may validly force the defeated state to dispose of its territories by a treaty. Title to the territories transferred or ceded by the defeated state is valid and cannot be denounced by the defeated state.

Rule 5. The words and language used in territorial treaties disposing a territory are precise and unambiguous, using words such as "grant," "cede," "divide," or words of abandonment, such as, "relinquish," for the present transfer or disposal of a territory.

In interpreting such a treaty, the 1969 Vienna Convention on the Law of Treaties¹³⁹ ("Vienna Convention") applies. Article 31 of the Vienna Convention adopts the ordinary meaning, or "objective" approach, supplemented by other methods, such as the intention of the parties, or "subjective" approach.¹⁴⁰

C. *Historical Events Affecting the Title to Formosa*

1. The Treaty of Shimonoseki

In 1895, Japan defeated China in the Sino-Japanese War and the Ching government signed the Treaty of Shimonoseki with Japan.¹⁴¹ In this treaty, China ceded the island of Formosa and the Pescadores Group "in perpetuity to Japan."¹⁴² At first, Japan distinguished Formosa as a colony, but later treated the territory as its own.¹⁴³

139. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(c), U.N. Doc. A/CONF. 39/27 at 289, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1990) [hereinafter Vienna Convention].

140. See *id.* art. 31 (providing interpretive methodologies for all treaties); REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 204 (Sweet & Maxwell, 1986).

141. Treaty of Peace between China and Japan, May 8, 1895, 181 Consol. T.S. 217. Article II of the Treaty of Peace between China and Japan provides:

China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon: (a) The island of Formosa, together with all islands appertaining or belonging to the said Island of Formosa. (b) The Pescadores Group, that is to say, all islands lying between the 119th and 120th degrees of north latitude.

Id.

143. It required all residents in Taiwan to adopt a Japanese surname.

2. Cairo Declaration and Potsdam Declaration

During World War II, Japan fought against the Allied Powers,¹⁴⁴ which were led by the United States in the Pacific. In 1943, while the Pacific War was in progress, U.S. President Franklin D. Roosevelt, Prime Minister of Great Britain Winston Churchill, and Generalissimo of China Chiang Kai-Shek met in Cairo to discuss the strategy for defeating Japan, which took place from November 22-26, 1943.¹⁴⁵ On December 1, 1943, the three governments made a joint statement, known as the Cairo Declaration.¹⁴⁶ The Cairo Declaration states, in part, 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."¹⁴⁷ In June 1945, President Harry Truman, Prime Minister Churchill, and President Chiang Kai-Shek conferred in Potsdam,¹⁴⁸ and on July 26, 1945 the three governments issued a joint declaration called the Potsdam Proclamation, which confirmed the Cairo Declaration with respect to the future of Formosa.¹⁴⁹ 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 we determine."¹⁵⁰

The intention of the three government heads expressed at the time of issuing the two declarations that Formosa be re-

144. The Allied Powers consisted of the following states: France, United Kingdom, Union of Soviet Socialist Republics ("USSR"), and the United States. The following countries signed the Peace Treaty of San Francisco 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, The Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, The Philippines, Saudi Arabia, Syria, Turkey, South Africa, United Kingdom, United States of America, Uruguay, Venezuela, and Vietnam.

145. Russia, not being then at war with Japan, was not represented. Cairo Declaration, *NEW CYCLES IN ASIA* 29 (Harold Isaacs, ed., 1947) [hereinafter Cairo Declaration].

146. *Id.*; Vol. IX Cairo Conference, *DEPT. ST. BULL.*, Dec. 1, 1943.

147. *Id.* at 29.

148. Great Britain was originally represented by Prime Minister Winston Churchill, who was replaced by Clement Attlee after losing election during the Potsdam Conference.

149. Potsdam Proclamation, July 26, 1945 (visited Apr. 5, 2000) <<http://metalab.unc.edu/hyperwar/PTO/Dip>> (on file with the *Fordham International Law Journal*).

