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Taiwan: Sovereignty Reinterpreted

The Relations Across the Taiwan Strait from the Perspective of International Law

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About the Author

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Introduction

This paper is a discussion on the peaceful reunification of China from the perspectives of international law and political science. The author has made some bold attempts to explore many difficult issues — including some "dead knots" — that have been encountered thus far in the relationship between both sides of the Strait over the question of unification, hoping to promote extensive and productive discussions. The key points brought forth are the following: This paper initiates the idea of taking into account the difference between the notions of "sovereignty" and "sovereign rights" in dealing with the question of "sovereignty," over which the two governments across the Strait have constantly argued. The author construes cross-Strait relations as relations where two governments enjoy internal and external "sovereign rights" under the territorial and sovereign principles of "one China." The author also suggests that the two governments should distinguish between "country recognition" and "government recognition" under the territorial and sovereign principles of "one China," so that while they seek reunification internally, internationally they respect each other and each country's choice of recognition. Ultimately, the two governments should work to eliminate hostility and pursue peaceful, non-military unification. The framework under which this is achieved should be a federal system.

Why is it necessary to make such strict conceptual differentiations? The author contends that in international law there are clear legal concepts to differentiate territorial possession (sovereignty) from territorial jurisdiction (sovereign rights) with regard to the concept

of "sovereignty," and "country recognition" from "government recognition" with regard to the concept of "recognition." Without clarifying these concepts, it would be impossible to correctly understand the principle of "one China" and the relations between the two governments across the Strait, and to effectively resolve the problem of "sovereignty" as contested by the two sides. To that end, this paper attempts the following explanations:

The Distinction between "Sovereignty" and "Sovereign Rights"

"Sovereignty" refers to a country's highest power to independently deal with internal and external affairs. It is the fundamental attribute of a country and the basis for its establishment. Only a country can possess "sovereignty." Territory is the platform on which a country exercises its "sovereignty." Thus, territory functions as a concrete embodiment of "sovereignty." The people who reside on a sovereign state's territory have permanent possession of it. They elect a legal government as their representative to administer the land they own and grant the government the rights to independently manage internal and external affairs. These rights are called "sovereign rights." Therefore, any legal government has "sovereign rights" to represent the people under its effective rule to handle its internal and external affairs. In a certain sense, any legal government can possess "sovereign rights," but not territorial sovereignty (i.e., territorial ownership). In a unified country, however, the nation's territorial "sovereignty" is identical with the government's "sovereign rights," and the government has the complete authority to exercise its "sovereign rights." However, the situation is much more complicated in the case of a divided country, or when a country has two legitimate governments to represent the country in performing its "sovereign rights."

Historical instances of "divided states" appear to indicate that, in order to ensure the ultimate reunification of a divided country, the governments of the two sides should agree that the sovereignty of the territory under their effective control actually belongs to the "traditional country" prior to separation. What each side exercises are "sovereign rights" left behind by the traditional country and granted by the local people. In other words, when a country is divided, the

two sides should both agree that the country's "sovereignty" is indivisible, in order to pursue the objective of unification. At the same time, both sides should acknowledge that it is rational and legal for the two sides to exercise "sovereign rights" on the part of land they effectively rule.

With regard to cross-Strait relations, the above theories can be applied in this way: the territorial sovereignty of both sides of the Strait belongs to "China" (the traditional country). Taiwan is a part of China; the mainland is also a part of China. The territorial sovereignty of Taiwan is also shared by the people of the mainland; the territorial sovereignty of the mainland is enjoyed by the people of Taiwan, as well. On the other hand, the two governments each possess "sovereign rights" to represent the people under their respective rules in dealing with their internal and external affairs. Thus, cross-Strait relations should be defined as two governments separately performing "sovereign rights" in internal and external affairs under the principle of "one China."

The author believes that only by construing cross-Strait relations in a way that distinguishes between "sovereignty" and "sovereign rights" can the urge for "Taiwan independence" be effectively contained, and non-peaceful annexation by the mainland under the excuse of "sovereignty" be avoided. This is an approach that would ensure national reunification under peaceful conditions.

Mutual Recognition between the Two Governments Across the Strait

The author believes that both governments across the Strait should adhere to the principle of "one China." Any legal attempt to secede from "Chinese" territory or any pursuit of annexation under the excuse of "sovereignty" would be a violation of this principle. As far as the current situation is concerned, the two governments should establish a consensus that territorial sovereignty belongs to a single "China," and that they should seek the reunification of China by adhering to the principle of "one China." The prerequisite here is that the two governments must recognize each other, as such mutual recognition is the only way to eradicate hostility across the Strait.

The political reality of 50 years of separate rule across the Strait

would be the basis for mutual recognition. Mutual recognition would also mean a formal declaration of the end of the civil war. However, before mutual recognition of the two governments can be attained, the relationship between the principle of "one China" and the coexistence of the Republic of China (ROC) with the People's Republic of China (PRC) must be clarified.

In reality, from the viewpoint of international law, there is no contradiction between recognizing the "one China" principle and recognizing the two governments across the Strait, as the former concerns "country recognition" while the latter involves "government recognition." "Country recognition" refers to the recognition of new countries, which can be formed by merger, secession, separation, and independence. As the current cross-Strait situation stands, the question of "country recognition" need not come up, so long as neither side declares a legal separation from China. "Government recognition" denotes the recognition of new governments, namely, the recognition that the new government is the legal representative of the area under its effective control. "Government recognition" is usually based on "effective rule." In other words, the new government must be able to successfully perform its "sovereign rights" over the territory under its control to be able to earn recognition from other countries.

Following the abovementioned notion of "recognition" in international law, the principle of "one China" refers to the international community's recognition of "China" — the traditional country shared by the two sides across the Strait. In fact, the international community currently only recognizes a single "China": as such, the recognition of the ROC and the PRC expresses the international community's recognition of the two governments. This "recognition" includes recognizing the two governments as legal representatives of the areas under their respective control, as well as their qualification as formal representatives of the country of "China." "Government recognition" of each side, however, does not contradict "country recognition" of "one China."

Mutual recognition means parity of the two governments across the Strait. Reunification on this basis will certainly not be based on the hierarchical dichotomy of a central government versus a local

government, but rather on a model in which the two governments across the Strait operate on a parallel structure.

"Sovereignty" Reinterpreted under International Law

Subjects of International Law from a Modern Point of View

Since its founding in 1949, the PRC on the mainland has gained international recognition from 162 nations, whereas the ROC in Taiwan, although still recognized even after its withdrawal from the United Nations (UN) in 1971, is recognized by only 24 nations. Undeniably then, the two governments have enjoyed the status of subjects of international law, or as international persons, under international law. The two countries each dispatch their diplomatic envoys, participate in international conferences, and hold membership in international organizations. In addition:

1. Each side has the capacity to independently take part in international legal activities. The ROC and the PRC have the capacity to carry out state functions in the international community. Although the ROC has withdrawn from the UN, it has remained a participant in certain international organizations, which indicates that its capability to legally take part independently in international activities still exists.[1]

2. Each side has the capacity to undertake direct obligations prescribed by international law, as illustrated by the fact that they have concluded treaties with other countries and observed the relevant obligations.

3. Each side has the capacity to enjoy rights granted by international law, as illustrated by the fact that they have established diplomatic relations with, and dispatched envoys to, foreign countries, participated in international conferences, and hold memberships in international organizations.

The three points mentioned above constitute the essential conditions for the ROC and PRC to be considered international persons. They reflect the status quo of the ROC on Taiwan despite the ROC's deprivation of membership in many international organizations

as the result of losing its seat in UN, and the subsequent restrictions on its rights and duties to a certain extent. As it stated in *Oppenheim's International Law* (*OIL*):[2]

> An international person need not possess all the international rights, duties and powers normally possessed by states. Some states only possess some of those rights and duties; they are therefore only in those limited respects subjects of international law and thus only possess limited international personality. International organizations also possess only international rights and duties appropriate for their particular situation and they are similarly only to a limited extent subjects of international law and international persons. (Vol. I, Chap. II, Sec. 33)

This is the present mainstream point of view in international law, and it applies to the status quo of the ROC on Taiwan as well.

Nevertheless, it must be pointed out that none of the 162 nations that recognize the PRC recognizes the ROC on Taiwan; in the same manner, the 24 nations that recognize the ROC refuse to recognize the PRC on the mainland. So it is clear that no country recognizes the PRC and ROC as co-existing states. In fact, the international community accords the two sides across the Strait only "government recognition" instead of "country recognition." In other words, it only recognizes the capacity of both sides to function as a state to represent China in the international community.

There is still another point that requires elaboration. International law has conventionally regarded a state as the exclusive subject for carrying out the law, i.e., only a sovereign state can become an international person in its own right. But as revealed by recent practices in international affairs, the conventional conception, which limits the subject of international law to the state only, is incompatible with reality in contemporary international relations, and thus is not conducive to the evolution of international law. The subject of international law should not be so limited, but should be extended to include governments as well as international organizations fighting for national liberation. This view has come to be internationally accepted because it mirrors the reality of international relations in the

world today and contributes to the positive evolution of international law (Duanmu, 1989:72).

Differentiation of "Sovereignty" and "Sovereign Rights"

Sovereignty, the fundamental attribute of a state, is the supreme authority of a state to handle its internal and external affairs independently under its own initiative. Accordingly, sovereignty is the basis of statehood, and only a state possesses sovereignty. "Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round within and without the borders of the country" (*OIL*, Vol. I, Chap. II, Sec. 34). In a certain sense, independence is often regarded as a fundamental attribute of sovereignty: because a state is independent, it has sovereignty. What, then, is independence? In the *Island of Palmas Case* (Permanent Court of Arbitration 1928), Max Huber, the arbitrator, put it this way: Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.

Thus, we can infer that statehood is associated with sovereignty, and that sovereignty is the intrinsic and determining nature of a state. From the viewpoint of international law, four determinative factors comprise a sovereign state. These are: permanent residency of a population, a defined territory, a concrete organ of political power, and a sovereign government (*OIL*, Vol. I, Chap. II, Sec. 34; Wang, 1981:86-87). The last factor is the most significant.

In the well-known *Les six livres de la République* of Jean Bodin (1577), a state is defined as "a multitude of families and the possessions they have in common ruled by a supreme power and by reason." According to the definition, a "state" is the supreme executive power, whereas the "essential manifestation of sovereignty" is the power to make laws, and since the sovereign makes the law, he clearly cannot be bound by the laws that he makes. Nevertheless, Bodin did not intend his "sovereign to be an irresponsible supra-legal power." Bodin went on to say that "there are some laws that do bind him, the divine law, the law of nature or reason, the law that is common to all nations," and also certain laws which Bodin calls *leges imperii*, the

laws of government. These *leges imperii*, which the sovereign does not make and cannot abrogate, are the "fundamental laws of the state" (Brierly, 1955:7-11).

In *Leviathan* (1651), Thomas Hobbes elaborated on the theory of sovereignty brought forth by Bodin. For Hobbes, as for Bodin, sovereignty was an essential principle of order. Hobbes believed that men need for their security "a common power to keep them in awe and to direct their actions to the common benefit"; and for him the person or body in whom this power resided, however it may have been acquired, was the sovereign. Law neither makes the sovereign, nor limits its authority; it is might that makes the sovereign, and law is merely what it commands. Moreover, since the power that is the strongest clearly cannot be limited by anything outside itself, it follows that sovereignty must be absolute and illimitable (Brierly, 1955:12-13). For centuries, Hobbes' idea that "might makes the sovereign" grew into a mainstream viewpoint in conventional international law, and had long been held in esteem by autocracies and colonialists up to the twentieth century.

Article 14 of the Draft Declaration on Rights and Duties of States, adopted by the UN International Law Commission in 1949, provides that "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law" (http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf). This Declaration for the first time gave priority to international law over individual state sovereignty. This reflected the trend in the evolution of international law in the twentieth century. Here we see that the concept of sovereignty was introduced into political theories and expanded in accordance with the prevailing belief that the power of the rules should enjoy supremacy only in domestic affairs. In other words, sovereignty is a question concerning the authority of the state constitution, which is regarded as domestically supreme, initiative and exclusive. But sovereignty, as the highest legal right and supreme authority, does not by itself confer the position of "statehood" in the international community.

