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An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan

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AN UNRECOGNIZED STATE IN FOREIGN AND INTERNATIONAL COURTS: THE CASE OF THE REPUBLIC OF CHINA ON TAIWAN

*Pasha L. Hsieh**

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Introduction

Taiwan may be one of the most unique entities under international law. The international community acknowledges its existence, but is reluctant to recognize its statehood. Despite its status as a “non-recognized State,” or an “entity *sui generis*,”¹ most countries engage in bilateral trade and establish “non-official” relations with Taiwan. These relations

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1. This concept may refer to “entities which maintain some sort of existence on the international plane in spite of their anomalous character” and “this is the situation of Taiwan (Formosa).” Ian Brownlie, *Principles of Public International Law* 63–65 (6th ed. 2003); Malcolm N. Shaw, *International Law* 166 (4th ed. 1997) (“Taiwan would appear to be a non-state territorial entity which is de jure part of China but under separate administration.”).

are due to Taiwan's trade power as the world's 17th largest economy² and the third largest holder of foreign exchange reserves.³ During the last decade, Taiwan has transformed from an authoritarian regime into a full-fledged democracy. Hence, western countries regard Taiwan as a model of democracy for China and other developing countries, particularly those in East Asia.⁴

Lack of diplomatic recognition, however, has jeopardized Taiwan's status in both foreign countries and international settings. As of now, only twenty-four countries, none of them world powers, give Taiwan full recognition.⁵ Facing diplomatic isolation, Taiwan can rarely use its official name, Republic of China (ROC), abroad. The Taiwanese cannot display their national flag or sing their national anthem in international settings.⁶ The nation exists as one entity with multiple identities. For instance, Taiwan's embassies may be called "Taipei Economic and Cultural Office," "Taipei Representative Office," or "Chung Hwa Travel

2. Republic of China, Government Information Office, A Brief Introduction to Taiwan: The Economy, http://www.gio.gov.tw/taiwan-website/5-gp/brief/info04_8.html (last visited Nov. 26, 2007).

3. *Id.* Taiwan has a trade balance of US \$15,818 million and a per capita GNP of US \$15,676. World Trade Organization, Trade Policy Review Body, *Trade Policy Review, Report by Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, 2-3, WT/TPR/G/165, (May 16, 2006); U.S. Dep't of State, Background Note: Taiwan, Bureau of East Asian and Pacific Affairs (Oct. 2007), <http://www.state.gov/r/pa/ei/bgn/35855.htm>.

4. Taiwan's first direct presidential election was held in 1996. In 2000, the opposition party leader won the presidential election, ending more than 50 years of one-party rule. Republic of China, Government Information Office, Direct Presidential Election in Taiwan (ROC), http://www.gio.gov.tw/elect2004/news/tw04_05.htm (last visited Mar. 23, 2008). *See also* Background Note: Taiwan, *supra* note 3 ("In March 2000, DPP candidate Chen Shui-bian became the first opposition party candidate to win the presidency. His victory resulted in the first-ever transition of the presidential office from one political party to another, validating Taiwan's democratic political system.")

5. Twenty-four countries that maintain diplomatic relations with Taiwan (ROC) include: Europe (Holy See); East Asia and Pacific (Kiribati, Marshall Islands, Nauru, Palau, Solomon Islands, and Tuvalu); Central and South America (Belize, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, St. Christopher & Nevis, St. Lucia, and St. Vincent & Grenadines); and Africa (Burkina Faso, The Gambia, Malawi, Sao Tome & Principe, and Swaziland). Ministry of Foreign Affairs, Republic of China (Taiwan), Embassies and Missions Abroad, <http://www.mofa.gov.tw/webapp/lp.asp?ctNode=1019&CtUnit=30&BaseDSD=30&mp=6> (last visited Mar. 12, 2008).

6. *E.g.*, Hung-mao Tien, The Great Transition: Political and Social Change in the Republic of China 220 (1989) (stating that Taiwan "agreed to abandon, as required, the ROC flag and national anthem when participating in future Olympic Games"); Max Woodworth, *It's All Fun and Games until China Gets Hurt*, Taipei Times, Dec. 20, 2001, at A11, available at <http://www.taipeitimes.com/News/feat/archives/2001/12/20/116620> ("Tseng won first place at the World Cyber Games (WCG) in Seoul[.] . . . [He] rose from his seat and declared at the top of his voice 'Taiwan No. 1!' and waved a national flag. It is a violation of the games' rules to display Taiwan's national flag.").

Service;⁷ and its memberships in international organizations are often labeled “Chinese Taipei,” “Taipei, China,” or “China (Taiwan).”⁸

Taiwan’s diplomatic problems result from pressure from The People’s Republic of China (PRC), and its insistence on the “one China” principle. The PRC asserts that, “there is but one China” and “Taiwan is an inalienable part of China.”⁹ China opposes any of Taiwan’s efforts to “split China’s sovereignty and territorial integrity.”¹⁰ The PRC’s assertions gained force in a 1971 Resolution of the United Nations that transferred the China seat to the government in Beijing,¹¹ subsequent to which most foreign nations, including the United States, terminated their diplomatic relations with Taiwan. Since then, foreign countries and international organizations have frequently encountered the dilemma of how to grant Taiwan proper diplomatic treatment without offending China.

This Article provides a comparative analysis of the status of the Republic of China on Taiwan in foreign and international settings. Most existing literature written from the traditional public international law perspective focuses on Taiwan’s separate statehood from China.¹² This

7. *Republic of China’s Official, Semi-Official or Unofficial Missions Abroad*, 20 Chinese (Taiwan) Y.B. Int’l L. & Aff. 504, 504–20 (2002).

8. For instance, “Chinese Taipei” is used by the WTO and for purposes of the Olympic Games; the Asian Development Bank refers to Taiwan as “Taipei China;” and “China (Taiwan)” is used by the International Cotton Advisory Committee. Most United Nations agencies use the term “Taiwan, Province of China.” See also Jacques deLisle, *The Chinese Puzzle of Taiwan’s Status*, 24 *Orbis* 35, 37 (2000) (describing how Taiwan uses “the alphabet soup of labels”).

9. Taiwan Affairs Office of the State Council, *The Taiwan Question and Reunification of China* (Sept. 9, 1993), <http://www.gwytb.gov.cn:8088/detail.asp> (follow “The Taiwan Question and Reunification of China (1993-9-1)” hyperlink under “White Papers On Taiwan Issue”) [hereinafter 1993 White Papers]; Taiwan Affairs Office of the State Council, *The One-China Principle and the Taiwan Issue* (Feb. 21, 2000), <http://www.gwytb.gov.cn:8088/index.asp> (follow “The One-China Principle and the Taiwan Issue (2000-2-21)” hyperlink under “White Papers On Taiwan Issue”) [hereinafter 2000 White Papers] (arguing that the two Germanys formula should not apply to China-Taiwan relations).

10. 1993 White Papers, *supra* note 9. See also 2000 White Papers, *supra* note 9 (stating that China may use force “against the scheme to create an ‘independent Taiwan’ and against the foreign forces interfering with the reunification of China. . .”).

11. G.A. Res. 2758, at 2, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8439 (Oct. 25, 1971), reprinted in 11 I.L.M. 561 (1972). See Tien, *supra* note 6, at 219 (“In October 1971, in yet another U.N. vote on the China seat, the United States dropped its lobbying on the ROC’s behalf and the China seat went to [Beijing]. The ROC had been ousted from the United Nations.”).

12. See e.g., Lung-chu Chen, *Taiwan’s Current International Legal Status*, 32 *New Eng. L. Rev.* 675, 676 (1998) (“Taiwan is an island nation, separate from continental China. Taiwan is Taiwan and China is China.”); Parris Chang & Kok-ui Lim, *Taiwan’s Case for United Nations Membership*, 1 *UCLA J. Int’l L. & Foreign Aff.* 393, 423 (1996–97) (“Taiwan has fulfilled the prerequisites for statehood, adhering to the rights and duties associated with states under international law.”); Y. Frank Chiang, *One-China Policy and Taiwan*, 28 *Fordham Int’l L.J.* 1, 87 (2004) (“China has no sovereignty over the island of Taiwan and its

Article addresses an important pragmatic issue that international courts and courts in foreign countries frequently face: whether Taiwan is a “foreign State” for particular salutatory purposes in judicial proceedings. Part I of this Article provides an overview of China-Taiwan relations and the status of Taiwan under international law. I argue that the ROC on Taiwan has been a sovereign State since its creation in 1912 and was never “succeeded” by the PRC, which was established in 1949. By my analysis, both the ROC and the PRC are equal entities in the “divided China”; neither side belongs to the other. Part II examines the decisions of domestic courts that have addressed the status of Taiwan in the United States, Canada, the United Kingdom, and Japan. In these countries (which do not recognize Taiwan as an autonomous entity, but nonetheless maintain substantial “non-official” ties with it), domestic courts have employed various devices to ensure the State-like status of Taiwan, thus safeguarding the country’s interests and allowing continued economic and diplomatic relations with the ROC. Consequently, judicial recognition of Taiwan’s existence as a State has risen to the level of customary international law. Part III explores the possibility of Taiwan bringing suit as a “State” before the International Court of Justice, as a “fishing entity” before the International Tribunal for the Law of the Sea, and as a “separate customs territory” in the dispute resolution mechanism of the World Trade Organization. This Article concludes that to avoid creating a global judicial “black hole,” it is both necessary and pragmatic to officially deem Taiwan a State in judicial proceedings of any kind.

I. Taiwan’s Status and its Relations with China

A. *Historical Background*

Taiwan fell to China in 1684 during the Ching Dynasty and was formally made a province of the Chinese Empire in 1885.¹³ After Japan defeated China in the Sino-Japanese war, the Ching Dynasty signed the Treaty of Shimonoseki in 1895, ceding Taiwan “in perpetuity” to Ja-

people. The one-China principle that the P.R.C. government advocates is flawed in its proposition that Taiwan is part of China.”). For the view of the PRC, see generally Che-Fu Lee, *China’s Perception of the Taiwan Issue*, 32 New Eng. L. Rev. 695 (1998) and Zhengyuan Fu, *China’s Perception of the Taiwan Issue*, 1 UCLA J. Int’l L. & Foreign Aff. 321 (1996–97).

13. See Taiwan Yearbook 2007, History (2007), <http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/03history.html#04>. See generally Gary Klintworth, *New Taiwan, New China: Taiwan’s Changing Role in the Asia-Pacific Region* 5 (1995) (“Taiwan was not associated with traditional Chinese territory in any formal way until the Ch’ing Dynasty and the [PRC’s] claim that Taiwan was part of ‘the sacred territory of China since ancient times’ is difficult to sustain.”).

pan.¹⁴ After the Second World War, the Japanese retreated from Taiwan under the terms of the Cairo Declaration, issued in 1943, which mandated that Taiwan “be returned to the Republic of China.”¹⁵ The Republic of China, to which the Allied Powers referred, was the government of the Chinese Nationalist Party, which had overthrown the Ching Dynasty in 1912. After the Chinese civil war between the Nationalist Party and the Communist Party, the Chinese Communist Party proclaimed the establishment of the PRC in 1949. The defeated ROC government, led by the Nationalist Party, retreated to Taiwan. Since then, China has had two regimes, the PRC on Mainland China and the ROC on Taiwan. The PRC planned to “liberate” Taiwan while the ROC intended to “counterattack and recover” the mainland. Both sides claimed to be the only legitimate government representing China and thus commenced a zero-sum race in diplomatic battles.¹⁶

For two decades, the ROC on Taiwan continued to represent the “old China.” It enjoyed diplomatic recognition by most States and had membership in the United Nations, of which the ROC was a founding State. In the 1970s, the world abruptly moved away from recognizing Taiwan as a separate State. In 1971, with allied developing countries siding with the PRC, the UN General Assembly passed Resolution 2758, expelling the ROC and giving China’s seat to the PRC.¹⁷ In less than one year, Taiwan was ousted from most UN-affiliated organizations. Even worse for Taiwan’s cause, in 1979 the United States, Taiwan’s long-term ally, decided to recognize the PRC as the representative government of China and terminated diplomatic relations with the ROC on Taiwan.

14. Treaty of Shimonoseki, China-Japan, art. 2, May 8, 1895, 181 Consol. T.S. 217 (“China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon: . . . (b) The island of Formosa, together with all islands appertaining or belonging to the said island of Formosa . . .”).

15. The Cairo Declaration was issued by Generalissimo Chiang Kai-Shek of the Republic of China, Prime Minister Winston Churchill of the United Kingdom, and President Franklin D. Roosevelt of the United States. The Declarations stated that “all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be returned to the Republic of China.” Cairo Conference, 9 Dep’t. St. Bull. 393 (Dec. 1, 1943).

16. See Cho Hui-Wan, Taiwan’s Application to GATT/WTO: Significance of Multilateralism for an Unrecognized State 112 (2001) (discussing that the ROC and the PRC “have been in diplomatic war with each other to win recognition by foreign states as ‘the sole legal government of China. Both say there is only one China, but until 1992 each claimed to be ‘the one’ representing China”); Che-Fu, *supra* note 12, at 326 (“Despite all the deep animosity between the CCP and the KMT, both sides believed that there is only one China, and Taiwan is a part of China.”).

17. See Cho, *supra* note 16, at 116–18 (discussing the ROC’s withdrawal from the United Nations).

B. *The Statehood of Taiwan under International Law*

After the 1970's, due to lack of membership in most State-oriented UN organs and the derecognition by major world powers, Taiwan's international status became a complex puzzle. Most countries find it thorny to deal with the unique relationship between China and Taiwan. To understand the issue of Taiwan's statehood, it is important to discuss cross-strait relations. In my view, the PRC-ROC relationship can be depicted as two equal entities in one divided China. On the one hand, Taiwan did not declare independence from "old China," to which both Mainland China and Taiwan once belonged. An independent "Republic of Taiwan" never came into existence. The state of the ROC remains the same. The only change after 1949 was the land and the population it controls. On the other hand, the PRC, since its creation, has never exercised jurisdiction over Taiwan and its outer islands.¹⁸ Hence, the PRC and the ROC are separate but equal, and neither belongs to the other.

The concept of divided States can be illustrated by the Korean and German examples. The fact that the constitutions of both Koreas uphold the principle of "one Korea" does not prevent the two Koreas from possessing separate international personalities.¹⁹ The German example went even further. In December 1972, the two Germanys concluded a treaty to normalize their relations.²⁰ The Constitutional Court of the Federal Republic of Germany affirmed the constitutionality of the Basic Treaty, ruling that relations between the "two parts of Germany with separate statehood" should be "governed by international law."²¹ Both Germanys were, and both Koreas are, widely recognized by most foreign countries and were entitled to UN membership.²² However, the PRC disputes the

18. See Lee Teng-hui, *Understanding Taiwan: Bridging the Perception Gap*, Foreign Aff., Nov.-Dec. 1999, at 9 ("In the 50 years since the P.R.C. was founded, both sides of the Taiwan Strait have been separately ruled, with neither subordinate to the other. This situation has not changed in any substantive way since 1949.").

19. Const. of Democratic People's Republic of Korea of 1998 art. 9 ("the DPRK shall strive [to] . . . reunify the country on the principle of independence, peaceful reunification and great national unity."); Const. of Republic of Korea art. 4 ("The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.").

20. See Hungdah Chiu, *The International Law of Recognition and Multi-System Nations—With Special Reference to the Chinese (Mainland-Taiwan) Case*, 1 Chinese (Taiwan) YB of Intl L. and Aff. 1 4-5 (1981); see also Markus G. Puder, *The Grass Will Not Be Trampled Because The Tigers Need Not Fight—New Thoughts and Old Paradigms for Détente Across the Taiwan Strait*, 34 Van. J. Transnat'l L. 481, 524-25 (2001)(stating that the German experience may be applied to China-Taiwan relations).

21. Chiu, *supra* note 20, at 5.

22. For further discussions on the concept of divided states and the German and Korean examples, see Divided States, 1 Encyclopedia of Public International Law 1085-89 (1992); see also Yung Wei, *Recognition of Divided States: Implications and Application of Concepts*

two-Koreas and two-Germanys formulas, and contends that the division of these two countries occurred because of arrangements by foreign superpowers. The PRC argues that this “external factor” makes the situation between Taiwan and China inherently different from the German example.²³

The PRC’s argument is flawed because under international law the reason for a country’s formation has no impact on the determination of its statehood. In other words, neither an “external factor,” such as foreign intervention, nor an “internal factor,” such as civil war, has any bearing on the ROC’s status as a State. Instead, the factors that determine the ROC’s statehood must be limited to those given in Article I of the Montevideo Convention on Rights and Duties of States.²⁴ Article I stipulates that a State should possess four characteristics, including 1) a permanent population; 2) a defined territory; 3) a government; and 4) capacity to enter into relations with other States. The ROC on Taiwan meets all four requirements.²⁵

First, the ROC has a permanent population that currently numbers 23 million living on Taiwan and its outlying islands.²⁶ Second, the ROC has a territory of “existing national boundaries.” Some argue that the ROC’s territory is yet to be defined because of disputes with China over territory.²⁷ Nonetheless, international law does not require fully defined territory. Both Russia and Japan have disputed territories with China, yet their statehoods have never been challenged.²⁸ Third, the ROC is an

of “Multi-System Nations,” “Political Entities,” and “Intra-Commonwealth,” 34 Int’l L. 997 (2000).

