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Dangerous Liaisons

Examining the Triangle between Taiwan, the United States, and the People's Republic of China from an International Law Point of View

Among the number of unsolved disputes about questions of sovereignty and territory in Asia today, the problem posed by the island of Taiwan is second to none in complexity and significance. The sovereignty conflict in the Taiwan Strait between the People's Republic of China (PRC) and the Republic of China (ROC)¹ on Taiwan has lasted for more than half a century, and a permanent solution is not yet in sight. This conflict constitutes the most serious contentious point between the United States and the PRC and, in the words of Thomas W. Robinson, "the only one for the foreseeable future with the potential for a direct military clash" (Robinson 1996:1357–1358) between Washington and Beijing.

The PRC, on the brink of becoming an economic as well as a political and perhaps even military big player in Asia, has shown a desire to be part of the world community and has professed to abide by its laws. It has been successful in its integration in international organizations such as the United Nations (UN), the World Trade Organization (WTO), or the Association of Southeast Asian Nations (ASEAN) Regional Forum (see Kang 2003:68). It even initiated the Shanghai Cooperation Organization (SCO) to enhance regional cooperation in Central Asia and has solved most of the territorial conflicts with the 14 nations with which it shares land borders and the seven that share its maritime boundaries. (Shambaugh 2002:285–286, 290). In contrast to this, the PRC government views the Taiwan conflict as part of "the Chinese people's struggle for national reunification and territorial integrity" (TAO 1993) ("中国人民为推护国家统一和领土完整的斗争", ZXB 1993) – in other words: this is not to be regarded as an international

¹ In using ROC as abbreviation of the international legal entity on Taiwan, I follow the Taiwanese authorities; however, I do so merely for the sake of brevity and in a way for the sake of fairness, using the official abbreviations in use on each side of the Taiwan Strait respectively. I do not wish to imply that the Taiwanese standpoint on matters of sovereignty and nomenclature is necessarily my own. For the use of different labels for Taiwan see deLisle 2000:37.

issue but rather as a domestic or internal affair and as such to be dealt with solely under PRC jurisdiction.

The ROC on the other hand is still striving to return to the international community as a fully-fledged member, its plight to be readmitted to the United Nations having lasted for over a decade (Hutchings 2001:416). When taking office in 2000, President Chen Shuibian (陳水扁) pledged that Taiwan would continue to “actively participate in international affairs, expand Taiwan’s room for survival in the international arena, and contribute to the welfare of the international community” (Chen 2000a) (“積極參與國際事務，擴大台灣在國際的生存空間，並且回饋國際社會”，Chen 2000b). Having successfully mastered the transition to democracy, Taiwanese voices on cross-Strait relations have shown a new confidence, demanding to meet with the PRC in “direct dialogue [...] under principles of democracy and parity” (Kau 2002:2), a stance which demonstrates the ROC’s demand to be treated as a separate state on equal footing with the PRC.

From the Korean War of 1950 onwards, the United States has been the most involved third party in the region. Throughout major changes in the political arena (the changing attitude of the international community towards communist China in the 1970s, economic reform and opening to western investment of the PRC under Deng Xiaoping (鄧小平), the disintegration of the Eastern Bloc and the end of the Cold War, the end of martial law in Taiwan, political reform and the establishment of democracy in the ROC during the 1990s, to name but a few) the U.S. had to find a way of defining and supporting its policies in the area. For the ROC, America constitutes the only, if not openly professed supporter of substantial influence on the international plane. Their relationship, however, is by no means independent of the general sovereignty dilemma in the region, but rather exists in a fairly complex triangle of PRC-U.S.-ROC relations. The very fact that the sovereignty dispute has not been resolved yet makes keeping up a stable relationship with both parties very tricky for the U.S. Were both sides widely acknowledged as independent states (and did the PRC share that estimation), the U.S. could maintain economic and political relations to both without further ado. As it is, however, relations to the PRC are closely tied to the absence of the same to the ROC, a fact that makes upholding the (admittedly unofficial) ties between the U.S. and the ROC a challenge and a difficult balancing act.

For decades now, the three parties have devised and adhered to a framework that functions as a *modus vivendi* for their dealings with each other: the ‘one China’ policy – or, more accurately, their ‘one China’ policies. It is the aim of this paper to examine how the three different parties interpret ‘one China’, what international legal principles they cite to uphold their interpretations, and how they develop their policies regarding cross-Strait issues accordingly. The focus will lie on the respec-

tive legal interpretations in order to show how one and the same concept may be motivated and explained in three different ways to effectuate different policies. Of course, as Ted Galen Carpenter puts it, “[w]hen it comes to territorial disputes, [...] international law is a far less important factor than military power” (Carpenter in Carpenter/Dorn 2000:80); however, it is still a factor. Since only very few countries openly admit their unwillingness to comply with international law and because consistency with international legal principles can give argumentative strength to policy positions, having a look at the legal implications can be very helpful in understanding and motivating the actions of countries on an international level.

So how does Taiwan fit into the international legal framework, according to the three parties, and what light does that shed on politics? For a long time, the PRC, the ROC, and the U.S. have ‘agreed to disagree’, all three using the same terms to outline their general policy but interpreting them in very different ways.