Generally speaking, no state should exercise any supreme

power and authority over other states; similarly, no other state will be subject to such sovereign power. The feature of inter-state relations is that of equality and independence. As a practical matter, all states are mutually dependent. In this light, any attempt to transfer the domestic concept of sovereignty to the international arena would be inappropriate, because it would be unfavourable to the normal operation and development of international law and international organizations (*OIL*, Vol. I, Chap. II, Sec. 37).

It can be inferred from the above that the concept of "sovereignty" applies only when a state justifies its position within its own borders, and that it does not apply to the assessment of a state's lawful position in the international community. In general, "sovereignty" is integrated with "statehood." In an entirely unified single state, sovereignty embodies the will of the state, and is absolutely independent and indivisible. But when a state exists as part of a compound system, the indivisibility and independence of sovereignty is questionable.

With regard to such situations, the Oppenheim's legal school of international jurists once introduced the concept of an "incomplete sovereign state." In their opinion, those states under suzerainty or protectorates, or the member states in a compound or federal system, are not legally independent. They may enjoy sovereignty and independence in some aspects of state functions and powers, but in other respects they are in a subordinate position to the authority of another state. They have the capacity to appoint and accept diplomatic envoys and conclude certain treaties with foreign states.

The leader of such a state enjoys high-level privileges (relevant to his position as head of state) granted by foreign states, since the privileges granted to him are deemed appropriate according to the norms of international law. All of these facts and other similar ones indicate that such partially independent countries are legal subjects or international persons. Once it is appreciated that it is not so much the possession of sovereignty that determines the possession of international personality but rather the possession of rights, duties, and powers in international law, it is apparent that a state that possesses some, but not all, of those rights, duties, and powers is nevertheless an international person (*OIL*, Vol. I, Chap. II, Sec. 35).

I think it is necessary to draw a distinction between "sovereignty" and "sovereign rights" and the scope of their applicability. Generally speaking, an independent state with territorial integrity undoubtedly possesses complete or absolute sovereignty, and hence qualifies as a subject of international law. However, when two countries exist as "incomplete" entities, each simultaneously possess power, rights, and duties in accordance with international law and, therefore, automatically enjoys international personality and status as a legal subject. But the international community cannot recognize both sides as sovereign states, because according to traditional international law, sovereignty is indivisible.

This is why countries such as Germany, Korea, Vietnam, and China seek reunification. They are all aware that only unification can bring about an independent sovereign state. Nevertheless, it is a simple fact that the "split parties" in each case enjoy separate "sovereign rights."

Here a brief definition of the connotation of "sovereign rights" and its origin is necessary. So-called "sovereign rights" refer to the rights and capability of a government in its performance in domestic and international affairs. This involves two aspects. One is the right and capacity to carry out state functions within the territory over which it has "effective control." The other is the possession of power, rights, and duties in an international context granted by international law. A state possesses sovereignty and sovereign rights simultaneously. In contrast, a government as an international person possesses only "sovereign rights" rather than "sovereignty." In other words, "sovereignty" and "sovereign rights" are unified in an independent sovereign state, although that is not the case in a "divided country," a federal system, or in so-called "incomplete sovereign states." Strictly speaking, "sovereignty," as an embodiment of the will of a state, is indivisible, but "sovereign rights" as a sign of the functioning of a state, are divisible. This may be illustrated by the situation in the United States, Switzerland, and Germany, under whose system of federalism "sovereign rights" are shared by the federal and member states. This fact has gained wide, although not universal, recognition and acceptance.[3]

Furthermore, there is another case that proves the necessity of differentiating between "sovereignty" and "sovereign rights." In 1953, the UN International Law Commission passed a draft resolution on the problems concerning the continental shelf, which established the principle that coastal countries are allowed to exercise sovereign rights on continental shelves for the purpose of developing resources, but that such development should not affect the legal status of the open sea and airspace above it. This principle was later adopted in 1958 by the International Law Commission, which was signed into the *Convention on the Continental Shelf*. Article 2 of the Convention states that "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." Article 3 states: "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters." (http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf). Here the distinction between "sovereignty" and "sovereign rights" is unequivocal. In other words, the sovereignty of the coastal countries only extends to natural resources in the continental shelf. As for sovereignty over the covering waters and the space above, this belongs to the high seas (or international community). This is one example of the concept of "limited sovereignty" (Tu, 1966:246).

In summary, just as international law scholars in the tradition of Oppenheim make a distinction between "absolute sovereignty" and "incomplete sovereignty," it is also necessary to distinguish "sovereignty" from "sovereign rights." This is because such a differentiation helps us to analyze and resolve the issue of "sovereignty" and "sovereign rights" for the two sides of a "split state."

A Divided China and the Issue of Sovereignty

Now we examine China's "sovereignty" issue in light of current politics. First, let us focus on the ROC government in Taiwan.

1. In *Relations Across The Taiwan Straits*, issued by the ROC government on 5 July 1994, it is stated "[t]hat the Republic of China has been an independent sovereign state since its establishment in

1912 is an incontrovertible historical fact" (http://www.mac.gov.tw/english/english/macpolicy/policy5/mlp1.htm). But this statement is only relevant to the sovereignty of the ROC from a historical point of view. During the period 1912 to 1949, China was a unified sovereign state under a unitary system ruled by a sole legitimate government — the government of the ROC. In other words, the "sovereign rights" of the ROC government coexisted with China's sovereignty. After 1949, the ROC government moved to Taiwan as a result of the establishment of the PRC in the mainland. The "sovereign rights" of the ROC coexisted with China's "sovereignty" with regard to international issues until 1971, when the ROC was deprived of its UN seat. But its "sovereign right" over territory was greatly reduced (to the areas of Taiwan, the Penghu Islands, Kinmen, Matsu, and the surrounding waters). This, too, is an incontrovertible historical fact.

As a result of the loss of its "sovereign rights," the ROC government had to shelve temporarily the "sovereignty dispute" in its interactions with the government on the mainland, which was represented by the Chinese Communist Party (CCP). Meanwhile, the ROC government defined the two sides of the Strait as two "political entities with de facto authority." Here, Taiwan used the term "de facto authority" in place of "sovereign rights" in order to avoid a "sovereignty dispute" with the mainland. In fact, the so-called "de facto authority" bore a similar connotation to the concept of "sovereign rights" adopted by international jurists. *Relations Across The Taiwan Straits* described the issue in the following terms:

> The ROC government believes that from the point of view of political reality, China is at present temporarily divided into two areas under two essentially equal political entities, the government of the Republic of China and the Peking regime. Although these two entities differ in terms of the extent of their jurisdiction, their population, and the systems they implement, they should treat each other equally in the course of their interaction. And in the areas over which they have jurisdiction, each should have exclusive rights; neither entity should be able to exercise its rule in the territory of the other, or should one force its will on the other in the name of sovereignty.

The two terms, "jurisdiction" and "rule," as used in the above text, can be expressed as legal substitutes for "sovereign rights" in international law.

> The ROC government is firm in its advocacy of "one China," and it is opposed to "two Chinas" or "one China, one Taiwan." But at the same time, given that the division between the two sides of the Taiwan Strait is a historical and political fact, the ROC government also holds that the two sides should be fully aware that each has jurisdiction over its respective territory and that they should coexist as two legal entities in the international arena. As for their relationship with each other, it is that of two separate areas of one China and is therefore "domestic" or "Chinese in nature." This position is extremely pragmatic. These proposals are quite different from either "two Chinas" or "one China, one Taiwan."

The text draws a clear distinction between "coexist[ence] as two legal entities in the international arena" and the assertion of "two Chinas" or "one China, one Taiwan," claiming that they are completely different in connotation. This is keeping with reality and with the current view of international law. Put in international legal terms, there is, in effect, a clear differentiation between "sovereign rights" (held by both sides) and "sovereignty" (possessed by one China). In all fairness, the statement in *Relations Across The Taiwan Straits* on cross-Strait relations and the question of sovereignty is, except for a few inaccurate legal terms, basically in conformity with historical facts and international legal principles. In particular, the reference to "one China" is not only precise and appropriate but also rational and objective.

Now let us look at the PRC government on the mainland. On 31 August 1993, the PRC government issued a white paper entitled *The Taiwan Question and Reunification of China*. Among other things, it stated: "The People's Republic of China was proclaimed on 1 October 1949 and the Government of the new People's Republic became the sole legal government of China." It also stated: "Since the founding of the People's Republic of China, 157 countries have established diplomatic relations with China. All these countries recognize that

there is only one China and that the Government of the People's Republic of China is the sole legal government of China and Taiwan is part of China" (http://www.china.org.cn/e-white/taiwan/).

In the text there is no mention of "sovereignty"; only the question of "recognition" is involved. But what is expressed diverges slightly from historical facts. From a legal point of view (i.e., in light of international law and the principle of "recognition by a third state"), the establishment of the PRC government as the sole legal government of China can be traced back to 1971, when it obtained representation in the UN. All 157 nations agreed that there was one China (the "country recognition"); at the same time, they recognized the PRC government. They did so believing it was the only legal government (so-called "government recognition") that represented China (the confluence of "sovereign rights" and "sovereignty").

There are two important passages in the white paper that involve statements about "one China" and "relations between international organizations and Taiwan."

> Only one China. There is only one China in the world, Taiwan is an inalienable part of China and the seat of China's central government is in Beijing. This is a universally recognized fact as well as the premise for a peaceful settlement of the Taiwan question.
>
> The Chinese Government is firmly against any words or deeds designed to split China's sovereignty and territorial integrity. It opposes "two Chinas", "one China, one Taiwan", "one country, two governments" or any attempt or act that could lead to "independence of Taiwan".

The text gives prominence to "the central government is in Beijing," and tactfully identifies this with the concepts of "China," "the Chinese government," and "Chinese sovereignty." In contrast to this is the identification of "two Chinas," "one China, one Taiwan," or "one country, two governments" with "Taiwan independence." All of these are generalized in a sweeping statement as "words or deeds of splitting China's sovereignty and territorial integrity."

> All the specialized agencies and organizations of the United Nations system are inter-governmental organizations composed

> of sovereign states. After the restoration of the lawful rights of the People's Republic of China in the United Nations, all the specialized agencies and organizations of the U.N. system have formally adopted resolutions restoring to the People's Republic of China its lawful seat and expelling the "representatives" of the Taiwan authorities. Since then the issue of China's representation in the U.N. system has been resolved once and for all and Taiwan's re-entry is out of the question.

The remarks in this text basically tally with the facts, yet there is one matter that should be clarified. In principle, only the representatives of a sovereign state are admitted into international organizations subordinate to the UN. However, the principle is not absolute. Some governments with "sovereign rights" have been admitted, including Ukraine, Byelorussia, India, and the Philippines (1945) (in the infancy of the UN); the Federal Republic of Germany and the German Democratic Republic (1973). The Republic of Korea and the Democratic People's Republic of Korea became UN members and joined other organizations in the UN system in their own right, and not in the capacity of sovereign states as defined by international law.

In fact, any government that holds rights over its internal and external affairs (i.e., sovereign rights) is qualified for membership in all UN organizations, even though that government may not necessarily be the representative of a sovereign state. In addition, the text mentions the expulsion of "the representatives of the Taiwan authorities." Here the use of "Taiwan authorities" is not proper, since the "expelled" authorities were then the rightful representatives of the "ROC." Clearly, the white paper contains some ambiguous and sometimes incorrect statements.