23. See 2000 White Papers, *supra* note 9 (arguing that the two Germanys formula should not apply to China-Taiwan relations).

24. Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 3100, 165 L.N.T.S. 17. See also Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discounts*, 37 Colum. J. Transnat’l L. 403, 408 (1999) (stating that the convention is the “source most often cited as authority on the definition of the state.”).

25. For discussions regarding Taiwan’s statehood under Article I of the Montevideo Convention, see Chang & Lim, *supra* note 12, at 420–23; Tzu-Wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. Int’l L. & Foreign Aff. 351, 387–88 (1996–1997); Christopher J. Carolan, Note, *The “Republic of Taiwan”: A Legal-Historical Justification for a Taiwanese Declaration of Independence*, 75 N.Y.U. L. Rev. 429, 451–56 (2000).

26. Taiwan: History, Geography, Government, and Culture—Infoplease.com, <http://www.infoplease.com/ipa/A0108020.html> (last visited Mar. 12, 2008).

27. See Brownlie, *supra* note 1, at 71 (“[T]he existence of fully defined frontiers is not required and . . . what matters is the effective establishment of a political community.”). Shaw, *supra* note 1, at 139 (“[T]here is no necessity in international law for defined and settled boundaries, . . . so long as there is a consistent band of territory which is undeniably controlled by the government of the alleged state.”).

28. See Gregory Clark, *Northern Territories Dispute Highlights Flawed Diplomacy*, Japan Times Online, Mar. 24, 2005, <http://search.japantimes.co.jp/cgi-bin/eo20050324gc.html>.

autonomous government independent of the PRC. The people of Taiwan democratically elect leaders of both the central and local governments.²⁹ Finally, the ROC has the capacity to conduct foreign relations. It maintains representative offices in almost 100 countries,³⁰ and it has concluded treaties and agreements even with countries with which Taiwan has no formal relations.³¹ Moreover, the ROC possesses full membership in numerous international organizations, including the World Trade Organization and the Asian Development Bank.³² Some contend that the ROC is unable to establish diplomatic relations with most countries, hence undermining its capacity to conduct foreign relations. However, Taiwan's main obstacle to maintaining foreign relations is China's pressure on foreign States, not Taiwan's incapacity to conduct foreign relations. Using this explanation, it is not difficult to distinguish Taiwan from other State-like entities that lack diplomatic relations with other countries. For instance, although Chechnya and Northern Cyprus may satisfy the first three criteria under Article I of the Montevideo Convention, they lack the capacity to enter into relations with foreign States and international organizations.³³

Taiwan's lack of diplomatic recognition does not affect its status as a State. There are two main theories of diplomatic recognition in international law.³⁴ According to the constitutive theory, recognition constitutes an essential element of statehood. This approach is difficult to adopt in practice because "states cannot by their independent judgment establish any competence of other states."³⁵ The prevailing view of recognition is

29. See Jonathan Manthorpe, *Opposition wins Taiwan election*, Nat'l Post, Mar. 22, 2008, <http://www.nationalpost.com/news/story.html?id=393804> (last visited May 7, 2008); *Bowing Out: Electoral humiliation marks the end of the Chen Shui-bian era*, Economist, Jan. 19, 2008, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=10533931.

30. See generally, Taiwan, Bureau of East Asian and Pacific Affairs, Dep't. of State, *supra* note 3. For the complete list of Taiwan's representative offices abroad, see Taiwan, Ministry of Foreign Affairs, Republic of China, <http://www.mofa.gov.tw/webapp/lp.asp?CtNode=279&CtUnit=30&BaseDSD=30&mp=1> (last visited Nov. 18, 2007).

31. See, e.g., Taiwan, Ministry of Finance, Republic of China, <http://www.dot.gov.tw/en/display/tax-treaty-policy.asp> (last visited Mar. 23, 2008).

32. Taiwan currently has memberships in twenty-two international organizations. See Taiwan, Ministry of Foreign Affairs, Republic of China, <http://www.mofa.gov.tw/webapp/lp.asp?ctNode=1037&CtUnit=46&BaseDSD=39&mp=6> (last visited Mar. 23, 2008).

33. Chechnya and Northern Cyprus are not members of any international organization. Northern Cyprus is recognized only by Turkey. See generally Anthony Comfort, *Policy Department Note on Turkey and the Problem of the Recognition of Cyprus*, available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/nt/553/553930/553930en.pdf.

34. See I.A. Shearer, *Starke's International Law* 117-21 (11th ed. 1994) for discussions on recognition. See also Lee, *supra* note 12, at 386 ("[T]he international status of a state is established 'independently of recognition.'").

35. Brownlie, *supra* note 1, at 88.

the declaratory theory, which asserts that recognition is only the formal acknowledgement of statehood or government.³⁶ In the *Tinoco Concessions Arbitration*, a case between the United Kingdom and Costa Rica, the arbitrator pointed out that, on the basis of international law, “non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco’s government.”³⁷ A US Court of Appeals in *Wulfsohn v. Russian Socialist Federated Soviet Republic* also held that “whether or not a government exists . . . is a fact, not a theory.”³⁸ Consequently, the ROC’s status as a State is not undermined by a lack of recognition.

In practice, despite the lack of formal relations, courts in foreign States explicitly and implicitly recognize that Taiwan meets the “State” requirements for particular legal purposes, and hold that Taiwan is not part of the PRC, but of the ROC.³⁹ By recognizing the statehood of both the PRC and the ROC, their relations should be governed by international law and, as a consequence, both sides would be obliged to settle their disputes peacefully.⁴⁰ The International Court of Justice would resolve political conflicts, the International Tribunal for the Law of the Sea would determine maritime disputes, and the dispute resolution mechanism of the World Trade Organization would resolve trade issues.

II. Foreign Court Decisions Regarding the Sovereignty of Taiwan

A. Practice of Foreign Courts

After the 1970s, most major States switched recognition from the ROC to the PRC. This political decision has created complex legal issues for domestic courts. The question of how to treat Taiwan, an ally formally recognized as the ROC, became a high-profile judicial puzzle that triggered a series of sensitive diplomatic maneuvers. Below is an

36. *Id.* at 87–88. The status of a state does not depend on whether it receives diplomatic recognition from other states. Restatement (Third) of the Foreign Relations Law of the United States § 202 cmts. a, b (1987).

37. Brownlie, *supra* note 1, at 88.

38. *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 138 N.E. 2d, 24 (N.Y. 1923); *see also* *Upright v. Mercury Business Machines Co.*, 213 N.Y.S.2d. 417, 419 (1961) (“A foreign government, although not recognized by the political arm of the United States Government, may nevertheless have *de facto* existence which is juridically cognizable.”).

39. *See* Shearer, *supra* note 34, at 123 (discussing examples of “legitimate occasions for conclusively implying recognition”).

40. *See* U.N. Charter art. 2, para. 3 (“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”).

exploration of judicial decisions in countries with which Taiwan maintains substantial “unofficial” relations and their treatment of the question of Taiwan’s status as an independent State.

1. United States

The ROC has been an old ally of the United States. The two countries concluded the Mutual Defense Treaty in 1955 in the aftermath of the Chinese Civil War and Korean War.⁴¹ However, in the 1970s, the United States began normalizing relations with the PRC as a result of Sino-Soviet conflicts.⁴² In 1972, President Richard Nixon visited China and the U.S. and the PRC issued the Shanghai Communique, in which the United States “acknowledge[d]” that “there is but one China” and “Taiwan is a part of China.”⁴³ On January 1, 1979, President Jimmy Carter formally announced the decision to terminate relations with the ROC and to recognize the PRC as “the sole legal government of China.”⁴⁴ Several days later, Taiwan was notified by the United States that the Mutual Defense Treaty would be terminated on January 1, 1980.⁴⁵

President Carter’s decision was a shock to Taiwan, and infuriated the U.S. Congress, where most members felt that the United States’ abandonment of its long-time ally would severely affect its credibility with other countries.⁴⁶ Members of Congress attempted to salvage U.S.-

41. The Treaty was signed by representatives of both nations on December 2, 1954 and was approved by the Senate and signed by the President on February 11, 1955. *Goldwater v. Carter*, 617 F. 2d 697, 699 (D.C. Cir. 1979). See generally Mutual Defense Treaty, U.S.-China, Dec. 2, 1954, 6 U.S.T. 434. In particular, Article V of the Treaty provides that each nation “would act to meet the common danger in accordance with its constitutional process.”

42. See John R. Bolton, About “Dual Recognition,” <http://www.fapa.org/dualrecognition/aboutdualrecog207.html> (“Nixon believed that ‘playing the China card’ would gain for the United States and unusual and highly unexpected ally in the global struggle against the Soviet Union and its satellites.”).

43. See Tien, *supra* note 6, at 233; Before Nixon’s visit, he sent Henry Kissinger, U.S. Assistant to the President for National Security Affairs, to Beijing to negotiate the meeting of leaders of the two countries. For Nixon’s policy on China-Taiwan relations, see Chiang, *supra* note 12, at 49–53.

44. The Normalization Communiqué and Associated Documents in Richard C. Bush, *At Cross Purposes: U.S.-Taiwan Relations Since 1942* 138 (2004). On December 30, 1978, President Carter signed a memorandum “recognizing the government of the People’s Republic of China as the sole legal government of China and . . . terminating diplomatic relations with the Republic of China.” President’s Memorandum for All Departments and Agencies: Relations with the People of Taiwan, *reprinted in* 1979 U.S.C.C.A.N. 36, 75 [hereinafter “President’s Memorandum”]. The President’s Memorandum also acknowledged that the United States wished to maintain relations “with the people of Taiwan without official government representation and without diplomatic relations.” *Id.*

45. *Goldwater*, 617 F. 2d at 700.

46. At a debate during the first U.S. Congress on March 12, 1979, Sen. David Boren stated that “[t]he government on Taiwan, the Republic of China, has never done anything to deserve mistreatment by the Government of the United States. They have been our friend.” 14 Chinese (Taiwan) YB Int’l L. & Aff. 128 (1995–96).

Taiwan relations by enacting the Taiwan Relations Act (TRA), which became the first and only U.S. legislation designed for an unrecognized State.⁴⁷ The TRA outlines the relationship between the United States and Taiwan. Its purpose is to ensure non-official relations between the people, instead of the governments, of the two countries.⁴⁸ In particular, the TRA stipulates that “[t]he absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan.”⁴⁹

The TRA is the only comprehensive domestic statute in the world governing relations with Taiwan.⁵⁰ Due to substantial relations between Taiwan and the United States, the courts’ judicial interpretations of Taiwan’s status and the TRA provide abundant guidance, to which many

47. Members of Congress also challenged the President’s unilateral termination of the Mutual Defense Treaty. In *Goldwater v. Carter*, they argued that the President’s decision contravened Congress’ “advice and consent” power under the U.S. Constitution. In their view, since two-thirds of the Senate vote is required to ratify a treaty, the same process should be followed to abrogate a treaty. Yet, the efforts of Congress failed. In 1979, the U.S. Supreme Court vacated the Circuit Court’s decision, which had sided with Congress, and held that the current case was not yet ripe for judicial review due to the lack of a constitutional impasse. Four concurring Justices held the view that this was a political question, which the Court should not review. *See generally* *Goldwater v. Carter*, 444 U.S. 996 (1979). *See* U.S. Const., art. II, § 2 (“The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”); *see also* Colin P.A. Jones, *United States Arms Exports to Taiwan Under The Taiwan Relations Act: The Failed Role of Law in United States Foreign Relations*, 9 Conn. J. Int’l L. 51, 56 (1993) (detailing the case of *Goldwater v. Carter*). It is noteworthy that Article V of the U.S.-ROC Mutual Defense Treaty stipulates that it would remain in force “indefinitely,” but states that “[e]ither Party may terminate it one year after notice has been given to the other Party.” However, the Treaty does not contain specific provisions regarding the process of terminating the Treaty.

48. 22 U.S.C. §§ 3301–16 (2000) (“[The Act] authorize[s] the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.”).

49. 22 U.S.C. § 3303 (2000).

50. For instance, the Taiwan Relations Act provides that U.S.-PRC diplomatic relations depend on “the expectation that the future of Taiwan will be determined by peaceful means.” 22 U.S.C. § 3301 (2000). In addition, “to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, [is] . . . of grave concern to the United States.” *Id.* *See* Jones, *supra* note 47, at 60–62 (describing US arms sales to Taiwan); Steven M. Goldstein & Randall Schriver, *An Uncertain Relationship: The United States, Taiwan and the Taiwan Relations Act*, 165 China Q. 147, 149–51 (2001) (explaining some controversial terms in the TRA). There are two significant points concerning the TRA and U.S. courts’ interpretations of that statute. First, the TRA is not construed as a “treaty,” but as U.S. domestic law. Hence, it is erroneous to state, as some Taiwanese politicians have claimed, that the U.S. bears an “international obligation” to protect Taiwan. Legally speaking, unlike the Mutual Defense Treaty, Taiwan is unable to invoke the TRA to ask the U.S. to defend Taiwan, should it be attacked by China. Secondly, the TRA is unique in that Congress intended to treat Taiwan as if it were a state without “recognizing” it as a state, a view that has been consistently upheld by the judicial branch. Congress’ enactment of the TRA has been widely considered to be successful in guaranteeing Taiwan’s interests and promoting substantive relations between the two nations.

other foreign courts refer. Judicial disputes involving Taiwan, or the ROC, occurred in the pre-TRA era. During that period, U.S. courts either recognized the ROC on Taiwan as the “*de jure* government of China,”⁵¹ or deemed “Formosa,” the ancient name of Taiwan, to be a nation for the purposes of a particular statute.⁵² Hence, the State status of Taiwan in U.S. courts was not substantially in doubt.

Nonetheless, problems arose following the termination of diplomatic relations. Taiwan’s greatest concern was the transfer of the ROC’s property to the PRC. Under international law, such transfer is the automatic result of “State succession.”⁵³ Taiwan was aware of this consequence. To avoid this result, Taiwan sold its embassy property, known as “Twin Oaks,”⁵⁴ which the ROC had acquired in 1947, to the Friends of Free China, a private organization chaired by pro-Taiwan Congressmen.⁵⁵ This “sale” was for the nominal sum of U.S. \$10 and was executed on December 22, 1978, seven days before President Carter announced the termination of formal relations with the ROC on Taiwan.⁵⁶

The PRC asked the U.S. government to block the transfer of the embassy property to Friends of Free China, contending that all government properties of China belonged to the PRC.⁵⁷ Ultimately, the TRA prevented the invalidation of this transfer by declaring that the absence of recognition of the ROC does not affect property interests “heretofore or hereafter acquired by or with respect to Taiwan.”⁵⁸ Because of this pro-

51. See *Nat’l Union Fire Ins. Co. v. Rep. of China*, 254 F.2d 177, 187 (4th Cir. 1958). (“[T]he vessels were sold to the ‘Government of the Republic of China’ and not to the Chinese state . . . and further, that the Nationalist government, in the US law, was still the *de jure* government of China . . .”).

52. See *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664–65 (D.C. Cir. 1960) (holding that Formosa is a “country” within the meaning of the Immigration and Nationality Act).

53. See *Aspects of the Law of State Succession*, International Law Association (2004), at 3 (“In all the types of State succession the transfer of an immobile property to the successor was confirmed. Specific regulations concern a destiny of mobile property in particular types of succession.”).

54. For an introduction to Twin Oaks, see *The Republic of China’s (Taiwan) Twin Oaks Estate*, <http://www.taiwanembassy.org/us/content.asp?CuItem=11441> (last visited Mar. 23, 2008).

55. Property of “De-recognized” Government, 14 Chinese (Taiwan) YB Int’l L. & Aff. 105 (1995–96).

56. *How Twin Oaks Came to be Sold for a Mere \$10*, Taipei Update, Apr. 16, 2001, at 8, available at http://dc.roc-taiwan.org/tpupdate/html/no014/css/no014_8.htm (last visited Mar. 23, 2008).

57. See Property of “De-recognized” Government 14 Chinese (Taiwan) YB Int’l L. & Aff. 105–06 (1995–96) (citing Deputy Secretary of State, Warren Christopher’s testimony that “[w]ith respect to diplomatic property that was acquired before 1949, . . . that diplomatic property belongs to the People’s Republic of China . . .”). The US Department of State supported the PRC’s claim that “diplomatic property” acquired prior to 1949 should belong to the PRC. *Id.*

58. Taiwan Relations Act, 22 U.S.C. § 3303(b)(3)(A) (2000). In 1982, the Friends of China Association transferred Twin Oaks back to the ROC government. Later, the ROC gov-

vision, the case of the RPC's diplomatic real property never went to court.

