

Attix: Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Par  
**BETWEEN THE DEVIL AND THE DEEP BLUE SEA: ARE  
TAIWAN'S TRADING PARTNERS IMPLYING RECOGNITION OF  
TAIWANESE STATEHOOD?**

I. INTRODUCTION

From 1949 to 1991, the People's Republic of China (PRC) and the Republic of China (Taiwan)<sup>1</sup> were locked in a diplomatic battle over which would be the internationally recognized representative of China.<sup>2</sup> By 1991, most nations wanting to do business with both would-be Chinas had solved the recognition problem by extending official recognition<sup>3</sup> to the PRC as the representative of China and carrying on unofficial trade and cultural relations with Taiwan. These relations, which are still operating today, were painstakingly crafted in such a way as not to imply recognition of the government of Taiwan but to amount, nonetheless, to diplomatic relations in all but name.<sup>4</sup> As part of their recognition of the PRC, these nations agreed also to recognize its claim to sovereignty over Taiwan and to regard the issue of Taiwan's international status as an internal PRC matter.

Recent changes in Taiwan have thrown the continued viability of this approach into some doubt. Since its founding in 1986, the Democratic People's Party (DPP), which supports independent statehood for Taiwan, has become a major force in Taiwanese politics.<sup>5</sup> In response to the growing popularity of the DPP, the ruling Kuomintang or Nationalist Party (KMT) which has ruled Taiwan since 1949, renounced its historical claim to sovereignty over all China and unilaterally recognized the PRC in 1991.<sup>6</sup> In 1992, the KMT announced it would seek international recognition of Taiwan on a par with the PRC as two parts of a divided China, similar to Korea or pre-reunification Germany.<sup>7</sup> This position has allowed it to retain the goal of eventual reunification with the mainland while co-opting the DPP's main issue.

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1. Taiwan consists of the island of Formosa, the Penghu Islands (the Pescadores), Jinmen (Quemoy) Island, and Mazu (Matsu) Island, 2 COUNTRIES OF THE WORLD AND THEIR LEADERS YEARBOOK 1243 (Thomas F. Bowen & Kelley S. Bowen eds., 1994) [hereinafter YEARBOOK].

2. The term "China" will be used throughout this paper to describe the concept of an entity which encompasses both the PRC and Taiwan.

3. Recognition is an act intended or calculated to give rise to legal rights and obligations between states and/or governments. SIR HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 330 (1947). On recognition of states and governments generally, see 1 OPPENHEIM'S INTERNATIONAL LAW 127-203 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM]; 2 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 574-92 (1969); WILLIAM L. TUNG, INTERNATIONAL LAW IN AN ORGANIZING WORLD 47-56 (1968); BRANIMIR M. JANKOVIC, PUBLIC INTERNATIONAL LAW 97-111 (1984).

4. See *infra* notes 49-64 and accompanying text.

5. Ross H. Munro, *Giving Taipei a Place at the Table*, FOREIGN AFF., Nov.-Dec. 1994, at 116-19.

6. *Id.* at 117.

7. *Id.*

Despite KMT efforts, the DPP has continued to gain momentum. In the December 1994 elections, a DPP candidate was elected Mayor of Taipei,<sup>8</sup> the third most powerful office in Taiwan.<sup>9</sup> Taiwan's first presidential elections are scheduled for early 1996.<sup>10</sup> The DPP has promised that if one of its candidates wins the presidency, it will hold a referendum on independence.<sup>11</sup>

From its vantage point across the Straits, the PRC sees no difference between the divided state idea and independence. Both conflict with what it sees as its sovereign right to rule Taiwan. Beijing has repeatedly vowed that if Taiwan were to declare independence, it would invade.<sup>12</sup> This threat is enhanced by the fact that Deng Xiaoping<sup>13</sup> is in poor health.<sup>14</sup> There is speculation that when he dies, there could be a power struggle in which an invasion of Taiwan might serve to rally the nation around a new, possibly less pragmatic, leader.<sup>15</sup>

None of Taiwan's major trading partners has yet seriously reexamined its recognition policy in light of these new developments. Taiwan's trading partners continue to affirm that Taiwan's international status is the PRC's internal matter. However, as Taiwan has become more assertive of its desire for recognition, the conduct of unofficial relations has begun to suggest that

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8. *Taiwan's Elections: A Fact Sheet*, Agence France Presse, Dec. 3, 1994, available in LEXIS, News Library, Presse File [hereinafter *Fact Sheet*].

9. *Taiwan Holds First Free Local Elections*, Deutsche Press Agentur, Dec. 3, 1994, available in LEXIS, News Library, DPA File.

10. *Taiwan's Passionate Democrats*, THE ECONOMIST, Dec. 10, 1994, at 31, 32.

11. Eric Ellis, *Taiwan: Elections Key to Shape of Independence*, Australian Financial Review, Dec. 2, 1994, available in LEXIS, News Library, REUTER File.

12. "[W]e will never sit idle if the Taiwan authorities go in for Taiwanese independence with support from foreign forces and turbulence breaks out in Taiwan as a result." Lorien Holland, *China Raps U.S. for Taiwan Moves*, UPI, Sept. 10, 1994, available in LEXIS, News Library, UPI File. "People on both sides of the Strait are all Chinese. It would be a great tragedy for all if China's territorial integrity and sovereignty were to be split and its people were to be drawn into a fratricide." *White Paper on Taiwan*, Xinhua Overseas News Service, Aug. 31, 1993, available in LEXIS, ASIAPC Library, Xinhua File [hereinafter *PRC White Paper*]. Chinese president, Jiang Zemin told president Clinton at Jakarta in late 1994 that the PRC would act militarily if Taiwan declares independence. Rone Tempest, *Taiwan Elections: Test of Nationhood*, L.A. TIMES, Dec. 3, 1994, at A12; Sunny Goh, *Independence from China Major Issue in Taiwan Elections Today*, THE STRAITS TIMES, Dec. 3, 1994, at 34.

13. Deng Xiaoping is often referred to as the PRC's "paramount" or "preeminent" leader. Following Mao Zedong's death in 1976, Deng led the PRC out of the confusion and destruction of the Cultural Revolution and began a series of pragmatic economic and political reforms. These reforms shifted the PRC's internal focus from class struggle to economic development. Deng has been the primary force behind the PRC's entry into the world market and its desire for more trade and contact with the West. Deng no longer holds an official office but he is still considered the most powerful man in the PRC. LAWRENCE ZIRING & C.I. EUGENE KIM, THE ASIAN POLITICAL DICTIONARY 212-13 (1985). See also CHINA IN THE ERA OF DENG XIAOPING: A DECADE OF REFORM (Michael Ying-mao Kau & Susan H. Marsh eds., 1993).

14. *Deng Visits with Chinese Leaders*, L.A. TIMES, Jan. 29, 1995, at A11. Deng is 90 years old and was last seen in public in February 1994. There are reports that he is critically ill. He spent the winter of 1994 in Beijing instead of making his customary trip to Shanghai. *Id.*

15. Tempest, *supra* note 12, at A12.

these nations have chosen to support Taiwanese independence. This growing discrepancy between words and deeds is the subject of this comment. With tensions mounting on both sides of the Taiwan Straits, it has become vitally important for the outside world to decide which side it supports before either Taipei or Beijing forces the issue. Otherwise, nations like the United States may have to choose between defending Taiwan and breaking their word to the PRC, or abandoning Taiwan to its fate in contradiction of their supportive actions.

In part II, this comment examines Mainland China's historical relationship to Taiwan and the nature of Taiwan's unofficial relations with its trading partners. Part III examines the differing perspectives on Taiwan's international status, beginning with its objective or de facto status, moving on to the PRC's view, and ending with the views of the three main political parties in Taiwan.

In the context of recent trends in Taiwan, part IV examines the extent to which Taiwan's unofficial relations with its trading partners complicate relations between Taiwan and China by suggesting a willingness to recognize Taiwan as a state. First it explains the theory of recognition implied from conduct. Next it analyzes two particularly troublesome areas, airspace agreements and arms sales, to determine whether an intent to recognize Taiwanese statehood may be implied. This comment concludes by recommending that nations involved in unofficial trade relations with Taiwan decide whether they support Taiwanese statehood or whether they truly consider Taiwan to be an internal PRC matter and communicate that decision clearly to both Taiwan and the PRC.

## II. BACKGROUND

### *A. Historical Perspective*

The earliest Chinese contact with the island of Formosa dates back almost 1700 years.<sup>16</sup> The Chinese Empire did not formally incorporate the island as a province until 1683.<sup>17</sup> From 1683 to 1895, Qing dynasty rule

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16. The first actual written account of the island, then called "Yizhou" is thought by PRC scholars to be found in the "seaboard geographic gazetteer" written by Shen Ying in the Three Kingdoms Period (A.D. 221-280). *PRC White Paper*, *supra* note 12. Periodic Chinese explorations of Formosa continued through the Sui dynasty (A.D. 581-617). *Id.* See generally JACQUES GERNET, A HISTORY OF CHINESE CIVILIZATION 196 (1985).

17. Prior to that, Chinese contact with Formosa was minimal, though it did have a constant presence in the Penghu Islands. *Taiwan*, in 7 KODANSHA ENCYCLOPEDIA OF JAPAN 306-09 (1983). In the mid-twelfth century, the Song dynasty (960-1279) established a military garrison on Penghu to ward off pirates. *Id.* at 306. Penghu came under Chinese Imperial administration in 1225, but Formosa remained unadministered. *Id.* The Dutch took over both Penghu and Formosa in 1622. *Id.* The Ming dynasty (1368-1644) expelled the Dutch from Penghu two years later but allowed them to stay on the island of Formosa and set up trading posts. *Id.* Formosa was a Dutch trading colony for the next 37 years. *Id.* A Spanish expeditionary force from Manila established a trading settlement in the northern part of Formosa which lasted from

of Taiwan was punctuated by sixty-eight popular uprisings.<sup>18</sup> In 1895, China was defeated by Japan in the Sino-Japanese War and was forced to sign the Treaty of Shimonoseki ceding<sup>19</sup> Taiwan to Japan.<sup>20</sup> Japanese rule of the island was extensive<sup>21</sup> and continued until the Japanese were defeated at the end of World War II.<sup>22</sup>

Meanwhile, on the mainland, the Qing dynasty was overthrown in a revolution which began in 1911.<sup>23</sup> In the late 1920s, Chiang Kai-shek, the commander-in-chief of the Kuomintang or Nationalist Army emerged as the

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1626 to 1642. *Id.* at 307.

After the fall of the Ming dynasty, a Ming loyalist named Cheng Ch'eng-kung, who had successfully held off the Qing dynasty (1644-1912) for many years in the southeast, invaded Formosa and ousted the Dutch. *Id.* From 1662 to 1683, Cheng and his successors ruled Formosa as a last outpost of the Ming dynasty. *Id.* Over 100,000 mainland Chinese migrated to Formosa during Cheng rule. *Id.* The Chengs set up a land cultivation system and traded with Japan and other Asian countries. *Id.* They also introduced a Chinese educational system and built Confucian temples, thus introducing Chinese culture to the island. *Id.* The Chengs abdicated power when faced with imminent invasion by the Qing in 1683. *Id.* See also THE CAMBRIDGE ENCYCLOPEDIA OF CHINA (Brian Hook ed., 1982); Yu-ming Shaw, *Modern History of Taiwan: An Interpretive Account*, in CHINA AND THE TAIWAN ISSUE 7, 8-11 (Hungdah Chiu ed., 1979).

18. Shaw, *supra* note 17, at 15. The uprisings were both the result of a mixture of pro-Ming sentiment and a revolt against the Qing military suppression of the Taiwanese population. *Id.*

19. Cession is the transfer of sovereignty by agreement between the ceding and the acquiring state. LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 327 (3d ed. 1993). In theory, cession is accomplished voluntarily, without coercion. *Id.* However, in actual historical practice cession has often been accomplished at gunpoint. China's "cession" of Taiwan to Japan via the treaty of Shimonoseki was merely a legal formality that legitimized Japan's military conquest of Taiwan.

20. Treaty of Shimonoseki, Apr. 17, 1895, Japan-China, art. II, 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919, 18-19 (John V. A. MacMurray, ed., 1921) (entered into force May 8, 1895) [hereinafter Shimonoseki]. The Chinese on Taiwan protested bitterly against cession and declared Taiwan a republic in a futile effort to win international sympathy. Hungdah Chiu, *Comments* on Ray E. Johnston, *Assessing the International Status of Partitioned Nations: Theories and Findings*, in MULTI-SYSTEM NATIONS IN INTERNATIONAL LAW: THE INTERNATIONAL STATUS OF GERMANY, KOREA AND CHINA 36, 38-39 (Hungdah Chiu & Robert Downen eds., 1981) [hereinafter MULTI-SYSTEM NATIONS IN INTERNATIONAL LAW].