"Recognition" Re-interpreted under International Law

The Concept of "Recognition"

According to the mainstream view of international law, "recognition" involves granting a certain group a certain status and, therefore, is an

act of state. For example, an existing state recognizes a society as a sovereign state (country recognition) or a ruling administration as that country's government (government recognition). This recognition is confirmation given by an existing state, through certain modes, to the fact that a new state or government has appeared. By giving such recognition, the existing state declares its intention of establishing diplomatic relations with the new state or government. However, the concept of recognition in international law also includes granting some political entities a certain status by way of recognition. For example, a recognizing state can recognize a government that has effective control over the territory it occupies (belligerents or insurgents) or a certain organization outside a sovereign state (a protectorate under a suzerain state, an overseas colony, and an associated state) without establishing diplomatic relations with it. Hence, recognition is not an act of state (*OIL*, Vol. I, Chap. II, Sec. 38).

Not only are there categories of "recognition," there are also modes of "recognition," including "de facto recognition," "de jure recognition," "express recognition," and "implied recognition."

Although modes of recognition share certain similarities and connections, they are different concepts having substantial implications. Their similarities lie in the fact that they all relate to the "recognition" of a new state, a new government, or a certain entity on the international stage. Their substantial differences lie in their respective implications (Zheng, 1999b).

1. De facto recognition and de jure recognition:

A new state or government is usually "recognized" de facto or de jure. Formal recognition is usually de jure recognition, which is the recognition of a new state or government as having a "complete personality" internationally. De facto recognition, on the other hand, indicates some reservations as to the ability of this new state or government to achieve legal personality status according to international law, but recognizes existence in fact. Following international precedents, if a new state or government wishes to have international de facto recognition, its founding must be by a general referendum according to its constitution. However, for

reasons of economic cooperation, some states will offer a new state or government de facto recognition before granting it official (i.e., de jure) recognition. For example, the United Kingdom gave the government of the Soviet Republic of Russia de facto recognition in 1921 and recognized it as de jure in 1924. The United Kingdom gave the government of the PRC de facto recognition on 1 October 1949 and de jure recognition on 6 January 1950. Both de facto recognition and de jure recognition are legal actions, with the difference being only in degree (*OIL*, Vol. I, Chap. II, Sec. 46; Tu, 1966:116-33).

2. Express recognition and implied recognition:

Express recognition is realized by a clearly expressed notification or declaration. This direct and declared recognition can be given to the recognized party by presenting a note or sending a telegraph, or by signing an agreement or a treaty that carries a clear statement of recognition of the new government or state. Implied recognition, on the other hand, does not directly express recognition, and is usually conducted in the following two modes: (1) The existing state concludes a treaty or treaties with a new state, automatically expressing recognition of the new state; (2) The existing state establishes diplomatic relations, including sending and receiving consuls vis-à-vis the recognized party. Currently, most states adopt mode of express recognition; implied recognition is rare in international practice (*OIL*, Vol. I, Chap. II, Sec. 46; Duanmu, 1989:116-33).

3. Country recognition and government recognition:

Country recognition means recognition of a new state by an existing state. Under the current practice of country recognition, the granting of recognition depends on whether or not a new state has satisfied all of the conditions of statehood as required by international law. The existence of a state as a lawful organization depends on the inner constitutional order of the state. Since there is often no clear-cut boundary between a state that has and a state that does not have the necessary qualifications of statehood, the inner constitutional order of a state becomes a prime-deciding factor. Of course, a state as a subject of international law should possess at least four attributes: a

permanent population, defined territory, an administration that wields effective control, and sovereignty. If a new state satisfies all of these four requirements, then it has become an international person with the rights and obligations of a state as endowed by international law. The birth of a new state and its subsequent recognition often takes place in the following circumstances: (1) Merger: two or more states merge into one new state; (2) Separation: a part of a state separates from that state to form a new one; (3) Split: a state splits into several new states, and the original state no longer exists; and (4) Independence: an original colony achieves its independence and forms a new independent state. In addition, because the decision to recognize a new state is one for each existing state to make for itself, it can happen that a new entity will be recognized as a state by some existing states but not by others (*OIL*, Vol. I, Chap. II, Sec. 40; Duanmu, 1989:93-94).

Government recognition means the recognition of a new government. It indicates that an existing state recognizes the new government as an official representative of that state and expresses its wish to establish or continue normal relations with the new government. In international practice, recognition of a new government is mainly based on the principle of "effective control." In other words, a new government is given recognition by other states only after it effectively exerts its rights over the territory it controls. The so-called principle of "effective control" is often interpreted as requiring support by the "will of the nation, substantially declared," with "evidence of popular approval, adequately expressed," of the legitimacy of its control.

Recognition of a new government is related to, but different from, recognition of a new state. They are related because whenever a new state is born, there is simultaneously an establishment of a new government. Therefore, if a new state is given recognition, so is its new government. But a government is different from a state because, when an existing state changes its government, the only need is to recognize the new government. For example, the international community was only concerned with the problem of recognizing the French government established by the French Revolution in 1789 and the government of Soviet Russia in 1917 after the Russian Revolution,

but was not concerned with the problem of recognizing the states of France and Russia (*OIL*, Vol. I, Chap. II, Sec. 41).

4. Recognition of belligerency and recognition of insurgency:

Belligerency and insurgency are related but differ in degree. According to *OIL* (8th edition), when a rebellion takes place, but has not yet reached the "scope and character of a civil war," third states can only recognize this as an insurgency and not as belligerency" (p. 150). Based on international law, although rebellious forces normally do not have international rights and obligations, they can enjoy a certain degree of international personality status and are accorded recognition. For example, rebellious forces may have consolidated their power over part of the territory of the state they have occupied. Although they have not overthrown the existing government, they deserve to be accorded recognition as a de facto government, at least of the territory over which they have effective control. Such recognition is necessary for the protection of the nationals of third states, and "for securing commercial intercourse and for other purposes connected with the hostilities" (p. 141) In these and similar cases third states remain neutral to the armed struggle "without conceding to the rebellious forces belligerent rights" (p. 140).

Recognition of belligerency, on the other hand, means that when there is a civil war in a country, third states may recognize as "belligerents" the non-governmental side of the civil war in order to protect the national interests of third states and respect the legal rights of both warring sides. Such recognition is usually declared in a statement. Once it recognizes belligerency, the recognizing state should stay neutral to both warring sides and fulfill its neutral obligations. The recognized belligerency is then held responsible internationally for the events that take place in the territory it occupies.

Whether a party is considered belligerent or insurgent, if it is attempting to overthrow only the government of its own state or to separate from its mother state, it does not violate international law. Hence, it deserves to be accorded a certain degree of recognition by the international community (*OIL*, Vol. I, Chap. II, Sec. 49; Duanmu, 1989:96).

It should be noted that the untimely and precipitate recognition of a new state, new government, or an insurgency that is soon suppressed is often regarded as a violation of the dignity of the mother-state, and is an unlawful act amounting to intervention (*OIL*, Vol. I, Chap. II, Sec. 41).

The Issue of "Recognition" on Both Sides of the Taiwan Strait

The issue of recognition on both sides of the Strait should be explored through three avenues before a complete understanding can be reached: (1) Self-positioning of both sides of the Strait, namely, "self-identification"; (2) Orientation of each by the other, namely "mutual recognition"; and (3) Recognition of both sides by the international community, namely "recognition by the third states."

The questions raised by the three propositions should be answered through an analysis of representative documents officially issued by the governments of both sides and of international law. They include *Relations Across The Taiwan Straits*, issued by the ROC; *The Taiwan Question and Reunification of China*, issued by the PRC; and *OIL*. The documents may be summarized as follows:

1. *Relations Across The Taiwan Straits*: The Mainland Affairs Council of the Executive Yuan of the ROC convened a meeting on 5 July 1994 and issued this document. This was Taipei's first important and comprehensive official document on its policy on relations between the two sides. *Relations Across The Taiwan Straits* consists of five parts: "Introduction," "The Origins and Nature of the Division between the Two Sides of the Taiwan Straits," "The Development of Cross-Strait Relations," "Domestic and External Factors Affecting Cross-Strait Relations," and the "Conclusion."

On "self-identification," *Relations Across The Taiwan Straits* contains the following words:

> That the Republic of China has been an independent sovereign state since its establishment in 1912 is an incontrovertible historical fact.… In October 1949, the CCP established the People's Republic of China in Peking, and the ROC government transferred from Nanking to Canton, and thence to Taipei. Since then, China has been

> a temporarily divided country under two separate governments on either side of the Taiwan Strait.

On the issue of "mutual recognition," the document states the following: The two sides of the Strait are both political entities with de facto authority. Taiwan is "free and democratic China" and the Mainland is "Communist dictatorship China." It further states that "the Peking regime should be defined as a 'confrontational competitive regime'."

As for relations between the two sides, *Relations Across The Taiwan Straits* contains the following language:

> The government [of the ROC] held that there was "only one China," but "Taiwan and the mainland were both parts of China" and "Peking regime was not equivalent to China." Prior to unification, China was ruled by two separate governments which should have the right to participate alongside each other in the international community.

Based on the above, the government of the ROC declared that it "would no longer compete for the 'right to represent China' in the international arena." At the same time, it decided that

> [It] had formally and unilaterally renounced military force as a means of national unification.... On April 30 [1991], President Lee announced that the "period of mobilization" would be terminated at midnight on May 1, and in accordance with a resolution passed by the National Assembly, he also announced that the "temporary provisions" of the Constitution in force during the mobilization period would be annulled simultaneously. Constitutionally speaking, this meant that the Peking regime was no longer regarded as a rebel organization.

2. *The Taiwan Question and Reunification of China*. This white paper was issued jointly by the Taiwan Affairs Office and the Information Office of the State Council of the PRC on 31 August 1993. It was Beijing's first systematic official document on its policy towards Taiwan. It is comprised of seven major parts: "Foreword," "Taiwan — an Inalienable Part of China," "Origin of the Taiwan Question,"

"The Chinese Government's Basic Position Regarding Settlement of the Taiwan Question," "Relations Across Taiwan Straits: Evolution and Stumbling Blocks," "Several Questions Involving Taiwan in International Relations," and "Conclusion."

As to "self-identification," the white paper notes the following:

> The People's Republic of China was proclaimed on 1 October 1949 and the Government of the new People's Republic became the sole legal government of China.... Since the founding of the People's Republic of China, 157 countries have established diplomatic relations with China. All these countries recognize that there is only one China and that the Government of the People's Republic of China is the sole legal government of China and Taiwan is part of China.

As for "mutual recognition," the white paper contains the following: "There is only one China in the world, Taiwan is an inalienable part of China and the seat of China's central government is in Beijing." The Beijing administration states that in certain international economic organizations, "Taiwan may participate in the activities of those organizations only as a region of China under the designation of Taipei, China (in ADB) or Chinese Taipei (in APEC)." In other words, the Taiwan administration is positioned as a local government.

As for relations between the two sides, the white paper states:

> [T]he Chinese people on both sides of the Straits all believe that there is only one China and espouse national reunification.... [T]he Taiwan question is purely an internal affair of China and bears no analogy to the cases of Germany and Korea which were brought about as a result of international accords at the end of the Second World War.... The Taiwan question should and entirely can be resolved judiciously through bilateral consultations and within the framework of one China.

In addition, the Beijing government utterly refutes the Taiwan government's international status:

> According to international law, a sovereign state can only be represented by a single central government.... [A]s a part of China, Taiwan has no right whatsoever to represent China, nor can it establish "diplomatic ties" or enter into relations of an official nature with foreign countries (http://www.fmprc.gov.cn/eng/ljzg/3568/t17807.htm).