Nonetheless, U.S. courts encountered more complex issues regarding the ROC's bank deposits in the United States. The first case addressing this problem was the *Wells Fargo Bank* case.⁵⁹ In 1949, due to the civil war in China, the Bank of China's headquarters moved to Taipei. The Liberation Army took over the old office in Shanghai and claimed "to have succeeded to the ownership" of the bank, thus dividing it.⁶⁰ In 1953, both Banks of China claimed to be entitled to funds deposited in a Wells Fargo Bank branch in California. To decide which bank was the real depositor, the court followed the executive branch's view that the ROC on Taiwan was the recognized government and ruled that the Bank of China in Taipei was entitled to the fund.⁶¹

Following the derecognition of the ROC, another American court encountered a similar question.⁶² After 1949, the Bank of China in Taipei was reorganized and was renamed the International Commercial Bank of China (ICBC). The New York branch maintained allegiance with Taipei, but the two branches in Pakistan sided with Beijing. The two Pakistan branches maintained deposits in the New York bank.⁶³ Subsequently, the PRC transferred control of the two branches to Pakistan. The National Bank of Pakistan brought suit against the ICBC and claimed the assets in the New York account. The ICBC urged the court to consider the precedent set by the *Wells Fargo Bank* case, meaning that the Bank of Pakistan should be collaterally estopped from claiming rights to the deposit. The court rejected this argument, holding that because the *Wells Fargo Bank* decision rested upon the formal recognition

ernment built a large new "non-embassy" on Wisconsin Avenue and uses Twin Oaks for "unofficial entertaining." June Teufel Dreyer, Taiwan Security Research, *China's Attitude Toward the Taiwan Relations Act* n. 41 (May 1999), available at <http://taiwansecurity.org/IS/IS-Dreyer.htm>.

59. See *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F.Supp. 59, 61–63 (N.D. Cal. 1952); see also *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 209 F.2d 467 (9th Cir. 1953).

60. *Wells Fargo Bank*, 104 F.Supp. at 62.

61. Nonetheless, the court conceded that "neither of the rival Banks of China is a true embodiment of the corporate entity which made the deposit in the Wells Fargo Bank." *Wells Fargo Bank*, 104 F.Supp. at 66. See also *Wells Fargo Bank*, 104 F.Supp. at 62. (stating that it is not proper for the court to determine "which government best represents the interests of the Chinese State in the Bank of China" and thus the court "should justly accept . . . that government which our executive deems best able to further the mutual interest of China and the United States."). The Court of Appeals also awarded interests to the Bank of China in Taipei. See *Wells Fargo Bank*, 209 F.2d 467 at 477.

62. See *Nat'l Bank of Pakistan v. Int'l Bank of Pakistan v. Int'l Commerce Bank of China*, 1999 N.Y.L.J., Apr. 13, 1988 at 11; *Nat'l Bank of Pakistan v. Int'l Commerce Bank of China*, 543 N.Y.S.2d 601 (N.Y. App. Div. 1989).

63. *Nat'l Bank of Pakistan*, 1999 N.Y.L.J., at 11.

of the ROC, it was inapplicable after the normalization of US-PRC relations.⁶⁴ Further, the court stated that the TRA “does not mandate a different conclusion.”⁶⁵

Arguably, the *National Bank of Pakistan* decision is erroneous, as it ignored the executive branch’s intent that the ROC’s bank deposits should “continue unaffected by normalization.”⁶⁶ More importantly, the court misinterpreted the TRA.⁶⁷ In contrast to the court’s finding that the TRA is inapplicable, the TRA clearly stipulates that Taiwan’s status under US laws would not be affected by the absence of recognition.⁶⁸ Legislative history further shows that the legal rights under the TRA contain those “involving bank assets.”⁶⁹ Consequently, the court’s decision contravened the purpose of the TRA and violated the clear mandate of the TRA by holding that *Wells Fargo Bank* was inapplicable.

Despite this one outlier, in nearly all subsequent cases, US courts have consistently applied the TRA. These cases indicate that the “derecognition of Taiwan did not change Taiwan’s status as a nation.”⁷⁰ For instance, in *Dupont Circle Citizen’s Association v. D.C. Bd. of Zoning Adjustment*, the court held that Taiwan’s *de facto* embassy met the definition of “chancery,” the equivalent to a “foreign mission,” within the meaning of zoning regulations.⁷¹ Therefore, Taiwan’s office should “be treated as if derecognition has not occurred.”⁷² The court noted that the

64. *Id.*

65. *See id.* (“Because the [TRA] was promulgated after the United States declared it would recognize the PRC as the sole legal government of China, there is no basis to support ICBC’s contention that the act was intended to continue the pre-1978 status between the ROC and the United States.”).

66. Letter from Herbet J. Hansell, Legal Advisor of the Dep’t of State, to Sen. Frank Church, Chairman of the Committee (Feb. 16, 1979) Chinese (Taiwan) Y.B. Int’l L. & Aff. 106 (1995–96).

67. *See* Mitchell A. Silk & Lester Ross, *Transnational Deposits, Government Succession, Frozen Assets and the Taiwan Relations Act: National Bank of Pakistan v. The International Commercial Bank of China*, 8 Int’l Tax & Bus. L. 1, 25 (1990) (arguing that the decision was in violation of the TRA).

68. Under the TRA, US laws “shall apply with respect to Taiwan in the manner that the laws of the United States applied . . . Taiwan prior to January 1, 1979. Moreover, according to the TRA, the derecognition of the ROC ‘shall not abrogate, infringe, [or] modify’ any rights acquired by Taiwan before 1979.” Taiwan Relations Act, 22 U.S.C. § 3303 (1979).

69. H.R.Rep. No. 96-26, pt. 1 at 9 (1985).

70. *N.Y. Chinese TV Programs, Inc. v. U.E. Enterprises*, 954 F.2d 847, 853 (2d Cir. 1992).

71. *Dupont Circle Citizens Ass’n. v. D.C. Bd. of Zoning Adjustment*, 530 A.2d 1163, 1170 (D.C. 1987). A “chancery” is a principle office of “a foreign mission used for diplomatic or used for diplomatic or related purposes . . .” *Id.* at 1166 (citing 11 DCMR § 199.9 (1986)). Furthermore, a foreign mission is defined as “any mission to or agency or entity in the United States which is involved in the diplomatic, consular, or other activities of, or which is substantially owned or effectively by . . . a foreign government . . .” 22 U.S.C.A. § 4302(a)(3) (West 2007 & Supp. 1987).

72. *Dupont Circle Citizens*, 530 A.2d at 1170.

language of the TRA states that lack of recognition “shall not” affect the application of U.S. laws regarding Taiwan, and stressed that the word “shall . . . creates a duty, not an option.”⁷³ Later, the court also ruled that regulations of Taiwan are considered “foreign law” under U.S. law.⁷⁴ Furthermore, the courts have consistently recognized that Taiwan’s sovereign acts fall under the “Act of State doctrine”⁷⁵ in U.S. law, and that the Foreign Sovereign Immunity Act (FSIA)⁷⁶ applies to Taiwan’s State-owned enterprises,⁷⁷ government agencies,⁷⁸ and officials⁷⁹ subject to limited exceptions under the FSIA.⁸⁰

U.S. courts have consistently held that on the basis of the TRA, the ROC-U.S. Treaty of Friendship, Commerce and Navigation (FCN Treaty, concluded in 1948) continue to be effective.⁸¹ They observed that

73. *Id.* The Department of State agreed that Taiwan’s office should be treated “as if it were a chancery for purposes of” the zoning regulations. *Id.* at 1168.

74. *United States v. 594,464 Pounds of Salmon*, 874 F.2d 824, 828, 830 (9th Cir. 1989). The court held that Taiwanese regulations restricting the importation of salmon is “foreign law” under the Lacey Act and, therefore, a violation that triggers the Act’s civil forfeiture provision. *Id.*

75. *E.g.*, *Millen Industries, Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 882 (D.C. Cir. 1988) (“The doctrine applies with reference to Taiwan even though the United States does not recognize that government.”). Under the act of state doctrine, a nation is sovereign within its territory and its domestic actions should not be questioned by foreign courts. Regarding the application of the doctrine, courts usually defer to the executive branch. *See First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

76. Under the FSIA, “a foreign state shall be immune from the jurisdiction of the courts of the United States,” subject to some exceptions. Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1994). In addition, that immunity extends to “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (1994).

77. *See, e.g.*, *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910 (S.D.N.Y. 1993) (holding that the Taiwan Steel Company is an instrumentality of Taiwan and is, therefore, entitled to immunity).

78. *See, e.g.*, *Chu v. Taiwan Tobacco & Wine Monopoly Bureau*, 30 F.3d 139 (1994) (finding that the Bureau is a government defendant and thus immune from jurisdiction).

79. *See, e.g.*, *Taiwan v. U.S. Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712 (1997) (deciding that the court is unable to compel Taiwanese diplomats to testify in U.S. courts). Such immunity is based on the Taiwan Relations Act, which provides Taiwanese diplomats with immunities for “the effective performance” of their functions, 22 U.S.C. § 3309(c).

80. *See Sun v. Taiwan*, 201 F.3d 1105, 1107–08 (9th Cir. 2000) (holding that Taiwan’s study tour for overseas Chinese is a “commercial activity” for purposes of the FSIA). However, in a subsequent appeal of the same case, the court affirmed that the district court lacked subject matter jurisdiction under the commercial activity exception because there is no nexus between the plaintiff’s action and the commercial activity in the United States. *Sun v. Taipei Eco. & Cultural Representative Office*, 34 F.App’x. 529, 531 (9th Cir. 2002). *See also Liu v. Republic of China*, 892 F.2d 1419, 1425 (9th Cir. 1989) (holding that the assassination of the plaintiff operated by ROC officials constitutes the tortious activity exception under the FSIA).

81. *See Chang v. Northwestern Mem’l Hosp.*, 506 F. Supp. 975, 977–78 (N.D. Ill. 1980) (stating that under the FCN Treaty and the TRA, citizens of Taiwan are entitled to sue in federal courts as citizens of recognized states); *N.Y. Chinese T.V. Programs v. U.E. Enterprises, Inc.*, 954 F. Supp. 841, 847, 853–54 (D.N.J. 1996) (finding that replacing the name “ROC” with Taiwan in the FCN Treaty does not affect its validity). *See generally* Virginia K. DeMarchi,

the United States maintains “*de facto* recognition” of Taiwan and U.S.-Taiwan relations are “quasi government relations.”⁸² This interpretation is consistent with the Vienna Convention on the Law of the Treaties, which stipulates that “[t]he severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty.”⁸³

Regarding Taiwan’s international treaties, the U.S. courts provide the most informative legal analysis. Two district court decisions are particularly problematic. These two decisions involve Taiwan and the Warsaw Convention, an international treaty providing limited liability for an air carrier and limiting the fora in which suits can be brought.⁸⁴ It should be first noted that, although the ROC was involved in the drafting of the Warsaw Convention in 1927, it never ratified it, and thus never became a “High Contracting Party” to the Convention. Nonetheless, in 1958, the PRC joined the Warsaw Convention with the declaration that the Convention “shall of course apply to the entire Chinese territory including Taiwan.”⁸⁵ Because the Warsaw Convention only applies to shipments between parties,⁸⁶ controversies arise from whether Taiwan is bound by the Convention, to which it is not a party. Recognizing Taiwan as a party to the Convention would imply that Taiwan is under the PRC’s jurisdiction.

In *Lee v. China Airlines*, a district court dismissed the suit by the plaintiffs—who suffered injuries as a result of a sudden drop during a flight from Hong Kong via Taipei to San Francisco—due to the absence of jurisdiction according to the Warsaw Convention.⁸⁷ However, the court indicated that the plaintiffs may bring suits in Hong Kong or Taiwan, since both of them “adhere to” the Convention.⁸⁸ The court’s use of the phrase “adhere to” erroneously suggests that Taiwan was a party to

Recent Development, United States-Taiwan Relations: New York Chinese TV Programs, Inv. v. U.E. Enterprises, Inc., No. 91-764, slip op. (2d Cir. Jan. 24, 1992), 33 Harv. Int’l. L.J. 631 (1992).

82. *Chang*, 506 F. Supp. at 978 n.3.

83. Vienna Convention on the Law of Treaties, art. 63, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

84. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 22, 28 Oct. 12, 1929, 49 Stat 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention], for specific examples of how the Warsaw Convention limits liability and fora, respectively.

85. *Atl. Mutual Ins. Co. v. Northwest Airlines*, 796 F. Supp. 1188, 1191 (E.D. Wis. 1992).

86. See *id.* at 1190 (“[A] High Contracting party is a state which is an original signatory to the convention or one which ratified the convention or filed declarations of adherence to the convention after it went into force (citation omitted). Further, a declaration of adherence to the convention by a state may include colonies or territories of that state.”).

87. *Lee v. China Airlines, Ltd.*, 669 F. Supp. 979, 980–82 (C.D. Cal. 1987).

88. *Id.* at 984.

the Warsaw Convention. Subsequently, in *Atlantic Mutual Insurance Company*, a court found the Warsaw Convention applicable because of the PRC's declaration that the Convention applies to Taiwan, among other reasons.⁸⁹

For several reasons, the two district courts misapplied the laws. The courts ignored the TRA and the jurisprudence establishing that Taiwan's status is not altered because of derecognition (and hence it should be treated as a separate entity from the PRC). The district courts' decisions rest upon an erroneous presumption that the United States' recognition of the PRC indicates the recognition of the PRC's territorial claim to Taiwan.⁹⁰ On the contrary, the court in *Wong v. Ilchert* clearly pointed out that the U.S.-PRC diplomatic relationship "does not necessarily entail acceptance of one another's territorial claim."⁹¹ As discussed previously, since the ROC and the PRC are separate States in the divided China, holding the ROC bound to treaties concluded by the PRC violates a basic premise of international law that "[a] treaty does not create either obligations or rights for a third State without its consent."⁹²

Understanding the errors made by the district courts, the Court of Appeals for the Ninth Circuit in *Mingtai Fire & Marine Insurance Co. v. UPS* concluded that courts should defer to the executive branch's determination that Taiwan should not be bound by the PRC's adherence to the Warsaw Convention.⁹³ The court pointed out that the U.S. government confirmed the spirit of the TRA by listing China and Taiwan separately in *Treaties in Force*, published by the State Department.⁹⁴ This decision has had a profound impact in both US courts⁹⁵ and foreign

89. *Atl. Mutual Ins. Co.*, 796 F. Supp. at 1191. For detailed discussions regarding these two cases, see Frank Chiang, *State, Sovereignty, and Taiwan*, 23 Fordham Int'l L.J. 959, 978–80 (2000); Andy Y. Sun, *Revisiting Taiwan's Legal Status in the United States: The Impact of the Taiwan Relations Act on Private Disputes*, 17 Chinese YB Int'l L. & Aff. 68, 72–74, 77–81 (1998–99).

90. *In re Schwinn Bicycle Co. v. AFS Cycle & Co.*, 190 B.R. 599, 611 (Bankr. N.D. Ill. 1995) ("The reasoning in *Atlantic Mutual* was flawed. Its main error in the conclusory statement that the United States' recognition of the People's Republic of China means that the United States' recognizes its territorial claim to the island of Taiwan.").

91. *Wong v. Ilchert*, 998 F.2d 661, 663 (9th Cir. 1993).

92. Vienna Convention, *supra* note 83, art. 34.

93. *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1145–47 (9th Cir. 1999); Eric Schwarz, *Recent Decision, Mingtai Fire & Marine Ins. Co., Ltd. v. United Parcel Serv. & United Parcel Int'l, Inc.*, 177 F.3d 1142 (9th Cir. 1999), 13 N.Y. Int'l L. Rev. 133, 133 (2000).

94. *Mingtai Fire & Marine Ins. Co.*, 177 F.3d at 1146 (" 'China' is listed as a signatory to the Warsaw Convention, while 'China (Taiwan)' is not.").

95. See, e.g., *In re Air Crash at Taipei*, Taiwan on October 31, 2000, 211 F.R.D. 374, 380 (C.D. Cal. 2002) (citing *Mingtai Fire*, 177 F.3d at 1146–47) (finding Annex 13 of the Convention on International Civil Aviation not applicable because Taiwan is not a party); *Leonardo v. Singapore Airlines Ltd.*, 140 Fed. Appx. 661, 664 (2005) (citing *Mingtai Fire*, 177 F.3d at 1145).

courts. As of now, German and Italian courts have found the Warsaw Convention inapplicable to shipments between Germany, Italy and Taiwan because the ROC on Taiwan is distinguishable from the PRC.⁹⁶

Because the United States and Taiwan have significant political and trade relationships, the number of judicial decisions by U.S. courts concerning Taiwan's sovereignty is the largest in the world, both before and after recognition. The TRA provides a comprehensive scheme under which the two nations maintain their ties to each other. Relying on the TRA, U.S. courts have established the principle that Taiwan is regarded as a State, and its immunities and other interests remained unscathed following derecognition.

2. United Kingdom

The United Kingdom does not have a statute similar to the Taiwan Relations Act. Instead, by basing judicial interpretations of Taiwan's status on the common law, British courts have granted Taiwan State status, thus achieving the same result as the US courts achieved through interpreting the TRA. The United Kingdom was one of the first Western countries that switched recognition from the ROC to the PRC. In 1950, the United Kingdom formally extended recognition to the PRC, and simultaneously severed relations with the ROC on Taiwan.⁹⁷ In 1972, the United Kingdom and the PRC signed the Joint Communiqué recognizing the PRC "as the sole legal government of China," and subsequently removed its official consulate in Taiwan.⁹⁸

96. See Landgericht Mönchengladbach (9 0 58/87) (Feb. 24, 1988), 1988 TRANSR 283 (German); *Fratelli v. Thai Airways, Alitalia*, Tribunale di Naples, 23. 4. 1983 n. 2850, (1989) AIR L. 213 (Italian) Cf., cited in Zheng Huang, *Theory and Practice of the International Air Carrier Liability Regime—A Critical Analysis of the Nagoya District Judgment on China Airlines B1816 Accident*, Dec. 26, 2003, 2 Taiwan Int'l. L. Quarterly, 2 (2005) (questioning Japan's Nagoya District Court's decision that the Warsaw Convention applies to Taiwan when considering the crash of China Airlines B1816).

