

Chapter 6: Taiwan's UN Membership Question

Since 1993, based on the model of a parallel representation of divided countries or later a new state, the Taipei government has applied for the UN membership as the representatives of the people of Taiwan only, under the various names such as the Republic of China in/on Taiwan, the Republic of China (Taiwan), or simply Taiwan.¹ However, Taiwan's annual request for the inclusion of Taiwan's application for the UN admission in the agenda of the General Assembly was denied every year until 2006 at the General Committee due to obstruction from the PRC and limited number of Taiwan's diplomatic allies.

In 2007, the UN Secretary-General Ban Ki-moon unilaterally refused to receive the Taiwan's application letter, unopened, saying that "by Resolution 2758 (XXVI) of 1971, the General Assembly decided to recognize the representatives of the People's Republic of China as the only legitimate representatives of China to the United Nations. This has been the official position of the United Nations and has not changed since 1971" (UNSG, 2007b, para. 49). Furthermore, Ban defended his rejection, saying that Resolution 2758 defined the PRC represent the whole of China and Taiwan is part of China; therefore, Taiwan is part of the PRC (UNSG, 2007a). However, his interpretations regarding the Taiwan question is completely inaccurate. In fact, not only does Resolution 2758 not mention about Taiwan, but also the PRC government has never exercised sovereignty over the islands of Taiwan, Pescadores, Kinmen, and Matsu since her establishment in 1949. In this chapter, in order to understand the complex nature of Taiwan's UN membership question, the legal status

¹ The name "The Republic of China (Taiwan)" indicates that the ROC is synonymous with Taiwan.

of Taiwan will be discussed.

2.1 Statehood

Since the UN Charter states, “Membership in the United Nations is open to all other peace-loving states,” statehood becomes a principal legal requirement for participating in the world organization (Article 4).

According to the traditional definition of statehood by the Montevideo Convention of 1933, statehood has to contain all four criteria: “(a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States” (as cited in R. Bush, 2005, p.83). In addition, Krasner (1999) distinguished four different concepts of sovereignty: Westphalian sovereignty, referring to “the exclusion of external actors from domestic authority configurations;” domestic sovereignty, referring to “the organization of public authority within a state and to the level of effective control exercised by those holding authority;” interdependence sovereignty, referring to “the ability of public authorities to control transborder movements;” and international legal sovereignty, referring to “the mutual recognition of states or other entities” (p. 9).

Nonetheless, in the history of the UN, not all states were subject to meet all legal qualification of statehood. For example, the Holy See, which has no territorial sovereignty albeit her close association with the independent territory of State of Vatican City, has been a major actor of international affairs including a permanent observer in the UN. The PLO (later renamed Palestine) was granted an observer status in 1974 despite her undefined territory. India, Philippines, Byelorussia, and Ukraine

were not independent states at the time of their admission.² In addition, the UN has recognized parallel representation of divided nations: Korea, Germany, and Yemen.

Taiwan, literally maintaining diplomatic relations with 23 nations and over 50 quasi-diplomatic offices in the world, has fulfilled all four criteria of the Montevideo Convention and the first three of Krasner's four sovereignties. However, Taiwan is not treated as a state in the international community at this point due to her weak position on international legal sovereignty – recognition by other states.

2.2 Legal Status of Taiwan

The legal status of Taiwan has been controversial internationally and even domestically due to its complex history and divided identities. The government of Taiwan has three different faces: the exile government of the ROC in Taiwan, the ROC (Taiwan), or the Republic of Taiwan, namely preferences of unification, status quo, or independence, respectively.³

After remaining a prefecture of Fujian for two centuries, Taiwan became a province of the Manchu-controlled Qing Dynasty of China for eight years from 1887 to 1895 despite the fact that effective Chinese administration on Taiwan was limited in her partial territory. Followed by the end to the first Sino-Japanese War, China ceded Taiwan “in perpetuity” to Japan under the Treaty of Shimonoseki of 1895 (Article 2). In the midst of the Pacific War, the leaders of the US, the UK, and the ROC assured Taiwan's return to the ROC at the end of the war in the Cairo

² *Oppenheim's International Law* (Jennings and Watts, 1992) explains a state that satisfies four conditions of statehood – people, territory, government, and sovereignty – does not have to be legally independent, but such states are subjects of international law, including the equality of states.