3. *OIL*. The problem of "recognition" with regard to the two sides of the Taiwan Strait has attracted the attention of mainstream scholars of international law and is treated as a special case of "recognition" in international law. In *OIL*, the following words address the problem of "recognition" with regard to the two sides of the Taiwan Strait:

> In 1949 the Government of the People's Republic of China proclaimed itself the Government of China, and conducted a civil war against the existing Nationalist Government. The latter was eventually driven on to the island of Formosa, the Government of the People's Republic of China taking effective control of the Mainland of China. Many states nevertheless refused to recognize that government and continued to recognize the Nationalist Government as the Government of China. The Government of the People's Republic of China did not receive general recognition until 1971, when its representatives were admitted as the representatives of China in the United Nations. (Vol. I, Chap. II, Sec. 44)

As for the reasons why the PRC was not recognized by many states until long after its founding, *OIL* contains the following additional explanation:

> The actions of the Government of the People's Republic of China at the time of the Korean hostilities (in which that government was condemned by the United Nations as an aggressor), and in certain other matters involving an apparent unwillingness to observe international obligations, was a major factor in the refusal of many states to recognize it. (Vol. I, Chap. II, Sec. 45)

Concerning the dispute between the governments of the two sides over the right to represent China in the UN, *OIL* gives the following detailed account:

> The General Assembly was confronted with such a situation in and after 1950, when the Government of the People's Republic of China obtained effective control over the entire Chinese territory (with the exception of the Island of Formosa whose territorial status was doubtful) and claimed to represent the State of China in the United Nations. At the time that government was recognized only by a minority of the members of the United Nations. The General Assembly, after prolonged study of the matter, adopted a resolution in 1950 stating that in cases of that description "the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case." The resolution also stated that the attitude adopted by the Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies; and the attitude of the Assembly on the question does not affect the direct relations of individual member states with the state concerned. The representatives of the Government of the People's Republic of China eventually occupied the Chinese seat in the United Nations, and the representatives of the Nationalist Government ceased to do so, in 1971. (Vol. I, Chap. II, Sec. 53)

Now, a brief review of the above representative documents is in order. First of all, the ROC on Taiwan is "an independent sovereign state." Although it moved to Taiwan from the mainland in 1949 and withdrew from the UN in 1971, its character has not changed. Historically, the Qing Emperor abdicated his throne in 1911. By 1912, the ROC had completed the process of regaining sovereignty. From that time until 1949, its legal status as "a sovereign state" is indisputable. From 1949 on, especially after its withdrawal from the UN in 1971, its legal status has been questioned by numerous states. For example, the United Kingdom withdrew its recognition as early as 6 January 1950. The states that withdrew their recognition after 1971 are numerous, although Taiwan still has legal status as an international person (there are still 24 states that accord it recognition in 2006).

As for "mutual recognition," positioning the two sides as "political entities with de facto authority" and as "parts of China" is in accordance with historical fact and with reality. The problem

is whether both political entities deem themselves to be "equals" or whether they accept each other. For example, the mainland obviously does not accept such a position. In *The Taiwan Question and Reunification of China*, Beijing states that it is "the sole legal government of China" and it only recognizes Taiwan as "a region of China" or "a part of China." The statement that "the central government is in Beijing" expresses clearly that the government of Taiwan is nothing but "a local government." This is the reason why Taiwan thinks the mainland's position is that the two governments are not equals, and therefore why it cannot accept this position.

How does the international community recognize the two sides? In accordance with *OIL* with regard to the issue of "recognition," the international community accords both the PRC and the ROC "government recognition" and not "country recognition." This case, in fact, involves the issue of the "recognition of a new head of state and the new government of an old state." On this issue, *OIL* states the following:

1. The recognition of a change in the headship of a state, or in its government, or in the title of an old state, are matters of importance. But such recognition must not be confused with recognition of the state itself (Vol. I, Chap. II, Sec. 42). This situation fits that of the PRC because at its founding in 1949, the change not only involved the "head of state" and the "government," but also the name of the state (ROC) on the mainland, where it had effective control. However, these changes did not affect recognition of "China" by the international community as a state itself (namely country recognition).

2. If a foreign state refuses to recognize a new head of state or a change in the government of an old state, the latter does not thereby lose its recognition as an international person (Vol. I, Chap. II, Sec. 42). This situation fits that of the ROC and that is why the ROC has never lost its status as an international person.[4] In other words, as long as the governing authorities in Taiwan do not change the name "ROC" to something else, the ROC as an old state will not lose its status as an international person.

In light of such "recognition" in international law, the recognition given by the international community to both sides of the Strait is

only "government recognition"; the status of "China" to which the international community gave "country recognition" has never changed. In the eyes of the international community, the governments on both sides of the Strait have always been unified (unified under the name of "China"). The only real issue is that China is divided internally into two governments.

"Succession" Re-interpreted under International Law

The Raising of the Question

In the late 1990s, the government of the ROC made a request to re-enter the UN and its peripheral organizations. Simultaneously, some American congresspersons have requested that Taiwan be allowed to join the UN and become a formal member (*World Journal*, 4 November 1999, p. A6). As a result, the "succession" issue between the two governments across the Strait has resurfaced.

Beijing insists that its succession to the ROC was completed when the Kuomintang (KMT) government was overthrown by revolutionary violence in 1949. As stated in *The Taiwan Question and Reunification of China,* in 1971, the government of the PRC as the sole legitimate government representing the people of China was recognized by the UN and various other countries of the world. According to international law, a sovereign state can only be represented by one central government. Taiwan as part of China had no rights to represent China in the international community. It cannot establish diplomatic relations, or develop official ties with foreign states. Nor can it participate in international organizations including those under the UN system.

De Facto Co-existence of the Cross-Strait Governments

From the traditional international law point of view, Beijing is correct in its assertion, for "succession" in international law means a change of government due to a revolution or coup d'état in which the rights and duties of the old government devolve upon the new one. This applies to the situation where the Beijing government "succeeded"

the KMT government. But the problem is that the KMT government was not completely overthrown or wiped out. Since it merely moved to Taipei, it has continued to exist, albeit under the name of ROC. Furthermore, until 1971, it represented China as the sole legitimate government and had been universally recognized by the international community. Even years after it withdrew from the UN, it still maintains diplomatic relations with 24 countries. This case has, in fact, exceeded the definition in scope of the "government succession" principle in traditional international law.

Therefore, the government of the ROC, when lobbying friendly nations to let it re-enter the UN, always stresses the point that "the concept of 'government succession' under traditional international law is not applicable to the ROC" (*World Journal*, 12 November 1999). The two governments across the Strait simply have a different understanding of "succession" under international law. This has resulted in continual diplomatic competition and in the waste of a great deal of resources. It is obvious that international law has to develop new concepts in order to rationally define the issue of "government succession" for a country that has been kept in such a divided state.

Scholars' Opinions

On the "succession" issue, Wang Hsiao-po, who has long studied cross-strait relations, has put forward a rather creative explanation. Wang (1992) pointed out:

> Apparently, the relation of the ROC and the PRC is that of government succession within one country. Its seat in the UN and its diplomatic relations with other countries all follow the theory of government succession of a state. However, in practice this succession of the government of the PRC to that of the ROC has not been completed. The ROC still has over 20 countries that keep diplomatic relations with it (although they are small, they are still countries). The original succession of the government of the PRC to the government of the ROC through violent revolution was halted by the PRC's declaration of "peaceful reunification" in 1979. This, for the moment, can be called "incomplete succession" or "incomplete revolution."

Wang Hsiao-po's concept of "incomplete succession" is in keeping with the reality of the political state of both governments. But can his theory be accepted by all parties? Wang Tieya (1993a), the most authoritative mainland expert on international law does not agree:

> As for state succession, there is a distinction between complete succession and incomplete succession, or between universal succession and partial succession. But government succession is completely different. The change of government has no impact on the identity of a state. A state has only one government from beginning to end. Therefore, government succession is only complete or universal. It cannot be incomplete or partial.... In the case of government succession it is quite wrong to put forward a concept of "incomplete succession." It cannot hold in theory. Nor can it be realizable in practice. This concept obliterates the difference between state succession and government succession and confuses them. It implies that after a governmental change, there can be two governments that stand for a state, and hence the result of incomplete succession.[5]

Wang Tieya's views have basically been drawn from the principles of *OIL*.[6] The latter states: "It helps to differentiate between universal succession and partial succession."[7] As for "government succession," it states: "In the case of a change of government, whether in a normal constitutional manner or as the result of a successful coup d'état or revolution, it is well established that the new regime takes the place of the former regime in all matters affecting the international rights and obligations of the state" (Vol. I, Chap. II, Sec. 67)[8] From this, one can see that no distinction is made between universal and partial succession within government succession in *OIL*.

However, one thing needs to be pointed out: the concept of "government succession" in *OIL* is an analysis and appraisal based on the normal circumstances of the replacement of an old government by a new one. In the case of the government of the PRC succeeding the government of the ROC, succession is a process that, even though incomplete, has gradually been accepted and recognized by the international community.

Accordingly, "succession" and "recognition" in international law should be examined together. Based on the facts that both sides across the Strait have been under separate and distinct rules; that the government of the ROC has not become completely extinct; that even after the change of government on the mainland the ROC until 1971 spoke on behalf of all of China in the international community, it is really necessary for international law to develop a new concept to explain the special case of the cross-Strait governments. Since the term "incomplete succession" is suspect, perhaps the term "unfinished succession" is closer to political reality and does not violate international legal principles.

On "Unfinished Succession"

"Unfinished succession" can be explained by historical fact. For example, the 1911 revolution overthrew the Manchu Qing Court and compelled the Qing emperor to abdicate. The next year the ROC was established to succeed the Manchu Court and became the legitimate government of China. In this way, the universal succession of the government of the Great Qing Empire by the ROC was realized. The succession of the ROC to the Great Qing Empire is a change of dynasty from a historian's point of view, but it is a change of government within a state, i.e., "government succession," from the point of view of international law. This change of government or "government succession" was a result of revolution. This universal succession took place according to *OIL*, in all affairs that affected the international rights and duties of the state. Therefore, the succession of the ROC to the old government of the Great Qing Empire was considered "normal," and that was why it was recognized by the international community and universally accepted.

However, the case of the PRC's succession to the ROC is totally different. *OIL* mainly concerns the international community's recognition of the PRC,[9] but in fact this problem of "recognition" was caused by the problem of "succession." The PRC overthrew the KMT government through civil war and became the de facto legitimate government with effective control of mainland China, although its legitimacy was not universally recognized by the

international community until much later. Despite the fact that the KMT government was driven to the island of Taiwan and lost the right to control mainland China, the international community recognized it as the legitimate government of China until 1971.

The above facts illustrate two points: (1) the government of the PRC has not succeeded the government of the ROC within the entire territory of China (the entire territory over which the ROC had effective control from 1945 to 1949). We may call this "incomplete succession"; (2) the government of the ROC has never announced its abdication as the Manchu Qing did when the ROC succeeded it. Therefore, although it withdrew from the UN in 1971 and lost its rights of representation as the government of China, its international personality has never disappeared. There are still 24 countries that recognize the ROC, and it has retained its membership in many international organizations. Thus, what we really have is an "unfinished succession."

Such an "unfinished succession" may be completed according to the following possible solutions consistent with the current development of cross-Strait relations:

1. Completion of succession by force, i.e., viewing "the solution of the Taiwan issue" as a continuation of the past civil war. Although this is the simplest method, it would be the costliest solution, since not only would the lives and property of people on both sides of the Strait be affected, but also the security of East Asia. Furthermore, "government succession" within various countries since World War II has tended to be resolved by constitutional or non-violent means.

2. Completion of succession through constitutional means or by peaceful reunification. This mode of succession requires the government of the PRC to achieve a democratic constitutional government and modernization to a degree that would be attractive to the government of the ROC and people across the Strait. This mode would also be the most natural process of reunification, realized on the basis of the volition of the Chinese people as a whole and of the agreement of the governments on both sides of the Strait.

3. The government of the PRC gives up the concept of a change of dynasty, gives up pursuing the completion of "government succession,"

negotiates with the government of the ROC on reunification, creates together with it a peaceful and reunified China, and becomes the sole legitimate government. This last scenario may well be in the best interests of Chinese people on both sides of the Strait.