THE PRC AND THE ‘ONE CHINA’ POLICY

The PRC’s general stance on ‘one China’ is fairly simple:

“There is only one China in the world, Taiwan is an inalienable part of China and the seat of China’s central government is in Beijing. This is a universally recognized fact as well as the premise for a peaceful settlement of the Taiwan question. [...] Taiwan’s status as an inalienable part of China has been determined and cannot be changed. ‘Self-determination’ for Taiwan is out of the question.” (TAO 1993)

The basic claim that Taiwan is part of China is the fundamental assumption of the so-called ‘one China’ policy to which the Chinese leadership has adhered since the founding of the PRC. The PRC’s legal arguing is based on the differentiation of sovereignty on the one hand and administrative authority and jurisdiction on the other (Shen 2000:1119). In the PRC’s opinion, since “[t]he sovereignty of each State is an integral whole which is indivisible and unsharable” (TAO 1993) (“每个国家的主权是完整的，既不能分割的，也不能分享”，ZXB 1993) and rests with the central government, it follows that there cannot be two separate entities both lawfully claiming sovereignty within the concept of ‘one China’. This stems from the notion that “one thing cannot have two owners” (“一物不能二主”，Huang/Wang 2002:30). However, numerous formulations in the two government White Papers especially dealing with the Taiwan question suggest that it is conceivable for the administrative authority and jurisdiction to temporarily rest with an authority other than the central government.² In consequence, whenever

² Such formulations include, e.g., “in 1945, the Chinese government *reinstated* its administrative authority in Taiwan Province” (TAO 1993) (“一九四五年 [...], 中国政府重新恢复了台湾省的行政管理机构”, ZXB 1993) and “the Chinese government *recovered* Taiwan and the Penghu Archipelago, *resuming* the exercise of sovereignty over Taiwan” (TAO 2000)

parts of China (as defined by the historic and cultural bond between the Chinese people “of the same flesh and blood” (TAO 2000) (骨肉同胞, ZXB 2000) fall under the control of foreign or internal powers other than the central government, this does not result in a split of sovereignty but merely in a split of jurisdiction and administrative authority. In the PRC’s concept, undivided sovereignty thus can never reside with any entity but the Chinese people (Lee 1997:700) represented by the central government. Even if administrative authority and jurisdiction are exercised by a power other than the central government, the PRC denies that this exercising administration also results in the *right* to do so, as that right is tied to the possession of a sovereign title (Lian 2002).

In order to legitimize the concept of an indivisible sovereign title from a historical and legal perspective, the central government argues that in the course of the Civil War of the 1940s “the government of the ‘Republic of China’ in Nanjing was [...] overthrown by the Chinese people” (TAO 1993) (“中国人民 [...] 推翻了南京 ‘中华民国’ 政府”, ZXB 1993) and that with the founding of the PRC the government of the ROC was *replaced*. Following this line of thought, the revolution of 1949 constituted a ‘succession of government’ that changed the form of government but left the state of China’s ‘international personality’ untouched and thus did not constitute a ‘succession of state’ (Shen 2000:1118). This estimation is grounded on the view that

“according to international law, if a country experiences a revolution that leads to the overthrow of the old government and the establishment of a new government, the latter will naturally inherit the whole authority and sovereignty held by the old government [up to that point]”.³

As a consequence of this full transfer of rights, in the eyes of the PRC the Republic of China ceased to exist in 1949, being replaced by the People’s Republic. Thus, the ROC existing on Taiwan today, even though using the same name, cannot claim to be the same legal person (TAO 2000).

According to PRC authorities and scholars, Chinese sovereignty has been united with the retrocession of the island by Japan, and since 1949 it has rested in the hands of the PRC government (Ruan 1994:18). The Taiwanese people are therefore regarded a special group within the bigger whole of the Chinese nation. As such they merely partake in the sovereign title held by the Chinese people, but cannot claim to hold a full, independent sovereign title of their own (Huang/Wang 2002:35). As a result, no separate sovereign title exists for the Taiwanese territory

(“中国政府收复台湾，澎湖列岛，重新恢复对台湾行使的主权”，ZXB 2000). Emphasis added.

³ Quoted from Chinese: “按照国际法，一国因发生革命导致旧政府被推翻，新政府成立，后者当然继承旧政府行使的一切权力和主权。” (Liu 2002)

and that it is part of Chinese territory, a fact that in the view of the PRC cannot be changed no matter what happens:

“No matter who takes office in Taiwan, no matter what method is used at what time, nothing can change the fact that Taiwan is part of the Chinese territory.”⁴

To resolve all the above-described sovereignty issues within the ‘one China’ framework, the PRC has found the formula of ‘one country, two systems’ (一国两制). Already implemented in the Hong Kong and Macao scenarios, this formula finally aims at reuniting the exercise of sovereignty with the sovereign title. The ‘one country’ part of the concept reflects the indivisibility of sovereign title, while the ‘two systems’ part takes note of the divisibility of the exercise of sovereignty (Huang/Wang 2002:36). Following this formula, the Taiwanese authorities would go on to administer the island very much as before (including their own military forces). They would have to relinquish their claim of being a separate state, though, and they would ultimately have to accept being a local authority subordinate to the national government in Beijing (the PRC regards this to be the case already, even without the ROC’s having accepted it).

The ‘one China’ principle does imply some far-reaching consequences for the way the PRC applies rules of international law to the Chinese context, or rather how it exempts the Chinese context from the sphere of international law. Since in PRC-Taiwan relations Beijing embodies governmental authority that is placed *above* the local authorities of Taiwan (deLisle 2000:40–41), it follows that all relations between Beijing and Taipei are regarded as a domestic and “purely internal affair of China” (TAO 1993) (“纯属中国的内政”, ZXB 1993) neither taking place in the international arena nor being subject to international law. Here the PRC calls upon the protection of her territorial integrity and the principle of non-intervention into domestic affairs of states (Ruan 1994:18).

The PRC’s policy of ‘one China’ and the resulting formula for reunification of ‘one country, two systems’ form a consistent theoretical framework that follows its inherent logic. The most important foundation of this framework is the concept of indivisible state sovereignty. The PRC argues that this concept is the fundamental principle without which the whole system of international law could not have been established in the first place and without which this system cannot function at all (Yang 2002:43, Zhu 2002:72).