³ Historically those who preferred to call the Republic of Taiwan (Republic of Formosa or simply Taiwan) were intended for independence from the Japanese occupation or the government of the ROC, but nowadays the term ‘independent’ are often used as independence from the PRC.

Communiqué of 1943, which was incorporated in the Potsdam Proclamation of 1945.⁴ The Japanese defeat in the Pacific War resulted in Japan's acceptance to the provisions of the Potsdam Proclamation in the Japanese Instrument of Surrender.

Subsequently, General MacArthur, Supreme Commander for the Allied Powers, issued General Order No. 1, which urged the Japanese armed force in Formosa to surrender to Generalissimo Chiang Kai-shek of the ROC. Because Chiang's military occupation in Taiwan was merely on behalf of the Allied Powers, the legalization of the ROC government's sovereignty over Taiwan should have been determined in a post war peace treaty.⁵ However, the representative of Chiang, Chen Yi, who received an instrument of surrender from Japanese governor-general of Taiwan Rikichi Ando, proclaimed that October 25, 1945 to be the retrocession day of Taiwan.⁶

In 1951, the San Francisco Peace Treaty (SFPT) was signed by 49 nations at the absence of Chinese governments due to international disagreement over which

⁴ The Cairo Communiqué (1943) said, "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be return to the Republic of China" (para. 2) However, despite the fact that international agreement does not require standard form, the legality of these documents has been questioned due to their inconsistent with the Atlantic Charter of 1941 and the Declaration by United Nations of 1942, which stipulated a right of self-determination and no territorial gain. Furthermore, according to Jain (1963), Prime Minister Churchill said that the Cairo communiqué "contained merely a statement of common purpose" (p. 27). As for the Potsdam Proclamation, Chiang Kai-shek was not even present at Potsdam conference, and Secretary of State Dulles noted, "Whatever private understandings might exist between the Allies themselves did not bind Japan" (as cited in O'Connell, 1956, p. 406).

⁵ According to the international law, there are five modes of acquiring territory, namely cession, occupation, accretion, subjugation, and prescription (Jennings and Watts, 1992). Cession refers to the transfer of sovereignty by a peace treaty between the ceding and the acquiring state. Occupation is the acquisition of territory that is not under the sovereignty of another state at that time. Accretion is the increase of newly formed land, such as newborn islands. Subjugation is acquiring territory by conquest or annexation. Although subjugation was an original mode of acquisition, with the developments in international law and the UN's anti-colonialism, the position to subjugation has changed. For example, the Declaration of Friendly Relations stipulates, "No territorial acquisition resulting from the threat or use of force shall be recognized as legal" (as cited in Jennings and Watts, 1992, p. 702). It should be also noted that there is no certain position in the international law regarding territory occupation in the consequences of self-defense. Prescription – some scholars reject as a mode of acquiring territory – is that *de facto* possession could receive *de jure* sovereignty after no state protests or claims some length of time.

⁶ Chen Yi also announced that "The people of Taiwan are people of our country. They lost their nationality because the island was invaded by an enemy. Now that the land has been recovered, the people who originally had the nationality of our country shall, effective on December 25, 1945, resume the nationality of our country" on January 12, 1946 (as cited in Chiu, 1990, p. 53).

government was the legitimate government of China – whereas the ROC exercised effective administrative control over Taiwan, the PRC gained control over the Chinese mainland at that time. Having an opportunity to pledge the legal transfer of Taiwan, the SFPT merely stipulated, “Japan renounces all right, title and claim to Formosa and the Pescadores” without specifying a recipient country (Article 2(b)). In addition, the SFPT urged Japan to sign “a bilateral Treaty of Peace on the same or substantially the same terms” of the SFPT with any state that is not a signatory of the SFPT (Article 26). Seven hours before the SFPT came into force, the Japanese government and the ROC concluded the Treaty of Taipei in 1952, which was no more than reaffirmation of the Japanese renunciation of Taiwan.