21. Under the Treaty of Shimonoseki, those Chinese wishing to retain their nationality were allowed to leave and go to the mainland. Shimonoseki, *supra* note 16, art. V, at 20. All who stayed became Japanese subjects in 1897. *Id.* The Japanese built Shinto shrines, enforced Japanese modes of dress and the use of the Japanese language. Ian Buruma, *Taiwan*, in 26 GRANTA 172-73 (Spring 1989). The Japanese built banks, hospitals and schools. *Id.* In the schools, Confucian ethics were taught as Japanese ideals. The Japanese developed water supply and sewage disposal systems and brought gas and electric power to the cities and countryside. *Id.* By 1931, there were 2,857 miles of railroad track in Taiwan compared to 9,400 miles in all of China. *Id.* By 1934, power stations in Taiwan produced almost as much electricity as those in China. *Id.* The first university in Taiwan, now Taiwan National University, was established by the Japanese in 1927. *Id.*

22. Buruma, *supra* note 21, at 173.

23. See, e.g. GERNET, *supra* note 16, CHINA: SEVENTY YEARS AFTER THE HSIN-HAI REVOLUTION (Hungdah Chiu & Shao-chuan Leng eds., 1984); FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, CHINA: A COUNTRY STUDY (Robert L. Worden et al. eds., 1988) [hereinafter COUNTRY STUDY].

president of the Republic of China.<sup>24</sup>

Chiang's KMT Party was in power when the Allies returned Taiwan to the Republic of China in 1945.<sup>25</sup> At that time, the KMT was preoccupied with a civil war against its former revolutionary ally, the Chinese Communist Party (CCP), led by Mao Zedong.<sup>26</sup>

The local population of Taiwan rebelled against the reimposition of Chinese rule and was crushed by the KMT army in February, 1947.<sup>27</sup> In response to the growing success of CCP forces on the mainland, the KMT declared martial law throughout China in 1948.<sup>28</sup>

Following defeat by the Communists in 1949, President Chiang Kai-shek and the KMT government fled to Taiwan and established the "temporary" capital of China in Taipei.<sup>29</sup> The KMT was joined there by an estimated two million loyalists.<sup>30</sup> Martial law under the KMT continued on Taiwan for the next forty years.<sup>31</sup> Support for the communist regime on the mainland was criminalized, as was support for Taiwanese independence.<sup>32</sup>

Despite the KMT's defeat and loss of control over the mainland, it continued to regard itself as the legal government of China.<sup>33</sup> Many nations of the world continued to view the KMT as China's legal government as

24. For an in-depth look at the complex political currents in China during this period, see C. Martin Wilbur, *Nationalist China 1928-1950: An Interpretation*, in CHINA: SEVENTY YEARS AFTER THE HSIN-HAI REVOLUTION, *supra* note 23, at 2, 2-57.

25. The Cairo Declaration, DEP'T ST. BULL., Dec. 4, 1943, at 393. The United States, the United Kingdom, and China declared that "[A]ll the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the *Republic of China*." (emphasis added). The Allies reaffirmed the Cairo Declaration in the Potsdam Declaration of July 26, 1945 which limited Japanese sovereignty to Japan. The Potsdam Declaration, DEP'T ST. BULL., July 29, 1945, at 137. The Soviet Union joined in the declaration when it declared war on Japan on August 8, 1945. MYUNG-KI KIM, *THE KOREAN WAR AND INTERNATIONAL LAW* 6-7 (1991). Japan accepted the terms of the Potsdam Declaration when it surrendered on August 15, 1945. *Id.* at 8. The declaration then became binding on Japan. *Id.*

26. In the years following the revolution, the nationalists had trouble consolidating control over the entire country. The KMT received aid from Soviet military advisors and reorganized itself along Soviet (Bolshevik) lines. Wilbur, *supra* note 24, at 4. As the Revolution progressed, differences arose between those in the KMT who favored social revolution along Marxist lines and those who merely wanted political change. The Communist faction was purged from the KMT in 1927. It reorganized as the Chinese Communist Party under Mao's leadership. *Id.* at 2-5. See also GERNET, *supra* note 16, at 624-43.

27. *Introduction to Taiwan*, in [1994 Binder XIX] Const. Countries World, (Oceana Pub., Inc.) xiii (Albert P. Blaustein & Gisbert H. Flanz eds., 1992 & Supp. 1993) [hereinafter Blaustein & Flanz]. An estimated 20,000 Taiwanese died in what has become known as "2-28" after the date it began. *Id.* The KMT did not formally inquire into the event until 1988. *Id.*

28. *Id.*

29. *Id.* at xiv.

30. YEARBOOK, *supra* note 1, at 1242.

31. Blaustein & Flanz, *supra* note 27, at xxiv.

32. Blaustein & Flanz, *supra* note 27, at xiv, xv, xvi.

33. *Id.* at xiv.

well.<sup>34</sup>

Interestingly, when Japan finally signed a peace treaty officially returning Taiwan to China in 1952, the treaty was between Japan and the KMT authorities on Taiwan.<sup>35</sup> Taiwan was returned to the Republic of China even though many states had, by that time, recognized the PRC as the legitimate government of China.<sup>36</sup>

In the 1950s the Taiwan Strait was one of the front lines of the Cold War.<sup>37</sup> The United States supplied Taiwan with aid and arms, and the two signed a mutual defense pact.<sup>38</sup> The PRC informally allied itself with the Soviet Union under the rubric of international communism.<sup>39</sup> After the PRC and the Soviet Union parted ways over ideological differences in the late 1950s and early 1960s,<sup>40</sup> however, good relations with the PRC were seen by the United States and other Western nations as a way to politically isolate the Soviet Union and check its perceived aggressive tendencies.<sup>41</sup> By the early 1970s, it had also become apparent to other nations that refusing recognition to the representative of over 700 million<sup>42</sup> people was impractical.<sup>43</sup>

Gradually, the CCP on the mainland began to supplant the KMT as the internationally recognized government of China.<sup>44</sup> As a condition of its

34. *U.S. Dept. of State Report on Diplomatic Relations of the Republic of China and the People's Republic of China*, 11 I.L.M. 571 (1972) [hereinafter DOS Report]. As of May 23, 1972, 46 countries recognized the KMT as the legitimate government of China.

35. Treaty of Peace, Apr. 28, 1952, R.O.C.-Japan, 138 U.N.T.S. 38.

36. The Japanese at that time recognized the KMT government as the legal representative of China. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 148 (1979).

37. DOROTHY AND THOMAS HOOBLER, *U.S.-CHINA RELATIONS SINCE WORLD WAR II* 29-30 (1981).

38. Mutual Defense Treaty, Dec. 2, 1954, U.S.-R.O.C., 6 U.S.T. 433, 248 U.N.T.S. 214 (entered into force Mar. 3, 1955, terminated Jan. 1, 1979).

39. ROSEMARY QUESTED, *SINO-RUSSIAN RELATIONS: A SHORT HISTORY* 115-29 (1984).

40. *Id.* at 120.

41. See Nancy Bernkopf Tucker, *China and America 1941-1991*, FOREIGN AFFAIRS, Winter 1991, at 75.

42. This was China's population in 1971 when the United Nations admitted the People's Republic of China as a member. Today, China's population numbers well over one billion. *THE STATESMAN'S YEARBOOK* 348 (Brian Hunter ed., 131st ed. 1994-95).

43. *Explanatory Memorandum to Draft Resolution Regarding the Restoration of the Lawful Rights of the People's Republic of China in the United Nations*, U.N. GAOR, 26th Sess., U.N. Doc. A/8392, July 15, 1971, 10 I.L.M. 1094 (1971). The Draft Resolution was sponsored by Albania, Algeria, Cuba, Guinea, Iraq, Mali, Mauritania, The People's Democratic Republic of Yemen, the People's Republic of the Congo, Romania, Somalia, Sudan, Syria, United Republic of Tanzania, Yemen, Yugoslavia, and Zambia. *Id.*

44. In 1972, 71 countries officially recognized the PRC. DOS Report, *supra* note 34. Today that number has risen to 159. *China's Representative on the Issue of So-Called Taiwan's "Representation" in UN*, Xinhua News Agency News Bulletin, July 23, 1994, available in LEXIS, ASIAPC Library, Xinhua File [hereinafter *So-Called Taiwan's "Representation"*]. Only 29 states officially recognize Taiwan. Fax from Eric Chou, Taipei Economic and Cultural Office in Los Angeles, (Mar. 23, 1995) (on file with the *California Western International Law Journal*) [hereinafter Fax from Taipei Economic and Cultural Office].

recognition by other states, the CCP insisted that the KMT first be de-recognized.<sup>45</sup> In 1971, the U.N. General Assembly voted to replace the KMT delegation with representatives from the CCP.<sup>46</sup> The CCP took the "Chinese seat" on the Security Council and the KMT was expelled from the United Nations.<sup>47</sup>

Although Taiwan was no longer represented in the U.N., it was not isolated. Taiwan's trading partners merely converted their official ties to Taiwan into unofficial relations when they recognized the PRC.<sup>48</sup> Of the 159 states which currently recognize the CCP as the sole government of China, over sixty continue to carry on extensive unofficial relations with the KMT on Taiwan.<sup>49</sup> These nations officially recognize the PRC's claim to sovereignty over Taiwan. In contrast, Taiwan currently carries on full diplomatic relations with twenty-nine states.<sup>50</sup> These nations have no diplomatic relations with the PRC and thus freely recognize the KMT as the legitimate government of Taiwan.<sup>51</sup>

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45. Hungdah Chiu, *The International Legal Status of the Republic of China*, 8 CHINESE Y.B. INT'L L. & AFF. 12-14 (1990). This practice continues today. In recent years, China has also broken off diplomatic relations with countries which had subsequently resumed diplomatic relations with Taiwan, e.g.: Grenada, Liberia, Belize and Lesotho. *Id.* This same tactic was employed by the KMT in the early years of its existence as a rival government. It broke relations with the Soviet Union, India, Great Britain and France when these nations recognized the CCP in 1949 (Soviet Union and India), 1950 (Great Britain), and 1964 (France). FRANK P. MORELLO, *THE INTERNATIONAL LEGAL STATUS OF FORMOSA* 79 (1966).

46. *Resolution Regarding the Restoration of the Lawful Rights of the People's Republic of China in the United Nations*, G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8429 (1971) ("[T]he representatives of the government of the People's Republic of China are the only lawful representatives of China to the United Nations.") [hereinafter UN Resolution on Restoration]. In 1971, during the debate on China's representation in the UN, the United States advanced a draft resolution allowing for the representation of both Taiwan and the PRC in the General Assembly pending a peaceful solution to their division. Under the proposal, the PRC would have replaced Taiwan on the Security Council but Taiwan would have remained a member of the General Assembly. The Draft Resolution was sponsored by Australia, Chad, Costa Rica, Dominican Republic, Fiji, Gambia, Haiti, Honduras, Japan, Lesotho, Liberia, New Zealand, the Philippines, Swaziland, Thailand, the United States and Uruguay. *U.N.G.A. Draft Resolution: The Representation of China in the United Nations*, U.N. GAOR, 26th Sess., Agenda item 96, Sept. 29, 1971, 10 I.L.M. 1100 (1971). It was never voted on because Taiwan refused to endorse the idea of co-membership. Munro, *supra* note 5, at 109.

47. UN Resolution on Restoration, *supra* note 46.

48. Chiu, *supra* note 45, at 15.

49. *Republic of China's Official, Semi-Official or Unofficial Missions Abroad*, 12 CHINESE Y.B. INT'L L. & AFFAIRS 777-93 (1992-1994) [hereinafter *Unofficial Missions*].

50. The Bahamas, Belize, Central African Republic, Costa Rica, Commonwealth of Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guinea Bissau, Haiti, Holy See, Honduras, Lesotho, Liberia, Malawi, Nauru, Nicaragua, Niger, Panama, Paraguay, St. Christopher and Nevis, Saint Lucia, St. Vincent and the Grenadines, Solomon Is., South Africa, Swaziland, Tonga and Tuvalu. Fax from Taipei Economic and Cultural Office, *supra* note 44.