It is true that the formation of the present system of international law is tied to the rise of the nation state and that for its implementation the concept of independently acting sovereign states is indispensable, since “the preservation of states in

⁴ Quoted from Chinese: “在台湾, 无论谁上台, 无论在什么时间采取什么方法, 都改变不了台湾是中国领土一部分的事实。” (Lian 2002)

their found territorial existence simply is a constitutive element of international law” (“[d]ie Erhaltung der Staaten in ihrem vorgefundenen territorialen Bestand [...] ein schlechthin konstituierendes Element der Völkerrechtsordnung [ist]”, Herdegen 2002:39). Nevertheless, the PRC’s use of the concept seems excessively formalistic, and especially the notion of the territorial extent of sovereignty being exempt from change, ensuring that no part of the territory once belonging to ‘China’ can *ever* lawfully be transferred to another state’s sovereignty, appears antiquated and obsolete.

What the PRC fails to take into account most of all is that in present practice of international law sovereignty only exists if a state is able to demonstrate actual exercise of sovereignty (Austin 1998:340). Even if one assumes that the exercise of sovereignty is not lawful unless it is tied to and legitimized by a sovereign title (as the PRC does), the effectiveness of the control of territory is an important part in determining the possession of sovereignty (principle of effectiveness, *Effektivitätsprinzip*). Because international law strives to be based on a realistic evaluation of facts, accepting the present allocation of power is often preferred to taking the theoretical legality of this *status quo* into account (Herdegen 2002:40). Accepting the “normative power of the factual” (“*normative [...] Kraft des Faktischen*”, Seidl-Hohenveldern/Stein 2000:326), the international community often yields to the practical need of dealing with the authorities actually in control. In some cases (e.g., when recognizing legally formed governments in exile who do not effectively control any territory at all), states try to deny that legally binding rules can arise from unlawfully committed acts (*ex iniuria ius non oritur*). Generally speaking, though, facts that do not change over an extended period of time create legally binding rules, even if these facts were brought about by unlawful actions (*ex factis ius oritur*) (Seidl-Hohenveldern/Stein 2000:326). Following such an application of the principle of effectiveness, even if one postulates that the administrative control over Taiwan by ROC authorities was unlawfully established, it is hard to deny the ROC’s claims of sovereignty over its territory, since the actual effective control of said territory by Taiwanese authorities is not doubted at all, not even by the PRC.

Another trend in modern international law which is not reflected in the PRC’s evaluation of the sovereignty issues in the Taiwan Strait is the fact that democracy is by now the form of government preferred by international law (Kokott/Doehring/Buergenthal 2003:18). The legitimacy of a government claiming to be in charge of a territory enters at least to some extent into the evaluation of that claim (principle of legitimacy *Legitimitätsprinzip*) (Herdegen 2002:40) – and with the ROC’s having successfully mastered the transition to democracy within the last two decades, again its claim of an independent sovereign identity on the international plane has been bolstered.

The arguing of the PRC's concept of 'one China' is free of inner contradictions, yet at times it appears simplistic: Sovereign title is reserved for states; Taiwan is not a state, because it belongs to Chinese territory and is subject to the sovereign title held by the whole of the Chinese people; therefore it cannot be sovereign itself (Liu 2002). Taiwan's existence as a state is denied because of the absence of a sovereign title, and its non-existence as a state again results in the denial of its sovereignty. Such argumentation essentially amounts to the scheme of 'Taiwan cannot be sovereign because it is not', a stance that hardly meets common standards of argumentative power. Moreover, this position's foundation crumbles if one assumes that it might be conceivable for the Chinese people to be divided up into the population of two separate states, or even more drastically, if one assumes that the decades of divided development have already given rise to a separate 'Taiwanese nation' entitled to its own national sovereignty.

As so often with the PRC's international policies, domestic problems seem to play quite a strong role in determining the rigid position Beijing takes on cross-Strait issues. Allowing Taiwan to inch away from the concept of an indivisible Chinese whole is equal, at least in the heads of many PRC decision makers, to weakening the position of the central government in relation to local separatist forces on China's periphery in general. The PRC leadership is clearly concerned that budging on the Taiwan issue might well mean opening the floodgates to the acknowledgement of regional identities and the following disintegration of the multi-nation state the PRC is at present. Tibet and Xinjiang are the two examples of such strong regional identities on China's periphery that immediately come to mind.

THE ROC AND THE 'ONE CHINA' POLICY

Compared to the arguing of the PRC, the ROC bases her views far less explicitly on principles of international law. In the Mainland Affairs Council's (大陸委員會, MAC) White Paper *Relations Across The Taiwan Straits* (臺海兩岸關係說明書) of 1994 which answered the PRC's 1993 White Paper, no interpretations of the various post-war treaties nor any explicit statements on the *exact* legal status of Taiwan are to be found. Nevertheless, the official statements of the MAC and other government officials clarify the ROC's point of view sufficiently.