150. Proclamation Defining Terms For Japanese Surrender, July 26, 1945, § 8, *DEPT ST. BULL.*

turned to China after Japan surrendered is not questioned here. It is the nature and the effect of the declarations that will be examined below. First, I will discuss the nature of the declarations. A joint declaration, like a communiqué, of two or more governments is often used to express the common foreign policy of the governments that made the declaration. Such foreign policy does not bind succeeding governments. It certainly does not have the nature of a contract in private law, creating a binding obligation on the governments, let alone on the states. Thus, the declarations have no binding effect on the governments that made such declarations.

Second, I will discuss the effect of the declarations. At the time when the declarations were issued, Japan had not yet surrendered. The Allied Powers were winning the war, but had not yet defeated Japan. It is a general rule of law that one cannot give something which he or she does not have. Even assuming, *arguendo* that the declarations were considered as contractual promises offering Formosa to China, they surely did not have that effect. The three governments did not have the title to Formosa and the Pescadores. Neither the three governments could, before Japan surrendered, force it to transfer the title to Formosa. Such transfer could have been made at a postwar settlement in a treaty only after Japan surrendered.

3. Postwar Occupation by the ROC Government

Soon after Japan surrendered on August 15, 1945, the U.S. Army occupied the major islands of Japan¹⁵¹ and Okinawa. The United States also assumed the post-surrender operation in southern Korea, leaving the operation in northern Korea to Russia, which had declared war against Japan just a week before Japan surrendered.¹⁵² The United States asked the United Kingdom to take over the operation in Southeast Asia, where Japan defeated the United Kingdom during the war. After the United States occupied the Okinawa Islands, it could also have assumed the post-surrender operation in Formosa. But, immediately after the Japanese surrender, the U.S. government wanted to recall its troops as soon as possible. The war had lasted too long since the Japanese attack on Pearl Harbor. General Douglas MacArthur,

151. The four major islands are Honshu, Hokkaido, Kyushu, and Shikoku.

152. This took place on August 8, 1945.

as the Supreme Commander of the Allied Forces' army, decided to assign the task of the post-surrender operation in Formosa over to President Chiang Kai-shek and the ROC government.¹⁵³ After all, most U.S. Department of State officials thought that Formosa would be returned to China pursuant to the Cairo Declaration at a postwar settlement.¹⁵⁴

The war between Japan and the Allied Powers did not formally end until 1950, when the Treaty of Peace with Japan¹⁵⁵ ("Peace Treaty of San Francisco") was signed, and the war between Japan and China was not formally over until 1952,¹⁵⁶ when the Peace Treaty between Japan and China, represented by the ROC government, was signed. Thus, the occupation of Formosa by the ROC government was until then a military wartime occupation.¹⁵⁷

The assignment of the task of the post-surrender operation in Formosa to the ROC government by the Allied Powers, through General MacArthur, created an agency relationship between the Allied Powers as the principal, and the ROC government as the agent, pending a peace settlement. The agency relationship would have terminated if the title to Formosa had formally been transferred to China in a peace treaty under negotiation at the time.

This state became a territorial state, and it is common that a victorious army in a war occupies 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

153. GEORGE H. KERR, *FORMOSA BETRAYED* 44 (Riverside Press, 1965) (assigning to ROC government task of taking over). Anthony Eden, British Secretary of State for Foreign Affairs, stated in the House of Commons, "In September, the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied powers; but this was not a cession, nor did it in itself involve any change of sovereignty. 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 . . . Formosa and the Pescadores are therefore, in the view of Her Majesty's Government, territory the *de jure* sovereignty over which is uncertain or undermined." Great Britain, *Parliamentary Debate* (Hansard), House of Commons, Official Report, vol. 536, col. 159 (Feb. 4, 1955).