Taiwan Authorities' New Concept of "Sovereignty"

With respect to the Taiwan authorities' new concept of "sovereignty," the words of Lee Teng-hui, president of the ROC and chairman of the KMT from 1988 to 2000, are most representative. The *World Journal* (10 July 1999) reported that Lee defined the positioning of cross-Strait relations in an exclusive interview by the German "Voice of Germany" broadcasting company. He pointed out that, since the constitutional amendment of 1991, "Taipei has positioned cross-Strait relations to state-to-state or at least special state-to-state relations." He argued that in 1991, the ROC amended Article 10 (currently Article 11) of its Additional Articles of the Constitution to reduce its constitutionally controlled area to just Taiwan, and to recognize the legitimacy of the PRC's rule over the mainland. The amended Articles 1 and 4 stipulate that the members of the Legislative Yuan and the polling bodies of the National Assembly will only be elected from among Taiwanese people. The constitutional amendment of 1992 further revised Article 2 to state that the president and vice president will be elected directly by the Taiwanese people so that the "state institutions formulated in this way will only represent the Taiwanese people; and the legality of the state's power and reign will only be granted by the people of Taiwan and will have nothing to do with the people of mainland China."

Thus, cross-Strait relations are not an internal relationship involving "one China," in which there exists one legal government, or one insurgent group, or one central government and one local government. In reality, since its establishment in 1949, the Chinese communist government has never ruled over the ROC's territories of Taiwan, Penghu, Kinmen, and Matsu. As cross-Strait relations are positioned as special state-to-state relations, "there is no need

to declare Taiwan's independence." The resolution of the cross-Strait issue cannot be explored only from the point of unification or independence. The key to the issue is the differences in "systems"; to gradually evolve from the "convergence of systems to the convergence of politics is the most natural and best choice for the well-being of the Chinese people."

The above "special state-to-state formula" put forward by Lee Teng-hui is, strictly speaking, an elaboration on the political concept that he advanced earlier in "the ROC Rules in Taiwan." It can be viewed as the recent expression of the Taiwan authorities' new concept of "sovereignty." Therefore, it is necessary to analyze it in some detail.

About "Sovereignty Separation"

Since its move to Taiwan, the government of the ROC run by the KMT has adhered to the "one China" policy, and has claimed to have sovereignty over all of China, although it has effective control only over Taiwan, Penghu, Kinmen, and Matsu. Taiwan has stated that "one China," refers to the current ROC that was established in 1912. As stated in the *Relations Across The Taiwan Straits,* its sovereignty covers all of China, but its current jurisdiction extends over Taiwan, Penghu, Kinmen, and Matsu. Taiwan is definitely a part of China, but so is the mainland.

Taiwan's statement about "one China" clearly displays a huge discrepancy between its "sovereign right" and "state sovereignty." In reality, Taiwan executes its sovereign right only over local areas.[10] Similarly, the PRC also adheres to the principle of "one China," and claims that it has complete sovereignty over China and that Taiwan is just a province or a region. As stated in *The Taiwan Question and Reunification of China,* the mainland government's statement on "one China" is that there is only one China, the PRC is the sole legal government representing China, and Taiwan is part of China. What is stressed is the identity of the PRC's sovereign right and its state sovereignty.

The mainland government's assertion of "one China" also suffers from vague concepts and inconsistency between "sovereign power"

and "national sovereignty." An analysis of its position may run like this: the statement "there is only one China" refers geographically, historically, and culturally to China, that is to say, the China that exists as a nation-state. Viewed through time and space, it should denote the unified China that existed before 1949 or the China that will unify the mainland and Taiwan in the future. The statement "the Government of the People's Republic of China is the sole legal government of China" refers to the issue of representation in the international community. Finally, we come to the statement: "Taiwan is part of China." Does it refer to geographical affiliation? Or does it refer to governmental subordination? Does it embody the concept of territorial sovereignty in international law? Or does it imply all three concepts? Certainly, if it is purely a geographical concept, I think all Chinese on both sides of the Strait would agree with it. If it refers to governmental subordination, Taiwan's argument is stronger, that is, the PRC has never ruled Taiwan, and consequently, there is no governmental subordination. The last concept should be interpreted as referring to territorial sovereignty in international law. In other words, under international law, Taiwan's territorial sovereignty belongs to China, and thus Taiwan's sovereignty belongs to the PRC.

Based on the above statements and inferences, the ROC on Taiwan has sound reason to believe that the CCP's "one China" principle is meant to absorb Taiwan and to succeed the ROC. Conceding to the CCP's "one China" principle is no different from admitting that the ROC no longer exists legally. This is something the KMT would never accept.

Thus, the KMT has brought forth another concept of "one China." The premise for the ROC's "one China" principle is that the ROC and PRC are still in a state of war and that the PRC is just an insurgent government. The ROC on Taiwan, therefore, still fully represents a divided China, although most countries do not recognize that Taiwan has complete sovereignty over China.

As time has passed, the KMT's insistence on a "one China" policy, along with the huge discrepancy between its "state sovereignty" and its "sovereign rights," sounds increasingly less convincing. With the rise of the international status of the PRC, especially after it replaced

the ROC in the UN, the legal basis for Taiwan's claim to represent the whole of "divided China" has nearly disappeared. In addition, with the process of democratization in Taiwan, especially after the lifting of martial law and the abolition of the Temporary Provisions Effective During the Period of National Mobilization for the Suppression of the Communist Rebellion, the "war" across the Strait came to an end. Then, the KMT acknowledged the CCP's legal rule over the mainland instead of denouncing it as an insurgent government. Consequently, the foundation of Taiwan's "one China" premise has crumbled.

To survive, the government of Taiwan must face reality and relinquish its claim of "sovereign rights" and "sovereignty" over China. It must follow Taiwanese public opinion. All factors combined dictate that the government of Taiwan must give up the concept of "one China," and adopt the more realistic policy of separate sovereignty. Under international law, the government of Taiwan has given up the principle of inalienable sovereignty under traditional international law and come to accept the principle of divisible sovereignty under modern international law. This theory of divisible sovereignty has provided support to Taiwan's separatists.

The Question of "Divisible Sovereignty" in International Law

As far as the principle of sovereignty is concerned, there have always been two theories, namely, the theory of the divisibility and the theory of the indivisibility of sovereignty. The former theory asserts that a country can be either sovereign or not sovereign. For instance, in his *Six livres de la république* (1577), Jean Bodin argued that a nation's sovereignty is indivisible. In the eighteenth century and nineteenth century, the influence of the *Treaty of Westphalia*, the experience from federal states in the German Empire, and the division of sovereign power between the federation and its member states in the United States, Switzerland, and Germany made the need to distinguish between absolute sovereignty and partial sovereignty widely (although not universally) acceptable. The fact that countries can be divided into those having full sovereignty and those having partial sovereignty implies that a nation's sovereignty is divisible. After World War II, East Germany and West Germany, South Korea

and North Korea, respectively, obtained international recognition and became members of the UN. These facts prove that national sovereignty is divisible, although this concept is unusual *OIL*, Vol. I, Chap. I, Sec. 36). Furthermore, the respective statements by the authorities on both sides of the Strait about "one China" imply that there is a difference between a state's "sovereignty" and its government's "sovereign rights."

The theory of the divisibility of national sovereignty has become the basis in international law for the separation of Taiwan from China. Based on the political theory that "sovereignty is in the people," the government of Taiwan has taken the theory of the divisibility of national sovereignty as a justification and has rapidly become a separatist force. Therefore, the government of Taiwan adheres internally to "sovereignty in the people," and externally emphasizes "sovereign divisibility." These ideas form the theoretical basis for the government of Taiwan to move towards separatism and to build a modern civil state.

While constantly trying to internationalize the Taiwan question, Taiwan's separatists are also actively seeking a legal basis to gain international recognition for the claim that the "ROC is on Taiwan." Taiwan's separatists believe that, following the four basic requirements in international law for the formation of a country, the ROC on Taiwan already has met the conditions to be considered a "country." These four requirements are as follows.

First, there must be a people. Taiwan's separatists argue that there are 22 million people living on Taiwan. That is a bigger population than most countries in the world. Although the majority of Taiwanese are ethnic Chinese, there is a sense among them that Taiwan is a separate entity from mainland China, owing to the long period of separation across the Strait and the differences in political systems and living standards.

Second, there must be a country in which the people have settled down. The size of the country does not matter. Taiwan has a land area of 36,000 square meters. Compared to mainland China, Taiwan's land is very small, but it is still much larger than many countries in the world.

Third, there must be a government, that is to say, one or more persons who are the representatives of the people and rule according to the law of the land. Society must be organized into a political unit if a state is to be differentiated from a tribe. Once the state is established, however, the temporary disruption of the government (for example, by civil war or occupation by a belligerent country) will not contradict the continued existence of the state. Taiwan is governed according to the constitution of the ROC. Furthermore, mayors, provincial governors, and the president are all elected in general elections by the people pursuant to that constitution. The ROC on Taiwan has developed into a modern civil state. Since its move to Taiwan in 1949, the government of the ROC has effectively controlled the areas of Taiwan, Penghu, Kinmen, and Matsu.

Fourth, the government must be sovereign. Sovereignty is supreme authority, which in international law does not necessarily imply authority over the laws of all other countries, but rather legal authority independent of any other earthly authority. Following its strictest and narrowest interpretation, sovereignty means full independence (*OIL*, Vol. 1, Chap. II, Sec. 34).[11] The separatists on Taiwan assert that, since its establishment in 1912, the ROC has always been a sovereign state, having a legal authority subordinate to no other country's legal authority. The ROC on Taiwan and the PRC on the mainland have governed separately and independently. The ROC has effectively ruled over Taiwan, Penghu, Kinmen, and Matsu, and has been a fully independent sovereign state since its establishment in 1912. Moreover, its legal rule has never been interrupted. As a result, the ROC has no need to declare independence.

Following the above stated principles, the ROC on Taiwan has fully met the conditions for international status as a country. For that reason, the separatists on Taiwan are determined to have their sovereignty, and to renounce the old policy of "one China," that is to say, to give up the ideal of sovereignty under "one China," in exchange for factual sovereignty under separate rule. Hence, the KMT does not agree with the Democratic Progressive Party's insistence on Taiwan becoming an independent country, but instead follows the controversial theory of "divisible sovereignty" in international

law. The KMT embraces a national policy of sharing sovereignty under "one China" and ruling separately across the Strait, seeking mutual recognition between Beijing and Taipei, as well as peaceful coexistence in the international community. That is Taiwan's new "sovereignty" concept proposed by the KMT under Lee Teng-hui.

The Origin of the Taiwan Authorities' New Concept of "Sovereignty"

Many scholars and experts recognize that Lee Teng-hui's choice to announce his "special state-to-state formula" for the first time on "Voice of Germany" radio on 9 July 1999, was the result of a very deliberate motivation. Evidently, his aim was to make the international community understand that the present-day relationship between the ROC and the PRC resembled that of pre-unification East and West Germany, and of North and South Korea; that is, all three were based on a "divided country" model. As such, Lee apparently hoped that the relationship across the Strait would be able to progress along the lines of East and West Germany, following a path from "divided sovereignty" to "unified sovereignty." His point of view is not entirely without reason. As a matter of fact, present-day relations across the Strait closely resemble those of a "divided country." It is precisely for this reason that numerous scholars of international law and political scientists believe that cross-Strait issues are those of a "divided country."[12]

However, the government of mainland China repudiates the categorization of Taiwan as a "divided country." On 21 February 2000, Beijing published a white paper entitled, *The One-China Principle and the Taiwan Issue*. In this document there is one article that expressly states that: the "two German states formula" cannot be applied to settle the Taiwan issue.