51. *Id.* These states do not recognize Taiwan as a separate state because Taiwan does not claim that status. Entities not claiming statehood status cannot be recognized as such. CRAWFORD, *supra* note 36, at 119.

### B. The Nature of Taiwan's Unofficial Relations

The predominant approach to Taiwanese relations was first developed by Japan in 1972.<sup>52</sup> When it recognized the PRC, Japan broke its official ties to Taiwan and established a private entity, the "Interchange Association," in Tokyo with an office in Taipei.<sup>53</sup> Taiwan then opened the private "Association of East Asian Relations" in Taipei with offices in Yokohama, Osaka and Fukuoka.<sup>54</sup> Although nominally private, both associations are funded by their respective governments. They are staffed by government officials on leave from their usual agencies.<sup>55</sup> Functionally, they are consulates general but the Japanese and Taiwanese governments do not recognize them as such.<sup>56</sup>

The Philippines adopted the "Japanese formula" in 1975, and other nations, including the United States, France, Australia, and New Zealand, did the same in the years following.<sup>57</sup>

Unofficial relations of this nature constitute what Lauterpacht characterized as "informal intercourse."<sup>58</sup> Informal intercourse may include unofficial agreements and may be accompanied by an exchange of representatives.<sup>59</sup> Without more, it has no legal effect.<sup>60</sup>

The United States provides a prime example of how convoluted these relations can be.<sup>61</sup> Taiwan is the United States' second-largest market in

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52. Chiu, *supra* note 45, at 15.

53. *Id.* This office was initially headed by the former Japanese ambassador to Taiwan. Ralph N. Clough, *Taiwan's International Status*, in *MULTI-SYSTEM NATIONS IN INTERNATIONAL LAW*, *supra* note 20, at 152.

54. Chiu, *supra* note 45, at 15.

55. *Id.* These officials are not accorded full diplomatic privileges and immunities but they have sufficient freedom and access to government officials to allow them to perform essentially the same functions as diplomats, including issuing visas and facilitating inter-governmental communications. Clough, *supra* note 53, at 152.

56. Chiu, *supra* note 45, at 15.

57. *Id.*

58. LAUTERPACHT, *supra* note 3, at 346-47.

59. *Id.*

60. *Id.*

61. In 1979, the United States "derecognized" or withdrew official recognition from Taiwan. DEP'T ST. BULL., Jan. 1979, at 26. Congress then codified the new relationship in the Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 (1990) [hereinafter TRA]. The TRA set up the nominally private American Institute in Taiwan (AIT). TRA § 6(a)(1). Taiwan then established the Coordination Council for North American Affairs (CCNAA) as a private entity to facilitate communications between the U.S. and Taiwan. *President Chiang Ching-kuo's Statement on Establishing a New Organization to Administer New Relations with the United States*, Feb. 15, 1979, 20 FREE CHINA WEEKLY, No. 6, Feb. 18, 1979, at 1 reprinted in *CHINA AND THE TAIWAN ISSUE* 265-66 (Hungdah Chiu ed., 1979).

When the United States modestly upgraded its relations with Taiwan in September 1994, the PRC protested that the move was an attempt to foster Taiwanese independence. Holland, *supra* note 12. The upgrade allows CCNAA to be renamed the Taipei Economic and Cultural Office (TECO), thus at least acknowledging whose office it is. *U.S. Expands High-level Meetings with Taiwan*, Deutsche Press-Agentur, Sept. 7, 1994, available in LEXIS, Nexis Library, DPA File. Taiwanese officials can now visit most U.S. government offices and U.S.

Asia.<sup>62</sup> The American Institute in Taiwan which represents U.S. interests there is staffed by foreign service officers on leaves of absence.<sup>63</sup> The Taiwan Relations Act, which governs U.S.-Taiwan relations, avoids giving the Taiwanese government any official status by referring to it as the "governing authorities on Taiwan."<sup>64</sup> The TRA also purports to continue cultural, scientific, and economic contact with the "people of Taiwan," not the government.<sup>65</sup> The TRA expressly allows Taiwan to retain its statehood status in domestic courts, however,<sup>66</sup> and specifies that all treaties with Taiwan in existence at the time the TRA was enacted will continue in force unless or until abrogated by law.<sup>67</sup>

Because the PRC sees the economic development of Taiwan as benefiting all of China upon reunification, it has condoned and even encouraged the Japanese formula, even in such an intense form as the TRA, as long as the substance of the relations was confined to trade.<sup>68</sup>

As a result of continuing trade relations, Taiwan's economy has prospered. Taiwan now has the twentieth-largest Gross Domestic Product in the world.<sup>69</sup> It is the thirteenth-largest trading economy and the twelfth-largest exporter of goods.<sup>70</sup> Its gross national product totals U.S.\$220

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economic and technical officials can now visit Taiwan. *Id.* The Clinton administration upgrade falls short of endorsing Taiwan's current bid for U.N. membership. Holland, *supra* note 12. Both houses of Congress, however, introduced concurrent resolutions in January 1995 which affirm that Taiwan deserves a seat in the U.N. and call on the U.S. to encourage the establishment of an ad hoc committee at the U.N. to study Taiwanese membership. S. Con. Res. 3, 104th Cong., 1st Sess. (1995); H.R. Con. Res. 8, 104th Cong., 1st Sess. (1995). The U.S. will also support Taiwan's entry into the General Agreements on Tariffs and Trade (GATT). *Id.* GATT membership is open to non-states. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXXIII, 61(5) Stat. A75, 4 Bevans 639.

The Taipei Economic and Cultural Office (TECO) in Washington D.C. is staffed by 120 Taiwanese nationals. Jim Mann, *Washington Presence: Unofficially, Taiwan is Alive, Well*, L.A. TIMES, Sept. 5, 1988, at 1 [hereinafter *Washington Presence*]. There is a separate military procurement section in another building in Washington which has a staff of 70. *Id.* The TECO has ten other offices around the United States which are staffed by another 350 to 400 Taiwanese nationals. *Id.* The offices are in Atlanta, Chicago, Honolulu, Houston, Los Angeles, Miami, New York, San Francisco, Seattle, Boston, Kansas City, and Guam. *Unofficial Missions*, *supra* note 49, at 791-92. In contrast, the PRC has only five consulates in the United States. The World Factbook, U.S. Central Intelligence Agency, 1994, available in LEXIS, ASIAPC Library, WOFACIT File. The consulates are in Chicago, Houston, Los Angeles, New York, and San Francisco. *Id.*

62. Caspar W. Weinberger, *Taiwan—A Warm and Powerful Friend*, FORBES, Jan. 16, 1995, at 35.

63. TRA, *supra* note 61, § 11.

64. *Id.* § 2(a).

65. *Id.* § 2(a)(2).

66. *Id.* §§ 4(b)(1), 4(b)(7); See also *New York Chinese TV Programs, Inc. v. U.E. Enter., Inc.* 954 F.2d 847, 850 (2d Cir. 1992), *cert denied* 113 S. Ct. 86 (1992) (holding that Taiwan is a state for purposes of suit in the United States).

67. TRA, *supra* note 61, § 4(c). The United States then unilaterally terminated the Mutual Defense Treaty. DEP'T ST. BULL., Jan. 1979, at 26.

68. Chiu, *supra* note 45, at 15.

69. Weinberger, *supra* note 62.

70. *Id.*

billion<sup>71</sup> and it holds U.S.\$92 billion in foreign currency reserves.<sup>72</sup>

The combination of increased wealth from foreign trade<sup>73</sup> and the political emergence of a generation without ties to the mainland has led the people of Taiwan to demand more political freedom.<sup>74</sup> The main opposition party, the DPP, was formed in 1986.<sup>75</sup> It won 20% of the contested seats in that year's election.<sup>76</sup> Martial law was ended the next year.<sup>77</sup> In 1991, the Taiwanese president, Lee Teng-hui, formally renounced the KMT's claim to be the only legitimate government of China.<sup>78</sup>

### III. CURRENT VIEWS ON THE STATUS OF TAIWAN

#### A. *Objective or De Facto*<sup>79</sup> Status

Although it has not yet claimed statehood status and is thus not recognized as such by any nations, Taiwan meets the traditional criteria for statehood.<sup>80</sup> It has a permanent population inhabiting a defined territory. Its government is in effective control of that territory and it has the capacity to carry on relations with other states.

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71. Edward A. Gargan, *Taiwan Pushes to Rebuild Its Position in Global Community*, N.Y. TIMES, June 26, 1994, at 8.

72. Weinberger, *supra* note 62.

73. Per capita GDP in Taiwan is U.S.\$12,000. *Id.*

74. Blaustein & Flanz, *supra* note 27, at xxvi. See also Michael C. Davis, *The Concept of Statehood and the Status of Taiwan*, 4 J. CHINESE L. 135, 143 (1990).

75. Blaustein & Flanz, *supra* note 27, at xxiv.

76. YEARBOOK, *supra* note 1, at 1245. Although the formation of the DPP was technically illegal under martial law, the KMT allowed it to operate. Opposition groups had run in elections prior to 1986 as "non-partisans." *Id.*

77. Blaustein & Flanz, *supra* note 27, at xxv.

78. On April 30, President Lee formally recognized the PRC. *Id.* at xxvii.

79. The term de facto describes a situation which exists even though the law does not officially sanction or recognize its existence. Accordingly, de facto states are those which meet the criteria for statehood despite lack of legal recognition by other states. International law calls upon other nations to respect the rights of de facto states and, in return, expects de facto states to abide by the norms of international law. Bi-lateral relations between de facto states and non-recognizing states are confined to what is necessary to meet the minimum requirements of international law. This situation is contrasted with that of a de jure state. A de jure state is one which is legally recognized by other states. De jure states are accorded the full rights and privileges of statehood by recognizing states. See LAUTERPACHT, *supra* note 3, at 336-46. For a discussion of some of the potential consequences of denying recognition to de facto states, see OPPENHEIM, *supra* note 3, at 197-203.

80. The requirements for statehood, as set out in the Montevideo Convention are: (1) a defined territory, (2) a permanent population, (3) an effective government and (4) the capacity to enter into relations with other states. Convention on the Rights and Duties of States, done at Montevideo, Uruguay, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention]. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987).

## 1. Permanent Population

Taiwan has a population of roughly twenty million.<sup>81</sup> Eighteen million are ethnic Han Chinese. Of these, sixteen million are native Taiwanese, descendants of the Chinese who migrated across the Strait in the 18th and 19th centuries and lived under Cheng and later, Japanese rule.<sup>82</sup> They speak a variety of dialects which are distinct from Mandarin, the official language of the PRC and the KMT.<sup>83</sup> The remaining two million ethnic Chinese are Mandarin speaking "mainlanders" who came across in 1949 after the defeat of the nationalist government.<sup>84</sup> In addition to native and mainland-born ethnic Chinese, there are an estimated 330,000 aborigines who are descendants of the Malayo-Polynesian headhunting tribes which populated the island prior to Chinese contact.<sup>85</sup> Regarded as barbarians, they were driven into the internal mountain regions under Chinese and Japanese rule and they remain carefully watched by the KMT today.<sup>86</sup> When the mainlanders arrived in 1949, they regarded both the native Taiwanese and indigenous populations as an inferior peasant class and treated them accordingly.<sup>87</sup> Today the lines between mainland and native-born Taiwanese are softening but the resentment remains.<sup>88</sup> The aboriginal population still remains isolated from Taiwanese society to a large degree.<sup>89</sup>

## 2. Defined Territory

The current Taiwanese government has been in effective control over the island of Formosa, the Penghu Islands, Quemoy Island and Mazu Island since 1945, when the territories were returned to China at the end of World War II.<sup>90</sup> Since 1991, these islands are the only territory it claims.

## 3. Effective Government

The authorities on Taiwan operate under a Constitution promulgated in 1947.<sup>91</sup> It provides for a government consisting of an elected National

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81. YEARBOOK, *supra* note 1, at 1242.

82. *Id.*

83. The two main dialects are Hakka and Fukien. John Franklin Copper, *Political Development in Taiwan*, in CHINA AND THE TAIWAN ISSUE 37 (Hungdah Chiu ed., 1979).

84. YEARBOOK, *supra* note 1, at 1242.

85. Buruma, *supra* note 21, at 180; YEARBOOK, *supra* note 1, at 1242.

86. Johnston, *supra* note 20, at 21.

87. Buruma, *supra* note 21, at 172.

88. YEARBOOK, *supra* note 1, at 1242.

89. Buruma, *supra* note 21, at 178-82.

90. *See supra* text accompanying notes 25-36.