154. *Id.*

155. Treaty of Peace with Japan (with two declarations), Sept. 8, 1951, 136 U.N.T.S. 46 [hereinafter Peace Treaty of San Francisco].

156. China was not a party to the Treaty of Peace with Japan ("Peace Treaty of San Francisco") in 1951. The Treaty of Peace between the Republic of China and Japan, Apr. 28, 1952, 163 U.N.T.S. 38 [hereinafter Treaty of Peace of 1952].

157. *American Insurance Co. v. Cantor*, 1 Pet. 511m 541, 26 U.S. 511 (1828).

enemy surrenders, pending a settlement, however, does not give the occupying state the title to the territory that it occupies. It has become an international custom 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.

The nature of the occupation of Formosa by the ROC government, before a post war settlement, was threefold. First, the occupation of Formosa was on behalf of the Allied Powers led by the United States and lasted until the agency relationship terminated, in which event the ROC government would have to cease the occupation of Formosa unless the title to Formosa was transferred to the state of China at the postwar settlement. If the title to Formosa were subsequently transferred to the state of China at the postwar settlement, then the ROC government would occupy it as the reigning government.

Second, the occupation of Formosa by the ROC government did not give the ROC government title to Formosa. The purpose of occupation of Formosa by the ROC government was for 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 possession or occupation of a territory and the right to its title are two distinct rights. For instance, in the Treaty of Paris of 1898 after the Spanish-American War, Spain relinquished the title to Cuba and the United States was given the right of occupation pending final resolution, but not title.

Third, the occupation of Formosa by the ROC government did not give the PRC government or the state of China the title to Formosa. In occupying Formosa, the ROC government acted as the agent of the Allied Powers, not of the PRC government or the state of China. Besides, the ROC government did not acquire the title to Formosa for itself or for anyone else. There was no legal ground under which either the PRC government or the state of China could have acquired title to Formosa based on the fact that the ROC government occupied Formosa pending a postwar settlement.

4. The Peace Treaty of San Francisco

After Japan surrendered in August 1945, the Allied Powers began to prepare for a postwar settlement. The United States, being the leading power during the war, assumed the task of

drafting a treaty. The drafts were distributed to other Allied Powers for comments, and exchanges of notes among the parties followed. The Peace Treaty of San Francisco, as it came to be called, was signed on September 8, 1951¹⁵⁸ between Japan and the Allied Powers. China was neither a party nor a signatory to this treaty. Neither the ROC government that occupied the island of Formosa, nor the PRC government, signed on behalf of the state of China.

The Peace Treaty of San Francisco, which forced Japan to dispose of some of its territory, is a territorial treaty. The only provision that deals with the territory of Formosa is Article 2(b) that provides that "Japan renounces all right, title and claim to Formosa and the Pescadores."¹⁵⁹ China did not acquire title to Formosa under the Peace Treaty of San Francisco. It did not acquire it by interpreting the Peace Treaty of San Francisco. There are two approaches in interpreting a treaty: the objective approach and the subjective approach.

Under the objective approach, *i.e.*, by the plain and ordinary meaning of this treaty, China has not acquired the title to Formosa under the Peace Treaty of San Francisco language. The treaty does not use the word "cede," which is the word customarily used in a treaty to transfer a territory. Instead, it uses the word "renounce." Its plain and ordinary meaning is "to give up"¹⁶⁰ and "to abandon."¹⁶¹ It has the same meaning with the word "relinquish" employed in the Treaty of Paris between Spain and the United States.¹⁶² Moreover, the Peace Treaty of San Francisco provision does not mention any transferee. No state could have received any right or title to Formosa under the treaty.

Under the subjective approach of interpretation, *i.e.*, the intention of the parties to the Peace Treaty of San Francisco, it was clear that the parties did not intend for China to acquire the title to Formosa. The U.S. government had a change of mind with respect to the policy announced in the Cairo Declaration and

158. Peace Treaty of San Francisco, *supra* note 155, 136 U.N.T.S. at 46.

159. *Id.* art. 2(b), 136 U.N.T.S. at 48.