Chinese governments (the PRC and the ROC) argue that Taiwan’s sovereignty was returned to China after Article 4 of the Treaty of Taipei implicitly nullified the Treaty of Shimonoseki of 1895 – the legal basis of Japanese occupation in Taiwan.⁷ However, according to the position in international law, an executed treaty would lose any binding effect once the treaty has implemented as it states.⁸ Therefore, the nullification of the Treaty does not directly suggest that Taiwan’s legal status was returned to be a Chinese province. In fact Chinese governments never claimed the cancellation or return of the rest of the executed provisions of the Treaty of Shimonoseki, such as recognition of the Korean independence or a war indemnity.

In addition, the language used in Article 10 of the Treaty of Taipei implied the undetermined legal status of Taiwan at that time. It stipulated that “*nationals* of the Republic of China *shall be deemed* to include all the *inhabitants* and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) [emphasis added]”

⁷ Some scholars, such as Chiu (1996), argued the Treaty of Shimonoseki was null and void since the ROC’s formal declaration of war against Japan in 1941. However, Treaty of Taipei stipulated that it was nullified due to “a consequences of the war” instead of the declaration of war (Article 4).

⁸ Foulke (1918) wrote that “an executed treaty cannot be said to have any binding effect because it has been performed, and there is nothing left for either of the parties to do. There is no room, therefore, to impose any obligation under it” (p. 443).

(Article 10). Careful distinction between “nationals” and “inhabitants” indicates they were not equivalent. Wajima, Director-General of Asian Affairs Bureau, Ministry of Foreign Affairs of Japan, explained to the House of Councillors (1952) that in order for “inhabitants” of Taiwan who lost Japanese nationality to conveniently travel abroad, they “shall be deemed” to be included in the “nationals” of the ROC. Moreover, the ROC Minister of Foreign Affairs George Yeh explained to the Legislative Yuan:

No provision has been made either in the San Francisco Treaty or the Sino-Japanese Treaty as to the future of Taiwan and Penghu... In fact, we control them now, and undoubtedly they constitute a part of our territories. The delicate international situation, however, means that they do not belong to us. In these circumstances, Japan has no right to transfer Formosa [Taiwan] and the Pescadores [Penghu] to us. Nor could we accept such a transfer from Japan even if she wished to do so (as cited in J. Wang, 2002, para. 6).

Thus, the SFPT or the Treaty of Taipei, more formal among international agreements due to ratification, failed to exercise the formal cession of Taiwan’s sovereignty to a specific state. Indeed, the legal status of Taiwan has been left undetermined (Bush, 2004; Snyder, 2007).

Meanwhile, the PRC government claims to be the successor state to the ROC since its establishment in 1949 and that Taiwan is a province of the PRC due to, among others, the Shanghai Communiqué and the UNGA Resolution 2758. After the Sino-Soviet border conflict in 1969, the Nixon administration moved toward a close relationship with Beijing and issued the Shanghai Communiqué of 1972. In the Communiqué, the PRC demanded that the US government recognize ‘one-China’ policy.⁹ The US’s remark in response to Beijing’s ‘one-China’ policy was, however,

⁹ In the Communiqué, “The PRC affirmed its position: the government of the PRC is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; the liberation of Taiwan is China’s internal affair in which no other country has the right to interfere... The Chinese Government firmly opposes any activities which aim at the creation of ‘one China, one Taiwan,’ ‘one China, two governments,’ ‘two Chinas,’ and ‘independent Taiwan’ or advocate that ‘the status of Taiwan remains to be determined’” (as cited in Copper, 1992, p. 155). According to Dang (2007), of 169 states that reached diplomatic relations with Beijing, only 39 states used the term “recognize” that Taiwan is part of the PRC. In other words, 80 percent of the UN member states do not

limited to:

acknowledges all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government *does not challenge that position*. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves [emphasis added] (as cited in Copper, 1992, p. 155).¹⁰

Washington, afraid of displeasing Beijing, established a policy of strategic ambiguity in order to temporarily prevent Taiwan from declaring *de jure* independence and the PRC from losing patience over Taiwan's refusal on peaceful unification.

At the establishment of the UN in 1945, the ROC was the legitimate representative of mainland China and one of the five permanent members of the Security Council. Having a veto power at the Security Council, the ROC had been able to prevent the PRC government from participating in the United Nations until 1971. Under the UN Charter, an admission of a new membership or an expulsion of a membership requires "the recommendation of the Security Council" and two-thirds majority of the UNGA members present and voting (Article 4, 18(2)).