97. Françoise Mengin, *A Function Relationship: Political Extension to Europe—Taiwan Economic Ties*, 169 China Q. 136, 137 (2002); Eberhard Sandschnieder, *China's Diplomatic Relations with the States of Europe*, 169 China Q. 33, 35 (2002).

98. See 196 Pal. Deb., HC (6th ser.) (1991) 293, reprinted in [1991] 62 British Y.B. Int'l L. 568 ("As was set out in the 1972 Joint Communiqué with the [PRC], the British government recognize the Government of the [PRC] as the sole legal government of China, and acknowledges the position of the Chinese government that Taiwan is a province of the People's Republic of China."); see also 238 Pal. Deb. (6th ser.) (1994) 936 reprinted in [1994] 65 British Y.B. Int'l L. 589 ("In our view the status of Taiwan is a matter for Peking and Taipei to resolve between themselves."); High Court Action No. 5805 of 1991: Questions by the Court about the Status of Taiwan, [1996] 67 British Y.B. Int'l L. 716–17 (Her majesty's government does not recognize Taiwan or deal with the government in Taipei, there are only non-official representative offices between the United Kingdom and Taiwan). The United Kingdom operates the non-official British Trade and Cultural Office in Taipei and its Taiwanese counterpart in London was established under the name, "Trade Representative Office." *Id.* at 717.

Since derecognition, the British courts have become a model for other common law jurisdictions on how to deal with the Taiwan question. British courts established precedents as to foreign States that the executive branch does not recognize. The leading case is *Carl Zeiss Stiftung v. Rayner & Keeler, Ltd.*,⁹⁹ before the House of Lords. The pivotal issue was whether the plaintiff corporation, incorporated under the laws of the German Democratic Republic, had legal capacity to sue in British courts.¹⁰⁰ At the time of suit, the British government did not recognize the German Democratic Republic. The defendant argued that the plaintiff corporation, as a “non-person,” lacked standing before British courts. Subsequently in a similar case, the Court of Appeals in *GUR Corporations v. Trust Bank of America* dealt with a similar standing issue involving the Ciskei government in South Africa.¹⁰¹ The issue was that the British government did not recognize Ciskei because it was established by South Africa during apartheid, also known as “separate development.”¹⁰²

In both cases, the British courts avoided the rule that courts are bound by the government’s policy to decline recognition to certain State-like entities. In *Carl Zeiss*, the House of Lords held that since the United Kingdom still recognized the Soviet Union, the German Democratic Republic could be considered to be a “subordinate body” acting in the name of the Soviet Union.¹⁰³ Following the same reasoning, in *GUR Corporations*, the court concluded that the acts of Ciskei were assumed to be those of South Africa, which the British government still recognized.¹⁰⁴ Collectively, the cases established the *Carl Zeiss* doctrine, under which unrecognized States may be “recognized” for limited purposes.¹⁰⁵

The *Carl Zeiss* doctrine does not, and should not, apply to disputes involving Taiwan. In both *Carl Zeiss* and *GUR Corporations*, the courts

99. *Carl Zeiss Stiftung v. Rayner & Keeler, Ltd.*, [1967] 1 A.C. 853 (H.L.); see also Stefan Talmon, *Recognition of Governments: An Analysis of the New British Policy and Practice*, 63 British Y.B. Int’l L. 231, 248–61 (1992) (discussing English law regarding recognition of foreign states).

100. Ivan Shearer, *International Legal Relations between Australia and Taiwan: Behind and Façade*, 21 Australian Y.B. Int’l L. 113, 125 (2000). See also Jochen Abr. Frowein, *From Two to One—Germany and the United Nations*, 46 German Y.B. Int’l L. 20, 22 (2003) (“The Three Western Powers . . . made it clear to the newly established German Government that it could not be recognized as the *de jure* government of all Germany, a position again formally upheld in the statement of the British Foreign Secretary in the famous *Carl Zeiss* case.”).

101. *GUR Corp. v. Trust Bank of Africa*, (1987) Q.B. 599 (Court of Appeal).

102. Shearer, *supra* note 100, at 126.

103. *Carl Zeiss Stiftung*, at 959.

104. *GUR Corp.*, *supra* note 101.

105. See generally Alona E. Evans, *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F.Supp. 892., 63 Am. J. Int’l L. 636 (1969).

ruled that the acts of the unrecognized entities were assumed to be acts of States that the United Kingdom recognized. In both cases, the subordinate States were “created on the initiative and with consent of” the parent States.¹⁰⁶ Taiwan’s situation is different.¹⁰⁷ The ROC was not created by the PRC or established because of the PRC’s consent. Both the executive and legislative practice of the United Kingdom supports this view.

While the British government “recognizes” the PRC as the only legitimate government of China, similar to the position of the U.S. government, it simply “acknowledges” the PRC’s position that Taiwan is part of the PRC.¹⁰⁸ The British government carefully chose the word “acknowledges,” which signifies no more than the statement that “we understand, although may not agree with, your position,” as opposed the word “recognizes,” which carries far greater legal implications. In addition, it is the long-standing practice of the British government, even in the absence of diplomatic relations, to recognize the “existence of Taiwanese authorities and their effective control over Taiwan.”¹⁰⁹ For instance, in March 1986, to ensure that British products be entitled to copyright protection in Taiwan under the reciprocal requirement of the ROC Copyright Law, the United Kingdom enacted an order granting Taiwanese products copyright protection.¹¹⁰ Recognition of Taiwanese law demonstrates the United Kingdom’s—at least limited—recognition of the ROC as the government of Taiwan.

British courts are cognizant of Taiwan’s unique situation and have never applied the *Carl Zeiss* doctrine to cases involving Taiwan. The only common law court that applied the *Carl Zeiss* doctrine to Taiwan may be the Hong Kong Court of Final Appeal, Hong Kong’s Supreme Court after the takeover of the PRC in 1997.¹¹¹ In the *Chen Li Hung v.*

106. Shearer, *supra* note 100, at 126.

107. *See id.* (“The situation of the Republic of China (Taiwan) is historically and legally quite different.”); Talmon, *supra* note 99, at 259 n. 161 (“Especially as the Taiwanese authorities cannot be regarded as a subordinate body or an agent set up by the entity which Her Majesty’s Government considers as entitled to exercise governing authority over the territory of Taiwan.”).

108. In the 1972 Joint Communique with the PRC, the British government recognizes the PRC government as the sole legal government of China, and acknowledges the position of the Chinese government that Taiwan is a province of the PRC. 196 Parl. Deb., H.C. (6th ser.) (1991) 293, *reprinted in* [1991] 62 British Y.B. Int’l L. 568. *See* Text of Joint Communique, Feb. 27, 1972 Dep’t St. Bull., Mar. 1972, 437 [hereinafter *Shanghai Communique*] (“The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China.”).

109. Talmon, *supra* note 99, at 259 n. 161.

110. *Id.* at 259–60.

111. *See* Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China art. 82 (“The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region . . .”).

Ting Lei Miao, the Court gave effect to a Taiwanese court's bankruptcy order.¹¹² The court stated that Taiwan is "under *de jure* sovereignty of" the PRC, but is currently "under the *de facto* albeit unlawful control of a usurper government."¹¹³ It then opined that giving effect to the bankruptcy order, which was made by "the usurper regime or courts in Taiwan," would promote China's reunification and was "necessary as a matter of common sense and justice."¹¹⁴ The court's reasoning should be read with caution however, given the fact that Hong Kong is now a special administrative region of the PRC, and its courts' judicial interpretations are confined by the PRC's "one country, two systems" structure.¹¹⁵

The first British case involving the ROC on Taiwan was also related to Hong Kong.¹¹⁶ Sitting in London and functioning as the court of last resort of Hong Kong before the Chinese takeover, the Privy Council¹¹⁷ was asked to determine an appeal from the Supreme Court of Hong Kong. The issue was whether the ROC's sale of 40 civil aircraft in Hong Kong to an American company, made on December 12, 1949, less than a month before the United Kingdom terminated diplomatic relations with the ROC on Taiwan, was still valid after derecognition. The defendant was the Central Air Transport Corporation (CATC), an ROC aircraft enterprise, which owned forty airplanes in Hong Kong. In November

112. Chen Li Hung v. Ting Lei Miao, [2000] 3 H.K.C.F.A.R 9, 21 (C.F.A.). See Rong-Chwan Chen, *A Boat on a Troubled Strait: The Interregional Private Law of the Republic of China on Taiwan*, 16 Wis. Int'l L.J. 599, 627-32 (1998) (introducing recognition of Taiwan and its judgment in Hong Kong courts); see also C.L. Lim, *Non-Recognition of Putative Foreign States (Taiwan) under Singapore's State Immunity Act*, 11 Asian Y.B. Int'l L. 3, 7 (2003-04) ("[The case] may be seen recently to have chosen to follow the broad approach taken in *Carl Zeiss and GUR*.").

113. Chen Li Hung v. Ting Lei Miao, [2000] 3 H.K.C.F.A.R. 9, 21 (C.F.A.) (emphasis in the original).

114. *Id.* at 21, 25. The Court also pointed out that, even China, under the Rules of the Supreme Court People's Court passed on January 15, 1998, extends recognition to civil judgments delivered in Taiwan. *Id.* at 19.

115. See Stephen J. Yates, *Hong Kong Under Chinese Rule: Testimony before the East Asian and Pacific Affairs Subcommittee—Foreign Relations Committee—United States Senate*, Heritage Foundation, July 1, 1999, available at <http://www.heritage.org/research/asiaandthepacific/test070199.cfm>.

116. *Civil Air Transport, Inc. v. Central Air Transport Corp.*, [1953] AC 70 (P.C. 1952). See generally Paul Abel, *Civil Air Transport Incorporated v. Central Air Transport Corporation*, 2 Int'l & Comp. L. Q. 136 (1953).

117. See generally Commonwealth Jurisdiction, available at <http://www.privycouncil.org.uk/output/Page32.asp> (last visited Mar. 23, 2008) (introducing the Privy Council's jurisdiction). After 1997, Hong Kong's Court of Final Appeal replaced the Privy Council as the highest court of appeal in Hong Kong. M. Lucy Tan, *From the Privy Council to the Court of Final Appeal: Will the Area of Non-Justiciability be the Same in Hong Kong after July 1, 1997?*, 19 Loy. L.A. Int'l & Comp. L.R. 413, 414 (1997).

1949, most CATC employees defected to the communist government.¹¹⁸ To avoid these aircrafts being taken by the PRC, the ROC government, which had by then retreated to Taiwan, sold them to a Delaware corporation formed by US citizens.¹¹⁹ The American company sought a declaratory judgment that the aircrafts were its property. Since lower courts ruled against the company, finding that the sale was made “not in good faith . . . but for an alien and improper purpose,”¹²⁰ and subsequently dismissed the company’s review request, the company appealed to the Privy Council.

The Privy Council overruled the lower courts’ decisions and upheld the validity of the transaction at issue. The Privy Council found that, at the time of the sale, the ROC was recognized by the UK as the sole *de jure* government of China and, therefore, the validity of the ROC’s sales should not be reviewed by British courts. In particular, the Privy Council stressed that the lower court’s examination of whether the ROC government was “alive to the probability of the withdrawal of recognition of [the British] government in the near future” was flawed because such consideration is “a matter of speculation.”¹²¹ Moreover, while retroactivity of recognition may validate acts of a *de facto* government, which later received recognition, it cannot “invalidate acts of the previous *de jure* government,” such as the ROC.¹²² The Privy Council’s decision in *Civil Air Transport* soon became significant international law precedent. When the US Congress debated the ownership of the ROC’s embassy property, which had been sold to a private association, the holding in *Civil Air Transport* played an important role in passing certain provisions of the Taiwan Relations Act, which avoided the retroactive invalidation of the embassy sale.¹²³

118. See *Civil Air Transport*, [1953] A.C. 70 (“On Nov. 9, 1949, the then president of C.A.T.C., Mr. Chen flew from Hong Kong to Peking and transferred his allegiance to the *de facto* communist government. About the same time, the majority of C.A.T.C.’s employees in Hong Kong also defected from the nationalist government . . .”). The PRC premier also declared the aircraft to be property of new China and asked employees of the C.A.T.C. to stay in Hong Kong to “bear the responsibility of protecting the assets.” *Id.*

119. One of them is pro-Nationalist US General Claire Chennault, who went to China in WWII and became the commander of the American Volunteer Group, better known as the “Flying Tigers.” See, e.g. <http://www.flyingtigersavg.com/tiger1.htm> (last visited Mar. 23, 2008).

120. *Civil Air Transport*, [1953] A.C. 70.

121. *Id.* This analysis is similar to the act of state doctrine in US courts.

122. *Id.*; see also *Guaranty Trust Co. v. U.S.*, 304 U.S. 126 (1938) (noting that recognition of a new government does not nullify earlier transactions made with a prior government); *Gdynia Ameryka Linie v. Boguslawski*, [1952] 2 All E.R. 470 (upholding a self-serving transaction by a soon-to-be unrecognized government).

123. See Taiwan Relations Act, 22 U.S.C. § 3301 (1979) (“The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those in-

The court in *Reel v. Holder* again confronted sovereignty issues involving Taiwan.¹²⁴ The case concerned Taiwan's membership in the International Amateur Athletic Federation (IAAF), an international athletic association established in 1912 with its headquarters in the United Kingdom. The pivotal issue was the interpretation of Article I of the IAAF charter, which provides that "[o]nly one member for each country can be affiliated."¹²⁵ The All China Athletic Association in Beijing (PRC Association) was elected to be a member of the IAAF in 1954, and a similar association from Taiwan (ROC Association) was also admitted in 1956. Although the PRC Association withdrew its membership in 1958 because of Taiwan's accession, the IAAF passed a resolution in 1978 accepting reification of the PRC Association and recognizing it as the only body governing both mainland China and Taiwan.¹²⁶ The ROC Association sought a declaratory judgment regarding the validity of the resolution. The British courts were asked to determine whether Taiwan still retained its membership or if it was wrongfully excluded.

The court first referred to other provisions of the IAAF Charter for guidance. According to the court, the IAAF Rule does not entertain the notion of "sovereign states in the international sense."¹²⁷ The membership of an athletic association is valid if "it is the supreme athletic association for that territory and is not subject to any control by another athletic association."¹²⁸ The court further noted that the jurisdiction of an athletic association is confined by the "political boundaries of the country."¹²⁹ The court thus held that Taiwan and China are separate countries

volving *contracts* . . .) under the laws of the United States *heretofore* or hereafter acquired by or with respect to Taiwan.") (emphasis added). From a military point of view, this case is even more crucial to the ROC's retreated forces in Taiwan. The ROC government was greatly concerned that if the PRC had gained control of the aircrafts, it would have immediately possessed the capability to attack Taiwan, which had no air-defense system.

124. *Reel v. Holder*, [1981] 3 All E.R. 321.

125. James Crawford, *Decisions in British Courts during 1979 Involving Questions of Public or Private International Law* 50 British Y.B. Int'l L. 217, 217 (1979).

126. *See Reel*, 3 All E.R. at 321.

127. *Id.* In particular, the court considered the following provisions. Article 7 provides that "[t]he *National* Governing Body for amateur athletics in any country shall be eligible for members of the Federation (emphasis added)." Article 9(7) further states that an affiliated member can be a "colony." *See id.* at 322 (declaring that Taiwan could be a member of the International Badminton Federation and the decision did not involve international law or sovereignty).

128. *See id.* at 321.

129. *See id.* at 325. (quoting Article 1(2)) (stipulating that "[t]he jurisdiction of members of the Federation shall be limited to the political boundaries of the country they represent." The court opined that "if Wales formed their own independent amateur athletic association and wanted to be separately represented, . . . Wales would be a 'country' . . . under the rules of the IAAF.") *See Crawford, supra* note 125, at 218 ("It is doubtful whether the boundary between, say, Wales and England could be described as 'political' . . . His Lordship did not

and, therefore, jurisdiction of one does not extend to the other. Thus, the IAAF's resolution erroneously excluded Taiwan.¹³⁰

The British courts' decisions are of great significance because, without a statutory basis, the courts have used their common law analysis to achieve the same result that the TRA does in U.S. courts. By stating that the use of the word "country" or "national" in a statute does not exclude Taiwan, the court recognized that the ROC continued to exist on Taiwan despite derecognition. British courts also noted that the PRC and ROC are separate jurisdictions and that the two States should be therefore treated independently. This refutes the PRC's claim that it has jurisdiction over Taiwan.

3. Canada

Canada established formal relations with the PRC on October 13, 1970, recognizing it as the sole legal government of China and "took note of" the PRC's view that Taiwan is an "inalienable part of the territory" of the PRC.¹³¹ Again, the term "[took] note of" shows that the Canadian government never "recognized" the PRC's territorial claim over Taiwan.¹³² The proposed "Taiwan Affairs Act," which copied many sections from the Taiwan Relations Act, was introduced into Parliament and passed the first reading in 2006.¹³³ However, due to the holding of

expressly consider whether the 'boundary' between Taiwan and the mainland could be described as a 'political' one.").