91. XIANFA [Constitution of the Republic of China] (1947) translated in [1994 Binder XIX] Const. Countries World, (Oceana Pub., Inc.) James T. Seymour, Taiwan-Republic of China 1 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992 & Supp. 1993) [hereinafter Taiwan Const.].

Assembly which then elects a president and vice-president.<sup>92</sup> Article twelve of the Constitution was amended in 1991 to allow the president and vice-president to be elected by popular suffrage beginning in 1996.<sup>93</sup> The National Assembly has the power to amend the Constitution and the powers of referendum and initiative.<sup>94</sup> Below the president are five administrative branches known as Yuans. The Executive Yuan is similar to the U.S. president's cabinet and performs policy and administrative functions.<sup>95</sup> Parliamentary functions are performed by the Legislative Yuan,<sup>96</sup> which is popularly elected.<sup>97</sup> The Control Yuan monitors efficiency of the public service and investigates allegations of corruption.<sup>98</sup> The Judicial Yuan is a seventeen-member supreme court which interprets the Taiwanese constitution.<sup>99</sup> The Examination Yuan recruits civil servants through a competitive examination process.<sup>100</sup>

This governmental structure was brought over by the KMT in 1949. Originally, it was a full government in exile with seats in the National Assembly and Legislative Yuan for representatives from each province on the mainland.<sup>101</sup> Today, these bodies have representatives only from Taiwan.<sup>102</sup>

#### 4. Capacity

The Taiwanese government's capacity to carry on relations with other states is abundantly clear. It has full diplomatic relations with twenty-nine states.<sup>103</sup> It enters into treaties with these governments and through agreements with them, effectively signs on to multilateral treaties.<sup>104</sup>

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92. *Id.* art. 27.

93. Taiwan Const., *supra* note 91, art. 12 (amended May 1, 1991).

94. *Id.* art. 27.

95. *Id.* arts. 53-61.

96. *Id.* arts. 62-76.

97. *Id.* art. 62.

98. *Id.* arts. 90-106.

99. *Id.* arts. 77-82; YEARBOOK *supra* note 1, at 1244.

100. Taiwan Const., *supra* note 91, arts. 83-89.

101. *Id.* art. 26, §§ 1-4; art. 64, §§ 1-4.

102. Blaustein & Flanz, *supra* note 27, at xxv-xxvi. In 1988, when the Kuomintang Central Standing Committee approved a restructuring of the legislature which would phase out all the old mainland seats in the Yuans. The next year, the Voluntary Retirement Act was passed, offering retirement incentives to those members of the Yuans who were elected on the mainland prior to the government's move to Taiwan. *Id.*

103. Fax from Taipei Economic and Cultural Office, *supra* note 44.

104. *See, e.g.*, Exchange of Notes between the Republic of China and the Kingdom of Tonga Concerning Mutual Implementation of the International Convention on Tonnage Measurement of Ships 1969, July 12, 1982 *reprinted in* 7 *Treaties between the Republic of China and Foreign States 1982-1985*, 260-61, *cited in* Chiu, *supra* note 45, at 17 (Ministry of Foreign Affairs, ed., 1986).

### B. The PRC's Perspective

The People's Republic of China views Taiwan as an inalienable part of its territory.<sup>105</sup> Under this view, the Chinese Communist Party is the only legitimate government of China by virtue of its victory over the KMT in the Chinese Civil War.<sup>106</sup> The Kuomintang is seen as a local government which continues to resist the rightful rule of Beijing.<sup>107</sup>

As the one legal government of China, the CCP conceives of reunification under a "one country, two systems" framework similar to that proposed for Hong Kong.<sup>108</sup> Under the "one country, two systems" plan, Taiwan would become a Special Administrative Region<sup>109</sup> with its own economic system and a "high degree" of local autonomy, but all sovereign power would be vested in the CCP.<sup>110</sup> Taiwan would keep its own administrative and legislative powers, maintain an independent judiciary with the right of local adjudication, and retain its military.<sup>111</sup> The Taiwanese government would be allowed to enter into commercial and cultural agreements with foreign countries regarding the territory under its local administration, much as it does now.<sup>112</sup> It would also "enjoy certain rights in foreign affairs"<sup>113</sup> which are left undefined.<sup>114</sup>

The CCP fails to specify how long the "one country, two systems" framework might exist after reunification or to define it in more than these broad terms.<sup>115</sup> The details of the "one country, two systems" concept and

105. "Taiwan is China's sacred territory. We are determined to liberate Taiwan and accomplish the great cause of unifying our motherland." XIANFA [Constitution] (1978) pmbl translated in 2 SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 130 (Joseph En-pao Wang, ed., 1979). Under the 1982 Constitution, this language was replaced with the affirmation that "Taiwan is part of the sacred territory of the People's Republic of China. It is part of the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland." XIANFA [Constitution] (1982) pmbl. translated in [1993-Bus. Reg.] China Laws for Foreign Business (CCH Australia Ltd.) ¶ 4-500 [hereinafter China Laws].

106. PRC White Paper, *supra* note 12.

107. *Id.*

108. COUNTRY STUDY, *supra* note 23, at 478. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, done at Beijing, Sept. 26, 1984, U.K.-P.R.C., 23 I.L.M. 1371 (1984) [hereinafter Joint Declaration on the Question of Hong Kong].

109. The PRC Constitution provides for the establishment of special administrative regions as necessary. XIANFA [Constitution] (1982) art 31, translated in China Laws, *supra* note 105.

110. PRC White Paper, *supra* note 12.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Given the PRC's record in Tibet, this lack of specificity may be cause for concern. Historically Tibet has been under some form of Chinese hegemony since the 13th century. From 1911 to 1950, however, it was effectively independent. In late 1950, the PRC army marched into Tibet to "liberate" it. 1 PEOPLE'S CHINA AND INTERNATIONAL LAW 384-85 (Alan Cohen

how it might work in practice will become clearer in 1997, however, when Hong Kong comes under PRC control.<sup>116</sup>

The PRC would regard any declaration of independence by Taiwan as an unlawful secession which it would be entitled to resist by force.<sup>117</sup> Under international law, if other nations were to become involved, they would be regarded as intervening in the PRC's internal affairs.<sup>118</sup> Beijing characterizes current actions by Taiwan's trading partners that appear to support Taiwanese independence as just this sort of intervention.<sup>119</sup>

### C. Taiwan's Perspective

The Taiwanese position is not as easy to discern as the PRC's. Since martial law was lifted in 1986, Taiwan has been developing a very active democratic process. There are currently three main political parties in Taiwan: the KMT, the DPP and the New Party.<sup>120</sup> Each has its own conception of Taiwan's international status. The KMT still holds most of the power in Taiwan, although in the last round of elections, in December 1994, the DPP gained several seats in the National Assembly and the Taipei City Council and won the mayor's race in Taipei.<sup>121</sup>

#### 1. The Kuomintang Party

As previously noted, the KMT has given up its historical claim to sovereignty over the entire state of China. Forty-six years after fleeing the

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and Hungdah Chiu eds., 1981). Tibet appealed to the United Nations for help but was virtually ignored. *Id.* at 385. Soon thereafter, the PRC forced Tibet to sign an agreement accepting Chinese rule. *Id.* In it Beijing promised to "not alter the existing political system in Tibet [or the] established status, functions and powers of the Dalai Lama." Agreement on the Administration of Tibet, May 23, 1951, P.R.C.-Tibet, para 4 reprinted in 1 PEOPLE'S CHINA AND INTERNATIONAL LAW, *supra* at 391-93. The agreement was followed by increasing governmental and military control over Tibetan affairs and a huge influx of Chinese immigrants. 1 PEOPLE'S CHINA AND INTERNATIONAL LAW, *supra* at 394. In March 1959, when Tibet declared its independence and rebelled, the PRC army crushed the revolt, purged the Tibetan leaders and sent thousands into exile, including the Dalai Lama. *Id.* at 394. In May of that year, the PRC asserted that Tibet was "an inalienable part of China's territory." *Id.* This is the same phrase it uses for Taiwan. See, e.g., Hungdah Chiu, *The International Law of Recognition and Multi-System Nations with Special Reference to the Chinese (Mainland-Taiwan) Case*, in MULTI-SYSTEM NATIONS AND INTERNATIONAL LAW, *supra* note 20, at 55 app. 2.

116. Joint Declaration on the Question of Hong Kong, *supra* note 108, arts 1-2.

117. *PRC White Paper*, *supra* note 12. Russia's recent military action against the separatist enclave of Chechnya provides a vivid example of this sort of sovereign prerogative. Other nations have condemned the action but none has felt obligated to stop it. See, e.g., Barbara Crossette, *What is a Nation?*, N.Y. TIMES, Dec. 26, 1994, at A10.

118. GERHARD VON GLAHN, *LAW AMONG NATIONS* 126-27 (3d. ed. 1976).

119. See, e.g., Holland, *supra* note 12 (quoting Chinese sources as saying that President Clinton's elevation of relations with Taiwan amounts to "gross interference in China's internal affairs and an infringement on its sovereignty").

120. *Fact Sheet*, *supra* note 8.

121. James Kynge, *Strong Nationalist Showing Averts China Crisis*, Reuters World Service, Dec. 4, 1994, available in LEXIS, Nexis Library, REUTER File.

mainland for Taiwan, those in the KMT who have ties to the mainland are aging and a new generation of leaders is emerging who have no recollection of the mainland and greatly weakened loyalties to it.<sup>122</sup> Most members of the Kuomintang Party today, including President Lee Teng-hui, were born in Taiwan.<sup>123</sup>

Despite weakened loyalties, the KMT does not go so far as to claim independent statehood for Taiwan. There are three main reasons for this. First, the KMT justified its initially brutal rule—and its forty years of martial law—on the premise that it was the legal government of China<sup>124</sup> which was fighting a civil war and intended to someday reunify the Chinese state.<sup>125</sup> Second, although it no longer claims to be the sole legal government, the KMT wants Taiwan to be part of a unified China.<sup>126</sup> Among the ethnic Chinese—both Mainlanders and native-born Taiwanese—who make up the KMT, there is a very strong sense of cultural affinity with the mainland.<sup>127</sup> Chinese political culture has also traditionally placed a strong emphasis on unity.<sup>128</sup> The KMT is in no hurry to reunify, however. It wants to maintain the status quo until political and economic conditions on the mainland are right for unification.<sup>129</sup> The third reason is that the KMT fears invasion from the mainland.<sup>130</sup>

During the early 1990s when the DPP was luring KMT voters away from the party with its talk of independence, the KMT developed its current position that Taiwan is part of a divided China similar to Korea or pre-reunification Germany.<sup>131</sup> If recognized by the outside world, this divided state concept would allow the Taiwanese people to remain part of China, while creating a recognized frontier between it and the mainland that the

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122. Buruma, *supra* note 21, at 177.

123. *Taiwan: The Rout that Didn't Happen*, THE ECONOMIST, Dec. 4, 1993, at 37, 38.

124. YEARBOOK, *supra* note 1, at 1242. The National Assembly and Legislative Yuan of the Republic of China both included seats for representatives of every province on the mainland. *Id.* at 1244.

125. Davis, *supra* note 74, at 150. See also *Temporary Provisions Effective During the Period of Communist Rebellion*, Taiwan Const., *supra* note 91, at 25, app. 1. These emergency measures were promulgated on May 10, 1948 just before martial law was declared on the mainland. *Id.*

126. *Taiwan-White Paper on Cross-Straits Relations* (part 2 of 2), BBC Monitoring Service: Far East, July 14, 1994, available in LEXIS, Nexis Library, BBCSWB File [hereinafter *Taiwan White Paper*].

127. Davis, *supra* note 74, at 157.

128. *Id.* at 144 (interview with Yeh Chijeng, Prof. of Sociology, National Taiwan University (Aug. 8, 1989)); Yung Wei, *The Unification and Division of Multi-System Nations: A Comparative Analysis of Basic Concepts, Issues and Approaches*, in MULTI-SYSTEM NATIONS IN INTERNATIONAL LAW, *supra* note 20, at 57, 66.

129. *Fact Sheet*, *supra* note 8; *Taiwan White Paper*, *supra* note 126. When it says that conditions must be right for reunification, the KMT means that the mainland must become more economically developed and more democratized than it is now. Davis, *supra* note 74, at 143 (interview with Ho Defen, Professor of Law, National Taiwan University (Aug. 8, 1989)).

130. *Taiwan's Passionate Democrats*, *supra* note 10, at 31.