Basically, the ROC authorities also adhere to a 'one China' policy.⁵ Their concept of what exactly this 'one China' implies, however, differs greatly from

⁵ Even though ROC officials of both the Democratic Progressive Party (DPP) and the Guomindang (國民黨, Kuomintang, KMT) have recently altered their stance on cross-Strait issues, the Taiwanese interpretation of 'one China' has so long been consistently implemented that

the PRC's, encompassing "China as a historical, geographical, cultural, and racial entity" (MAC 1994) ("歷史上, 地理上, 文化上, 血緣上的中國", XDW 1994) but mentioning no legal or political dimensions. Accommodating this notion of 'one China' while at the same time underpinning the ROC's separate stance on the international stage, the ROC government develops the model of "one China, two equal political entities" (MAC 1994) ("一個中國, 兩個對等政治實體", XDW 1994). It sees China as a "divided country" ("分裂國家") with two "political entities with de facto authority" (MAC 1994) ("擁有統治權的政治實體", XDW 1994). These formulations together with the frequent use of the word 'parity' (對等) imply that the ROC authorities view Taiwan as *equal* partner in cross-strait relations and that they wish to disassociate themselves from Beijing's interpretation of the relationship as one between central and local government or super- and subordinate. It follows that, contradictory to PRC interpretations of sovereignty, the Taiwanese authorities believe that not merely the administrative control of the Chinese territory is divided but also sovereignty itself. Their concept of sovereignty thus is not indivisible and or sharable in the case of China.

In the view of the MAC "the Republic of China has been an independent sovereign state since its foundation in 1912" (MAC 1994) ("中華民國 [...] 一九一二年創立以來, [...] 是一個具獨立主權的國家", XDW 1994), that merely "transferred" (MAC 1994) ("播遷", XDW 1994) its government from Nanjing to Taipei. In the MAC's response to the PRC's second White Paper on the Taiwan issue of 2000, it again claims that the ROC "never for a moment vanish[ed]" (MAC 2000) ("非僅不曾消滅", XDW 2000). By giving this interpretation of historical events, the MAC opposes Beijing's view of a complete 'succession of government' that resulted in the replacement of the Republic by the People's Republic. Rather, the ROC devises numerous ways of saying – without officially declaring independence – that Taiwan is an independent country that holds sovereignty over its territory and is not subject to Beijing's sovereignty. This stance is summed up by President Chen Shuibian in his concept of "one country on each side" (Chen 2002) of the Taiwan Strait (一邊一國). Notwithstanding, the MAC proclaims China's division to be a mere "temporary, transitional phenomenon" (MAC 1994) ("暫時的, 過渡時期的現象", XDW 1994), thus manifesting the intention to keep Chinese reunification as the ultimate aim. The MAC also states in its 1994 White Paper that the relationship between the two sides of the Taiwan

a description and an interpretation of the concept in its conventional form is required first. In how far the new policies will be durable is difficult to assess at present. In any case they are developments which are based on some aspects of the long-standing policy and are thus tied to the same principles of international law.

Strait can, in a way, be regarded “‘domestic’ or ‘Chinese’ in nature” (MAC 1994) (“屬於 ‘一國內部’ 或 ‘中國內部’ 的性質”, XDW 1994), because both sides belong to the above-defined Chinese whole. By doing so, they disassociate themselves from Taiwanese secession and official independence.

Nevertheless, with much of the controversy so far appearing to be a struggle for the right wording rather than the tow of two incompatible interpretations, the fundamental clash of opinions becomes clear when taking a look at the constitutional reforms implemented in the ROC during the 1990s. The first step towards change was the 1991 abolishment of the Temporary Provisions that superseded the Constitution as long as the ‘period of Communist rebellion’ lasted, i.e. from 1948 until then (Office of the President 2003). This meant that the Beijing government was no longer regarded as an unlawful rebel organization (MAC 1994). In the course of six revisions the National Assembly redefined the Constitution as applicable to the present area of the ROC only (Office of the President 2003). By doing so, the ROC took a major step away from her official policy up to that point which had been to claim representation of the whole of China on the international stage (deLisle 2000:44).

Defining the Communists as a ‘rebel government’ had been a vital part of the Guomindang’s (國民黨, Kuomintang, KMT) legitimization during the period of rule by martial law on Taiwan, and the claim to represent all of China had been its logical consequence (deLisle 2000:36). Now, however, after democratization, the Taiwanese electorate is so clearly confined to the present borders of the ROC that dropping the claim to represent the whole of China appears to be the inevitable consequence of the process.

As mentioned earlier, there are a few principles of international law that bolster the claim of a separate and independent state on Taiwan such as the principles of effectiveness and legitimacy. The ROC authorities do not appeal to any of these explicitly, but in their arguing for a separate Taiwanese state they put the emphasis on their *de facto* control of the Taiwanese territory and the democratic legitimacy of their government and thus indirectly call upon the said principles.

The ROC’s view of China as a ‘divided state’ appeals to aspects of international law which are rather unconventional and have not taken root very firmly as of yet. A set of rules emerged during the Cold War that gave the international community a way of dealing with the cases of, e.g., a divided Germany and a divided Korea by granting them dual recognition in international organizations. However, most of the circumstances that applied to those two countries then do not apply to the Chinese situation today (e.g., a more or less equal share of territory, population, and international recognition), making it difficult to apply the rules one-to-one. Moreover, it does not appear desirable for the Taiwanese government to ‘translate’ especially the German context to their situation, since the German

reunification scenario was that of the smaller state joining the bigger while giving up its own political system completely (deLisle 2000:53–55).

Much in the ROC's publications on the matter of 'one China' implies that for Taiwan upholding the 'one China' principle means pragmatism more than anything else. The ROC's interpretation of the concept is very different from the PRC's, and subscribing to it at all appears to be lip service more than conviction – the recent changes in the ROC authorities' position on the subject also suggest that this has been the case for some time.

RECENT DEVELOPMENTS

Starting in 2003, ROC authorities and President Chen in particular have stepped up the rhetoric in cross-Strait relations, creating some doubts in the PRC, the U.S., and the international community as a whole whether the long-standing Taiwanese policy of not declaring formal independence will hold true for much longer.