130. See *Liang Ren-Guey v. Lake Placid 1980 Olympic Games, Inc.*, 49 N.Y.2d 771 (1980) (holding that the question of whether a local International Olympic Committee should be allowed to display the ROC flag to be a political question beyond the court's power to review).

131. Colin Mackerras & Amanda Yorke, *The Cambridge Handbook of Contemporary China* 152 (Cambridge 2001).

132. The Canadian Secretary of State for External Affairs stated that "[o]ur position, . . . which was made clear to Chinese from the start of the negotiations, is that the Canadian Government does not consider it appropriate either to endorse or to challenge the Chinese Government's position on the status of Taiwan." L.C. Green, *Representation versus Membership: The Chinese Precedent in the United Nations*, 10 Canadian Y.B. of Int'l L. 128-29 (1972).

133. Jim Abbot, a member of Canada's Conservative Party, introduced the Bill C-357 to provide "an improved framework for economic, trade, cultural and other initiatives between the people of Canada and the people of Taiwan." *Taiwan Affairs Bill Can Be Revived*, available at <http://taiwanjournal.nat.gov.tw/ct.asp?xItem=21785&CtNode=122> (last visited Mar. 23, 2008); see also *Delegation of Canadian MPs Urged to Support Taiwan*, Taipei Times, Sept. 20, 2005, at A1 (stating that Taiwan's president "urged Canada to pass a law to legalize its unofficial with Taipei."); *China Fears for Passage of Taiwan Affairs Act by Canada Parliament*, available at <http://www.roc-taiwan.org/uk/TaiwanUpdate/ns1151005s.htm> (reporting that China's ambassador warned that the Act would damage China-Canada relations); Nancy Hughes Anthony, Canadian Chamber of Commerce, Letter to Members to Parliament, Aug. 26, 2005 (arguing that passage of the bill would be harmful to Canada's negotiations for tourism and investment agreements with China), available at <http://www.chamber.ca/>

the general election, the bill, as with other legislative bills under consideration, died on the order paper of the Congress.¹³⁴ Canada's judicial system is based both on British common law and on European civil law.¹³⁵ Both of the two distinctive legal systems encountered the Taiwan question and, interestingly, ruled similarly.

The first leading Canadian case involving the status of Taiwan was *Romania v. Cheng*, which went through the common law system.¹³⁶ A vessel named *Maersk Dubai* that was registered in Taiwan arrived in Nova Scotia, Canada on May 24, 1996.¹³⁷ Canadian police arrested the captain and crew, who were nationals of Taiwan, after learning that three Romanian stowaways were thrown overboard during two voyages from Spain to Canada. Romania charged the Taiwanese suspects with murder and, based on the Romania-Canada Extradition Treaty, requested that Canada extradite them to Romania.¹³⁸ Taiwan applied to the Nova Scotia Supreme Court for permission to intervene in the case, arguing that under international law, the case was under Taiwan's jurisdiction because the alleged crimes were committed on the high seas and, as a flag State, Taiwan had exclusive jurisdiction over this subject matter.¹³⁹ The PRC also asked for the suspects on the basis of its jurisdiction over Taiwan.¹⁴⁰

The court found that Canada was not obliged to extradite the Taiwanese suspects to Romania because the crimes were not committed within Romania's jurisdiction or territory.¹⁴¹ It thus granted Taiwan jurisdiction over the case despite the lack of diplomatic relations

article.asp?id=181#letters (follow "Aug. 26, 2005 to Members of Parliament re: Bill C-357" hyperlink).

134. *Taiwan Affairs Bill Can Be Revived*, *supra* note 133.

135. *Where Our Legal Systems Comes From*, Canada's System of Justice, available at <http://www.justice.gc.ca/en/dept/pub/just/03.html>.

136. *Romania v. Cheng* [1997] N.S.R.2d 13, 45 (Can.), *reprinted in* 15 Chinese Y.B. Int'l L. & Aff. 111-140 (1996-97).

137. Hungdah Chiu et al., *Transfer to the Republic of China of the Detainees Involved in the Maersk Dubai Case in Canada*, *in* 15 Chinese Y.B. Int'l L. 103 (1996-97).

138. *Id.*

139. *Id.*; see also Robert Jennings & Arthur Watts, *Oppenheim's International Law* 734 (9th ed. 1992) ("Jurisdiction on the high seas is thus dependent upon the maritime flag under which vessels sail. . .").

140. Angeline G. Chen, *Taiwan's International Personality: Crossing the River by Feeling the Stones*, 20 Loy. L.A. Int'l & Comp. L.J. 223, 237-38 (1998).

141. Under the Extradition Act, Canada is obliged to extradite a "fugitive"—"a person being or suspected of being in Canada, who is accused or convicted of an extradition crime committed within the jurisdiction of a foreign state." *Transfer to the Republic of China of the Detainees Involved in the Maersk Dubai Case in Canada*, 1996-97, 15 Chinese Y.B. Int'l L. 115. Article I of the Canada-Romanian Treaty provides that "[t]he High Contracting parties engage to deliver up to each other those persons who, being accused or convicted of a crime or offense committed in the territory of one Party, shall be found within the territory of the other party, under the circumstances and conditions stated in the present treaty." *Id.* at 124.

between Canada and Taiwan.¹⁴² This case shows that Canada's derecognition does not bar judicial cooperation with Taiwan. This principle was also confirmed outside Canada in a case where the Swiss Federal Supreme Court granted Taiwan judicial assistance.¹⁴³ There, the court stressed that "[t]he absence of recognition and of diplomatic relations . . . does not mean that [such assistance] would be forbidden."¹⁴⁴

Moreover, Canada's civil law Quebec Superior Court in *Parent v. Singapore Airlines* affirmed Taiwan's sovereign immunity based upon Canada's State Immunity Act.¹⁴⁵ The plaintiff in *Parent* brought action against Singapore Airlines (SAL) for injuries resulting from a crash in Taiwan. SAL, in turn, sued in warranty against Taiwan's Civil Aeronautics Administration (CAA), claiming that the CAA should be liable for the accident because of its mismanagement. The CAA argued that, as a government agency, it was entitled to immunity from the jurisdiction of Canadian courts. The court turned to Canada's Ministry of Foreign Affairs, inquiring whether Taiwan was a foreign State.¹⁴⁶ The Ministry of Foreign Affairs replied that, pursuant to its one-China policy, Canada recognizes the PRC and has no diplomatic ties with Taiwan or the ROC.¹⁴⁷ Despite the government's reply, the court held that it was not the exclusive province of the executive branch to decide whether a foreign entity is a State under the State Immunity Act. The court found that Taiwan satisfied the criteria for statehood under the Montevideo Convention. Additionally, it ruled that based on bilateral official dealings, the Canadian government in practice recognizes Taiwan's "effective political independence."¹⁴⁸ Therefore, the court found that Taiwan was a

142. Subsequently, the Canadian government transferred the suspects in custody to Taiwanese officials in Canada. Following the decision of the Canadian court, Taiwan's Kaohsiung Public Prosecutors' Office issued criminal summons for the suspects to appear before the prosecutors and subsequently indicted the captain. For information on the indictments, see *The Synopsis by the Prosecutor in the Maersk Dubai Case at the Kaohsiung District Court of Taiwan, Republic of China*, 1998-99 Chinese Y.B. Int'l L. 105-134; see also 15 Chinese Y.B. Int'l L., *supra* note 141, at 109 ("The Canadian Government's actions [are] in full accordance with International Law. There is no jurisdiction for Canadian courts under either Canadian or International Law.").

143. See generally Marc Henzelin, *Mutual Assistance in Criminal Matters between Switzerland and Taiwan: The Andrew and others Case*, 3 J. Int'l Crim. Just. 790 (2005).

144. Tribunal Fédéral [Federal Court] May 3, 2004, 130 Arrêts du Tribunal Fédéral Suisse II 217 (Switz.), translated in Henzelin, *supra* note 143, at 793.

145. *Parent v. Singapore Airlines Ltd.*, [2003] R.J.Q. 1330.

146. Olufemi A. Elias, *The International Status of Taiwan in the Court of Canada and Singapore*, 2004 Sing. Y.B. Int'l L. 94.

147. *Id.*

148. *Id.* at 95.

“foreign state” within the meaning of the State Immunity Act and dismissed the SAL’s action in warranty.¹⁴⁹

4. Japan

Japan’s legal system is modeled after European civil law.¹⁵⁰ Japan did not enact a statute similar to the Taiwan Relations Act nor does it consider common law rulings to be of precedential value. Nonetheless, similar to their counterparts in the United States, the United Kingdom and Canada, Japanese courts have accorded Taiwan State status in spite of derecognition.

After World War II, the ROC concluded the Peace Treaty with Japan restoring diplomatic relations between the two nations. This treaty was nullified in 1972 when Japan signed the Joint Communiqué with the PRC recognizing the Beijing government as China’s sole legitimate government.¹⁵¹ The most significant Japanese case involving Taiwan is *Republic of China v. Yu Ping-huan*, commonly known as the *Kokaryo* case. This case involved the title of the *Kokaryo* dormitory for Chinese students. During World War II, Kyoto University rented the property for Chinese students. The ROC purchased it in 1952 for the same purpose.¹⁵² After Japan’s recognition of the PRC in 1972, pro-Beijing students occupied the dormitory, which caused the ROC government to file a lawsuit demanding that the students leave the premises. The case soon became one of the most prominent cases concerning State succession in

149. It is worth noting that in a similar case, Singapore’s Ministry Foreign Affairs declined to issue a certificate addressing the issue whether Taiwan was a foreign state for statutory purposes. The courts held that whether or not a foreign entity is entitled to sovereign immunity was “within the exclusive province of the executive.” *Woo Anthony v. Singapore Airlines Ltd. and other actions*, [2003] 3 S.G.H.C. 688, para. 22, available at <http://www.singaporelaw.sg/rss/judg/28602.html>. As the government’s position as to Taiwan’s status was vague and inconclusive, the court ruled that Taiwan was not a foreign state within the meaning of Singapore’s State Immunity Act of 1985. It is interesting to observe that both courts in Singapore and Canada followed “the one voice doctrine” under which the court should defer to the executive branch as to recognition, but ruled differently. See Elias, *supra* note 146, at 96–97 (detailing the case). The Singaporean court not only misinterpreted “no voice,” i.e. the government’s silence on the status of Taiwan, as “a voice,” but also failed to consider Singapore’s other official dealings with Taiwan. See also Lim, *supra* note 112, at 10 (“The learned judge added that the suggestion that *de facto* recognition is of ‘equal importance’ for the purposes of the Act may also be something of ‘an exaggerated idea.’”).

150. Japan is “modeled after German civil law system with English-American influence.” CIA World Factbook, Field Listing—Legal System, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited May 7, 2008).

151. Joint Communiqué of the Government of Japan and the People’s Republic of China, Point 2, Sept. 29, 1972, M.O.F.A. Pursuant to the Communiqué, Japan continues “working relations with Taiwan on a non-governmental basis.” The Ministry of Foreign Affairs Japan, Diplomatic Bluebook 2006, 47 (2006).

152. *X. v. Taiwan (Republic of China)*, 31 Japanese Annual Int’l. L. 201 (Osaka High Ct., Feb. 26, 1987).

Japan and abroad. Japanese courts were asked to determine two issues regarding the two Chinas. First, after Japan's derecognition of the ROC, did the ROC still have the capacity to sue in Japanese courts? Second, should the PRC, the government that Japan recognizes, succeed ownership of the property purchased by the ROC?

On the standing issue, the Kyoto District Court in 1977 dismissed the case. It ruled that since Japan switched recognition to the PRC, the ROC government in Taiwan possessed no right to protect the property at issue in Japan.¹⁵³ The district court's decision was overruled by the Osaka High Court, which found that the ROC had the capacity to be a party to the suit. The court noted trade relations between Taiwan and Japan and found that it would be "most reasonable" to admit Taiwan's standing in private legal disputes.¹⁵⁴ Furthermore, in the court's view, recognizing Taiwan's standing to bring suit does not hinder the government's recognition of the PRC.¹⁵⁵ The case was then remanded to the district court.

In 1986, the Kyoto District Court found that, since the ROC still dominates Taiwan, Japan's recognition of the PRC "followed an incomplete succession of government."¹⁵⁶ Thus the ROC kept its property right to the dormitory and was entitled to exercise that right in Japan. The Osaka High Court reaffirmed this decision and elaborated further on the theory of "incomplete succession." The court explained that under this theory, the old government's assets abroad are "not necessarily succeeded to the new government, for the latter does not dominate them while the former still exists."¹⁵⁷ The court also found that while the assets abroad "representing the country" or being "used for the exercise of state powers" should succeed to the new government upon the change of recognition, other assets should be retained by the old government.¹⁵⁸ Considering the fact that the ROC, as the old government, still efficiently controls Taiwan and adjacent islands, and that the dormitory was not a "diplomatic asset," the court concluded that despite the switch of recognition, the ROC "has not lost the ownership right to the property."¹⁵⁹ Subsequently, the PRC filed an appeal to the Japanese Supreme

153. *See generally* Republic of China v. Yu Ping-huan, 22 Japanese Annual Int'l L. 151-56 (Kyoto Dist. Ct., Sept. 16, 1977).

154. Republic of China v. Yu Ping-huan, 33 Japanese Annual Int'l L. 186 (Kyoto Dist. Ct., Apr. 13, 1982).

155. *Id.*

156. Republic of China v. Yu Ping-huan, 33 Japanese Annual Int'l L. 188 (Kyoto Dist. Ct., Feb. 4, 1986).

157. *See* Chinese Y.B. of Int'l L. and Aff., vol. 11 (1991-92) at 249, para. 3.

158. *Id.*

159. *Id.* at para 1.

Court in 1987. At this point, the Supreme Court has not heard or dismissed the case.¹⁶⁰

The procedural decision recognizing the ROC's capacity to sue is in line with case law in the other jurisdictions discussed above. More legally interesting is the courts' substantive decision about the ROC's title over the Kokaryo dormitory and the Japanese courts' application of the innovative theory of "incomplete succession." Upholding the ROC's property title, Japanese courts refuted the PRC's claim that it replaced the ROC under international law.¹⁶¹ Beijing heavily attacked the *Kokaryo* case as violating the Japan-PRC Joint Communiqué, which recognizes the PRC as the only *de jure* government of China.¹⁶² The PRC's position is flawed, however, because in the Joint Communiqué, Japan simply "understands and respects," rather than "recognizes," the PRC's territorial claim over Taiwan.¹⁶³ Hence, the *Kokaryo* case reaffirms that the ROC's State status was not altered as a result of derecognition.

B. *Emerging Customary International Law*

Based on the foregoing cases, I argue that treating the ROC on Taiwan as a distinct State for purposes of judicial proceedings has risen to the level of customary international law. This creates a binding effect on domestic and international courts. Customary international law is considered to be "the oldest and the original source of international law."¹⁶⁴ According to Article 38 of the Statute of the International Court of Justice, the ICJ is bound to apply "international custom, as evidence of a general practice accepted as law" when deciding issues of international law.¹⁶⁵ Evidence of custom is demonstrated by showing two essential elements: 1) generality of the State practice and 2) *Opinio Juris*.¹⁶⁶

160. Jianming Shen, *Revisiting the Disability of the Non-Recognized in the Courts of the Non-Recognizing States and Beyond: The Departure of the In Re Guanhua Liao Courts From the Rules*, 5 Fla. Int'l J. 401, 411 (1990).

161. See *Taiwan Issues, Core of Sino-Japanese Relations: Experts*, People's Daily, Aug. 5, 2002, available at http://English.peopledaily.com.cn/200208/05/eng/20020805_100916.shtml (stating that the PRC replaced the ROC in 1949 and the PRC "is the only sovereign state representing China").

162. See Shen, *supra* note 160, at 412 (arguing that due to treaties concluded between the PRC and Japan, Taiwan lost all international rights that a government enjoys).

163. Joint Communiqué of the Government of Japan and the People's Republic of China, Point 3, Sept. 29, 1972, M.O.F.A.

164. Jennings & Watts, *supra* note 139, at 25.

165. See Statute of the International Court of Justice, art. 38.1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter the ICJ Statute] ("The Court, whose function is to decide in accordance with international law such disputes as are subsumed to it, shall apply: . . . (b) international custom, as evidence of a general practice accepted as law . . .").

166. Jennings & Watts, *supra* note 139, at 27.

To satisfy the generality of the State practice, the conduct of States should be regular and consistent.¹⁶⁷ In the *Fisheries Jurisdiction* case, the ICJ found that a 12-mile fishery zone limit had become “generally accepted” and “an increasing and widespread acceptance of the concept of preferential rights for coastal states.”¹⁶⁸ Similarly, the practice in most major countries demonstrates that treating Taiwan as a State independent of the PRC has been widely accepted. While the governments recognize the PRC as the government of China, they never concede that Taiwan belongs to the PRC. Instead, the United States and the United Kingdom “acknowledge,” Canada “takes note of,” and Japan “understands and respects” the PRC’s territorial claim over Taiwan. They carefully chose these non-legally-binding phrases to avoid downgrading the ROC’s State status and to maintain the same level of substantive, albeit unofficial, relations with Taiwan. The recognition of Taiwan’s *de facto* independence is even more significant from a judicial perspective. Courts across the world deem Taiwan to be a State in judicial proceedings.