131. Munro, *supra* note 5, at 117.

PRC could not cross without an international response.<sup>132</sup>

Divided statehood is not a widely recognized legal concept.<sup>133</sup> Gerhard von Glahn defines a divided state as, “[a state] divided into two entities, each equipped with an operative government.”<sup>134</sup> He further notes that the divisions of Germany and Korea were the result of particular historical circumstances following World War II.<sup>135</sup> The ideological bipolarity of the Cold War facilitated the division of states into communist and “free” entities

132. The Taiwan Straits need not be an international boundary to be a frontier for purposes of the use of force. CRAWFORD, *supra* note 36, at 271-72. A partition line separating one part of a divided state from another is sufficient to constitute a frontier across which an act of aggression would be considered a use of force under article 2, section 4 of the United Nations Charter. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 122-23, U.N. Doc. A/8028 (1970) [hereinafter *U.N. Declaration on Friendly Relations*]. Such a use of force is considered a per se violation of international law and may be met with collective self-defense by other nations under Charter articles 39 and 51. Definition of Aggression, G.A. Res 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

133. See, e.g., 1 L. OPPENHEIM, INTERNATIONAL LAW 568 (Hersh Lauterpacht ed., 8th ed., 1957) (theorizing that the international status of Germany was “suspended” temporarily); OPPENHEIM, *supra* note 3, at 139 (noting that for practical purposes, the pre-unification status of Germany was resolved on the basis of the existence of two German states); D.W. GREIG, INTERNATIONAL LAW 77-79 (1970) (treating East Germany as a German territory under the de facto control of the East German government). Brierly does not even mention the subject in his discussion of States. J.L. BRIERLY, THE LAW OF NATIONS 126-61 (Sir Humphrey Waldock ed., 6th ed., 1963). Crawford recognizes the existence of divided states but argues that they should not be treated as a special category apart from states in general. CRAWFORD, *supra* note 36, at 273.

134. VON GLAHN, *supra* note 118, at 70.

135. *Id.* Von Glahn includes China and Taiwan in this definition as well as North and South Vietnam. *Id.* On China specifically see, MULTI-SYSTEM NATIONS IN INTERNATIONAL LAW, *supra* note 20.

Germany was the defeated aggressor and its partition was effected in order to “assure that Germany should never again become a menace to American security or to the peace of the world.” U.S. DEPARTMENT OF STATE, OCCUPATION OF GERMANY: POLICY AND PROGRESS 1945-1946, 1 (1947). The goal was to destroy the laws and institutions of Nazism, completely disarm the country, punish the war criminals and ensure the payment of reparations for war damage. *Id.* Despite their desire to eradicate all traces of Nazism, the Allies made clear that their occupation was not an annexation. *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic*, Press Release, June 5, 1945 reprinted in *Id.* at 79. In effect, the sovereignty of the occupation forces lay over Germany like a blanket, but did not interrupt the continuity of German statehood. DIETER BLUMENWITZ, WHAT IS GERMANY? EXPLORING GERMANY’S STATUS AFTER WORLD WAR II 30 (1989).

Korea was annexed by Japan in 1910. KIM, *supra* note 25, at 28. After Japan’s defeat in 1945, it surrendered its forces on the Korean peninsula to Soviet troops north of the 38th parallel and to U.S. troops south of the 38th parallel. *Id.* at 19. Following the war, there was to be a four-power trusteeship over Korea for up to five years to allow it to return smoothly to independence after 35 years under Japanese rule. *Id.* at 22 (China and the United Kingdom were the other two powers). Negotiations between the U.S. and U.S.S.R. on the nature of the trusteeship broke down when the two sides could not agree. *Id.* Subsequently, North and South Korea, with the approval of the Soviet Union and the United States respectively, established their own separate governments. *Id.* at 26-27. The Korean War began when forces from the North attacked the South in an attempt to reunify the country under Kim Il-sung. C. Kenneth Quinones, *Korean War*, in 4 KODANSHA ENCYCLOPEDIA OF JAPAN 292 (1983). It ended with the peninsula firmly divided at the 38th parallel, as it is to this day. *Id.*

which functioned as separate states but still claimed to be part of the whole country.<sup>136</sup>

Unlike the PRC, the KMT does not view divided statehood as a hindrance to reunification. In the German and Korean situations, U.N. membership was not precluded simply because the statehood of the two parts was in dispute.<sup>137</sup> Nor has divided state status necessarily been a barrier to communication and cooperation.<sup>138</sup>

China falls more or less neatly into von Glahn's definition of a divided state. There are two entities—the PRC and Taiwan—and each is equipped with an operative government, the CCP and the KMT, respectively. The historical circumstances that divided China were similar to those in operation for Germany and Korea.<sup>139</sup> The circumstances differ in that there was no foreign occupation of China;<sup>140</sup> it was divided without foreign intervention

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136. VON GLAHN, *supra* note 118, at 70.

137. Germany was divided into the Federal Republic in the West and the Democratic Republic in the East. Both were admitted to the United Nations in 1973. BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW CASES AND MATERIALS 23-24 (Louis Henkin et al. eds., 3d ed., 1993) [hereinafter BASIC DOCUMENTS]. Reunification was achieved in 1990. See, e.g., Thomas Risse-Kappen, *From Mutual Containment to Common Security: Europe During and After the Cold War*, in WORLD SECURITY TRENDS AND CHALLENGES AT CENTURY'S END 123, 136 (Michael T. Klare & Daniel C. Thomas, eds. 1991). Korea remains divided into the Republic of Korea in the south and the Democratic People's Republic of Korea in the north. Both were admitted to the United Nations in 1991. BASIC DOCUMENTS, *supra*.

138. Prior to U.N. admission, the two Germanies exchanged "Letters of German Unity," and signed what was known as the Basic Treaty. Treaty on the Basis of Intra-German Relations, Dec. 21, 1973, F.R.G.-G.D.R., 12 I.L.M. 16-24 (1973). The Basic Treaty and its supplemental protocols provided the mechanisms for cooperation between East and West Germany on such subjects as peace and security, trade, travel, communications and inter-governmental contact. *Id.* arts. 3, 5, 7 & Supp. Protocol at 16-18. North and South Korea signed a similar agreement. Agreement on Reconciliation, Non-Aggression & Exchanges and Cooperation between the South and the North, Dec. 13, 1991, R.O.K.-P.D.R.K., reprinted in KOREA NEWSREVIEW, Dec. 21, 1991, at 10-11. It allows divided families to travel across the demilitarized zone (art. 18), provides for the establishment of postal and telecommunications services between the North and South (art. 20), and makes provision for governmental contacts (art. 8). The gradual easing of tensions effected by the German Basic Treaty and the informal communication that was possible within the United Nations framework are considered to have improved relations between the two Germanies prior to reunification. BLUMENWITZ, *supra* note 135, at 58 (noting views expressed by the Foreign Minister of the F.R.G. before the U.N. General Assembly). Although the Reconciliation Treaty has been largely ignored by North and South Korea, there is still hope that the 1991 admission of North and South Korea to the United Nations will ease tensions and help facilitate the reunification of Korea. CRAWFORD, *supra* note 36, at 283. Since 1953, the United Nations has repeatedly affirmed that its main objective with regard to Korea is the peaceful achievement of a unified, independent, and democratic Korea. See, e.g., G.A. Res. 811, U.N. GAOR 9th Sess., Supp. No. 21, at 5, U.N. Doc. A/2890 (1954); G.A. Res. 2668, U.N. GAOR, 25th Sess., Supp. No. 28, at 18, U.N. Doc. A/8028 (1970). The KMT has made much of this argument. See Davis, *supra* note 74, at 144 (Interview with Wei Yung, Chancellor, Sun Yat-sen Institute of Policy Research and Development (Aug. 19, 1989)); Request to Include the Republic of China U.N. Membership Issue in the Agenda of the 48th Sess. of the UNGA, U.N. GAOR 48th Sess., Annex 4 at 4, U.N. Doc. A/48/191 (1993), reprinted in 11 CHINESE Y.B. INT'L L. & AFF. 261-65 (1991-1992) [hereinafter Request to Include]. (stating that UN membership was not incompatible with German or Korean reunification, therefore it would not interfere with the reunification of China).

139. VON GLAHN, *supra* note 118, at 70-72.

140. *Id.*

through a civil war.<sup>141</sup>

Nonetheless, the willingness of the United States to recognize and militarily support the non-communist government on Taiwan effectively prevented the PRC from attempting to reunite the country by force.<sup>142</sup> This solidified the division of China along ideological lines in much the same way as physical occupation divided Germany and Korea.<sup>143</sup>

Along the lines of the German and Korean models, the KMT conceives of reunification through a series of contacts and negotiations designed to ease hostilities between the two entities.<sup>144</sup> The process has begun with “people to people” exchanges<sup>145</sup> and unofficial talks between the two governments.<sup>146</sup> The KMT envisions these meetings leading to the creation of a “reunification consultation institution” through which the two governments would officially negotiate reunification over the long term.<sup>147</sup> During this process the KMT wants Taiwan to be represented on an equal footing with the PRC in international affairs.<sup>148</sup>

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141. *Id.* See also *supra* notes 23-30 and accompanying text.

142. VON GLAHN, *supra* note 118, at 71; HOUBLER, *supra* note 37, at 30.

143. VON GLAHN, *supra* note 118, at 71.

144. *Taiwan White Paper*, *supra* note 126.

145. Under the “people to people” concept, official visits are not permitted but “various private contacts of an indirect nature” are encouraged. Davis, *supra* note 74, at 138 n. 10. These contacts have included: private visits of DPP leaders to the People’s Republic; visits to family members living in the PRC and to ancestral gravesites; direct Red Cross contacts; and exchanges of journalists from both sides of the Straits. *Id.* at 138. See also RALPH N. CLOUGH, *REACHING ACROSS THE TAIWAN STRAIT: PEOPLE TO PEOPLE DIPLOMACY* (1993).

146. On March 9, 1991, Taiwan established the private Straits Exchange Foundation (SEF) to make unofficial contacts and negotiate with China. In December of the same year, China established the unofficial Association for Relations Across the Taiwan Straits (ARATS). In 1992, the ARATS sent an invitation to the chairman of the SEF to meet to discuss cultural, economic and trade exchanges. Hungdah Chiu, *Introduction to Agreements Concerning Cross-Strait Activities done at Singapore on Apr. 29, 1993, A.R.A.T.S.-S.E.F.*, 32 I.L.M. 1217 (1993) (Introduction only available on LEXIS) [hereinafter ARATS-SEF Agreement]. On April 29, 1993 Taiwan and China, through these non-governmental counterparts, signed an agreement which provided for the beginnings of cross-straits relations in the areas of illegal migration, smuggling, fishing disputes, protection of intellectual property, and judicial cooperation. ARATS-SEF Agreement, *supra*, para. 1, at 1221. They agreed to further talks on economic exchanges and on cooperation in energy and resources. *Id.* paras. 2 & 3, at 1221. They also agreed to promote cultural, educational, scientific and technological exchanges. *Id.* para. 4, at 1221. On August 7, 1994, the two signed an accord in which the mainland accepted the jurisdiction of Taiwanese courts over certain issues including skyjacking and fishing disputes. Annie Thomas, *La Chine Reconnaît pour la Première Fois l’Autorité Juridique à Taiwan*, Agence France Presse, Aug. 8, 1994, at 7, available in LEXIS, News Library, PRESSE File. This occasion also marked the first time since 1949 that a mainland official has visited the island, albeit in an unofficial capacity as the head of the ARATS delegation. Patrice de Beer, *Les Relations Entre Pekin et Taipei: La Première Visite Officielle d’un Responsable de la Chine à Taiwan a Permises la Conclusion de Plusieurs Accords*, LE MONDE, Aug. 11, 1994, at 7. Trade between Taiwan and the PRC now amounts to US\$10 billion per year. All of which is routed through third ports such as Hong Kong. Ellis, *supra* note 11.

147. *Taiwan White Paper*, *supra* note 126.