When first taking office in 2000, Chen Shuibian was anxious to play down differences across the Strait and alleviate PRC fears of formal Taiwanese independence under a DPP president. His stance on the 'one China' issue in 2000 – “I hope that everyone can show wisdom and creativity in trying to define 'one China' in a way that's acceptable to people on both sides of the strait” (Chen as cited in Baum/Pao 2000) – stands in stark contrast to his more recent statements:

We don't want Taiwan to be a second Hong Kong. We reject “one country, two systems”. We oppose “one China”. [...] We have our own national sovereignty, dignity, and safety. (Chen as cited in Dean/Kaufman/Vatikiotis 2003)

Chen openly renounces the 'one China' policy as applied by the PRC, especially the 'one country, two systems' approach to reunification. What appears at first to be quite a shocking new take on cross-Strait issues, upon closer scrutiny reveals to be a more drastic way of saying what had been said many times before. As has been described above, for a long time Taiwanese authorities had subscribed to a 'one China' policy similar to that of the PRC in name only but not in content. What exactly is meant by 'one China' has been defined differently by both sides for years, and openly stating that the PRC's 'one China' policy does not match the ROC's notion of 'one China' accurately describes the *status quo*. ROC authorities have avoided such frankness for years, so as not to provoke the PRC and to pay at least lip service to Beijing's demand that the 'one China' policy be adhered to; therefore, an open rejection does constitute a certain realignment in cross-Strait diplomacy. It has to be remembered, though, that Chen Shuibian cannot single-handedly shape the Taiwanese stance on cross-Strait relations. Similar to his American colleague, the Taiwanese President is to some extent dependent on the

lawmaking body (the Legislative Yuan (立法院) in the Taiwanese case, Congress in the U.S.) in shaping his policies. Majorities in this body have for quite some time not been in his favor; therefore, Chen's statements can be regarded as moves in the tug and tow of politics rather than a fundamental new take on policies in the Taiwan Strait. With Chen's having faced presidential election in March 2004, the renewal of his aggressive stance on cross-Strait issues can be viewed as a predictable attempt to mobilize the pro-independence faction of his voters. Also, it places the PRC authorities in a tight spot: They have to object to Chen's statements, and yet as soon as they do, they nurture Taiwanese national sentiment and help in mobilizing Chen's voters as they did in 2000 (Dean 2004). Chen was in the advantageous position (a position Taiwanese authorities can seldom call their own) of commanding a win-win situation: He could take a firm stand on cross-Strait issues and impress voters; he could probe and possibly expand the scope of his options in the Strait, because Beijing's hands were, if not quite tied, at least constricted; and even if Beijing had chosen to take strong measures against his statements, Chen would have profited from an expected surge in national sentiment.

Much more than by Chen's statements, doubts have been fostered regarding the ROC's sober-mindedness and prudence in cross-Strait relations by the move to add the word 'Taiwan' to newly issued passports in June 2003, by Chen's announcement in September of the same year to aim at a new constitution for Taiwan (not the ROC) by the year 2006, and most of all by the passing of controversial referendum legislation in November 2003. The passport issue has led to the first threat of a PRC military strike in the Taiwan Strait in two years, because the PRC views a change in name of her 'renegade province' a step away from the *status quo* towards independence. The plan of a new constitution and in particular the referendum law (公民投票法) that opens the possibility of holding plebiscites on major national policies as well as on constitutional amendments⁶ have met with opposition and suspicion in Beijing and in the international community alike.

Beijing's reaction, however, has been rather moderate, in part, as has been argued above, because strong rhetoric and saber-rattling on the part of the PRC would only help to grow support for Chen Shuibian. Beijing sometimes calls on Washington to take a stand and restrain Chen's moves towards formal indepen-

⁶ There are many restrictions on the possible content of referenda, excluding independence and changes of the island's flag and name. The government is banned from proposing or endorsing referenda with the only exception of a 'defensive referendum' called by the president in case of a military attack on Taiwan (see Lu 2003). Chen circumvented this ban by arguing that the PRC missile buildup opposite Taiwan was constantly posing a threat to the ROC's national security, he called a referendum for March 20, 2004 on whether the PRC should its ballistic missiles. The low turnout of voters, however, shows that the Taiwanese electorate sees through such dubious moves and handles cross-Strait issues with extreme care.

dence. But PRC authorities cannot depend on the U.S. too much, because this would undermine their claim that the Taiwan issue is a strictly domestic and not an international concern (Kuhn 2004).

It is not easy for the authorities in Beijing to weigh different options of action against each other, particularly not so since some of their assumptions of the past have proven wrong. Lately, e.g., PRC authorities had to admit that their long-standing belief in the integrative power of economic ties between the two sides had been misguided and that economic benefits from cross-Strait trade and investment had nurtured Taiwanese self-confidence rather than drawn the 'lost' province closer to the motherland (Dean 2004). For the development of mutual prosperity, further economic integration seems sensible, even if this would again result in stronger Taiwanese self-esteem. At the moment, PRC authorities seem not too much interested in escalating cross-Strait differences, and they mostly confine themselves to reiterating their long-standing policies of 'one China' and 'one country, two systems', as Premier Wen Jiabao (溫傢寶) did, for example, in a December 2003 interview with the *Washington Post*:

"Our policy toward Taiwan is a clear-cut one. It is peaceful reunification and 'one country, two systems'. We will not give up our efforts for a peaceful settlement of the question of Taiwan because a peaceful settlement is in the fundamental interests of all Chinese people, our Taiwan compatriots included. [...] China's sovereignty and territorial integrity brook no division and the position of the Chinese government on upholding the one-China principle is rock firm and defies all challenges." (Wen as cited in Bennett et al. 2003)