160. WEBSTER'S NEW COLLEGIATE DICTIONARY 972 (1981).

161. *Id.*

162. In the 1898 Treaty of Paris between Spain and the United States, Spain relinquished its sovereignty over Cuba. The Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

intended to leave the future of Formosa undetermined. So, it wanted Japan to relinquish title to Formosa, and did not want China to have 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.¹⁶³ The government of the Union of Soviet Socialist Republics ("U.S.S.R."), in its memorandum to the U.S. Ambassador¹⁶⁴ commented,

In the meantime the American 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 fulfill 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.¹⁶⁵

Likewise, the Government of India was fully aware that Formosa was not to be returned to China under the draft of the Peace Treaty of San Francisco. In its memorandum to the U.S. Department of State,¹⁶⁶ 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 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 engaged in the last war against her does not appear to the Government of India to be either just or expedient.¹⁶⁷

Thus, it was clear to all the states involved that China was not to acquire and did not acquire the title to Formosa.

The Peace Treaty of San Francisco left intact the Treaty of Shimonoseki of 1895, under which Japan acquired Formosa. The renouncement of the title in the treaty to Formosa took effect from the time it became effective. It had no retroactive ef-

163. U.S. Memorandum of May 19, 1951, DEPT. ST. BULL., July 23, 1951.

164. Soviet Memorandum of June 10, 1951, DEPT. ST. BULL., July 23, 1951, at 138.

165. *Id.* at 142.

166. India Refuses To Be Party to Treaty, DEPT. ST. BULL., Sept. 3, 1951, at 385.

167. *Id.* at 386.

fect. Therefore, the renouncement of the title to Formosa did not affect the fact that Japan acquired the title to Formosa from the Treaty of Shimonoseki of 1895. This legal fact was not changed by Article 10 of the Peace Treaty of San Francisco that 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 the said protocol, annexes, notes and document.¹⁶⁸

Although Article 10 requires Japan to renounce all its rights and interests in China under the mentioned protocol and documents and abrogate those documents, it does not deal with the territory of Japan, and certainly does not refer to the Treaty of Shimonoseki.

Second, China could not acquire title to Formosa under the Peace Treaty of San Francisco because only an Allied Power, which was a party to the treaty, could acquire title to a Japanese territory. Under the general rule of law mentioned earlier, in a territorial treaty, only a party to the treaty can transfer or acquire title to a territory. The Peace Treaty of San Francisco was 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 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.¹⁶⁹

According to Article 23, China was not a party to the Peace Treaty of San Francisco. Article 23 provides,¹⁷⁰

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 instrument of ratification have been deposited by Japan and by the majority, including the United States of America as the principal Power, of the following states, [here appear the names of such of the fol-

168. Peace Treaty of San Francisco, *supra* note 155, art. 10, 136 U.N.T.S. at 58.

169. *Id.* art. 25, 136 U.N.T.S. at 74.

170. *Id.* art. 23, 136 U.N.T.S. at 74.

lowing States as signatories to the present Treaty] namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

China was not mentioned in Article 23. China was 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 that in each case the State concerned has signed and ratified the Treaty.¹⁷¹

Because China was not a party to the treaty and not an Allied Power under the treaty, China could not acquire the title to a territory owned by Japan under Article 25.

China could not acquire the title to Formosa under an exception to Article 25 either. The exception was in Article 21. Article 21 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”¹⁷² As discussed before, Article 10 deals with the rights and interest of Japan in China, not with territories. Article 14 deals with reparations and acceptance of surrender,¹⁷³ not with territories either.