148. *Id.* Taiwan has shown a degree of flexibility with regard to how it is known in the few international organizations in which it retains membership. It is called “Taiwan, China” in INTERPOL (International Criminal Police Organization), and “Chinese Taipei” at APEC (Asian Pacific Economic Cooperation). When finally admitted to GATT, it will be known as

Acceptance of the divided state concept has been difficult. When Taiwan applied for membership in the United Nations in 1993,<sup>149</sup> the PRC objected to the idea and blocked the matter's inclusion in the daily agenda.<sup>150</sup> The same thing happened when the KMT brought the issue before the General Assembly again in 1994.<sup>151</sup>

## 2. The Democratic People's Party

The DPP supports full and official independence for Taiwan. If it wins the presidency in 1996, the DPP has vowed that it will submit the matter to the people in a national referendum on self-determination.<sup>152</sup> The DPP is made up mostly of native Taiwanese who felt marginalized by the main-

"The Customs Territory of Taiwan, Penghu, Kinmen and Matsu." There is a limit to this pragmatism, however. At the ADB (Asian Development Bank), Taiwan's name was changed from the Republic of China to "Taipei, China." Because this was done without Taiwan's permission at the insistence of the PRC, Taiwan has stated that it attends meetings under protest and that such attendance should in no way be interpreted as expressing acceptance of the name. *The Republic of China and Inter-governmental Organizations*, 11 CHINESE Y.B. INT'L L. & AFF. 268, 269 (1991-1992).

149. *Request to Include*, supra note 138, ¶ 4. *So-called Taiwan's "Representation," supra note 44.*

150. Francis Deron et Philippe Pons, *L'Assemblée Générale des Nations Unies: La Chine a réussi à empêcher le retour de Taiwan au Sein de l' ONU*, LE MONDE, Sept. 23, 1994, at 3 [hereinafter *Assemblée Générale*]. *So-Called Taiwan's "Representation," supra note 44.* U.N. membership is open only to states. Any membership vote by the General Assembly must be approved by the Security Council where China has a veto. U.N. CHARTER, art. 4 ¶ 2. It is unlikely that China would have to exercise its veto in this matter however. Regarding Taiwan's latest push for membership, U.N. Secretary General Butros Butros-Ghali affirmed "there is only one China . . . we refuse any contact, direct or indirect, with Taiwan." *U.N. Adheres to One China Position: U.N. Chief*, Xinhua News Agency, Sept. 5, 1994, available in LEXIS, ASIAPC Library, Xinhua File.

151. *Assemblée Générale*, supra note 150. See also *Request to Include the Republic of China U.N. Membership Issue in the Agenda of the 49th Sess. of the U.N.G.A.*, U.N. GAOR, 49th Sess., U.N. Doc. A/49/144 (1994) reprinted in 12 CHINESE Y.B. INT'L L. & AFF. 199-205 (1992-1994).

152. *Taiwan's Passionate Democrats*, supra note 7, at 31; Ellis, supra note 11. The Taiwanese term for self-determination, *zi jui* means "we decide." Davis, supra note 74, at 148. Self-determination is a concept which developed as the moral imperative for the decolonization of European and Japanese Colonies following World War II. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 A.J.I.L. 46, 54 (1992). During the decolonization period, self-determination was narrowly interpreted as the right of peoples living under foreign domination to throw off the colonial yoke and freely determine their own political destinies. *Id.* In contrast, the territorial integrity and political unity of nations already independent of colonial control were given precedence over the internal self-determination of distinct peoples living within their borders. See, e.g., *U.N. Declaration on Friendly Relations*, supra note 132, at 124. In recent years, self-determination has been adopted as the battle cry of minority ethnic, religious, and linguistic groups living within independent nations. See generally Franck, supra, at 46-91. As such, self-determination is now viewed by some as a destabilizing force with the potential to fragment the international status quo into a million autonomous pieces. See, e.g., Butros Butros-Ghali, *Agenda for Peace*, U.N. SCOR, 47th Sess., at para. 17, U.N. Doc. S/24111 (1992).

The Taiwanese idea of *zi jui* carries none of this conceptual baggage. It is more a simple call for democratic decision making than the invocation of a legal right of distinct peoples. Davis, supra note 74, at 148.

lander-dominated KMT.<sup>153</sup> It was in the forefront of the democracy movement of the 1980s. The DPP fought a long battle to open Taiwanese politics to participation by non-mainlanders.<sup>154</sup> Now that Taiwan is functioning as a democracy, the DPP is not about to give up its new-found freedom to be part of a unified China. DPP leaders play down the possibility of invasion from the mainland by citing Taiwan's close relations with the West, especially the United States.<sup>155</sup> They do not believe that the world could stand by and watch as China consolidated its power over Taiwan.<sup>156</sup>

In the 1992 election for the National Assembly, the DPP included a "Pro-Taiwan Independence Clause" in its party program and held rallies for independence.<sup>157</sup> Although the DPP was defeated in National Assembly elections, support for independence was decriminalized the next year.<sup>158</sup> Since 1993, the DPP has been free to hold rallies and publish newspapers critical of the KMT's position.

### 3. The New Party

The New Party is really the old guard. It is a splinter party formed by the "mainlander" faction of the KMT.<sup>159</sup> It was founded in 1993, by seven KMT dissidents who were disillusioned with the corruption of the KMT and who wanted a renewed commitment to reunification.<sup>160</sup> The New Party accuses the KMT of becoming "Taiwanized" and of pandering to the DPP's cries for independence by adopting the divided state theory.<sup>161</sup> The New Party does not believe that President Lee and the KMT are serious about

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153. *Fact Sheet*, *supra* note 8.

154. Sunny Goh, *Mayor Ah Bian Out to Transform Taipei*, THE STRAITS TIMES, Dec. 11, 1994, at 3.

155. Davis, *supra* note 74, at 150.

156. *Id.* In such a case the United States, at least, could find itself obligated to intervene on Taiwan's behalf. The TRA contains strong affirmations that the United States supports peaceful reunification and would meet any military action against Taiwan with force. TRA, *supra* note 61, at §§ 2(b)(4), 2(b)(6). *But Cf.*, Munro, *supra* note 5, at 122 (pointing out that a declaration of independence by Taiwan might nullify these provisions because the issue would no longer be reunification and Taiwan could be seen as having unwisely provoked Beijing).

157. *Taiwan and China: PRC Journal Says "Two Chinas" Policy will "Plunge Taiwan into Great Disaster"*, BBC Summary of World Broadcasts, Jan. 27, 1993, available in LEXIS, News Library, BBCSWB File [hereinafter *Great Disaster*].

158. *Great Disaster*, *supra* note 157. In May 1993, the Legislative Yuan amended article 100 of Taiwan's criminal code so that the crime of "inciting internal strife" would be confined to instances of violence or coercion against the state. *Id.* "Rebellion by words" and "peaceful rebellion" which would have included non-violent support for Taiwanese independence, are no longer punishable. *Id.* They are now protected under law. *Id.* Leaders of the Taiwanese independence movement were released from prison. *Id.*

159. Lawrence Chung, *Taiwan's Biggest Election Rally Backs "One China,"* Agence France Presse, Nov. 20, 1994, available in LEXIS, News Library, PRESSE File.

160. *Taiwan Holds First Free Local Elections*, *supra* note 9; *Fact Sheet*, *supra* note 8.

161. Willy Wo-Lap Lam, *Taiwan Politics Comes of Age*, SOUTH CHINA MORNING POST, Nov. 30, 1994, at 23.

reunification and accuses them of secretly plotting independence.<sup>162</sup> It warns against possible invasion by the PRC if independence is declared.<sup>163</sup> New Party candidates have had the most success when campaigning against corruption in the KMT.<sup>164</sup>

#### 4. Which View will Prevail in Taiwan?

According to the KMT, its divided state idea received approval from the voters in the last general elections which were held in 1992.<sup>165</sup> The December 1994 election results were equivocal. Voter turnout was around 75%.<sup>166</sup> The elections were for the offices of Provincial Governor and Mayor of Taipei and Mayor of Kaohsiung.<sup>167</sup> The Governorship was formerly an appointed post, while the Mayors' offices had not been directly elected since 1964 and 1977.<sup>168</sup>

The Taipei mayoral race was won by the DPP candidate, Chen Shui-bian.<sup>169</sup> Although devoted to the cause of independence,<sup>170</sup> Mr. Chen avoided the subject during his campaign.<sup>171</sup> He ran instead on a platform of improving the quality of life for Taipei's citizens.<sup>172</sup> Taipei's incumbent KMT mayor, Huang Ta-chou, seems to have been blamed for Taipei's traffic problems, pollution, and the many delays and setbacks in the construction of the city's new subway system.<sup>173</sup> The only candidate to make independence an issue was the New Party candidate, Jaw Shaw-kong, who came in second.<sup>174</sup> The New Party held the largest rally in Taiwan's history in

162. *Id.*

163. *Taiwan Holds First Free Local Elections*, *supra* note 9.

164. For example, the New Party received a strong protest vote among KMT voters concerned about collusion between the KMT and financial interests in Taipei. In the 1994 Taipei mayoral race, the New Party beat the KMT by 5.28%. Philip Liu, *Taiwan: The Election Results—A Milestone in Democratization*, Business Taiwan, Dec. 12, 1994 available in LEXIS, News Library, REUTER File. The results were DPP 43.67%, New Party 31.17%, KMT 25.89%. *Id.*

165. *The Rout that Didn't Happen*, *supra* note 123. See also Munro, *supra* note 5, at 117-119.

166. Weinberger, *supra* note 62, at 35.

167. *Fact Sheet*, *supra* note 8.

168. Dennis Engbarth, *Gains for Opposition in Taiwan Elections*, SOUTH CHINA MORNING POST, Dec. 4, 1994, at 1.

169. Liu, *supra* note 164.

170. Goh, *supra* note 154, at 3. Mr. Chen's political career has been devoted to the fight for democracy and independence. *Id.* He spent eight months in prison in 1986 for his involvement with an opposition magazine critical of the KMT. *Id.*

171. Liu, *supra* note 164. During his campaign, Mr. Chen flew the Taiwanese national flag at his campaign headquarters. Goh, *supra* note 154, at 3. This is something the DPP never does because it implies acceptance of the KMT's position on reunification. *Id.*

172. Liu, *supra* note 164.

173. *Id.*

174. Liu, *supra* note 164.

Taipei to protest the idea of Taiwanese independence.<sup>175</sup>

In contrast to Taipei, independence was a hotly contested issue in the Governor's race, which the KMT won. The Governorship of Taiwan is the second most powerful office in Taiwan after the Presidency<sup>176</sup> and currently the highest elected post.<sup>177</sup> The KMT candidate, James Soong, won with 56.2% of the vote.<sup>178</sup> The DPP, which received 38.7% of the vote,<sup>179</sup> campaigned on a pro-independence platform.<sup>180</sup> The KMT also won the mayor's race in Kaohsiung with 54.46% of the vote.<sup>181</sup>

From across the Straits, Beijing watched the elections with disdain. Official news agency reports zeroed in on election-related violence, bribery and dirty campaign tactics.<sup>182</sup> The PRC views Taiwan's democratization as leading inexorably to Taiwanese independence.<sup>183</sup>

No clear message emerges from the 1994 election results. On one hand, the DPP victory in Taipei seems to be more a mandate to get the subway running than a call for independence. On the other hand, the new mayor, Mr. Chen was a well-known member of the Legislative Yuan and a high-profile leader of the democracy and independence movements.<sup>184</sup> The New Party was able to mobilize 50,000 people to protest independence, but polls taken before the election showed most Taiwanese opposing reunification.<sup>185</sup> The governor's race was the only one in which the DPP campaigned strongly for independence and it lost. Its candidate, however, was a relative unknown.<sup>186</sup> The one thing that is certain is that the DPP is now a well-established opposition party with the potential to one day unseat the KMT. If and when that happens, Taiwan's trading partners may be forced to decide whether they will stay out of China's internal affairs or whether they will support the wishes of the Taiwanese people as expressed through free elections.

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175. Chung, *supra* note 159. 50,000 people attended the rally. *Id.*

176. *Taiwan Holds First Free Local Elections*, *supra* note 9.

177. Engbarth, *supra* note 168, at 7. The Governor is responsible for the domestic affairs of all Taiwan except Taipei, Kaohsiung, Quemoy and Mazu. *Ethnicity Not So Vital for Taiwan Voters*, Japan Economic Newswire, Dec. 4, 1994, available in LEXIS, News Library, JEN File [hereinafter *Ethnicity Not So Vital*].

178. Liu, *supra* note 164.

179. *Id.*

180. *Ethnicity Not So Vital*, *supra* note 177. DPP chairman Shih Ming-teh alleges election fraud by the KMT, citing extremely high turnouts, defeats in several DPP strongholds and reports of "widespread irregularities" at the polls. Dennis Engbarth, *Polls Give President a Boost*, SOUTH CHINA MORNING POST, Dec. 4, 1994, at 7.

181. Liu, *supra* note 164.

182. *Mainland Views Taiwan Elections: Taiwan Elections Reportedly Characterized by "Chaos," Misdeeds and Bribery*, New China News Agency Domestic News Service, Dec. 9, 1994 available in LEXIS, News Library, BBC File.