Because at present the new leadership around Hu Jintao (胡錦濤) and Wen Jiabao is still preoccupied with consolidating their own power, they have no interest in a serious clash over the Taiwan issues neither with Washington nor Taipei (Kuhn 2004). Therefore, the PRC leaders are mostly willing to play down differences in order to alleviate domestic and international fears of an impending conflict in the Taiwan Strait. They appear to adopt a rather sober-minded approach to these expressions of Taiwan's new self-confidence, seeing them in the context of the Taiwanese election campaign. This is reflected in an article in *Current Events Report* of January 2004:

"Our opinion is that the basic pattern of cross-strait relations that have developed over a long time has been gravely challenged, but not basically changed. [...] we have basically contained the overt threat of Taiwanese independence since Chen took office, avoiding a worst-case scenario and maintaining the status of Taiwan as part of China." (*Current Events Report*⁷ cited after Kuhn 2004)

⁷ *Current Events Report*, according to Kuhn, is "a Communist Party Propaganda Department magazine that analyzes current events for the bureaucratic rank and file" (Kuhn 2004).

Sometimes, however, the PRC itself does not shy away from using the Taiwan Strait conflict in its domestic power play, either. In the spring of 2005, for example, Premier Wen Jiabao started out the annual sessions of the National People's Congress by rallying the delegates support for anti-secession legislation that would legalize the use of force should Taiwan choose to declare independence. This move created some anxieties on Taiwan and in the international community about growing tensions in the Strait; however, many analysts immediately saw it as Wen's attempt to start out the session on a note of unanimous approval to smooth the way for more controversial issues later (CNN 2005). Beijing's overall policy at present speaks for the fact that for now the PRC is content to endorse the *status quo* up to a point and to focus on economic development and integration. In recent years, it seems that both parties have become accustomed to the way the issue is dealt with by the other side and at times exploited for domestic reasons.

But does the present *status quo*, Beijing's being content for the present with Taipei's *de facto* independence as long as it does not alter its status *de jure*, and Taipei's plea not to declare formal independence as long as Beijing does not force reunification, still accurately reflect the will of the population? A look at Taiwanese opinion polls concerning the question of national identity suggests that the recently changed positions of the ROC leadership might be in step with the Taiwanese *zeitgeist* – a fact that is quite alarming for the authorities in Beijing who until recently could claim that Chen and his DPP were taking radical positions not backed by the majority of Taiwan's population. When comparing the numbers on national identity of June 1992 to the most recent numbers of June 2003 (as collected by the Election Study Center at Taipei's National Chengchi University), the sharp increase in respondents who identify themselves as Taiwanese only (from 17.3% in 1992 to 41.5% eleven years later) bears witness to a new self-confidence in the ROC and the rise of a separate identity (taken from Dean 2004). This sense of a separate Taiwanese identity that is no longer primarily Chinese in nature is likely to trigger some changes in the way cross-Strait issues are dealt with. Nonetheless, people who identify themselves as Taiwanese do not necessarily endorse rash action in cross-Strait issues. The overwhelming majority of the people questioned by the MAC in November 2003 (aged 20–69) favored the *status quo* for the present. Roughly 80% of respondents opted for a present prolongation of the *status quo*, differing merely in their favored course of action in the future.

Preserving the *status quo* for now also reflects the opinion of a majority of PRC citizens. According to a poll conducted by Horizon Research in Beijing in January 2004, 15% of the 4000 people questioned favored immediate military action, but a majority of 58% deemed military force to be unnecessary and opted for economic integration instead (taken from Kuhn 2004).

THE U.S. AND THE 'ONE CHINA' POLICY

The United States has in general a strong interest in the Pacific Rim region, partly due to its rapid economic development and partly because of American strategic considerations of its military presence in Asia (Lin in Chang 1988:44). But how exactly does the United States see its role in the cross-Strait conflict? As a third party that is only indirectly involved in the conflict, the need to comprehensively argue its point of view is not as strong for the U.S. as it is for the PRC and ROC respectively. There are three basic pillars to the United States policy in the region: adherence to a 'one China', the call for a peaceful settlement of the conflict, and the insistence that the Chinese themselves should resolve the issue (Lee 2000:185). Again, 'One China' is cited as the main framework, this time interpreted by the U.S. State Department as follows:

"The U.S. 'one-China' policy acknowledges that both Taiwan and the Mainland are part of China. The U.S. insists on the peaceful resolution of cross-Strait differences and encourages dialogue to help advance such a resolution. The U.S. does not support Taiwanese independence. [...] The United States is opposed to any attempt by either side to unilaterally alter the status quo in the Taiwan Strait. The United States has endorsed dialogue and exchanges between the two sides and has encouraged the P.R.C. to engage the democratically elected leadership of Taiwan." (BEAPA 2005)

The wording of the statement already implies that more than one 'one China' policy exists, and that this is the version adhered to by the United States. The U.S. does not go into any legal detail of how its interpretation was reached. However, the wording clarifies that this interpretation of facts is quite different from that of the PRC: The U.S. calls both Taiwan and the Mainland part of China, clearly equating 'the Mainland' and not 'China' with the PRC.