Some contend that some governments and courts still hold the view that the PRC has jurisdiction over Taiwan. In my view, that position ignores that, to form a custom, the practice of states does not have to be “in absolutely rigorous conformity.”¹⁶⁹ International law requires that the practice of countries “whose interests are specially affected” be “extensive and virtually uniform.”¹⁷⁰ The United States, the United Kingdom, Canada, and Japan certainly qualify as countries whose interests are specially affected, given that they are major trading partners with both China and Taiwan, and are consistently concerned about political situations across the Taiwan Strait.

As for *opinio juris*, the statute of the ICJ requires the general practice to be “accepted as law” by States. Ian Brownlie defines *opinio juris* as a “sense of legal obligation,” distinct from “motives of courtesy, fairness, or morality.”¹⁷¹ This legal obligation is exemplified by a US court’s decision stating that it is obliged to apply law to Taiwan as if it were recognized.¹⁷² Moreover, courts in the United States, Canada, and Switzerland explicitly pointed out that Taiwan met the criteria for statehood

167. See *Asylum Case* (Colombia v. Peru), 1950 I.C.J. 266, 276 (Nov. 20). The ICJ in the *Asylum* case also emphasized the necessity for constancy and uniformity of usages or practices before they can be recognized as custom.

168. *Fisheries Jurisdiction Case* (U.K. & N. Ir. v. Ice.), 1974 I.C.J. 23–26 (July 25).

169. *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 98 n.186 (June 27).

170. *North Sea Continental Shelf Cases* (W. Ger./Den.; W. Ger./Neth.), 1969 ICJ Rep. 3 (Judgment of Feb. 20), reprinted in 8 ILM 340 (1969).

171. Brownlie, *supra* note 1, at 8.

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

under the Montevideo Convention, and that the absence of recognition does not diminish Taiwan's status as a nation.¹⁷³ This finding demonstrates that courts feel they are legally obligated to treat Taiwan as a State. In turn, this finding buttresses the theory that the ROC and the PRC are divided States under international law. Since recognition of Taiwan as a foreign State satisfies two prongs under Article 38 of the ICJ Statute, i.e. State practice and *opinio juris*, the judicial recognition of Taiwan's status should be considered an established international custom. Indeed, no territory in the world should be left in a judicial vacuum. As Judge Golcuklu pointed out at the European Court of Human Rights, "[w]ho today would deny the existence of Taiwan?"¹⁷⁴

III. Taiwan's Standing Before International Courts

A. *Practice of International Courts*

The practice of foreign courts in various legally significant jurisdictions shows that Taiwan should be considered a State in judicial proceedings. Further, this judicial recognition has risen to the level of international custom with which international courts are bound to comply. The following sections examine how international courts deal with the Taiwan question; that is, how Taiwan can access to courts in international settings to resolve disputes. They assess, in turn, Taiwan's standing before the International Court of Justice as a non-UN Member State; the possibility of bringing a case before the International Tribunal for the Law of the Sea; and whether Taiwan can utilize the WTO dispute settlement system.

1. International Court of Justice

The International Court of Justice is the "principle judicial organ of the United Nations."¹⁷⁵ After World War I, nations devastated by the

173. See *N.Y. Chinese TV Programs v. U.E. Enterprises, Inc.*, 954 F.2d 847, 853 (2d Cir. 1991)(discussing the criteria for a nation and holding that the absence of derecognition does not alter Taiwan's status as a nation); *Parent Singapore Airlines Ltd.*, [2003] R.J.Q. 1330("[Taiwan] easily passes all the traditional tests of international law. The conclusion is reached that by international law Formosa has achieved statehood."); Tribunal Fédéral [Federal Court] May 3, 2004, 130 Arrêts du Tribunal Fédéral Suisse II 217 (Switz.) (finding that Taiwan meets the criteria under the Montevideo Convention).

174. *Loizidou v. Turkey* 89 Eur. Ct. of H.R. (15318), paras. 148, 149, and 174 (1996).

175. UN Charter art. 92 provides:

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based

war decided to establish a peace resolution mechanism to safeguard long-standing harmony in the world. The Permanent Court of International Justice (PCIJ) was established under the auspices of the League of Nations. After World War II, recognizing that the world community needed a more law-oriented, rather than power-oriented, judicial institution, countries around the globe, including China (represented by the ROC government), signed the United Nations Charter in which they replaced the PCIJ with the ICJ. Since its first decision in 1946, *Corfu Channel*,¹⁷⁶ the ICJ's decisions and advisory opinions have significantly clarified international law principles and elaborated upon States' duties and responsibilities.¹⁷⁷ Therefore, whether or not Taiwan is able to have access to the ICJ to resolve international disputes is of great importance to the country.

a. Jurisdiction

The ICJ's jurisdiction is based on the consent of the parties. A State is able to consent to the ICJ jurisdiction by special agreement, by treaties and conventions, or by the recognition of the Court's compulsory jurisdiction. The legal basis of the ICJ's jurisdiction is contained in Article 36 of the ICJ Statute. According to Article 36(1), the Court's jurisdiction includes all cases referred by State parties, usually in the form of special agreement for the specific purpose of submitting the dispute and indicating the subject of the dispute as well as the parties involved.¹⁷⁸ In my view, the ICJ should have jurisdiction over cases regarding Taiwan, despite the fact that the country is not a party to the ICJ Statute. Based on Article 36(1) of the ICJ Statute, Taiwan may accept the ICJ's jurisdiction by concluding treaties or conventions that require that disputes that arise from those agreements to be subject to the ICJ's jurisdiction.¹⁷⁹ Provisions of two treaties that Taiwan concluded, Article XXVIII of the

upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

176. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (April 9)(involving Albania's state responsibility for the explosion of mines and resulting damage to British property in territorial waters, where Albania knew of the mine at issue).

177. Since 1946, the ICJ has issued 92 judgments and 25 advisory opinions. The International Court of Justice, Nov. 23, 2006, available at <http://www.icj.cig.org/icjwww7/igeneralinformation.pdf> (last visited Mar. 23, 2008).

178. See ICJ Statute, *supra* note 165, at art. 36(1) ("[T]he Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.").

179. See Basis of the Court's Jurisdiction, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2> (last visited Mar. 23, 2008) ("Such cases normally come before the Court by notification to the Registry of an agreement known as a *special agreement* and concluded by the parties specially for this purpose.").

1946 ROC-U.S. Treaty of Friendship, Commerce and Navigation (FCN Treaty) and Article 2 of the 1947 ROC-Philippines Treaty of Amity, confer jurisdiction over bilateral disputes on the ICJ.¹⁸⁰ Although the Treaty of Amity may have been rescinded because of derecognition of the ROC by the Philippines, both U.S. and Taiwanese courts have consistently recognized the validity of the ROC-U.S. FCN Treaty.¹⁸¹ Thus, the FCN Treaty, which meets the requirement of “treaties and conventions in force” under Article 36(1) of the ICJ Statute, may enable Taiwan to resort to the ICJ.

The other way of conferring jurisdiction on the ICJ is based upon on Article 36(2) of the ICJ Statute under which a State may accept the Court’s compulsory jurisdiction.¹⁸² Yet, to resort to this provision, Taiwan must first become a party to the ICJ Statute. In theory, it is possible for a non-UN member to be a party to the ICJ Statute under Article 93(2) of the UN Charter.¹⁸³ In 1946, the UN General Assembly passed Resolution 91(I), requiring Switzerland to meet certain conditions to become a party to the ICJ Statute.¹⁸⁴ However, Taiwan would face political obstacles should it follow Switzerland’s approach. Under Article 93(2) of the UN Charter, Taiwan’s accession to the ICJ would have to be decided by the UN General Assembly on the Security Council’s recommendation. Since the PRC, as a permanent member of the Security Council, possesses veto power, it is difficult to envision the PRC acquiescing to Taiwan’s attempts to become party to the ICJ Statute, particularly given

180. Treaty of Amity, China–Phil., art. II, Apr. 18, 1947, 175 U.N.T.S. 364; Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, U.S.–R.O.C., art. XXVIII, Nov. 4, 1946, 25 U.N.T.S. 233. *See also* International Court of Justice, Jurisdiction, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4> (“All entries recorded throughout this Section in respect of China . . . are to be understood in the light of General Assembly resolution 2758 (XXVI) of 25 October 1971.”).

181. *See generally* Chang v. Northwestern Memorial Hospital, 506 F.Supp. 975 (N.D. Ill. 1980); N.Y. Chinese TV Programs, Inc. v. U.E. Enterprises, 954 F.2d 847 (2d Cir. 1992). *See* Connie Guang-Hwa Yang, WTO System and Dispute Settlement, Lecture at the World Trade Law Association First Asian-Pacific Regional Conference (Oct. 18, 2003), *available at* http://www.tradelaw.nccu.edu.tw/ebook/World%20Trade%20Law%20Association_First%20Asian-Pacific%20Regional%20Conference_1.pdf (stating that according to the ROC-US FCN Treaty, Taiwanese courts in 1984, 1985, and 1990 consistently granted US companies standing in copyright cases).

182. *See* ICJ Statute, *supra* note 165, at art. 36(2).

183. *See* U.N. Charter, *supra* note 175, at art. 93(2) (stating that a non-UN Member State may become a party to the ICJ Statute “on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.”). For instance, Switzerland and Lichtenstein became parties to the ICJ Statute and participated in the Interhandel Case and the Nottebohm Case, respectively, before they joined the United Nations.

184. G.A. Res. 91(I), (Dec. 11, 1946) (The UN General Assembly required Switzerland to (1) accept provisions of the ICJ Statute; 2) accept obligations of a Member of the United Nations under Article 94 of the Charter; and (3) undertake to contribute to the Court’s expenses).

the PRC's longstanding position against resolving cross-strait "domestic disputes" in international settings.

b. Standing for a Non-UN Member

If Taiwan is able to overcome the jurisdiction threshold, it faces a much thornier challenge before it can resort to the ICJ: obtaining standing before the Court. A State needs to be a party to the ICJ Statute in order to try cases before the ICJ. However, as discussed above, it is unlikely that Taiwan would become a party to the ICJ Statute because of Chinese pressure. As a result, the fundamental legal knot that Taiwan has to untie is whether the country, which is not a UN member or a party to the ICJ Statute, can have its day in court. Strictly legally speaking, the problem may not be an insurmountable obstacle.

According to Article 35(2) of the ICJ Statute, the Court is open to States that are not party to the ICJ Statute (and likely not UN-members) subject to conditions determined by the Security Council.¹⁸⁵ According to Resolution 9, adopted by the Security Council in 1946, a State may deposit a declaration with the ICJ accepting its jurisdiction if it indicates that it would comply with the Court's decisions and obligations under the UN Charter.¹⁸⁶ It should be noted that this procedure under Article 35(2) of the ICJ Statute and Resolution 9 of the Security Council is distinguishable from the procedure pursuant to Article 93(2) of the UN Charter and Resolution 91(I) of the General Assembly. Under the former procedure, Taiwan's accession to the Court would be decided by the ICJ alone. Under the latter procedure, whether Taiwan can become a party to the ICJ Statute hinges upon the decision of the General Assembly, a political forum where Taiwan has fewer than 30 diplomatic allies.

Therefore, the most plausible legal basis for Taiwan to gain standing before the ICJ may be Article 35(2) of the ICJ Statute and Resolution 9 of the Security Council. The ICJ has never rejected any State's jurisdiction declaration. If Taiwan complies with the conditions set forth in the Resolution, such as depositing a declaration with the ICJ accepting its jurisdiction, the ICJ may consider the worldwide judicial recognition of Taiwan as a State and grant the nation standing before the court. The case of Taiwan has never been tested. It should be noted that the country's attempt to file a declaration accepting the ICJ's jurisdiction may involve the substantial political risk of losing a case in the ICJ. It is true that if it prevails, the ROC will effectively claim its independent statehood because, according to the ICJ Statute, only States can make such a

185. See ICJ Statute, *supra* note 165 at art. 35(2) ("The conditions under which the Court shall be open to other states shall . . . be laid down by the Security Council . . .").

186. See S.C. Res. 9 (Oct. 15, 1946).

declaration. However, if the Court rules against Taiwan, the country's statehood will be largely undermined because other judicial bodies will most likely follow the ICJ's precedent.

2. International Tribunal for the Law of Sea

It is important to understand that the stringent State requirements of the International Court of Justice may exclude some States, such as Taiwan, whose international status is disputed. Because this would undermine the effect of a sound judicial system, a new movement to broaden the scope of access to judicial proceedings has emerged among international tribunals. Evidence of this trend is the establishment of the International Tribunal for the Law of the Sea (ITLOS, or Tribunal), which was created under the 1982 UN Convention on the Law of the Sea. Distinct from the ICJ, whose access is limited to State parties,¹⁸⁷ the ITLOS is more widely open to "entities" that "confer jurisdiction on the Tribunal."¹⁸⁸ For instance, the UN Convention on the Law of the Sea provides that with respect to seabed disputes, the Convention should apply "*mutatis mutandis*" to entities other than State Parties.¹⁸⁹ Taiwan, as a maritime power which possesses the world's seventh-largest fishing fleet,¹⁹⁰ needs a mechanism to resolve sea disputes. This is important not only for Taiwan but for other nations who may have disputes with Taiwan.¹⁹¹ Even though Taiwan is not a party to the UN Convention on the Law of the Sea, as a "fishing entity," it has the right to have access to the Tribunal.

a. Fishing Entity

The term "fishing entity" is a unique concept under international law. This term specifically applies to Taiwan, and the concept provides a legal basis for Taiwan to bring suits before the ITLOS. The term first appeared in the text of the 1995 UN Fish Stock Agreement (UN Fish

187. ICJ Statute, *supra* note 165, at art. 35.1 ("The Court shall be open to the states parties to the present Statute.").

188. United Nations Convention on the Law of the Sea, at Annex VI, art. 20, paras. 1 and 2, U.N. Doc. A/CONF.62/122 (Dec. 10, 1982)(Statute of the International Tribunal for the Law of the Sea) [hereinafter "ITLOS Statute" or "ITLOS"].

189. *Id.* at art. 285 ("This section applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with procedures provided for in this Part. If an entity other than a State Party is a party to such a dispute, this section applies *mutatis mutandis*.").

190. International Boat Industry, Key Market Facts: Taiwan—Background Market Data, available at http://www.ibinews.com/ibinews/key_mkt_facts/key_info_taiwan.htm (last visited Nov. 19, 2007).

191. See generally Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 Int'l & Comp. L.Q. 37 (1997).

Stock Agreement).¹⁹² The major goal of this Agreement is to enforce the UN Convention on the Law of the Sea and to “ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks.”¹⁹³ As of the beginning of 2007, there are 59 signatories to the UN Fish Stock Agreement.¹⁹⁴ While the Agreement primarily governs State Parties,¹⁹⁵ Article 1(3) provides that “this Agreement applies *mutatis mutandis* to other *fishing entities* whose vessels fish on the high seas.”¹⁹⁶ Article 17(3) further details the obligations of “fishing entities.”¹⁹⁷ Since then, the term “fishing entities” has frequently appeared in other international fishery agreements.¹⁹⁸ Moreover, the ITLOS stressed in the *Southern Bluefin Tuna* cases that the countries involved should “make further efforts to reach agreement with other States and *fishing entities*” in order to preserve fishing stocks.¹⁹⁹

The question of to whom the term “fishing entities” refers should trace back to the drafting history of the UN Fish Stock Agreement. No legislative material specifically explains the definition of fishing entities. Nonetheless, at a conference in 1996, Poland inquired as to what the concept of “fishing entities” meant. The chairman responded that it is “a particular reference to the status of China.”²⁰⁰ Moritaka Hayashi, the

192. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 34 I.L.M. 1542 [hereinafter Fish Stock Agreement].

193. *Id.* at 1547.

194. See Oceans and Law of the Sea, Overview on the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *available at* http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm (last visited Nov. 19, 2007).

195. Fish Stock Agreement, *supra* note 192, at art.1, sec. 2(a) (“‘States Parties’ means States which have consented to be bound by this Agreement and for which the Agreement is in force.”).

196. *Id.*

197. *Id.* at art. 17, para. 3 (“States which are members of a subregional or regional fisheries management organization . . . shall . . . request the *fishing entities* Such *fishing entities* shall enjoy benefits”) (emphasis added).

198. See, e.g., Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art. 9(2), Sept. 5, 2000, 2000 A.T.N.I.F. 11 (“A fishing entity referred to in the Agreement”); Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, art. 1(i), Aug. 31, 2002, 2002 O.J. (L/234/40) (EC) (“‘[F]ishing entity’ means any fishing entity referred to in Article 1(3) of the 1995 Agreement”).

199. Southern Bluefin Tuna Cases, (N.Z. v. Japan; Aust’l. v. Japan), 38 I.L.M. 1624 at para. 90 [hereinafter Int’l. Trib. L. of the Sea 1999] (concerning requests from Australia and New Zealand for provisional measures against Japan’s over fishing of southern bluefin tuna).