> Some people in Taiwan have suggested that cross-Straits relations should be dealt with according to the "two German states formula," since Germany was divided into two states after the Second World War, and was later reunified. This proposal shows a misunderstanding

of history and reality. The division of Germany after the war and the temporary division between the two sides of the Straits are questions of a different nature, the difference lying mainly in three aspects. The first is the reasons for, and the nature of, the division. After its defeat in the Second World War in 1945, Germany was divided into zones occupied separately by the four victorious nations of the United States, Britain, France and the Soviet Union according to a declaration on the defeat of Germany and the assumption of supreme authority and the subsequent Potsdam Agreement. The reunification of Germany became a focus of the confrontation in Europe between the United States and the Soviet Union during the cold war. The Federal Republic of Germany and the German Democratic Republic were established in the zones occupied by the U.S., Britain and France, and that occupied by the Soviet Union. Thus Germany was divided into two states. Obviously, the German question arose entirely from external factors, while the Taiwan issue, left over by China's civil war, is a matter of China's internal affairs. The second aspect is the difference in status between the two under international law. Germany was divided according to a series of international treaties during and after the Second World War, while the Taiwan question involves provisions of the Cairo Declaration, the Potsdam Proclamation and other international treaties, stating that Japan must return Taiwan, which it had stolen from China, to the Chinese. The third is the difference between the two in their actual conditions of existence.

Against the backdrop of the confrontation between the U.S. and the Soviet Union, the two German states had foreign troops stationing in their territories and so were compelled to recognize each other and co-exist in the international community. The Chinese government has always persisted in the principle of one China. Before Lee Teng-hui assumed power, and during his early days in office, the Taiwan authorities recognized only one China and opposed "two Chinas," and the One-China Principle has also been widely accepted by the international community. For these reasons, the Taiwan issue and the German issue cannot be placed in the same category, nor can the "two German states formula" be copied to settle the Taiwan question. (http://english.people.com.cn/features/taiwanpaper/taiwan.html)

The abovementioned points of view of Taipei and Beijing can

be said to be in direct opposition to one another. Such fundamental differences of opinion constitute one important reason why the resolution of the cross-Strait problem has not made any real headway, even after a considerable period of time. Therefore, in the opinion of the present writer, in order to convert differences into some kind of accord, it is perhaps advantageous to analyze and compare the relationship across the Strait with the formulas provided by Germany and Korea.

The Circumstances Surrounding the Two German States

After World War II ended in 1945 with the *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany* signed on 5 June 1945, the Allied occupation forces of England, the United States, the Soviet Union, and France came to constitute the highest authority over German affairs. Further, they divided Germany into four occupation zones (each Allied country overlooked its own separate territory), while Berlin became the seat of the Allied Control Council. In accordance with the declaration, power over Germany's domestic and external affairs was shared by the four Allied nations, although they clearly denied having any designs to actually annex Germany.[13]

In 1949, the political authorities representing the three western allies agreed to establish the country of the Federal Republic of Germany in the three western occupation zones. The German Democratic Republic was formed with the support of the Soviet Union. The former came to be known in common parlance as West Germany; the latter was referred to as East Germany. Because Germany continued to exist as a country in international law, and in order to take into account the possible eventual reunification of both Germanys and the treaties it would conclude with other countries, the recognition given the two Germanys contained some unique characteristics. In 1955, the three western allies recognized that West Germany possessed the full authority of a sovereign state over its internal and external affairs. However, it should be noted that they did not recognize Germany to be an actual sovereign state. The government of West Germany, which took form on the basis of free

elections and valid legal standing, had the right to speak on behalf of the German people with regard to international affairs. However, the authority of West Germany was restricted by the obligation placed upon it by the three western countries to preserve the whole of Germany. These kinds of limitations reflect the ultimate authority of the Allies concerning "the entire Germany including its reunification and peaceful resolution." After 1949, West Germany very quickly obtained the recognition of the majority of countries.

However, at the very beginning, East Germany was recognized only by the Soviet Union and other communist countries. Later, other countries also recognized Germany, but until the signing of the *Treaty Concerning the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic* in 1972, East Germany did not receive widespread recognition. In 1973, East and West Germany simultaneously became members of the UN.[14]

The United States recognized East Germany on 4 September 1974, and on the same day, the two countries signed the "Agreement for the Establishment of Foreign Relations." West Germany signed separate treaties with the Soviet Union and Poland in 1970. This amounted to early preparatory steps towards the normalization of relations between the two German states. In the course of friendly relations between the two German states, which included the signing of agreements, East Germany considered both itself and West Germany to be independent states in international law. By contrast, West Germany did not view East Germany in the same way; it preferred to see both itself and East Germany as two states affiliated with a still existent "Germany" (i.e., two parts of a single Germany).

In principle, West Germany considered itself to be the successor of pre-war Germany, regardless of the fact that its authority was temporarily restricted to the territory occupied by West Germany. West Germany understood the East Germany to be another part of Germany, a region that was not yet subject to the application of West Germany's "basic law." Consequently, the relationship between the two Germanys was not completely, or at least not only, an issue pertaining to international public law. The agreements that existed between them differed from what agreements normally imply in the

strictest sense. In the case of the former, it would be best to refer to them as domestic agreements between two separate regions of a single Germany.[15]

In 1989 and 1990, developments in Eastern Europe paved the way for the possible reunification of Germany. Prior to the reunification, East and West Germany adopted a series of measures that included a treaty establishing a Monetary, Economic and Social Union between the two German states (it was signed on 18 May 1990 and took effect on 1 July 1990). The Unification Treaty was also one of the measures implemented (it was signed on 31 August 1990 and took effect on 29 September 1990). These treaties finally led to the actual reunification of Germany on 3 October 1990.[16]

The Circumstances Surrounding the Two Koreas

Before World War II, Korea was a colony of Japan. When the war ended, United States troops occupied the southern part of Korea, while troops of the Soviet Union occupied the northern part. In the meantime, the UN declared the independent reunification of Korea to be one of its prime objectives. In 1951, as part of the peace treaty signed by the United States and Japan in San Francisco, Japan surrendered its sovereignty over Korea. Prior to this, in 1948, the Republic of Korea (South Korea) was established in the south, and the Democratic People's Republic of Korea (North Korea) was established in the north.

Afterwards, South Korea was recognized by the vast majority of countries and became a member of numerous international organizations. North Korea was recognized by the vast majority of communist countries, as well as by a number of other countries, and became a member of several special organizations. Prior to May 1990, South Korea had already obtained diplomatic recognition from 140 countries, including communist countries such as Hungary, Poland, Czechoslovakia, Bulgaria, and Romania. North Korea also maintained formal relations with 103 countries across the globe. In 1991, North and South Korea became separate member nations of the UN (*OIL*, Vol. I, Chap. II, Sec. 40; Shaw, 1996:179-80).

As "divided states," Article 3 of South Korea's constitution clearly

states that "[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands" (http://www.ccourt.go.kr/english/welcome01.htm); meanwhile, Article 5 of the constitution of North Korea also implies that its government will expand its socialist system across the whole of the Korean peninsula (http://www.novexcn.com/dprk_former_constitution.html). However, the contrast implicit in these forms of rationalization have not interfered with the fair and equal measures employed by North and South Korea to expand their diplomatic influence abroad. Furthermore, in September 1975 both parties accepted the "cross recognition" formula proposed by United States Secretary of State Henry Kissinger, at the 30th UN General Assembly. That is, "on the premise of not rejecting the possible reunification of Korea, the United States supported the admittance of South and North Korea into the UN. As such, North Korea improved its relations with other allied countries and South Korea, while the United States improved its relations with North Korea" (cited from Shaw, 1996:179-82).

The competition for peace that occurred as a result of this kind of "cross recognition" helped to alleviate hostilities on both sides, stimulate exchanges, and enhance communication. At the same time, it was also beneficial to the reunification of the two Koreas. A lesson can certainly be learned from the two Koreas' pursuit of peaceful coexistence through the employment of well-intentioned measures.

A Comparative Analysis of the Relations Across the Taiwan Strait and the Formulas of Germany and Korea

1. Germany and Korea started to manifest the appearance of "divided states" as a result of powerful intervention from foreign powers. This is to say that the "divided states" status of both Germany and Korea materialized with the support of foreign powers. As such, there is a significant difference between this and the division that exists on the two sides of the Strait. The division of the two sides is the result of a civil war that is still ongoing (although Taiwan has unilaterally declared the war to be over).

2. Germany's (the two German states') right to exercise sovereignty was restricted through treaties with allied countries. This

made it necessary for the reunification of Germany to be resolved in accordance with certain clearly stipulated courses of action that were peaceful in nature. By contrast, the two sides of the Strait are not restricted in this sense by anything resembling these treaties (although the Taiwan Relations Act bears some resemblance). As long as either side of the Strait refuses to abandon its arms, peaceful reunification will be impossible. The civil war could erupt once again at virtually any time.

3. When the two German and Korean states first developed into "divided states," the positions they adopted were clear. Further, they were of equal status and fairly close in terms of resources and registered population. This was beneficial to the process of peaceful reunification once the governments involved entered into negotiations with one another. For example, this was the case when the two German states signed the *Treaty Concerning the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic* in 1972. This is something the two sides of the Strait have as yet been unable to achieve.

4. In the divided North and South Korea, each government asserts the principle of "one Korea" in contending that their territorial sovereignty (rationalism) encompasses all of the other's territory. In this respect, the position adhered to by the two sides of the Strait is similar, as they both assert the principle of "one China." However, in terms of general external affairs, the two Koreas reject the "zero-sum" approach, freely accepting either the "cross recognition" or "dual recognition" formula.

The two German states of the past and the present-day two Koreas have similarly acknowledged and mutually helped one another to strive for a single seat in the UN. In both cases, the attainment of a UN seat implies that the ethnic groups represented by these two pairs of countries effectively gain a voice in the international community. This constitutes the expression of a strengthened ethnicity, and not the weakening of it. Simultaneously, for an ethnic group split up by political boundaries, the attainment of a UN seat also promotes shared good will and well-intended, mutually beneficial action between the two divided halves. This kind of mutual recognition does not currently

exist in relations across the Strait. Perhaps this is because the division between the two sides is the result of civil war, and a country divided through warfare cannot behave in this fashion. As such, it would seem that for the resolution of the problem we must return to the source of the problem. The feeling of hostility shared by the two sides remains undiminished; in the presence of such problems, mutual recognition is unattainable, which is a great sorrow and misfortune for the Chinese people.

5. There is an explanation for the process that gave rise to the realization of peaceful reunification by the two Germanys and the tendency of the two Koreas to behave in mutually beneficial ways. This explanation is at once so concealed and deep that not many in the sphere of international law have formally proposed it for discussion. It originates in the Christian concept of "pardon consciousness," a problem that has become prominent in present-day international law. It cannot be denied that the basic premise of traditional international law can be encapsulated by the following: "striving for power is the universal principle" and "supreme sovereignty."[17]

However, after the end of World War II, leaders of the Allied states began to be aware that traditional international law based on these notions could not, in fact, fundamentally resolve international conflicts, because from the view of international arbitration, two warring sides are both supported in a legal sense by the "principle of sovereignty." If the problem is to be resolved, both sides must adopt a means of resolution based on a principle of respecting the regulations of international law over and above the sovereignty of individual states. Finding a solid legal footing is a necessary restrictive condition for the establishment of "a principle of sovereignty."[18]

In 1955, in a declaration published by France, United Kingdom, and the United States, and aimed at West Germany, this point was conveyed in extremely clear terms. On the one hand, West Germany was recognized to possess complete authority over general internal and external affairs inherent to a sovereign state. On the other hand, the supreme sovereignty over Germany's right to exercise state sovereignty was firmly held by the Allies.

Moreover, it stipulates that the reunification of the two German

states has to be undertaken through peaceful measures. This kind of consciousness, involving the implementation of restrictive conditions on the "principle of sovereignty," continued to develop until the 1970s, when it began to gradually evolve into a principle of "human rights over sovereignty." However, the origins of this principle are undoubtedly rooted in the "principle of the supremacy of international law over state sovereignty," which emerged after World War II. Among divided states, if the two sides confronting one another fail to accept the principle of international law, any effort made towards establishing common recognition would be superfluous, and it would be impossible for the principle of "human rights over sovereignty" to ever be accepted.