This interpretation of 'one China', that might look at first like a bending of the knee to Beijing's wishes but upon closer scrutiny reveals to be aimed at establishing a balance in cross-Strait forces, is emblematic of U.S. policies in the region. Winston Lord, United States Assistant Secretary of State for East Asian and Pacific Affairs during the 1990s and former Ambassador to the PRC, sums up the U.S. strategies in dealing with cross-Strait issues quite nicely when talking about the 1996 missile crisis:

"It is prudent generally that you don't state in advance what you will do in specific situations. [...] If the PRC thinks that we won't come to the defense of Taiwan in a crunch, they're going to be aggressive and they're going to press Taiwan. [...] If Taiwan thinks that we're going to come to their defense, no matter what happens, they're going to be provocative, knowing that they're going to have a free ride, no matter how angry Beijing gets. Therefore, we can't be precise." (Lord as quoted in Bernkopf-Tucker 2001:489-490)

The U.S. has, in general, pursued a policy of ‘strategic ambiguity’ towards both sides of the Strait, i.e., Washington backs Beijing’s claim of ‘one China’ and at the same time ensures – via weapons sales and military assistance – that Taiwan can effectively defend itself against a PRC military attack (Lampton 2001:99–100). This policy is designed to strengthen the *status quo* in the region, making sure that the PRC is never too confident that it can take Taiwan by force and that the ROC never feels too sure of U.S. support and thus becomes reckless.⁸ This ambiguity has ensured stability and to some extent predictability in cross-Strait relations and has thus been crucial in establishing a favorable environment for economic growth on both sides of the Strait (Lin in Chang 1988:40). However, ambiguity continually runs the risk of misinterpretation by one side or the other (Lee 2000:187).

Every once in a while, therefore, the need for clearer words arises. Triggered, for example, by the scheduling of a Taiwanese referendum on the PRC missile buildup opposite Taiwan for March 20, 2004 (the same day as the Presidential elections on Taiwan), U.S. officials felt compelled to find clearer words and to abandon their former ambiguity. In December 2003, they spelled out the U.S. vision for the region, namely: no unilateral alteration of the *status quo* by either side. Even though part of the warning was directed at the PRC, the bulk of Washington’s admonitions were aimed at ROC authorities whom they perceived to be stretching the limits of U.S. patience and PRC goodwill too far (Allen/Kessler 2003). The warnings directed at the ROC have been met with skepticism in some parts of the international community, because they can be seen as hampering democratic consolidation on Taiwan and can be interpreted as the Americans deferring to the authorities in Beijing (Wieser 2003). Looking at the U.S. actions in the region over a longer period of time, however, the continued arms sales to Taiwan over decades in spite of Beijing’s complaints, the sending of two aircraft carriers to waters close to Taiwan in the 1996 missile crisis (marshaling the biggest fighting force in the Western Pacific since the Vietnam War) (Lord cited in Bernkopf-Tucker 2001:486) – bear witness to the fact that the U.S. is strongly committed to safeguarding peace and stability in the region, deterring aggression or provocation by either side, and in general maintaining the fragile equilibrium of forces in the triangle of relations. Thus, the basic goals of the general policy of ambiguity and the incidents of clarity are the same. The U.S., just like the international community as a whole, is mainly interested in ensuring economic and

⁸ This policy was interrupted only shortly when President George W. Bush assured Taiwan in a TV interview in April 2001 that the U.S. would do “whatever it takes” to defend Taiwan – a blunder that was followed quickly by backpedaling and the administration’s retreat to its reliable policy of ambiguity (see Allen/Kessler 2003).

political stability in the Taiwan Strait, and it sees the best chance of achieving this by preserving the *status quo*.

It has been argued above that the U.S. does not motivate its position in cross-Strait issues by international legal principles, but that it merely follows pragmatic considerations and its interest of stability in the region. Quite intriguingly, however, the fact, that U.S. policy in the region has been as consistent as it is in the long term, to a large extent owes its existence to American *domestic* law-making. In American international politics, the White House and the State Department are usually the main decision makers who generally operate independently of the law-making body, Congress. The Chinese context, however, constitutes the first exemption to this rule: When the U.S. withdrew its official support for the ROC in the late 1970s and established official diplomatic ties with the PRC, Congress, in passing the Taiwan Relations Act (TRA) in 1979, made sure that there was a legal basis for upholding unofficial ties with the island's authorities and that consistency in policies towards Taiwan was ensured. For the first time in history, Congress built a legal framework for 'foreign' relations, as the provisions of the TRA (among them an indefinite security commitment of the U.S. in the region and arms sales to Taiwan that ensure self-defense) are "not a structure of discretionary administrative regulations and loose practice [but] a binding set of national commitments and policies enforceable in a court of law" (Emerson in Chang 1988:53). Some analysts argue that the TRA constitutes a quasi-official *de facto* recognition of Taiwan by the United States (Emerson in Chang 1988:53–65) because the TRA treats Taiwan as a foreign country and functions as a defense treaty; however, it seems more appropriate, given the above-described U.S. interest in maintaining a balance of forces in the region, that the TRA is not so much a guarantee towards Taiwan as it is the legal basis for an option to act. Since it is not in the U.S. interest to definitely take sides in the cross-Strait conflict, the TRA gives a legal foundation for a military presence of the U.S. in the Western Pacific, and East Asia, but it does not stand in the way of trying to achieve 'comprehensive engagement' of the PRC as well (which includes treating the PRC as a strategic partner in the region while working towards her integration into the international economy, military transparency and cooperation, and her acceptance of international law) (Lee 2000:195–196). Also, the State Department is again very careful not to anger Beijing too much by going out on a limb and supporting Taiwan as if it were a sovereign state:

"In keeping with its one-China policy, while the U.S. does not support Taiwan independence, it does support Taiwan's membership in appropriate international organizations, such as the WTO, APEC forum, and the Asian Development Bank, where statehood is not a requirement for membership. In addition, the U.S. supports appropriate opportunities for Taiwan's voice to be heard in organizations where its membership is not possible." (BEAPA 2005)

For the ROC the fact that Congress is involved so directly in U.S. decision making in the Chinese arena is good news. The TRA has ensured that in the course of five administrations, both Republican and Democrat, the U.S. policy of offering the ROC help whenever it is needed has been quite consistent.⁹ Obviously, however, the general policy of strategic ambiguity takes precedence.