While the PRC faced virtually impossible task to overcome the ROC's veto power in the Security Council, Beijing's approach was to increase mutual recognition of the General Assembly members and to switch Chinese representative at the General Assembly, staving off an 'Important Question.' The international community gradually recognized the legitimacy and jurisdiction of the PRC on the mainland China.¹¹ While the government of the ROC "vacillated" about the US-led concept of the dual representation (two Chinas), the UNGA ended up adapting the Resolution

recognize one China.

¹⁰ See Bush (2004) and Copper (1992) for various interpretations on the Communiqué. For example, Copper (1992) said "timetable for this was not specified" (p. 38). In addition, the language used in the text: "all Chinese [refrain from grammatically correct form of 'both Chinese'] on either side of the Taiwan Strait" could mean to be possible exclusion of those who call themselves Taiwanese.

¹¹ According to K. Wang (1984), the number of the PRC allies in the UNGA increased from eighteen in 1950 to sixty-three in 1971.

2758 by a vote of 76 in favor, 35 opposed, and 17 abstaining (Shen, 1983, p. 60).¹²

The UNGA Resolution 2758 of October 25, 1971 stated:

Recalling the principles of the Charter of the United Nations,

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

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

Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it (UN, 1971b).

Despite the fact that the resolution contains the word “expel,” the question was not admission of a new state or an expulsion of a membership, or to settle Taiwan’s sovereignty issue.¹³ Instead, it was the matter of the international majority deciding what China was supposed to be and who supposed to represent China as a result of Chinese Civil War.

¹² On September 29, 1971, 19 states (Australia, Bolivia, Chad, Costa Rica, the Dominican Republic, Fiji, the Gambia, Haiti, Honduras, Japan, Lesotho, Liberia, Mauritius, New Zealand, the Philippines, Swaziland, Thailand, the United States and Uruguay) submitted the ‘dual representation’ resolution, recommended that the PRC take over China’s seat at a permanent member of the Security Council while the PRC and the ROC each represent at the General Assembly, the resolution had no chance to be voted (UN, 1971a). The failure to adopt the ‘dual representation’ was due to not only the ROC government’s policy – ‘gentlemen cannot coexist with thieves,’ but also the objection from the PRC and the lack of support from then Secretary of State Kissinger who was in Beijing during that time. Ross (1995) noted that, “Kissinger himself acknowledged that he would have preferred to accept outright expulsion of Taiwan rather than trying for dual representation” (p. 43).

¹³ Bolton (1994) argued the illegality of Resolution 2758 as expelling or admitting a new state without recommendation of the Security Council. On the other hand, Feldman (1995) said that vote of the UNGA members was entitled to decide which delegation to represent China.

6.3 Conclusion

The Taiwan issue is created to be ambiguous. International community has not supported Taiwan's participation in organizations such as the UN, for which statehood is a prerequisite, and only anticipated peaceful solution through cross-Strait dialogue. Because Taiwan's *de jure* statehood question is a Pandora's Box, which may possibly lead to the cross-Strait crisis, Taiwan issue has been deliberately avoided to clarify. Jennings and Watts (1992) in *Oppenheim's International Law* notes "the existence of a state, as the legal organization of community, is determined by the state's internal constitutional order" (p. 130). In contrast, however, in international reality, legal existence or disappearance of a state is based on power and interest of other states. It appears that ideological positive peace respecting Taiwan's self-determination can not be fulfilled without the consideration of the realistic political power of the PRC.

While the Taiwan issue was originated in the Western and Japanese imperialism as well as the Chinese Civil War, decades later Chineseness in Taiwan, including people, language, culture, and history is no longer synonymous with what Beijing defines and merely represents part of what Taiwan consists of today.¹⁴ On the *de facto* basis, the ROC and Taiwan have united as the sole legitimate government of 23 million people of Taiwan through Taiwan's democratization process and behaved as a separate political, economical, social, and cultural entity from the PRC albeit the people of Taiwan may prefer to remain part of China (not the PRC) or to move toward peaceful unification with the mainland China in future.

¹⁴ For example, Taiwanese pop star A-mei was banned from the mainland China after she sang the national anthem of ROC at President Chen Shui-bian's inauguration ceremony in 2000. However, the words of the anthem were originally delivered by Sun Yat-sen, the father of Modern China.