The language in Chapter 2, Article 2(b), in which Japan renounced the title to Formosa, and the language in Article 2(c), in which Japan renounced the title to Kurile Island and Sakhalin Island, are different and should be distinguished. Article 2(c) provides that “Japan renounces all rights, title and claim to the Kurile Island, 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.”¹⁷⁴ The reference to the Treaty of Portsmouth is important. The title and rights renounced are specific, *i.e.*, those acquired under the Treaty of Portsmouth. When Japan renounced all its rights and claims acquired under the Treaty of Portsmouth, these

171. *Id.* art. 25, 136 U.N.T.S. at 74.

172. *Id.* art. 21, 136 U.N.T.S. at 72.

173. *Id.* art. 14, 136 U.N.T.S. at 60.

174. *Id.* art. 2, 136 U.N.T.S. at 48-49.

rights and claims terminated and were returned to Russia.¹⁷⁵

With respect to the title to Formosa and the Pescadores, Japan simply renounced the title and claim to them. Renouncement took effect at the time the Peace Treaty of San Francisco went into effect. The language in Article 2(b) of this treaty is similar to that in Article 2(f) dealing with the Spratly Islands and the Paracel Islands. In these two provisions, Japan renounced its claim to them without qualification and without any attempt to transfer their title, but leaving it unresolved.

From the analysis above, it is beyond any doubt that China did not acquire the title to Formosa under the Peace Treaty of San Francisco. The Peace Treaty of San Francisco also had two implications. First, it did not carry out the wartime foreign policy of the three governments announced in the Cairo Proclamation. The Cairo Declaration and the Potsdam Proclamation were rejected formally by the Allied Powers who signed the Peace Treaty of San Francisco. Second, the Peace Treaty of San Francisco did not terminate the agency relationship of the ROC government and the Allied Powers. Because China did not acquire title to Formosa under this treaty, the status of the ROC government as an agent of the Allied Powers was unchanged. Under the general principle of law recognized by civilized nations, agency status remains the same unless and until it is terminated by the principal, which in this case is the Allied Powers.¹⁷⁶

5. Peace Treaties Between China and Japan

Since the conclusion of the Peace Treaty of San Francisco in 1951, Japan has signed two peace treaties with China, one with the ROC government in 1952,¹⁷⁷ and the other with the PRC government in 1978.¹⁷⁸ Neither peace treaty is a territorial treaty.

175. Article 2(c), however, has such effect only if Russia signed the Peace Treaty of San Francisco. Although the U.S.S.R. was originally named a party in Article 23, it did not sign the Peace Treaty of San Francisco. It has, however, occupied the Kurile Islands and Sakhalin Islands, as well as four small islands north of Hokkaido, which Japan claims to be her original territories. So, Russia will not acquire the title to the Kurile Islands and Sakhalin Islands until it signs a peace treaty with Japan.

176. 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.

177. Treaty of Peace of 1952, *supra* note 156.

178. The Treaty of Peace and Friendship Between Japan and the People's Republic of China, P.R.C.-Japan, Aug. 12, 1978, 1225 U.N.T.S. 269.

The 1952 treaty, signed by the ROC government, ended the war between China and Japan. The treaty does not deal with title to Formosa, but simply confirmed the disposition that Japan made in the Peace Treaty of San Francisco. Article II of the 1952 peace treaty 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 (hereinafter referred to as the San Francisco Treaty), Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and Parcel Islands.¹⁷⁹

By recognizing that Japan had abandoned Formosa, the ROC government accepted it as officially valid. Not only did the state of China not acquire the title to Formosa under the 1952 peace treaty, but the ROC government, which represented China, also formally accepted the legal fact that Japan had abandoned Formosa without claiming it as its own. The second peace treaty signed between Japan and China, represented by the PRC government in 1978, does not even mention the Peace Treaty of San Francisco or Formosa.

Under the general principles of law, China could not have acquired title to Formosa under these treaties because Japan, having renounced its title to the island of Taiwan in the 1951 Peace Treaty of San Francisco, had no more title or right to the island of Taiwan to give at the time of signing these two treaties.