The American position in cross-Strait relations illustrates how important it is to analyze both legal considerations as well as politics when trying to understand the actions of countries on the international plane. As argued above, the U.S. keeps up the fragile equilibrium of forces in the South China Sea and thus ensures stable conditions for prosperous economic relations by continuously sending signals to both sides of the conflict, supporting the ROC with such measures as ensured by the TRA and at the same time adhering to Beijing's requirement of not entertaining official diplomatic ties to the island or recognizing it as a sovereign state. Did the United States only consider international legal principles in crafting its policies in the region, it could quite easily decide to fully acknowledge the ROC as an independent state. International law as practiced today is rather clear on what an entity needs to be regarded a state. Following Georg Jellinek's *Lehre von den Staatenverbindungen* (1882), present legal practice as defined by the Montevideo Convention on the Rights and Duties of States demands that the following four criteria for statehood be met: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States" (League of Nations 1936:25). The ROC fulfills all these criteria for statehood, and since modern international law perceives statehood to exist prior to and independent of recognition, the fact that the ROC is not recognized by the majority of the international community does not stand in the way of her being an independent state *de jure* (deLisle 2000, Shen 2000). However, since the PRC still upholds that whoever wants to have diplomatic ties with her may not recognize the ROC, the members of the international community have to decide with which Chinese government they want to have dealings. The vast majority – and with them the ROC's most important international contact, the U.S. – chooses the PRC over the ROC. Thus, although the ROC might well be a state *de jure*, it certainly is not treated as one *de facto*.

⁹ One might argue that the sheer bulk of weapons the U.S. is selling to Taiwan explains the United States' unaltered interest in keeping the relationships in the area stable. Taiwan is the U.S.' second best customer for defense equipment and has perhaps the world's most advanced semiconductor fabrication infrastructure, important for the production of weapon sensitive electronic components. Both facts strongly argue for a U.S. interest in maintaining the *status quo* (see Tkacik 2003).

CLOSING REMARKS

Much of the controversy about the correct interpretation of the legal facts in cross-Strait issues circles around questions of the ROC's *de jure* possession or non-possession of sovereignty and her *de jure* existence or non-existence as a state. The first question is hard to answer conclusively due to the two rather diametrically opposed interpretations of state sovereignty put forth by the contesting sides and the U.S.' unwillingness to lead the way in making a definite decision one way or the other. Who holds sovereignty in the Chinese context will ultimately have to be decided by future developments within the international framework, either pointing towards a strengthening of nation-state concepts of integrity or towards a fortification of territorial communities and their rights. The second question regarding statehood is a little simpler. Not only are the criteria for statehood comparatively clear and universally accepted, but they can also be put to the test quite easily. Modern concepts of international law as well as some aspects of international life strongly argue for Taiwan's *de jure* existence as an independent state despite the PRC's as well as the U.S. reservations on this issue and even in lack of universal recognition on the international plane.

De facto it can hardly be doubted that the ROC, regulating her affairs as it sees fit and conforming to international standards of law and human rights, acts as a sovereign and independent state, as far as it is permitted to do so, in the international community. That this does not result in her *de facto* treatment as a sovereign state by that community is due to multiple factors of politics and national sentiment and the fact that there are no ready-made solutions for such complex relationships as the one between the two sides of the Taiwan Strait. The international community's attitude towards the Taiwan Strait conflict is far from univocal, many countries being torn between their natural sympathy for the Taiwanese society that has been awarded a "democratic stamp of approval" (Henckaerts 1996b:242) and the attraction of the allegedly huge future market on the Mainland. What exactly the future of the conflict will be is therefore hard to predict, much speaks in favor of a continuation of the present "creative ambiguity" (Charney/Prescott 2000:277) by all parties concerned.

In recent years, the ROC is increasingly unhappy with its isolation on the international plane and has stepped up her rhetoric in cross-Strait diplomacy. What is regarded as reckless agitation by some, is plausible and to some extent even necessary when viewed from the vantage point of international law. It is one innate characteristic of international law that it is created by the same entities which are to be bound by it, i.e., by states in the international arena. As long as the ROC is kept out of this arena almost completely, it is extremely difficult for it to actively shape the future of the international legal systems in a similar way as the

internationally recognized states are allowed to do (and with them the PRC). For the ROC, the question of participation in the international arena may well prove to be a question of survival in the long term. For quite some time, therefore, the government on Taiwan has employed all means at its disposal to alter its state of “diplomatic orphanage” (Van Vranken Hickey 1996:65), resorting to the so-called ‘pragmatic’ or ‘informal diplomacy’ of establishing unofficial ties wherever official ones are beyond its reach. This may ensure a stable relationship with many states worldwide, including the ROC’s most important strategic partner, the U.S., who has been very receptive to Taiwanese lobbying over the years.¹⁰ In the relations with Beijing, however, this unusual approach to international diplomacy is viewed as promoting Taiwanese independence (Wu 1996:51–52). Taiwanese ties to other states are thus ‘inversely proportional’ to a good climate between Taipei and Beijing. And since the PRC is as yet the major stumbling block in ROC relations to the international community, and since the ROC is the most important contentious point between the PRC, arguably the most important rising force in Asia, and the only superpower, the United States, strange as it may appear, in the ROC’s way to a firmly established position in the international arena seems to lead through a phase of inner-Chinese rapprochement.

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¹⁰ Thomas W. Robinson argues that, even in the absence of exact numbers, it is beyond doubt that Taiwan has spent at least hundreds of millions of dollars on the targeted lobbying of Congress, numbers only paralleled by Israel’s spending. For this information and a more detailed account of Taiwanese influencing of American policies, see Robinson 1996:1343–1356.

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