183. *So-called Taiwan's "Representation"* *supra* note 44.

184. Liu, *supra* note 164; Goh, *supra* note 154, at 3.

185. Tempest, *supra* note 12, at A12.

186. Liu, *supra* note 164.

## IV. TRADE RELATIONS AND IMPLIED RECOGNITION

In the midst of the current foment about Taiwanese independence, Taiwan's trading partners are attempting to carry on relations with Taiwan in the way they always have. However, their words, and especially their actions, are being closely monitored by all sides.<sup>187</sup>

Recently, Beijing has expressed concern regarding two developments.<sup>188</sup> First, a total of ten nations have now concluded agreements with Taiwan to fly commercial aircraft directly into its airspace.<sup>189</sup> Second, the pace of arms sales to Taiwan has picked up in the last few years. Between 1990 and 1994, the United States, France, Germany, and others sold Taiwan U.S.\$10 billion worth of weapons.<sup>190</sup> Although technically trade issues, these actions spill over into the political arena and are seen by the PRC—and Taiwan as well—as implying the intent to recognize Taiwan as an independent state.

## A. Conduct Implying Recognition

Recognition is an act intended or calculated to give rise to legal rights and obligations between states and/or governments.<sup>191</sup> Recognition may be

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187. See *PRC White Paper, supra* note 12 *Taiwan's Passionate Democrats, supra* note 10 (describing the Taiwanese government as "charmed" by U.S. Transportation Secretary Federico Pena's visit to the Taiwanese Foreign Minister in his office).

188. *PRC White Paper, supra* note 12.

189. See *infra* notes 209-213 and accompanying text.

190. See *infra* notes 215-228 and accompanying text.

191. LAUTERPACHT, *supra* note 3, at 6. There are two views on the effect of recognition. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 88-91 (4th ed. 1990). The dominant theory is that it is merely declarative of a situation that already exists; i.e., that the entity involved has achieved the status of statehood or that the government involved is the effective governing authority in the territory. *Id.* at 88-89. Under this view, a state or government may exist without being recognized by other states. *Id.* at 89. The main function of recognition under the declaratory theory is, therefore, "to acknowledge the fact of the state or government's political existence and to declare the recognizing state's willingness to treat the entity as an international person with the rights and obligations of a state." HENKIN, *supra* note 19, at 244.

The other view is that recognition is constitutive. *Id.* Under this view, the act of recognition by other states confers international legal personality on an entity purporting to be a state or government. *Id.* Cf. LAUTERPACHT, *supra* note 3, at 63 (postulating that while recognition is constitutive, states have a duty to recognize entities which meet the criteria of statehood). Though the constitutive view is in the minority, there are situations in which it may be argued that recognition is constitutive even if it is considered declarative most of the time. For example, states in the process of formation which have not yet met the full requirements of statehood, or insurgencies not yet meeting the requirements of full effectiveness as governments, may benefit from recognition because it gives them access to foreign aid which may help them to consolidate the territory and/or enhance their legitimacy with the population. Examples include: France's recognition of the United States in 1778, the United States' recognition of Israel in 1948 and India's recognition of Bangladesh in 1972. It may also be ineffective, as in the case of Biafra which was recognized by five states between 1967 and 1970 but ultimately failed to gain independence from Nigeria. See OPPENHEIM, *supra* note 3, at 143-44.

either express or implied.<sup>192</sup> In either case, the crucial factor is the existence of the intent on the part of the recognizing state, to give rise to legal rights and obligations.<sup>193</sup> Express recognition is unequivocal.<sup>194</sup> It normally consists of a formal statement by the recognizing state that it intends to recognize the other state and carry on diplomatic relations with it.<sup>195</sup> This is usually accompanied by the opening of embassies and consulates and the exchange of ambassadors.<sup>196</sup>

Implied recognition is deduced from the way a state conducts its relations with an unrecognized entity.<sup>197</sup> Due to the nature of the international legal system, in which sovereign states enjoy a high degree of freedom from imposed obligations, recognition is rarely implied.<sup>198</sup> The exception to this general rule is the conclusion of a bilateral treaty regulating relations between the state and the new entity and/or the exchange of official representatives.<sup>199</sup> This is considered highly indicative of the requisite intent to engage in full diplomatic relations and is, thus, often held to imply recognition.<sup>200</sup>

Anything less than such a treaty or exchange will not necessarily confer recognition on a state or government.<sup>201</sup> This is because the expression of intent would be too vague to serve as a basis for applying the substantial rights and duties of statehood or governmental legitimacy to a state's relations with an unrecognized entity.<sup>202</sup>

A further reason for this is that recognition is often withheld as a form of sanction against governments which have come to power through extra-constitutional means or against entities purporting to be states but whose existence violates a *jus cogens* principle of international law.<sup>203</sup> In light of

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192. Montevideo Convention, *supra* note 80, art 7; OPPENHEIM, *supra* note 3, at 169; TUNG, *supra* note 3, at 50; VERZIJL, *supra* note 3, at 582.

193. OPPENHEIM, *supra* note 3, at 169.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. LAUTERPACHT, *supra* note 3, at 370.

199. *Id.*

200. *Id.* BROWNLIE, *supra* note 191, at 96.

201. BROWNLIE, *supra* note 191, at 96. The exchange of unofficial representatives, exchange of letters and memoranda, admission to international organizations, and participation in international conferences would all fall short of expressing the requisite intent. LAUTERPACHT, *supra* note 3, at 346. *See also*, TUNG, *supra* note 3, at 50 (writing in 1968, before the United States officially recognized the PRC, that diplomatic negotiations between the two nations at over 130 meetings had failed to imply recognition).

202. LAUTERPACHT, *supra* note 3, at 346.

203. For example, in 1965, the white minority under Ian Smith took power in Southern Rhodesia (now Zimbabwe) and proclaimed independence. The U.N. Security Council passed a resolution "[c]ondemning the usurpation of power by a racist settler minority" and calling on all states to withhold recognition and refrain from any dealings with the "illegal" state. *Resolution Concerning Southern Rhodesia*, S.C. Res. 217, UN SCOR, 20th Sess., 1265th mtg. at 8, U.N. Doc. A/8429 (1965).

this fact, Lauterpacht explicitly states that to imply recognition from conduct is “particularly inappropriate when the general attitude of the state in question points to its continued determination to deny recognition.”<sup>204</sup>

### *B. Is there an Implicit Intent to Recognize Taiwan?*

Those among Taiwan’s trading partners which recognize the PRC, have always been very careful to accompany any change in unofficial relations with an affirmation of the PRC’s sovereignty over Taiwan.<sup>205</sup> Given the intense nature of Taiwan’s relations with its trading partners and the history behind them, however, these affirmations do not clearly “point[] to a continued determination to deny recognition” but rather, to an attempt to mollify the PRC while still benefiting from trade with Taiwan.<sup>206</sup>

In other words, non-recognition is not being used to express any sort of distaste for the Taiwanese entity or for its government. There is no indication that these states are withholding recognition because they find Taiwan’s existence repugnant or its actions in violation of any *jus cogens* principle of international law. On the contrary, most of them formerly recognized the KMT, at least initially, as the *de jure* government of China after it moved to Taiwan. Many continue to be vigorous supporters of the Taiwanese government, though on an unofficial level.<sup>207</sup>

If the CCP did not precondition diplomatic relations on non-recognition of the government of Taiwan, these nations would be unlikely to object to official recognition the KMT, or any other freely-elected government, as the legitimate government of Taiwan. In the absence of objections from the PRC, most of them might also recognize Taiwan as a state were it to declare itself one.

Beijing is fully aware of this situation.<sup>208</sup> Thus, the constant verbal

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204. LAUTERPACHT, *supra* note 3, at 371.

205. For example, when the U.S. upgraded relations this year, a senior administration official stressed that the change was merely an “adjustment” and that it represents no alteration of the United States’ “fundamental” policy of recognizing China’s claim to sovereignty over Taiwan. *U.S. Expands High-level Meetings with Taiwan*, *supra* note 61.

206. LAUTERPACHT, *supra* note 3, at 371.

207. Thailand and the Philippines receive President Lee at the highest level but unofficially. Philip Bowring, *America’s “New” Policy on Taiwan is Timid and Unimaginative*, INT’L HERALD TRIB., Sept. 12, 1994, at 6 (comparing current U.S. policy with that of more supportive states). In the United States, Senator Paul Simon and others have criticized US policy and urged closer contacts with, and more support for, Taiwan. Steven Greenhouse, *U.S., Despite Critics, Is to Expand Taiwan Ties*, N.Y. TIMES, Sept. 8, 1994, at A5; Marilyn Green, *U.S. Edges Toward Closer Ties with Taiwan, But Not Too Close*, USA TODAY, Sept. 9, 1994, at 7A. In March 1995, Senator Barbara Murkowski and 35 other senators submitted a concurrent resolution expressing the sense of the Senate that President Lee should be allowed to visit the United States in a private capacity. Sen. Con. Res. 9, 104th Cong., 1st Sess. (1995). Mr. Lee is an alumnus of Cornell University and has been prohibited from accepting Cornell’s invitation to visit. *Id.* See also Weinberger, *supra* note 62, at 35 (writing for the business magazine Forbes, Former Secretary of Defense Caspar Weinberger is generous with his praise of Taiwan and its emerging democratic process).

208. *PRC White Paper*, *supra* note 12.

affirmations of Taiwan's trading partners that they have no intentions of recognizing either Taiwan or its government, are little comfort. The PRC remains concerned that a de facto situation is being created in which a declaration of independence by Taiwan would be favorably met.

### 1. Airspace Agreements

Lebanon, the United Arab Emirates, Indonesia, Thailand, and the Philippines have all entered into agreements with either Taiwan's Civil Aeronautics Administration or its state-owned China Airlines to fly directly to Taiwan.<sup>209</sup> KLM Dutch Airlines has offered daily direct flights to Taipei since 1983,<sup>210</sup> despite Beijing's objection.<sup>211</sup> Both Australia and New Zealand established direct flights without seeking approval from the PRC.<sup>212</sup> Russia and Vietnam did the same in 1993.<sup>213</sup>

These agreements illustrate the legal difficulties inherent in business dealings with Taiwan. It is hard to imagine that the nations involved consciously intended to imply anything about Taiwan's international status when they set up their direct flights. Since Taiwan is a bustling commercial destination, it is simply good business for airlines to have direct flights there.

However, under the Convention on International Civil Aviation, "every State has complete and exclusive sovereignty over that airspace above its territory."<sup>214</sup> Establishing direct flights without the permission of the PRC implies that these nations do not recognize the sovereignty of the PRC over Taiwan's airspace. Since they contracted with the Taiwanese government, it follows that these nations instead recognize its complete and exclusive sovereignty over the airspace of Taiwan. Under the terms of the Convention, only states have sovereignty over the air above them. Thus the

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209. *Annex: List of Bi-lateral Agreements*, 10 CHINESE Y.B. INT'L L. & AFF. 243-45 (1990-1991). Most of the governments of these countries did not contract directly with Taiwan, but they could scarcely be unaware of the agreements. Lebanon, Thailand and the Philippines contracted through their state-owned airlines and Indonesia did it through its Chamber of Commerce office in Taipei. Only the U.A.E. went through its Department of Civil Aviation. *Id.*

210. Jacques Charmelot, *Les Droits de l'Homme au Menu des Entretiens du Ministre Néerlandais des Affaires Étrangères*, Agence France Presse, Mar. 7, 1994 available in LEXIS, News Library, PRESSE File. Other state-owned European carriers, such as Air France, Lufthansa and British Airways opened flights to Taipei in 1993, but did so under subsidiary companies. *Id.*

211. *Id.* See also PRC White Paper, *supra* note 12.

212. Nicholas D. Kristof, *Taiwan, Winning New Friends, Hopes for Another One in Clinton*, N.Y. TIMES, Jan. 18, 1993, at A10.

213. Agreement on Mutual Cooperation in Civil Aviation, July 28, 1993, Taipei-Moscow Economic and Cultural Coordination Commission-Moscow-Taipei Economic and Cultural Commission, *reprinted in* 12 CHINESE Y.B. INT'L L. & AFF. 463 (1992-1994); Agreement on the Promotion and Expansion of Air Services, Nov. 25, 1993, Taipei Airlines Association-Airlines Association of Vietnam, *reprinted in* 12 CHINESE Y.B. INT'L L. & AFF. 535 (1992-1994).