200. Song Yahhui, A Refutation of the CCP rational denying Taiwanese Participation in the WHO (Feb 2003), <http://www.csil.org.tw/bbs/Forum200302.pdf>. The chairman was Ambassador Statya Nandam of Fiji. *Id.*

former director of the UN Division for Ocean Affairs and the Law of the Sea, pointed out that the term “fishing entity” refers to Taiwan.²⁰¹ This explanation is also widely supported within academia.²⁰² In addition, it is noteworthy that even the PRC did not raise objections in the process of enacting the UN Fish Stock Agreement, in which the term “fishing entities” first appeared. China’s silence, to some extent, also indicates its acquiescence to the concept of fishing entities. In my view, the reason for creating the special category for Taiwan reflects a reluctant political compromise between China’s pressure and other nations’ desire to incorporate Taiwan, a major fishing State, into global regulations.

b. Access to the Tribunal

The notion of Taiwan being a fishing entity is well accepted by the international community. Relying on its status as a fishing entity, Taiwan is entitled to access the ITLOS through the dispute settlement provisions of the international fishery agreements. In 2000, Taiwan, as a fishing entity, joined the Commission established under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPO Convention).²⁰³ The WCPO Convention states that one of the major purposes of the Commission is to “promote the peaceful settlement of disputes.”²⁰⁴ It further provides that the dispute settlement mechanism of the UN Fish Stock Agreement, which grants access to the ITLOS, should apply to disputes

201. Moritaka Hayashi, *The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention*, 29 *Ocean & Coastal J.* 51, 59 (1995); see also Ronald Barton, *The Law of the Sea and Regional Fisheries Organizations*, 14 *Int’l J. Mar. & Coastal L.* 333, 351 (1999).

202. See David H. Anderson, *The Straddling Stocks Agreement of 1995—An Initial Assessment*, 45 *Int’l & Comp. L. Q.* 463, 463–75 (1996); David A. Balton, *Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 27 *Ocean Development & Int’l L.*, 125, 125–51 (1996); see also Sean D. Murphy, *Conservation of Fish in the Western and Central Pacific Ocean*, 95 *Am. J. Int’l L.* 152, 153 (2001) (stating that Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean includes “fishing entities” in order to cover Taiwan).

203. See Internet Guide to International Fisheries Law, Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, <http://www.intfish.plus.com/orgs/fisheries/wcpfc.htm> (last visited Jan. 20, 2007) (“The Commission also provides for participation by fishing entities, which is enabled by means of an Arrangement for the Participation of Fishing Entities (which was signed by Chinese Taipei on 5 September 2000).”). The western and central Pacific Ocean is an area where Taiwan catches a significant amount of fish catch and, hence, Taiwan’s participation is vital to meet the goal of the WCPO Convention.

204. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean art. 10, §1(n), Sept. 5, 2000, S. Treaty Doc. No. 109-1 (2005), 40 *I.L.M.* 278, available at <http://www.intfish.plus.com/treaties/westpac.htm>.

among members of the Commission.²⁰⁵ Taiwan may take advantage of this process even though it is currently unable to be a party to the UN Fish Stock Agreement.

In August 2002, Taiwan became a member of the Extended Commission for the Conservation of Southern Bluefin Tuna as a fishing entity.²⁰⁶ The Extended Commission's resolution provides that disputes should be resolved by "arbitration or other peaceful means."²⁰⁷ Taiwan is also poised to join the Antigua Convention²⁰⁸ through a similar arrangement – as a fishing entity under the name of Chinese Taipei.²⁰⁹ The Antigua Convention also provides that members are obliged to resolve disputes through "peaceful means" consistent with international law.²¹⁰

A reasonable interpretation of the term "peaceful means" contained in the foregoing agreements cannot preclude resolving conflicts before the ITLOS, the judicial forum recognized to be the most authoritative in maritime affairs. Thus, Taiwan in its capacity as a fishing entity may rely on the following provisions. Article 288 of the UN Convention for the Law of Sea provides that the ITLOS is entitled to jurisdiction over disputes arising from "an *international agreement* related to the purposes of this Convention."²¹¹ Article 20 of the ITLOS Statute also permits an entity "other than State Parties" to have access to the Tribunal "pursuant to *any other agreement* conferring jurisdiction."²¹² Article 21 of the same Statute further states that the jurisdiction of the ITLOS com-

205. *Id.* at art. 31 ("The provisions relating to the settlement of disputes set out in Part VIII of the Agreement apply, *mutatis mutandis*, to any dispute between members of the Commission, whether or not they are also Parties to the Agreement."). It is interesting to note Annex I(2), which provides that a dispute involving a fishing entity may be submitted to arbitration according to "the relevant rules of the Permanent Court of Arbitration." *Id.* at annex I(2). Furthermore, to avoid precedential value of this provision, Annex I(4) states that "this Annex relating to participation by fishing entities are solely for the purposes of this Convention." *Id.* at annex I(4).

206. *See* Commission for the Conservation of Southern Bluefin Tuna, <http://www.ccsbt.org/docs/about.html> (last visited Jan. 20, 2007) ("The Fishing Entity of Taiwan's membership of the Extended Commission became effective on 30 August 2002.").

207. Extended Commission for the Conservation of Southern Bluefish Tuna, Resolution to Establish an Extended Commission and an Extended Committee, http://www.ccsbt.org/docs/pdf/about_the_commission/the_Extended_commission.pdf (last visited Mar. 23, 2008).

208. Convention for the Establishment of the Inter-American Tropical Tuna Commission (IATTC), U.S.– Costa Rica, May 31, 1949, 1 U.S.T. 230 [hereinafter Antigua Convention].

209. The Quarterly Report Apr.– June 2003 of the Inter-American Tropical Tuna Commission 3 (2003), available at <http://www.iattc.org/PDFFiles2/IATTCq032ENG.pdf> ("This resolution calls upon the observer from Taiwan to sign the new IATTC convention 'under the name Chinese Taipei.'").

210. *See* Antigua Convention, *supra* note 208, art. XXV (2) ("If a dispute is not settled through such consultation within a reasonable period, the members [may] settle the dispute through any peaceful means they may agree upon, in accordance with international law.").

211. ITLOS, *supra* note 189, art. 288, para. 2 (emphasis added).

212. ITLOS, *supra* note 188, art. 20, para. 2 (emphasis added).

prises “all matters specifically provided for in *any other agreement* which confers jurisdiction on the Tribunal.”²¹³

The PRC may argue that according to the Vienna Convention on the Law of Treaties, the term “international agreement” refers to treaties that are “concluded between States”²¹⁴ and, because Taiwan is not a State, the fishery agreements to which Taiwan is a party do not meet the requirement set forth in Article 288 of the UN Convention for the Law of Sea. I disagree with this argument for the following reasons. The Vienna Convention does not preclude the fisheries agreement from the scope of international agreements. It clearly stipulates that the rules of that Convention do not apply to certain international agreements, for instance, the one concluded between States and “other subjects of international law.”²¹⁵ The Vienna Convention, hence, envisions treaties as only one type of international agreement. Even if fisheries agreements do not constitute “treaties” in relation to Taiwan, they still qualify as international agreements within the meaning of Article 288 of the UN Convention on the Law of the Sea.

Additionally, while Article 288 of the UN Convention on the Law of the Sea uses the term “international agreements,” Articles 20 and 21 of the ITLOS Statute use the term “any other agreement.” The omission of the adjective “international” enlarges the scope of jurisdiction under those agreements. As Gudmundur Eiriksson, former president of the ITLOS asserted, the agreements concluded with “entities whose international status is unclear” should fall within the meaning of Article 288.²¹⁶ As a result, the fishery agreements concluded between foreign States and Taiwan would constitute international agreements under both the UN Convention on the Law of the Sea and the ITLOS Statute.

Although Taiwan is not a “Contracting Party”—a term China deems to have sovereign implications—to the UN Convention on the Law of the Sea and to the UN Fish Stock Agreement, Taiwan is now widely recognized as a fishing entity. Under this new identity, Taiwan is entitled to the rights other States possess under the multilateral fishery agreements and, more importantly, is able to resolve its fishing disputes in the ITLOS on the basis of the dispute settlement provisions of those agreements.

213. ITLOS, *supra* note 188, art. 21 (emphasis added).

214. Vienna Convention, *supra* note 83, art. 2(a) (defining a treaty as “an international agreement concluded between States in written form and governed by international law.”)

215. Vienna Convention, *supra* note 83, art. 3.

216. See Gudmundur Eiriksson, The International Tribunal for the Law of the Sea 115 (2000) (“It can be argued that other entities . . . would fall under [Article 288(2) of the Convention], for example, non-governmental organizations or natural or juridical persons or other entities whose international status is unclear.”).

3. World Trade Organization

In comparison to ICJ jurisdiction, which is limited to the consent of "States," the broadened jurisdiction under the ITLOS that is extended to other entities demonstrates the trend toward wider jurisdiction of international tribunals. This trend is further evidenced by the creation of the dispute settlement mechanism of the World Trade Organization (WTO), which has evolved into one of the most vibrant global judicial dispute settlement systems in the past decade. As the 17th largest economy in the world, it is of great importance that Taiwan be able to utilize the system to resolve trade quarrels. Taiwan's participation in WTO litigation as a "separate customs territory" reaffirms that Taiwan is considered to be an independent entity, even if it is not have the name of State in some judicial proceedings.

The WTO came into existence in 1995 based on the *Agreement Establishing the World Trade Organization* (WTO Agreement), concluded at the end of the Uruguay Round. The purpose of the WTO is to provide an integrated framework to its predecessor, the General Agreement on Tariffs and Trade (GATT), to which the ROC was a party, and other covered agreements. The pivotal innovation of the WTO is the dispute settlement system based on the new Dispute Settlement Understanding. The new Dispute Settlement Understanding prescribes the mandatory jurisdiction over WTO Members. This is different from most international tribunals, where jurisdiction is generally bestowed by parties' consent.²¹⁷

Should a Member find its rights under any covered agreement impaired by another Member, the former may resort to the Dispute Settlement Mechanism. The Dispute Settlement Understanding requires the Members to first engage in consultations to try to resolve the dispute without formal proceedings. If no mutually satisfactory results can be achieved, a Member may formally request the establishment of a panel to adjudicate its case.²¹⁸ The panel is composed of three legal or trade experts chosen by the parties or appointed by the WTO Director-General.²¹⁹ The Dispute Settlement Mechanism also provides a standing

217. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter the DSU or Dispute Settlement Understanding]; see also World Trade Org., A Handbook on the WTO Dispute Settlement System 8 (2004) (stating that due to the compulsory jurisdiction, "no responding party Member may escape from that jurisdiction").

218. See DSU, *supra* note 217, art. 6.1 ("If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda . . .").

219. DSU, *supra* note 217, arts. 8.5 and 8.7.

appellate review institution, the Appellate Body, which consists of seven “judges,” to whom the parties to appeal.²²⁰ The panel and Appellate Body reports become binding after the adoption by the Dispute Settlement Body, comprised of all WTO members, unless the Dispute Settlement Body determines by consensus not to adopt the reports.²²¹ This “negative consensus” approach remedies the problem that arose during the GATT period, where minority parties could “block” the adoption of panel reports. The DSB may authorize the injured Member to request compensation or, by suspending its concession under relevant agreements, “retaliate” against the losing Member.²²² The Dispute Settlement Mechanism, which has dealt with 357 cases as of January 2007,²²³ has been applauded for its contribution to the multilateral trading system and, for this reason, the Appellate Body has frequently been referred to as the “World Trade Court.”²²⁴

a. Separate Customs Territory

To examine whether Taiwan is entitled to access the WTO dispute settlement system, we must trace the ROC’s history in the WTO. In 1947, the ROC, then the only government of China, became one of the 23 contracting parties to the GATT, the predecessor of the WTO.²²⁵ In 1950, the ROC could no longer fulfill GATT obligations undertaken on behalf of the mainland after losing the civil war. The government thus decided to withdraw from the GATT.²²⁶ In 1965, realizing the importance of expanding foreign market access to Taiwan, the ROC applied for observer status,

220. DSU, *supra* note 217, art. 17.1. For information on current Appellate Body Members, see Dispute Settlement: Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Nov. 20, 2007).

221. DSU, *supra* note 217, arts. 16.4 and 17.14.

222. DSU, *supra* note 217, art. 22.

223. Dispute Settlement: Disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 23, 2008).

224. See, e.g., Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the WTO*, 36 J. World Trade 605, 605 (2002); see also Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*, Mattstricht Faculty of Law Working Papers 2005-1, at 2 (“The Appellate Body is now, in all but name, the World Trade Court.”).

225. Twenty-three original contracting members include Australia, Belgium, Brazil, Burma, Brazil, Canada, Ceylon (now Sri Lanka), Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, South Rhodesia, Syria, the United Kingdom, and the United States. Yang Guohua & Cheng Fin, *The Process of China’s Accession to the WTO*, 14 J. Int’l Econ. L. 297, 297 n.2 (2001).

226. Communication from Secretary-General of the United Nations Regarding China, GATT/CP/54 (Mar. 6, 1950), available at <http://gatt.stanford.edu/search/advanced>.

which was granted.²²⁷ However, in 1971, given the ROC's loss of its UN seat, the GATT decided to expel Taiwan.²²⁸

In 1990, Taiwan attempted to rejoin the GATT because of its new pragmatic policy, which sought wider participation in international organizations despite the PRC's presence. Taiwan based its application on Article XXXIII of the GATT under the name of "The Customs Territory of Taiwan, Penghu, Kinmen and Matsu," abbreviated as "Chinese Taipei."²²⁹ In Taiwan's view, this name, albeit tedious, decreases sovereign disputes and reflects the ROC's jurisdiction over Taiwan and other outlying islands.²³⁰

The PRC fiercely opposed the ROC's application because of its fear that Taiwan's membership would strengthen its independent image by showing that Taiwan and China are of equal legal status.²³¹ The PRC contended that Taiwan's application was illegal because, as part of China, Taiwan's membership, like that of Hong Kong, must be premised on Beijing's confirmation.²³² The PRC's position is untenable for several reasons. First, the GATT membership requirement is based on "governments," rather than "states." Article XXXII:1 clearly stipulates that "[t]he contracting parties . . . shall be understood to be those governments." To date, although the ROC's status as a State is controversial, the ROC as the government of Taiwan is rarely challenged. This is why foreign governments and courts deemed the ROC to be an independent subject of international law.

Furthermore, the PRC ignored the distinction between two accession provisions of the GATT, Article XXVI:5, on which Hong Kong's membership application was based, and Article XXXIII, on which Taiwan

227. Chung-chou Li, *Resumption of China's GATT Membership*, 21 J. World Trade L. 25, 26 (1987).

228. Summary Record of the Second Meeting, GATT SR. 27/2 (Nov. 19, 1971).

229. See World Trade Organization, WTO Successfully Concludes Negotiations on Entry of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Sept. 18, 2001) http://www.wto.org/english/news_e/pres01_e/pr244_e.htm.

230. Cf. Edwin Hsiao, *New Strategy Could Prove Good WHO Medicine*, Taiwan J., Apr. 17, 2008, <http://taiwanjournal.nat.gov.tw/ct.asp?CtNode=122&xItem=36457> (reporting president-elect Ma's "displeasure with the government's plan to apply for WHO membership using the name Taiwan.").

231. See Note, Susanna Chan, *Taiwan's Application to the GATT: A New Urgency with the Conclusion of the Uruguay Round*, 2 Ind. J. Global Legal Stud. 275, 285 (1994) ("[A]cceptance of the ROC's application will promote international recognition of the ROC as the legitimate government of China" and that "reunification between Taiwan and China would become even more remote if the GATT recognizes the strength of Taiwan's economy."); Charles Wolf, *Fault Lines in China's Economic Terrain* 160 (2003) (stating that the PRC believed Taiwan's WTO membership "as a customs entity[] may enhance [its] *de facto* stature as an independent state").

232. Lei Wang, *Separate Customs Territory in GATT and Taiwan's Request for GATT membership*, 25 J. World Trade 5, 17, 19 (1991).

relied. According to Article XXVI:5, Hong Kong's accession to the GATT in 1986 was due to the UK's "sponsorship" because Hong Kong was a British territory, for which the UK possessed "international responsibility."²³³ The PRC, prior to the takeover in 1997, also ensured that Hong Kong would continue to have "full autonomy in the conduct of its external commercial relations" and other GATT-related matters, thus maintaining Hong Kong's status as required by Article XXVI:5(c) of the GATT.²³⁴ However, the ROC's situation is inherently distinguishable from that of Hong Kong in both fact and law. Taiwan has never been under the *de facto* rule of the government of the PRC and, unlike Hong Kong, is not a colony. Pursuant to Article XXXIII of the GATT, the ROC is the government that applied for membership "acting on behalf of" its territories and possesses "full autonomy" in foreign trade relations.²³⁵ Consequently, the ROC is entitled to GATT membership on its own behalf without the PRC's sponsorship.

It is noteworthy that the 1992 GATT Council specifically expounded that in examining the accession process of China and Taiwan, "the working party reports should be examined *independently*."²³⁶ After the establishment of the WTO in 1994, Taiwan changed its application based on both XXIII of the GATT and Article XII of the WTO Agreement.²³⁷ On January 1, 2002, Taiwan finally joined the WTO as a "separate customs territory," a new identity for Taiwan in international law. Similar to the concept of a "fishing entity" in multilateral fishery agreements, Taiwan's accession to the WTO indicates its independent status.

b. Participation in WTO Litigation

The WTO dispute resolution mechanism is recognized as "a central element in providing security and predictability to the multilateral trad-

233. General Agreement on Tariffs and Trade art. XXVI:5(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] ("Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility . . .").