The acceptance of this principle was fundamental to the realization of the peaceful reunification of Germany and the movement of the two Koreas towards friendly interaction. In both cases, the countries confronting each other came to understand the importance of limiting themselves and pardoning the other (what may be termed "a consciousness of leniency"), acknowledging that the greatest value of reunification lay in the prosperity and welfare of the people existing on both sides of the border.

Although the origins of the division and the divided government across the Strait are vastly different from those involving the two German states and the two Koreas, the division of state and government itself is similar. As such, might not a lesson be learned from the "consciousness of leniency" displayed by Germany and Korea? As far as those in power are concerned, discussing international relations or political problems in terms of "leniency" and tolerance is positively "naive"; however, this kind of "naiveté" is still the most effective means of resolving the problem. The difference between traditional international law and modern international law lies here (i.e., discussion in terms of tolerance, and acceptance of the "principle of the supremacy of international law over state sovereignty").

6. In the present-day relationship between the ROC and PRC, the function of the Taiwan Relations Act is extremely important; it has a bearing on the entire situation. The Beijing authorities view the Taiwan Relations Act as the greatest obstacle preventing the

reunification of the two sides of the Strait, whereas the authorities in Taipei view it as ensuring peace and security. In actuality, the Taiwan Relations Act was instituted by the United States in the spirit of the Allied nation's past declaration concerning West Germany. In fact, their content is largely the same.

For example, the course of action taken for "peaceful settlement" includes the following explanation:

> [T]he United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means.... [A]ny effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, [is] a threat to the peace and security of the Western Pacific area and of grave concern to the United States. (http://usinfo.state.gov/eap/Archive_Index/Taiwan_Relations_Act.html)

According to these examples, the Taiwan Relations Act without a doubt places restrictive conditions on Beijing's right to exercise complete sovereignty, something which conflicts with China's principle of the right of sovereignty. On the basis of this, Beijing strongly protests what it perceives to be a serious infringement of Chinese sovereignty represented by the Taiwan Relations Act. Clearly, when the United States signed the Act, it considered the two sides of the Strait to constitute a "divided state"; however, in actuality they are not equivalent to East and West Germany, and South and North Korea. There is another point of relevance; that is, at the time that the Allies placed restrictive conditions on West Germany's execution of complete sovereignty, one important consideration was to prevent Germany from walking along the path of fascism. By contrast, China's principle of sovereignty does not entail any designs for global expansion, and the government of Beijing therefore cannot accept the forcing of conditions by United States that restrict Chinese sovereignty. Consequently, as Beijing sees it, the Taiwan Relations Act actually created the two Chinas.[19]

Taiwan authorities also clearly understand that the idea of the Taiwan Relations Act originated in the formula of the two German

states. Furthermore, the intention of the United States is for Taiwan to gradually develop in the direction of the Germany formula on the premise of unofficially abandoning the principle of "one China." This is also one of the origins of the Taiwan authorities' new concept of sovereignty.

As a Chinese, I believe that the vast majority of Chinese people on both sides of the Strait are not willing to see their own native country move towards division. However, facing what in reality has already become a situation of division, I think that contemplating the experiences of countries that have resolved similar problems will perhaps help the two sides of the Strait realize peaceful reunification relatively early.[20]

Conclusion

In the twenty-first century, the biggest challenge facing the Chinese people is how to bring about peaceful reunification of China across the Strait. Every honest Chinese understands that, divided, both sides will lose; united, both will win. However, faced with the reality of separate rule across the Strait, how do we help realize peaceful reunification? What will be the basis of reunification for the two sides? In this paper, I have put forward my suggestions on the peaceful reunification of China.

Above all, I believe that the principle of "one China" must be redefined. For many years, the governments across the Strait have had different interpretations of "one China." Consequently, they have issued separate statements on the principle of "one China," over which they have never agreed. This is also why the two sides have never been able to enter into any pragmatic political negotiations about peaceful unification. The reunification of China should be realized in the name of the great China that has been defined by culture, history, and geography. To achieve a genuine peaceful reunification of China across the Strait, the content of "one China" must be redefined to be acceptable by both sides. Therefore, I suggest that the principle of redefining "one China" should be "one nation, one country, and two

governments." As to the model of reunification, the single system of "one country, two systems," or the composite systems of "federation" or "confederacy" can be considered. Even models such as a "multi-system nation" or "commonwealth" can be explored. If any of these can be realized, the one China will be a new China created by compatriots across the Strait, and this China will hold the same for all.

Before reunification, the two sides should negotiate under the principle of one China and devise policies for the transitional period to peaceful reunification. During the transitional period, both sides should realize mutual checks and regulations; that is to say, Taipei and Beijing should be bound and restrained by giving up "Taiwan independence" and renouncing military actions against Taiwan, respectively. Both sides should recognize each other as the legal representative of the land and people under their respective effective control. Both sides can be defined as "equal political persons," to facilitate political negotiations and consequently eliminate hostility and establish mutual trust.

In addition, during the transitional period, both sides should prove through pragmatic actions their promise and determination to realize peaceful reunification. Both sides should learn from the reunification of Germany and begin the reunification process by promulgating an internal bilateral peace treaty and declaring the end of the civil war. Both sides should agree that reunification is to be achieved by peaceful means. Then, the two sides should sign a basic treaty to normalize bilateral relations under the principles of one China and peaceful reunification, in order to facilitate more political, economic, and cultural exchanges. A new order of positive interaction between the two sides therefore would be established as a basis to ultimately achieve self-determined unification on the basis of bilateral agreement and on the free will of the people across the Strait.

Furthermore, the leaders across the Strait must face the current reality of separate rule, namely, that the PRC in fact has not fully succeeded in achieving complete sovereignty over the ROC, and the ROC has not relinquished all of its pre-1949 sovereignty. Based on these factors, both governments should recognize each other's autonomy in

internal affairs in areas under their respective, effective control. In foreign affairs, both sides should respect each other's international position. Taipei should be aware of the PRC government's concern about "Taiwan independence," and avoid creating a situation of "two Chinas" or "one China, one Taiwan." At the same time, the PRC should permit the continuity in international relations that Taiwan has established. The objective of national unification and the principle of one China should be objectives shared by both governments across the Strait. Towards this end, the two sides should, in international affairs, treat each other with respect, help each other to promote peace, and urge each other to carry out their international obligations. In international organizations, therefore, the mainland can act as the chief representative in the UN, with Taiwan participating as a member representative. In issues concerning the principle of "one China" in the UN, the two sides should work to avoid confrontation. For instance, Taiwan can set up offices in countries where the mainland has diplomatic relations; the mainland can set up offices where Taiwan has diplomatic relations. With this kind of avoidance and exclusion, the two sides can achieve the objective of maintaining the principle of "one China."

Moreover, the two sides currently must be regulated by the principle of one nation, one country. Sovereignty belongs to only one China. While exercising their sovereignty in the international community, the two sides must be controlled by the principle of "one China." The people across the Strait should establish a mutually trusting and equal "sense of community" based on the "national consciousness" of "one China," so as to promote positive interaction in political, economic, cultural, and scientific exchanges. With these prospects, the two sides can negotiate the establishment of a committee for political and economic cooperation to deal with public powers and to promote the welfare of the people across the Strait. When the right time comes, the two sides can create a political consultative committee specifically charged with the task of achieving peaceful reunification and with carrying out negotiations on a national title, national flag, anthem, and constitution for the unified country.

Finally, the leaders of both sides must always emphasize the

prosperity of the Chinese nation and give the highest recognition to the well-being of their compatriots across the Strait. Political negotiations on the exchange of mail, trade, air and shipping services, and preparations for peaceful unification should be launched immediately.

Acting in the national interest and on the great premise of constructing a Chinese commonwealth, the two governments should eliminate hostility, dissolve their old enmity, and seek peaceful reunification. The two governments should endeavour to establish a great Chinese commonwealth that allows people on both sides of the Strait to coexist, to prosper together, and to mutually benefit. It will be the good fortune of the Chinese nation and the Chinese people on both sides of the Strait if such Chinese wisdom is fully displayed.

Notes

1. Currently, the ROC still holds membership in the following inter-government organizations: 1. International Union for the Publication of Customs Tariffs (IUPCT); 2. International Criminal Police Organization (INTERPOL); 3. International Office of Epizootic Diseases (IOE); 4. International Cotton Advisory Committee (ICAC); 5. Asian Productivity Organization (APO); 6. Afro-Asian Rural Reconstruction Organization (AARRO); 7. Asian and Pacific Council (ASPAC); and, 8. Asian Development Bank (ADB). In addition, Taiwan has been a member of the following organizations in the capacity of "China Taipei": the Asia-Pacific Economic Cooperation (APEC) and the International Olympic Committee. This list does not include some regional UN special organizations. For detailed information, see Chiu (1993) and Li (1993).

2. In this paper, *OIL* refers to the 9th edition unless specified otherwise.

3. In 1955, the Federal Republic of Germany was recognized by France, Britain, and the United States, not as a sovereign state but as a country that "possesses all the rights over its interior and exterior affairs as a sovereign state does." This is a good example of the distinction between "sovereignty" and "sovereign rights." See *OIL*, Vol. I, Chap. II, Sec. 40.

4. The ROC has more than ten governmental organizations in the UN. There are numerous non-governmental, half-official organizations.

5. On the distinction between "state succession" and "government succession," Wang Tieya (1993b:520) in his "State Succession and Treaties" further pointed out: State succession must be distinguished from government succession. Although change of government is one kind of state change — for example, change of dynasty, change of form of government — and although scholars discuss state succession together with government succession, change of government does not incur the problem of state succession, and the succeeding government is responsible for the ex-government. Thus, it is government succession, which is a different legal phenomenon from state succession and thus should be treated by different rules.

6. Wang Tieya's views have also been formed with reference to other works such as *Fenwick's International Law* (1934) and Smith (1932).

7. With regard to "universal succession" and "partial succession," *OIL* has the following definition: "It is sometimes helpful to distinguish between universal and partial succession. The former takes place when one international person is completely absorbed by another, either through voluntary merger, or upon the dismemberment of a state which is broken up into parts which either have become separate international persons of their own or have been annexed by surrounding international persons, or (in former times) through subjugation. Partial succession takes place when a part of the territory of an international person has separated from it in a revolt and by winning its independence has become itself an international person; when one international person has acquired a part of the territory of another through cession; when a hitherto fully sovereign state has lost part of its independence through entering into a federal state, or coming under suzerainty or under a protectorate; or when a hitherto partially sovereign state has become fully sovereign" (Vol. I, Chap. 2, Sec. 60).

8. In addition, government succession and state succession can be distinguished further: government succession indicates a change of government caused by revolution or coup d'état, thereby the rights and duties of an old government are succeeded by a new government. Government succession is different from state succession. First, there are different causes for succession. While state succession is

caused by a change of territory, government succession is caused by a change of government caused in turn by a revolution or a coup d'état. The subjects in the relations of succession are different. The participators in state succession are different international subjects, whereas in government succession, the subjects are the new and old governments within the same international entity. See also Duanmu (1989:107).

9. See *OIL* (Vol. I, Chap. II, Sec. 44) quoted in p. 23.

10. For discussions on the differences between "sovereignty" and "sovereign right," their connotations and range of application, see Zheng (1999a).

11. Article 1 of the *Montevideo Convention on the Rights and Duties of States* (1933) sets out the qualifications for international statehood as "(a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with the other States" (http://en.wikipedia.org/wiki/Montevideo_Convention). In addition, Lee Teng-hui emphasized that the ROC on Taiwan has complete state status as well as an international legal personality by quoting the Montevideo Convention in his speech to the Panama Congress on 8 September 1997. He said,

> Since 1912, the ROC has been a sovereign state, enjoying the full rights of a sovereign state, which include attending all the international organizations among governments and sustaining normal diplomatic relations with all the sovereign states. According to Article 1 of the *Montevideo Convention on the Rights and Duties of States* (1933), a 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. We fully meet these qualifications. We have a certain boundary of territory, a democratic government that is exercising efficient governing rights and is elected by all the people, 21 million in population, and the recognition of 30 sovereign states. The CCP's hegemonic intervention is the only reason that other states would not recognize us. The CCP's 50 years of suppression has brought unfair obstruction to our activities in the international community. But this cannot shake our firm determination to strive for international living

> space and to safeguard our international status. Article 3 of the *Montevideo Convention* stipulates specifically that "[t]he political existence of the state is independent of recognition by the other states." Whether the CCP recognizes it or not will never influence the fact that we exist as a sovereign state. (*Central Daily*, 10 September 1997)

The above statement further motivates the intensity with which the government of Taiwan is appealing to be more fully recognized as a sovereign state by the international community.