214. Convention on International Civil Aviation, *done at Chicago Dec. 7, 1944*, art. 1, 61 Stat. 1180, 15 U.N.T.S. 259, (entered into force Apr. 4, 1957) (emphasis added).

conclusion of airspace agreements with a government whose jurisdiction encompasses only the islands of Taiwan, might be held to imply an intent to recognize Taiwan as a state.

As noted above, such actions would hardly be sufficiently unambiguous to constitute implied recognition with all its legal consequences. However, contracting with Taiwanese authorities to enter Taiwan's airspace does contradict the official stance of the nations in question and as such, both encourages the proponents of Taiwanese independence and angers the PRC.

## 2. Arms Sales

The more complex matter of arms sales to Taiwan could also be taken to imply that the selling countries are willing to recognize Taiwan as a state. In 1990, Taiwan unveiled a six-year, U.S.\$300 billion public works program.<sup>215</sup> Many European and U.S. companies began competing for construction contracts.<sup>216</sup> At the same time, Taiwan began to update its military.<sup>217</sup>

Because many of the arms purchasers were retired military officers with close ties to the KMT,<sup>218</sup> arms sales were seen by many countries as an opportunity to improve their chances of being awarded the civilian contracts.<sup>219</sup> For this reason, the governments of France, Germany, and the United States gave defense contractors in their countries permission to sell arms to Taiwan.<sup>220</sup> From 1990 to 1994, Taiwan spent U.S.\$10 billion on

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215. The program includes plans for a U.S.\$7.4 billion nuclear power plant, a U.S.\$13 billion highway, an U.S.\$11 billion high speed railroad, and two mass-transit systems, one worth U.S.\$7.4 billion and one worth U.S.\$6.2 billion. Jim Mann, *Taiwan Arms Deals Open Doors to Civilian Contracts, Targeting Taiwan for Arms Deals* part 2, L.A. TIMES, Mar. 15, 1994, at A1 [hereinafter *Targeting*, part 2].

216. In 1991, France sent a Cabinet-level minister to Taiwan at the head of a large delegation. *Id.* In 1992, U.S. Trade Representative Carla Hills visited Taiwan. *Id.* She was the first Cabinet-level official from the U.S. to do so since 1979. *Id.* Cabinet-level officials are not officially allowed to visit Taiwan even under the new Clinton Administration policy. *U.S. Expands High-level Meetings with Taiwan*, *supra* note 61. This did not stop Transportation Secretary Federico Pena from visiting Taiwan in December 1994, however. Weinberger, *supra* note 62, at 35.

217. *Targeting*, part 2, *supra* note 215.

218. *Id.*

219. After the U.S. sale of F-16s in 1992, officials and trade representatives were hopeful that the sale would help U.S. firms get commercial contracts in Taiwan. Especially coveted was the nuclear power plant contract. *Targeting*, part 2, *supra* note 215. The British government remains detached from Taiwan, but British defense contractors have been looking into the Taiwanese market, as have Italian and Russian firms and military officials. Jim Mann, *Targeting Taiwan for Arms Deals*, part 1, L.A. TIMES, Mar. 14, 1994, at A1 [hereinafter *Targeting*, part 1].

220. In France, lobbying by Dassault, the maker of the Mirage, resulted in top-level ministers approving a change in France's long-standing policy of refusing to sell arms to Taiwan. *Targeting*, part 1, *supra* note 219. The United States, under pressure from weapons contractors, gave specific permission to sell only certain arms to Taiwan, thus carefully avoiding abandoning its 1982 joint communiqué with China in which the United States promised to phase out arms sales to Taiwan. Joint Communiqué on Taiwan, Aug. 17, 1982, U.S.-P.R.C., paras.

Western weapons.<sup>221</sup> These arms sales appear to be having the hoped-for effect, resulting in civilian contracts for firms in those countries.<sup>222</sup>

The PRC complained that the arms sales constituted illegal intervention in its internal affairs.<sup>223</sup> Beijing publicly retaliated against France on that ground.<sup>224</sup> It disqualified French firms from bidding on its Guangzhou subway project after France sold Taiwan sixty Mirage fighters.<sup>225</sup> The PRC also closed the French consulate in Guangzhou.<sup>226</sup> As a result, France reversed course. In January 1994, France changed its policy and issued a joint communiqué with the PRC "that in the future, it will refrain from authorizing French businesses to participate in the arming of Taiwan."<sup>227</sup> France is the only nation thus far to bring its actions in line with its public statements. The United States and Germany have continued their sales in increasingly inventive ways and with tacit governmental approval.<sup>228</sup>

International law forbids unlawful intervention by one state in another state's internal affairs.<sup>229</sup> Intervention is defined as, "interference by one state in the affairs of another for the purpose of either maintaining or

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6, 21 I.L.M. 1147 [hereinafter Joint Communiqué]. The Communiqué tempered section 3301(b)(5) of the TRA, which states it is the policy of the United States to provide Taiwan with defensive arms. There was strong support in Congress to abandon the Communiqué altogether. Jim Mann, *U.S. Accord Clears Way for New Arms Sales to Taiwan*, L.A. TIMES, Apr. 27, 1994, at A1 [hereinafter *U.S. Accord Clears Way*].

221. *Targeting*, part 1, *supra* note 219. France sold Taiwan six Lafayette-class light frigates in 1991. *Après des Fregates et des Mirage 2000, Taiwan Envisage d'Acheter des Garde-Côtes à la France*, LE MONDE, Oct. 8, 1993, available in LEXIS, News Library, PRESSE File [hereinafter *Après des Fregates*]. In 1993, it sold 60 Mirage fighter jets and 1500 MICA air to air missiles to Taiwan. *Id.* In 1992, the United States sold 150 F-16s to Taiwan. *Targeting*, part 1, *supra* note 219. Germany sold Taiwan 10 submarines that year. Sophie Huet, *Pas de Sous-Marins Allemands à Taiwan, Affirme le Ministre Allemand des Affaires Étrangères*, Agence France Press, Apr. 27, 1994, available in LEXIS, Nexis Library, PRESSE File.

222. France's Matra was awarded the Taipei subway contract. *Targeting*, part 2, *supra* note 215, at A6. Germany was optimistic about its prospects for selling high speed trains worth U.S.\$17 million to Taiwan. Huet, *supra* note 221. The bids for the nuclear power plant contract were reviewed at the end of 1994 and the contract will be awarded in 1995. *Taiwan Seeks Nuclear Technology in Reactor Tender*, The Reuter Asia-Pacific Business Report, Oct. 4, 1993, available in LEXIS, News Library, REUTERS File.

223. *PRC White Paper*, *supra* note 12. The PRC has likened U.S. arms sales to Taiwan to the British selling arms to the Confederacy. *Washington Presence*, *supra* note 61.

224. *Targeting*, part 2, *supra* note 215, at A6.

225. *Id.*

226. Kristof, *supra* note 212.

227. *Targeting*, part 2, *supra* note 215, at A6. This move was the result of lobbying by French businesses doing business in the PRC. *Id.*

228. In response to PRC protests, the German government forbade the *direct* shipment of submarines to Taiwan, but agreements between German shipyards and American firms have resulted in agreements to ship disassembled submarines to the U.S. or South Korea, assemble them there and transship them to Taiwan. Huet, *supra* note 221. South Korea switched recognition from Taiwan to the PRC in 1992 and adopted the Japanese formula. *Unofficial Missions*, *supra* note 49, at 629.

229. VON GLAHN, *supra* note 118, at 162.

changing the status quo.”<sup>230</sup> The purpose of the nations involved in arms sales is arguably nothing more than to further their own trade interests in Taiwan. In effect, however, selling arms to Taiwan does preserve the status quo by maintaining a putative balance of power between Taiwan and the PRC.<sup>231</sup>

As these nations purport to recognize the PRC’s claim to sovereignty over Taiwan, selling arms to the KMT thus constitutes arming a rival government within territory under PRC sovereignty. Looked at in this way, the arms sales do, as the PRC suggests, constitute unlawful interference in its internal affairs.<sup>232</sup> Since most states attempt to act within the bounds of international law whenever possible, the PRC’s interpretation is not illogical.

However, the PRC’s objections to the recent arms sales must be understood in the context of Taiwanese politics. Beijing sees the sales as supporting and encouraging those who advocate independence or enhanced recognition. Despite reassurances from the United States, Germany and others that they recognize the PRC’s claims to sovereignty over Taiwan, their actions continue to imply that they recognize the KMT’s territorial authority over the islands of Taiwan and its right to defend that territory. Beijing knows that Taiwan believes that any aggression is most likely to come from the mainland.<sup>233</sup> Nations selling arms to Taiwan are also aware of this.<sup>234</sup> Thus, if they mean what they say, the United States, France, and Germany are in violation of international law; if they mean what can be implied from their actions, they could be seen as supporting Taiwanese independence or the divided state theory.<sup>235</sup>

## V. CONCLUSION

Taiwan’s trading partners are caught between Taiwan’s burgeoning

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230. *Id.* at 163.

231. *U.S. Accord Clears Way*, *supra* note 220, at A1.

232. While the PRC has said that it will allow Taiwan to keep its armed forces after reunification, their strength and supply will presumably be controlled by Beijing. *See PRC White Paper*, *supra* note 12.

233. *Taiwan Defense Minister Warns of Chinese Threat*, Reuters World Service, Aug. 31, 1994, available in LEXIS, News Library, REUTER File.

234. For example, the United States Joint Communiqué with the PRC which governs US-PRC relations, makes the United States’ reduction in arms sales to Taiwan contingent on peaceful reunification. Joint Communiqué, *supra* note 220, paras. 5-6.

235. Arms sales are also not incompatible with the divided state theory. In 1987, two years before the Berlin wall fell, West Germany imported U.S.\$420 million worth of arms and East Germany imported U.S.\$220 million. U.S. ARMS CONTROL AND DISARMAMENT AGENCY, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 1988 85 tbl. II (1989). In 1991, the year North and South Korea were admitted to the United Nations, those countries spent U.S.\$2.4 billion and U.S.\$3 billion, respectively, on arms imports. U.S. ARMS CONTROL AND DISARMAMENT AGENCY, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 1991-1992, 12 (1994). *See also* Oh Kwan-chi, *The Military Balance on the Korean Peninsula*, in THE KOREAN PENINSULA: PROSPECTS FOR ARMS REDUCTION UNDER GLOBAL DETENTE 91 (William J. Taylor et al. eds., 1990).

democracy and desire for international status, and the mainland's historical claim to Taiwan as a part of the former Chinese empire. The unpredictability of Taiwan's voters on one hand and the ambitions of those who would succeed Deng Xiaoping as the PRC's preeminent leader on the other, make this a precarious place to be.

Although it is highly unlikely that trading nations with unofficial ties to Taiwan would acquire any legal duties toward Taiwan through implied recognition, it is clear that in the overall context, actions speak louder than words. By saying that they recognize the PRC's claim to Taiwan and at the same time going ahead with trade arrangements like arms sales and airspace agreements which imply support for statehood, Taiwan's trading partners are aggravating the situation.

The DPP and the native Taiwanese within the KMT cannot help but be encouraged in their efforts toward greater recognition and potential independence by this attention. At the same time, the PRC cannot help but be appalled at the seeming duplicity of those nations which say one thing and do another. Were the DPP to gain the presidency in 1996 and, relying on what it sees as widespread international support, ask for a referendum on self-determination, the PRC could be provoked into action. Alternatively, with Deng Xiaoping near death, there may come a time of instability in the PRC's leadership which could lead to the rash decision to grab Taiwan before it slips away.

If either of these scenarios occurs, the trading nations which have played both sides of the fence for so long, will suddenly find themselves having to choose between ignoring the Taiwanese people to whom they have lent their implicit support, or breaking their word to the PRC that Taiwan's status is the PRC's internal affair in which they will not intervene. Neither scenario is appealing. Therefore, it is in the best interest of each nation involved with Taiwan to decide which position it supports and clearly communicate that position to both Taiwan and the PRC.

The divided state concept currently put forth by the KMT is potentially the best compromise between the two extremes of province and state. International recognition of the division of China at the Taiwan Straits would make those Straits a frontier for purposes of the use of force and take the issue of Taiwan out of Beijing's internal domain. At the same time, it would create a stable framework in which the PRC and Taiwan could negotiate toward reunification or some form of association over the long term. Taiwan would be secure from attack in its enhanced international status and the PRC would maintain its historical ties to Taiwan. Selling Beijing on this idea will

be difficult, but an effort must be made to resolve the ambiguity of Taiwan's status before either side tests the international waters.

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