D. *Chinese Sovereignty over Taiwan*

The modern state has territorial state sovereignty that is based on the territory that the state owns and controls. Any sovereignty of China over Taiwan must be based on title to the island of Taiwan. Due to the fact that China, as analyzed herein, has not acquired the title to the island of Taiwan either under a treaty or by occupation, China has no sovereignty over the island of Taiwan.

Consequently, China has no sovereignty over the people in Taiwan. A state with no sovereignty over a territory cannot have sovereignty over the people in the territory. Under the theory of

179. Treaty of Peace of 1952, *supra* note 156, art. II, 163 U.N.T.S. at 38.

the territorial state, the sovereign power of a state ceases at its borders.

There are many implications from the conclusion that China has no sovereignty over Taiwan. One, neither the PRC government nor the ROC government can claim for the state of China the title to Formosa. The claim of both governments that Taiwan is part of China has no legal basis. The one-China policy that has been advocated by the two Chinese governments is correct in the first part that there is only one China, but wrong in the second part that Taiwan is a part of China.

Second, the U.S. foreign policy toward China and Taiwan based on the "one-China policy" is flawed because it is based on a mistaken assumption that China has title to the island of Taiwan. In the joint U.S-China Shanghai Communique of 1972 by President Richard Nixon and Chinese Premier Zhou Enlai, the U.S. government was careful in its language, acknowledging that "all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China."¹⁸⁰ In other words, the U.S. government in the communique only took notice of the Chinese claim on the island of Taiwan and would not lend color to legitimacy of the Chinese claim. President Clinton, in 1998, during an official visit to China, in Shanghai, changed the tone when he announced the "Three-nos" policy, in which he recognized China's claim that Taiwan is a part of China. In response to China's *White paper on Taiwan* threatening the use of force against Taiwan before its presidential election, the U.S. Secretary of Defense William Cohen said that the United States supports "the one-China policy."¹⁸¹ The change of tone from "acknowledge" to "support" still will not confer the legal right of the island of Taiwan to China because title to a territory is not transferred by such a policy statement by a third party. But, if the term "support" is interpreted as "acceptance,"¹⁸² the change of tone has far-reaching adverse effects on international relations.

180. Joint Communique, Issued at Shanghai, Feb. 27, 1972, 66 DEP'T ST. BULL. 435 (1972).

181. See *US Businessmen Urge Cross-strait Calm*, S. CHINA MORNING POST, Mar. 12, 2000, at 1; Otto Kreisher, *Defense Chief Urges 'Constructive Engagement' with China Continue*, SAN DIEGO UNION TRIBUNE, Mar. 25, 2000, at A16 (quoting Secretary of Defense William Cohen: "We have a one-China policy that we continue to support.").

182. See WEBSTER'S NEW COLLEGIATE DICTIONARY 7 (1981) (defining "acceptance").

Third, under international law, the Taiwan issue is not a domestic issue of the state of China. The U.N. Secretary General Kofi Annan was misled when he said, after the September 1999 earthquakes in Taiwan, that the United Nations, in dispatching a disaster assessment team to "the Taiwan Province of China," had to ask the PRC government for permission.¹⁸³ Under the Vienna Convention, states and international organizations, such as the United Nations, which are not parties to the Peace Treaty of San Francisco, are also bound by its territorial arrangement.¹⁸⁴

IV. SOLUTIONS FOR TAIWAN

In 1951, after Japan was forced to renounce its title to Formosa in the Peace Treaty of San Francisco, Taiwan was no longer subject to any sovereign. As mentioned earlier, not all civil societies are states. A society may be a political entity, yet neither be a state, nor be subject to any sovereign. Although the island of Taiwan is not owned by any state, it is submitted that the island of Taiwan has become the "people's property," a concept derived from the Roman law concept of *res humani juris* or "things subject to human dominion."¹⁸⁵ People's property is property owned by a society, or, more specifically, the people of the society collectively.