12. For example, in works such as Wei (1983) and Chiu (1983), China, Germany, Korea and Vietnam are all viewed as "divided countries." However, when interpreting the concept of "country recognition," and touching upon the subject of "divided countries," the authors of *OIL* only mention Germany, Korea, and Vietnam. China is not included in their discussion. The reason for this is that China's division only concerns governmental authority, and not the division of a country (i.e., a single country divided into and becoming two distinct countries). As such, the case of China does not involve the issue of country recognition. This evidence suggests that it is unsuitable to view cross-Strait issues as those of a "divided country." The issues surrounding the cross-Strait division are undoubtedly much more complex than those that arose from the division of Germany and Korea. Although one cannot apply the formulas provided by Germany and Korea in interpreting the cross-Strait issue, the peaceful reunification of Germany should nevertheless be seen as a model experience. See *OIL* (Vol. I, Chap. II, Sec. 40).

13. In accordance with the declaration, the Allied administrative powers over the domestic and external affairs of Germany incorporated the following: (1) the powers possessed by the German national government, as well as every state, city and local government, or seat of authority, within Germany; (2) any type of power pertaining to the diplomatic, consular, and economic relations held by Germany with other countries; and (3) the rights to administer and dispose of Germany's buildings, assets, and official files whether or not they related to its diplomatic offices or other institutions. In actuality, these rights fully constituted the "sovereign rights" possessed by the German government prior to World War II. However, the Allies clearly denied having any ambitions to annex

Germany. This is to say that, the Allies did not in fact hold territorial sovereignty over Germany. It is clearly evident that when the Allies occupied Germany, they made a strict distinction between territorial sovereignty over Germany and the sovereign rights of government. See *OIL* (Vol. I, Chap. II, Sec. 40).

14. After signing the Basic Treaty, East Germany obtained the widespread recognition of non-communist western countries. This caused the 1954 declaration made by the governments of the United States, United Kingdom, and France (http://www.nato.int/docu/basictxt/b541022d.htm) — i.e., which recognized the West Germany government as the sole legal German government — to lose significance. Further, since the vast majority of countries adopted a position of "dual recognition" of East and West Germany, the UN General Assembly in 1973 accepted both East and West Germany as separate members. Taking the experience of Germany into consideration, if the government of Taiwan desires to re-enter the UN, it must at the very outset obtain "dual recognition" from the vast majority of countries. Only by doing so can the government of the ROC diminish the significance implied by the UN General Assembly Resolution 2758 (XXVI) "Restoration of the Lawful Rights of the People's Republic of China in the United Nations," which states: "the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations." (http://en.wikisource.org/wiki/UN_General_Assembly_Resolution_2758) If Taiwan fails to attain the approval of the PRC (i.e., acceptance of "dual recognition"), it will be almost impossible for Taiwan to return to the UN under the name of the ROC.

15. After the two sides had joined the UN, East Germany would have wanted to define its relationship with West Germany as one of "two German states." This was not acceptable to West Germany. West Germany's definition was "one Germany; two states," or "one country; two governments." It insisted on the principle of "one Germany" in order to maintain its ultimate objective: the reunification of Germany. Consequently, on 3 March 1974, West Germany and East Germany exchanged established delegate protocols to avoid using the terminology normally used between foreign countries. West Germany's unchanging position regarding the reunification of Germany is a lesson to be heeded by the two cross-Strait governments.

16. The Treaty on the Final Settlement with Respect to Germany (also known as the "Two Plus Four Treaty") signed by East Germany, West Germany, and the Four Powers on 12 September 1990 has a great deal of significance. Article 7 of this treaty stipulates that the authority and responsibility held by the United Kingdom, France, the United States, and the Soviet Union with regard to both Berlin and the whole of Germany since 1945 was effectively terminated (http://usa.usembassy.de/etexts/2plusfour8994e.htm). Germany thus became a single country with unrestricted autonomy over all of its territory. In formal terms, East Germany became part of West Germany, and the latter title now referred to a unified Germany; the Basic Law of West Germany is now the constitution of a united Germany. Germany's reunification was essentially the absorption of East Germany by West Germany; consequently, it did not entail a change in Germany's name. Germany's experience with reunification shows us that if the two sides of the Strait reunify, they can use the name "China" (if the federalist system is emulated, the name "Federalist China" may be adopted). Domestically, a constitution acceptable to both sides of the Strait must be instituted; with regard to foreign affairs, the Taiwan Relations Act of the United States must be abrogated.

17. On the concept of "supreme sovereignty," the most representative school of thought is that of Hegel. In his *Philosophy of Right* (1821), Hegel states the following: "Since autonomy is a principle underlying the relations between individual countries, each individual country exists within a king of natural state. The authority of each individual country is not founded on some kind of supreme sovereignty constructed by a common consciousness; rather, it is founded upon each country's own individual consciousness." On the basis of this, it is evident he feels that besides "domestic supremacy" there is also an external "independent autonomy." This kind of theory stresses the lofty status of the country, and asserts a position whereby sovereignty does not receive any restriction in the international community. Germany, Italy, and Japan before World War II, and the various socialist countries after World War II, have all employed Hegel's "philosophy of sovereignty." This "philosophy of sovereignty," which is also called a "principle of sovereignty," has had both a positive and a negative influence on the formation of the international community and the development of international law in recent decades. With regard to the positive

influence, numerous countries and ethnic groups in recent decades have borrowed this type of concept to rid themselves of traditional colonial rule based upon a principle of "might is right," and to establish independent "ethnically based states." Consequently, an international community in which states treat one another as equals has been established. With regard to negative influences, radical nationalists often borrow this kind of "principle of sovereignty" to free themselves of responsibilities placed on their country by the international community, sometimes creating numerous, serious problems. With the rise of nationalist consciousness, there are countries unwilling to accept the regulations of the international community. This in turn has given rise to expansionistic objectives. See Tu (1996:Chap. 4).

18. Following World War II, countries in the western world gradually came to accept the concept of necessary restrictive conditions for the establishment of "a principles of sovereignty." Some countries have even gone as far as to stipulate in their constitutions the supremacy of international law. In the 1946 constitution of France, Article 26 stipulates, "All ratified and publicly announced foreign treaties which have passed through normal procedures possess legal efficacy, even if they are in contravention of the law. Except for the sake of ratification, the implementation of treaties does not need to pass through any other legislative process." In the 1949 constitution of West Germany, Article 25 stipulates, "Generally speaking, regulations of international law should constitute part of federal law, and should belong to common law. Moreover, such law creates rights and duties directly relevant to those who reside in federalist territory." In 1949, the International Law Commission passed Article 14 of the *Draft Declaration on Rights and Duties of States*, which states: "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law" (*OIL*, Vol. I, Chap. II, Sec. 37).

19. The government of Beijing firmly believes that cross-Strait divisiveness is the result of meddling on the part of the United States. In *The One-China Principle and the Taiwan Issue*, Beijing repeatedly stressed: "the reason that the Taiwan question has not been settled for such a long period of time is mainly due to the intervention of foreign forces and the obstruction of the separatist forces in Taiwan." Beijing is of the opinion that the problem of Taiwan could

be neatly resolved once interference by the United States has been eliminated, and the Taiwan Relations Act terminated.

20. For an analysis of experiences involving the resolution of similar problems on the international arena, see Chang (1992). In chapter 6, Chang states that the most valuable lessons we can learn from East and West Germany's historical experiences are: (1) one can take the theoretical concept brought forth to smash the pre-existing deadlock; (2) consider a flexible principle of "same intention with only different views" (i.e., agree to disagree); (3) one should deal with relations between the two parties in the spirit of unrelenting thoroughness, and on a foundation of legalization; (4) the two parties in conflict should conduct themselves with mutual respect, tolerance, and restraint, so that their relations may develop along the path of normalization; and (5) stress the reality of division at first; however, never abandon the long-term objective of eventual reunification.

    Discussing the historical experience involving the 30-year conflict between South and North Korea, there are also valuable lessons to be learned. However, these lessons show why reunification has not yet taken place: (1) the authorities on both sides have not approached reunification with any degree of sincerity; and (2) negotiations initiated by the two Koreas have not resulted in agreement although much time has passed, and if an agreement is reached, it may be impossible to implement such an agreement. Mutual distrust is the primary reason for this. Moreover, each side wants to adopt a course of action for reunification most advantageous for itself, and sometimes attempts to force the opposite side to accept it.

    Finally, at this juncture, Chang will present the following characteristics comprising a so-called "divided states formula." These characteristics are derived from the long-term state of conflict experienced by both East and West Germany, as well as South and North Korea: (1) view the state of affairs surrounding the country's division objectively; (2) both sides should uphold the principle for the peaceful resolution of disputes announced in the UN Charter; (3) both sides should recognize that each has sovereignty over the territory that they administer; (4) both sides should recognize and respect the equal status of the other; and (5) in terms of foreign affairs, both sides should accept dual recognition and dual representation.

Although as divided states, Germany and Korea have different historical backgrounds than China, and differ in terms of their hostile relations, their principal natures, traits, and pursuit of reunification are for the most part the same. Consequently, the experience of Germany and Korea is of substantial assistance in the peaceful resolution of the differences embodying the two sides of the Strait, and the actualization of reunification.

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Taiwan: Sovereignty Reinterpreted

The Relations Across the Taiwan Strait from the Perspective of International Law

Abstract

This paper focuses on the relations between the two sides of the Taiwan Strait, and explores from the perspectives of international law and political science how peaceful reunification can be achieved. Through an analysis of concepts such as "sovereignty" and "sovereign rights," "de facto recognition" and "de jure recognition," "succession of government" and "succession of states," the author puts forward for the first time an ideology for settling the long-term dispute over sovereignty across the Strait that relies on a distinctive understanding of the connotations of "sovereignty" and "sovereign rights," and positions the relationship between the two sides as one in which the two governments would wield respective authority over international affairs and their own domestic affairs under the principle of "one China."

The author suggests, under the principle of "one China," that the two governments should clearly understand the difference between a "succession of states" and the "succession of government," and seek "the goal of China's reunification" within the domestic landscape, while respecting various acknowledgements from the international community. Given the above preconditions, the two sides could dispel the hostile atmosphere and pursue non-violent solutions towards a peaceful reunification. This paper also provides an in-depth analysis of the German experience with reunification, the split between North and South Korea as well as their efforts to achieve unification, and the "New Sovereignty Concept" suggested by the Taiwan authorities and its impact on the cross-Strait relationship.

台灣：主權的重新解釋

鄭海麟

（中文摘要）

本文從國際法和政治學的角度研究台海關係，探討兩岸和平統一之道。作者通過分析國際法中的「主權」和「主權權利」、「事實承認」與「法理承認」、「政府繼承」與「國家繼承」等概念，首次提出用區分「主權」和「主權權利」內涵來處理海峽兩岸長期爭議不休的主權問題，並且將兩岸關係定位為：在「一個中國」主權原則下分別擁有對內對外事務主權權利的政府。

作者認為，從「一個中國」的主權原則出發，兩岸政府應清楚地區分「國家承認」與「政府承認」之不同，在國內追求「中國統一的目標」，在國際尊重他人承認的選擇，在消除敵意基礎上謀求一條非武力的和平統一道路。本文對德國和平統一的經驗、兩韓分裂及謀求統一的情形、台灣當局近年提出的「新主權觀念」及其對兩岸關係的影響，皆做了較深入的分析。

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