234. See Chung-chou Li, *Resumption of China's GATT Membership*, 21 J. World Trade L. 25, 43 (1987) (According to the UK-PRC Agreement, the PRC promised that "the Hong Kong Special Administrative Region shall be a separate customs territory. It may participate in relevant international organizations and international trade agreements . . ."); see also, GATT, *supra* note 233, art. XXVI:5(c).

235. GATT, *supra* note 233, art. XXXIII.

236. Analytical Index, Guide to GATT Law and Practice 944 (6th ed. 1994) (emphasis added).

237. See GATT, *supra* note 233, art. XXXIII; see also Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XII (stating that "any State or separate customs territory . . . may accede to this Agreement.")

ing system.”²³⁸ This section analyzes whether Taiwan, as a separate customs territory, has the same access to the judicial system as other States, and whether Taiwan can solve its trade disputes with China at the WTO. As a starting point, it is important to understand that the WTO considers “States” and “separate customs territories” to be equal “Members,” and, hence, Taiwan is entitled to full access to the Dispute Settlement Mechanism. The WTO has proven to be efficient in dealing with Taiwan’s trade conflicts, as many of them were unable to be resolved bilaterally because of a lack of diplomatic ties.²³⁹ Since the *US–Steel Safeguards* case, Taiwan’s first complaint against US safety measures on steel products in 2002, the country has participated as a “third party” in 29 cases as of February 2007.²⁴⁰ Although Taiwan has not yet been a “real party” to disputes, as other new Members have, the country’s third party experiences have helped to familiarize it with WTO legal proceedings. Taiwan has appeared before the panels in 16 cases,²⁴¹ and before the Appellate Body in 10 cases, of which the Appellate Body examined Taiwan’s submissions in three cases.²⁴² Because Taiwan is able to contribute its own legal interpretation, its utilization of the Dispute Settlement Mechanism is beneficial to the trading system as a whole. Other Members also benefit because they can now appeal to the Dispute Settlement Mechanism to request Taiwan’s removal of WTO-

238. DSU, *supra* note 217, art. 3.2.

239. For instance, in 1999, Argentina and Poland imposed import restrictions on certain textile products from Taiwan. Followed by Taiwan’s accession to the WTO, the government requested that Argentina and Poland comply with WTO non-discriminatory obligations. Subsequently, both countries notified Taiwan of the termination of restriction measures by 2002. Major Responsibilities, Permanent Mission of Taiwan to the WTO, *available at* http://www.taiwanwto.ch/about_mission/achievements.html (last visited Jan. 22, 2007).

240. In *US—Steel Safeguards* (DS274), Taiwan requested consultations with the United States but did not join the other 8 Members as complaining parties in panel and Appellate Body proceedings. Taiwan participated as a third party in that case. *See* Member Information: Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) and the WTO, http://www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm (last visited Jan. 22, 2007); *see also* DSU, *supra* note 217, art. 10.2 (“Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a ‘third party’) shall have an opportunity to be heard by the panel and to make written submissions to the panel.”).

241. *See* Parties and Third Parties in WTO Panel Proceedings, <http://worldtradelaw.net> (last visited November 26, 2007).

242. Appellate Body Annual Report for 2006, WT/AB/7 (Jan. 23, 2007), at 34–36. The three cases include *US–Gambling*, WT/DS285/AB/R, *US–Countervailing Duty Investigation on DRAMS*, WT/DS296/AB/R, and *US–Zeroing (EC)*, WT/DS294/AB/R. In the other seven cases before the Appellate Body, Taiwan participated in the oral hearing without submitting written submissions pursuant to Rule 24(2) of the Working Procedures for Appellate Review.

inconsistent measures, rather than simply exercising political pressure as in the past.²⁴³

The application of the WTO Dispute Settlement Mechanism to China-Taiwan trade disputes has drawn the world's attention. China claimed that cross-strait disputes are solely internal affairs and, according to its one China principle, such disputes should be resolved bilaterally and not within the WTO.²⁴⁴ China erred because its one China principle cannot override the WTO's compulsory jurisdiction under which both China and Taiwan are on equal footing. In fact, recent cross-strait trade disputes have shown that China has realized that failure to interact with Taiwan would place China in violation of WTO rules.

In May 2005, without notifying the Taiwanese government as required by Article 12 of the Safeguard Agreement, China imposed provisional safeguard measures against steel products imported from Taiwan.²⁴⁵ Hence, Taiwan's WTO Mission formally requested consultations with the PRC. China's WTO Mission replied to Taiwan by letter, but addressed Taiwan's Mission as the "economic trade office," the title that Hong Kong and Macau use, rather than Taiwan's official title "Permanent Representative Mission," which China considers to have sovereign implications.²⁴⁶ Taiwan immediately responded, referring to China's slight as "inappropriate" and again requested consultations pursuant to WTO rules.²⁴⁷ Afraid that Taiwan would bring the case to the WTO and further enhance the "two States" impression, China finally held a meeting with Taiwan at the latter's Mission on November 12, 2002.²⁴⁸ Although no concrete results were reached in this first-ever cross-strait meeting under the WTO framework, it paved the way for the two sides to resolve disputes and bypass their political deadlock.

243. For example, in January 2007, the Dutch electronic company, Phillips, requested that the European Commission sue Taiwan under the WTO because of Taiwan's compulsory licensing of Phillips CD-Rom patents, which allegedly constituted a violation under the Agreement on Trade Related Intellectual Property Rights [hereinafter TRIPS]. If the European Commission takes the case, Taiwan will face its first legal challenge under the WTO. Kathrin Hille, *Philips Seeks WTO help in Taiwan Dispute* (Jan. 15, 2007), Financial Times, available at http://www.ft.com/cms/s/7ec05692-a447-11db-bec4-0000779e2340_i_rssPage=fce0dcea-3017-11da-ba9f-00000e2511c8.html.

244. *China Says WTO No Place for Solving Trade Disputes*, Taipei Times, Nov. 1, 2001, at A1.

245. Only a private steel association in Taiwan was informed. See Agreement on Safeguards, art. 12.3 ("A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned . . .").

246. C.H. Lu & P.C. Tang, *Effect of WTO Talks on Cross-Strait Relations Still an Open Question*, Central News Agency (Taiwan), Dec. 16, 2002.

247. *Id.*

248. See *id.* Prior to the meeting, two sides reached an implicit agreement that China would not address the Taiwan Mission as "economic and trade office" or "Taipei, China."

The cross-strait trade conflicts do not stop here. The steel dispute was soon followed by the “towel war.” In May 2006, Taiwan’s local towel manufacturers applied for import relief contending that cheap Chinese-made towels were flooding the market in Taiwan, causing a substantial decline in sales of locally made towels.²⁴⁹ The government initiated both anti-dumping and safeguard investigations. To meet the WTO notification requirements, Taiwan’s WTO Mission again requested consultations with its Chinese counterpart. At their meeting, Chinese representatives expressed that, although China could accept anti-dumping measures, they found Taiwan’s safeguard measures discriminatory.²⁵⁰ This time, cross-strait interactions went even beyond the meetings. To assist Chinese towel industries, four PRC officials from the Ministry of Commerce made a groundbreaking visit, attending a public hearing held in Taipei as consultants.²⁵¹ An ROC official from the Ministry of Finance also traveled to China to investigate the normal value of Chinese products.²⁵²

In my view, one of the greatest contributions of the WTO dispute settlement mechanism is to make such direct talks, as well as “official” visits, across the Taiwan Strait possible. Geneva is now the focal point for bridging the gap between Beijing and Taipei. The WTO provides a rules-based forum for both China and Taiwan, thereby reducing cross-strait political tensions. The WTO experience demonstrates that bringing Taiwan into international tribunals enhances not only global justice but also China-Taiwan relations.

B. Reasons for Accessing International Courts

The new trend of multilateral agreements and international courts is to relax the rigid “State” requirements so that they are able to accommodate Taiwan, which possesses full autonomy both domestically and internationally. Taiwan’s identity as a fishing entity or a separate cus-

249. See *Taipei, Beijing Officials Tackle Towel Tussle at WTO*, Taipei Times, June 24, 2006, at A11; see also S.C. Chang, *Committee Rules China’s Towel Dumping Hurts Taiwan Businesses*, Central News Agency (Taiwan), Aug. 29, 2006 (“By 2005, Chinese imports had taken a 70 percent share of Taiwan’s towel market, causing ‘evident and adverse impact’ on the domestic towel industry.”); Susan Yu, *ITC Concludes Towel Business Should Get Relief* (Mar. 24, 2006) <http://www.taiwan.com.au/Polieco/Industry/20060327.html>.

250. *Taipei, Beijing Officials Tackle Towel Tussle at WTO*, *supra* note 249.

251. David Lague, *Taiwan Takes on China in WTO*, International Herald Tribune, Apr. 5, 2006, available at <http://www.ihl.com/articles/2006/04/04/business/wto.php>.

252. Sofia Wu, *Taiwan Official Visits China for Anti-Dumping Probes*, Central News Agency (Taiwan), June 14, 2006. Finding that the sales of Chinese towels were below market value, Taiwan’s Ministry of Finance announced on September 19, 2006 that it would impose a provisional 204.1% anti-dumping tax on imported Chinese towels. Deborah Kuo, *Taiwan Imposing 204 Percent Anti-Dumping Tax on Chinese Towels*, Central News Agency (Taiwan), Sept. 19, 2006.

toms territory allows Taiwan to avoid the obstacle of recognition and utilize international tribunals to resolve disputes. Furthermore, it buttresses Taiwan's claim of being a subject of international law independent of the PRC. International tribunals' extension of jurisdiction to Taiwan mirrors, to some extent, the approach of many domestic courts, which deems Taiwan to be a State for statutory purposes. It is both pragmatic and necessary for international courts to grant standing to Taiwan for three reasons.

First, the denial of standing before international courts will inevitably shield Taiwan from shouldering its own State responsibility. It is neither justified nor reasonable to hold the PRC liable for wrongs committed by Taiwan. Under international law, a State bears responsibility if it engages in wrongful international acts in violation of its international obligations.²⁵³ According to the ICJ in *F.R.G. v. Poland (the Chorzow Factory case)*, a breach of such obligations, in turn, "involves an obligation to make reparation."²⁵⁴ If an international tribunal upheld the PRC version of the "one China" principle, the PRC would be obliged to make reparation for Taiwan's wrongful acts. Additionally, enforcing judgments for wrongs committed by Taiwan would be problematic because China does not have control over Taiwan.

Domestic courts have perceived this problem, which is why the Canadian court in *Romania v. Cheng* rejected the PRC's request for jurisdiction and transferred suspected crews to Taiwan, the flag State responsible for adjudicating the case. WTO rules further show that, should measures adopted by Taiwan be inconsistent with WTO rules, it is Taiwan, not China, that should bring the measures into conformity or suffer trade retaliation. These examples should inform international tribunals; if Taiwan is granted standing before the courts, the injured States can directly ask Taiwan to bear State responsibility, thereby promptly resolving disputes.

Second, denying Taiwan access to international courts will deprive its 23 million nationals of their individual human rights. It is frequently argued that, by granting individual access to certain international courts and tribunals, such as the European Court of Human Rights or treaty-based human rights committees,²⁵⁵ international law has gradually de-

253. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001).

254. *The Factory at Chorzow (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 24 (Sept. 13).

255. For example, committees established under Optional Protocol to the International Covenant on Civil and Political Rights and the International Convention for the Elimination of All Form of Racial Discrimination may receive complaints from individuals whose states are parties to those treaties.

parted from the embedded Westphalian concept of sovereign States. Nonetheless, the very premise of the State requirement, which most international courts require, has not yet eroded. If a national's human rights are infringed upon by another State, a remedy can be found if their governments exercise diplomatic protection and seek international redress for them.²⁵⁶ A dire situation could arise concerning ROC citizens if the country is denied standing before international courts. ROC nationals will be deprived of the opportunity to assert their rights, and infractions on these rights will go unpunished.

The PRC may assert that it is entitled to exercise protection on behalf its "nationals" on Taiwan. This position ignores the holding of the *Nottebohm* case. In that case, Frederic Nottebohm was a German national who lived in Guatemala for 34 years and later became a naturalized citizen of Liechtenstein. Nottebohm's connection with Liechtenstein was tenuous. In fact, he had only paid the country a few brief visits. When he returned to Guatemala in 1940 under his Liechtenstein passport, Nottebohm was deemed to be an enemy alien since Guatemala had sided with the Allies during World War II. As a result, the Guatemalan government deported him and expropriated his property. After the war, Liechtenstein brought the case against Guatemala to the ICJ, seeking damages. The ICJ agreed with Guatemala's argument, finding that despite Nottebohm's Liechtenstein citizenship, he was not a national of Liechtenstein under international law, given the lack of "genuine connection" with that country.²⁵⁷ The ICJ dismissed the case. In my view, the PRC's desire to exercise protection of nationals of Taiwan can hardly overcome the "genuine connection" threshold. The relationship between the PRC and people in Taiwan is even more remote than the relationship between Liechtenstein and Nottebohm, as most Taiwanese people have never set foot in mainland China and do not possess PRC citizenship. Therefore, by denying Taiwan's standing, international tribunals would render 23 million ROC citizens "stateless"

256. See *The Panevezys-Saldutiskis Railways Case* (Est. v. Lith.), 1939 P.C.I.J., ser. A/B, No. 76, at 13 (Feb. 28) ("[I]n the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection . . .").

257. The ICJ defined nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. (Apr. 6). See also David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 Cornell Int'l L.J. 293, 301-02 (2003) (detailing the *Nottebohm* case and discussing criticism regarding the ICJ's rulings).

and divest them of their human rights, which are presumably “universal.”²⁵⁸

Finally, the world as a whole would suffer social and economic costs if international tribunals are unable to resolve disputes concerning Taiwan. As a significant trading nation, Taiwan has concluded numerous bilateral agreements, such as double taxation and investment treaties. Similar agreements concluded between other States usually designate an international tribunal, such as the ICJ, the Permanent Court of Arbitration, or the International Centre for Settlement of Investment Disputes under the World Bank, to adjudicate disputes arising from those agreements. Given Taiwan’s inability to access international courts, contracting parties are precluded from resorting to rule-based judicial forums and can only rely on uncertain political bargains in disputes with Taiwan. This prolongs the process and incurs higher economic costs. This situation undermines the foundation and the goals of the international courts, which are to promote predictability and prompt settlement of global disputes in a peaceful way.

The WTO’s dispute settlement system, to which Taiwan has access, provides a prime example of why Taiwan should be incorporated into the international judicial system. The world has witnessed the WTO’s success in facilitating the resolution of trade conflicts between Taiwan and the rest of the world in a cost efficient way. The fact that China and Taiwan can now resolve their quarrels through the WTO’s rule-based system further vindicates this view. I believe that the WTO experience should inform the global community and international courts. A simpler question is, if international courts are incapable of resolving conflicts involving Taiwan, can such courts still be called “international?”

Conclusion

Since its loss of the China seat in the United Nations, the Republic of China on Taiwan has become the most renowned example of an “unrecognized State” under international law. This Article has argued that despite this unrecognized status, the ROC should be considered a State for statutory purposes in judicial proceedings in foreign and international courts. Moreover, this Article finds that China has been a “divided

258. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (Art. 1 provides that “[a]ll human beings are born free and equal in dignity and rights,” while Article 2 states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction* of any kind, such as . . . political or other opinion, *national* or . . . *birth or other status*” (emphasis added)).

State” since the establishment of the PRC on mainland China and the ROC’s relocation to Taiwan. The ROC and the PRC are two equal entities under international law. The practice of foreign courts vindicates this view by ruling that Taiwan, which meets the criteria for statehood under the Montevideo Convention, never lost its State status as a result of derecognition. Whether relying on statutory or common law, courts in diverse jurisdictions almost uniformly confirm the validity of Taiwan’s rights to treaties and property concluded and acquired prior to derecognition. By so doing, foreign courts rejected the PRC’s claim that it has “succeeded” the ROC. The judicial recognition of treating Taiwan as a foreign State has risen to the level of an “international custom,” creating a binding effect on all tribunals.

The issue of Taiwan’s standing before international courts is complex, given the State requirements to access those courts. In the case of the International Court of Justice, this Article argues that Taiwan may file a declaration with the ICJ declaring its acceptance of the Court’s jurisdiction, although Taiwan incurs high political risks for pursuing this course of action. In certain fields of international law, the global community has begun to share the views of the domestic courts and has started to carefully carve out exceptions to accommodate Taiwan. Thus, Taiwan is now widely recognized as a fishing entity and a separate customs territory in multilateral fisheries agreements and within the World Trade Organization, respectively. In turn, Taiwan’s new identities form a legal basis for the nation to access the International Tribunal for the Law of the Sea and the WTO dispute settlement system. Although this arrangement reflects a reluctant political compromise between the international community and the PRC, it avoids the undesirable creation of a “judicial black hole.”

The Taiwan question has stirred intense political debate in the international arena for many decades. Despite Taiwan’s absence of recognition, the international community has accorded Taiwan status as an independent entity or territory, thereby accepting Taiwan as a subject of international law. Although political situations surrounding both Taiwan and the world have changed rapidly, the fairness of every judicial system should remain constant. Consequently, political obstacles should not preclude the fundamental goal of the courts, which is to pursue justice. Recognizing that global fairness and justice should be universally applied without national boundaries, Taiwan should be entitled to its day in court.