The situation of a group of people living in a society, but not subject to any sovereignty is not unique for Taiwan. In the Treaty of Paris between the United States and Spain signed after the end of the Spanish-American War, Spain relinquished its title to Cuba.¹⁸⁶ Even though Cuba was thereafter occupied by the United States until Cuba established statehood, the territory and the society were not under any sovereign.¹⁸⁷ East Timor is

183. See Chiang, *supra* note 3; *UN Sends Coordinating Rescue Team*, *supra* note 3; Siemaszko, *supra* note 3.

184. Vienna Convention, *supra* note 139, art. 38, 1155 U.N.T.S. at 341; WALLACE, *supra* note 140, at 206.

185. Gaius in his Institute 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." Section 10 states: "Things subject to human dominion (*res humani juris*) are either public or private." GAIUS, *ELEMENTS OF ROMAN LAW* 158-59 (2d ed., 1994).

186. The Treaty of Paris of 1898 between the United States and Spain after the end of the Spanish-American War provides: "Spain relinquishes all claim of sovereignty over and title to Cuba." The Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

187. *Id.* art. I. Article I provides:

Spain relinquishes all claim of sovereignty over and title to Cuba. And as the

in a similar situation.¹⁸⁸

The occupation of Cuba by the United States after the Spanish-American War and the occupation of the island of Taiwan by the ROC government after the Japanese surrender 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 Allied Powers 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,¹⁸⁹ it was presumed that the ROC government that was authorized by the Allied Powers, as its agent, to conduct a military occupation in the island of Taiwan, was to continue to administer the island. While the United States withdrew from Cuba soon after Cuba established statehood, the ROC government has since administered the affairs of Taiwan.

The ROC government and the state it claims to represent, China, do not have sovereignty over the island of Taiwan. The ROC government has administered the affairs of the island under a constitution promulgated in Nanking, China in 1947.¹⁹⁰

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.

Id.

188. East Timor, after the Indonesian Parliament ratified the inhabitants' votes for independence in the August 1999 referendum, is not under any sovereign. Pending a preparation for establishing statehood under the U.N. administration, the territory is the people's property, owned by the peoples of East Timor collectively.

189. Article 14(a)2 of the Peace Treaty of San Francisco does not confer to the ROC government any right to govern the island of Taiwan. Article 14(a)2 provides:

[E]ach of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

- (a) Japan and Japanese nationals,
- (b) person acting for or on behalf Japan or Japanese nationals, and
- (c) entities owned or controlled by Japan or Japanese nationals,

which on the first coming into force of the present Treaty were subject to its jurisdiction.

Peace Treaty of San Francisco, *supra* note 155, art. 14(a)(2), 136 U.N.T.S. at 59. Although China, not being an Allied Power as defined, was conferred no right, titles, or benefits by the Peace Treaty of San Francisco, (Article 25), Article 21 provides an exception for China so that China had the benefit under Article 14(a)2.

190. ZHONGHUA RENMIN GONGHEGUO XIANFA [CHUNGHUA JENMIN KUNGHOKUO HSIENFA] (CONSTITUTION OF THE REPUBLIC OF CHINA) (adopted by the National Assembly on Dec. 25, 1946, promulgated by the National Government on Jan. 1, 1947, effective from Dec. 25, 1947), (visited Apr. 16, 2000) <<http://www.oop.gov.tw/roc/charter/echarter.htm>> (on file with the *Fordham International Law Journal*) The amendment to

Amendments to the constitution and participation by the inhabitants in the government have not changed the character of the government as an agent of the Allied Powers. It is time that the people of Taiwan are allowed to decide their own political future.

The doctrine of self-determination has been a heated issue during the twentieth century, especially after World War II.¹⁹¹ It is a doctrine that can be traced to the eighteenth and nineteenth centuries' ideology of nationalism,¹⁹² and is 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 sometimes a group of people living in a territory within a state, of its own political future, including establishing a state of its own by a referendum or other methods.¹⁹³

An issue in international law is whether a minority group within a state has the right of self-determination against the wish 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. Nevertheless, most writers support the principle of self-determination. International conventions concluded after World War II also embrace this principle. In practice, most of the new states established after World War II were created out of the European and U.S. colonies in

the Constitution of the Republic of China, promulgated May 1, 1991 with respect to Articles 1-10 and the amendment to the Constitution of the Republic of China, promulgated May 28, 1992 with respect to Articles 11-19. *Id.*

191. ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES, A LEGAL REAPPRAISAL* 44-46 (Cambridge Univ. Press, 1995). Antonio Cassese stated:

[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.

192. HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 27 (U. of Pennsylvania Press, 1990). OTTO HINTZE, *THE EMERGENCE OF THE DEMOCRATIC NATION-STATE [DAS DURCHBRUCH DES DEMOKRATISCHEN NATIONALSTAATES IN DER AMERIKANISCHEN UND FRANZOESISCHEN REVOLUTION]* STAAT UND VERFASSUNG 503-10 (2d ed. Guettingen, Vandenhoeck & Ruprecht) (*trans.* by LUBASZ, *supra* note 9, at 69).

193. HANNUM, *supra* note 192, at 36.

the name of self-determination.¹⁹⁴

While the peoples in Taiwan, in making the decision on their own political future, may employ the procedure frequently used in self-determination, *i.e.*, referendum, they do not have to rely on the doctrine of self-determination because they do not face the problem of most minority groups seeking self-determination. The people of Taiwan, not being under the sovereignty of any state, by conducting a referendum will not challenge the sovereign power of any state, including China.

A referendum is a procedure by which the people express their common wish by voting on certain issues. A general election, including an election of the president, does not necessarily reflect the common wish of the people on their political 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. The only way for the people to express freely and clearly their common wish on their political future is a referendum on that single issue.

Since the establishment of the PRC government 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 elections, China intimidated the voters of Taiwan with the threats of the use of force if they did not vote for the candidate of its choice. Recently, the PRC government, in its *White paper on Taiwan*, threatened to use force against Taiwan if the ROC government further delays the “reunification” talk. Under such circumstances, people in Taiwan cannot express their free will in a referendum.

The Allied Powers, especially the United States, contributed to the predicament of the people in Taiwan. They forced Japan to abandon its title to the island of Taiwan in the Peace Treaty of San Francisco, but permitted the ROC government to continue its occupation of the island, leaving the political status of Taiwan unsettled. 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 polit-

194. Although some states are not as ready to recognize such rights to minority groups of people who reside in their main territories, *e.g.*, Turkey to Kurds, Russia to Chechens.

ical future. In addition, in order to assure that the people in Taiwan may express their will without fear of military attack by China, the United States and the rest of the world should guarantee that the result of the referendum will be respected by all states.

CONCLUSION

The PRC government that represents the state of China claims that Taiwan is part of China. The ROC government also claims to represent the state of China or, more recently, a part of China. Its president, Lee Teng-hui, at times also claims that the ROC is an independent state with sovereignty.

This Article, by applying the principles of international law, has concluded that although Taiwan is a civil society, it is not a state. It then analyzed the Cairo Declaration and the Peace Treaty of San Francisco against the rules of international law and concluded that China has not acquired title to the island of Taiwan, and hence has no sovereignty over Taiwan. The one-China policy that both governments advocate and that has formed the U.S. foreign policy toward China and Taiwan for the last three decades is based on an erroneous assumption that China has acquired title to the island of Taiwan.

This Article has offered a solution for the Taiwan problem—a referendum by the people in Taiwan with an international guarantee of its result. Before that takes place, the United States and other governments should reformulate their foreign policy toward China and Taiwan in accord with the findings of this Article.