

*The China-Taiwan Relationship:*

## Law's Spectral Answers to the Cross-Strait Sovereignty Question

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There is much talk of the need to craft a new, formal arrangement to address relations across the Taiwan Strait and the “sovereignty question.” In international relations, formal arrangements deal in terms that are partly legal, such as “statehood” and “sovereignty.” “Blended,” “hybrid,” or “modified” sovereignty arrangements have been systematized in international law over the centuries and should be especially relevant under current conditions of sovereignty-undermining globalization. The hope and expectation is that these arrangements can provide a new structure for cross-Strait relations to reduce recent tendencies toward political crisis and manage increasingly dense and complex economic ties.

The optimism, however, is misplaced. Available legal models of non-traditional sovereignty interact in toxic ways with contemporary cross-Strait politics. Absent a change in political will and perceived interests on one or both sides of the Strait, focusing on formal solutions afforded by international law will do little good and may do considerable harm.

### **The Strange Career of “One China”**

The reasons for seeking a new formula are obvious. The old, formal framework for addressing sovereignty and the cross-Strait relationship has crumbled since the beginning of the 1990s. It provided that Chinese on both sides of the Strait maintained that there was one China and that Taiwan was a part of China. Under this arrangement, which was most famously recorded in the 1972 Shanghai Communiqué, the PRC and the ROC agreed to disagree about which of them could legitimately exercise sovereignty over that single China. For the ROC authorities in Taipei, it was a question of recovering the mainland from the communists. For the PRC's rulers in Beijing, it was a matter of completing the civil war and reunifying the country under their

leadership. The strange arrangement remained serviceable because neither side was willing and able to bring about “one China.”

So long as both parties were willing to endure the status quo of two functionally independent regimes without formally separate state status, there was no reason to tinker with this formula. It provided a rhetorical stability of legal principle that paralleled the *modus vivendi* in practical politics. As later events underscored, any unraveling of “one China, but which one?” meant crisis.

Moreover, the formula served domestic political needs on both sides. For the Kuomintang regime of the Chiang Kai-shek era (1948–75) and much of the Chiang Ching-kuo era (1978–88), asserting a single China rightfully ruled by the ROC government was a vital element in the KMT’s claim to legitimate power on Taiwan. It explained why rule by a mainlander minority was proper and why the authoritarian rule that sustained KMT power was necessary. On the mainland, the mirror-image claim supported the CCP’s mandate. The Party’s authority had always rested partly on its having accomplished the nationalist mission of reunifying China. It would be at least embarrassing and, for any individual leader, perilous to countenance abandoning the most important remaining item on that agenda. Further, since the mainland and Taiwan had so little to do with one another, the “one China” fiction could survive unthreatened by practical demands that would attend dense economic ties and political interactions across the Strait.

On all of these fronts, much changed beginning in the late 1980s. The old legal-diplomatic formula and the tense stability in cross-Strait politics rapidly came apart. Observers asked whether Taiwan was a nation-state or a province.<sup>1</sup> Beijing proffered a “one country, two systems” model for reintegrating Taiwan as a uniquely autonomous subunit of the PRC.<sup>2</sup> In addition to promising a growing list of specific powers and privileges for a reunified Taiwan, Beijing has flirted with more radical changes to the old rhetoric, with Vice Premier Qian Qichen floating the idea that the PRC and Taiwan both “belong to” or are “include[d] in” one China—with “China” suggested to be some greater entity, less narrowly identified with the PRC as its sole legitimate and actual government.<sup>3</sup>

Leaders in Taipei embarked on a series of formulations that edged toward claiming sovereignty for Taiwan as a state separate from the PRC. Among the most noted of the touchy and tangled formulations of the Lee Teng-hui (1988–2000) and Chen Shui-bian (2000—) presidencies are: (i) that

<sup>1</sup> John F. Copper, *Taiwan: Nation-State or Province?* (Boulder, Colo.: Westview Press, 2nd ed., 1996).

<sup>2</sup> Li Jiaquan, “‘One Country, Two Systems Concept’: Its Formation and Development,” *Beijing Review*, Jan. 4–10, 1988, pp. 17–18.

<sup>3</sup> Qian Qichen, “Adhere to the Basic Policy of ‘One Country, Two Systems’ and Strive to Promote the Development of Cross-Strait Relations” (Jan. 24, 2002), Beijing Xinhua Domestic Service; “Everything on the Table, Qian Tells Taipei,” *South China Morning Post*, Jan. 23, 2001.

the ROC and the PRC are two essentially equal political entities within a China that may be unified in the future; (ii) that relations between the ROC and the PRC are state-to-state relations or at least a special kind of nation-to-nation relations; (iii) that Taiwan has no need to declare independence because the ROC has been a sovereign state since its establishment in 1912; (iv) that the present reality is not “one China,” although that is a future goal, but not an inevitably achieved one; and (v) that the “one China” principle is a potentially acceptable basis for cross-Strait relations, but only if understood in terms of the “spirit” of the 1992 bilateral discussions, construed as the two sides’ agreeing on “one China” but disagreeing about what “one China” means.<sup>4</sup>

Each side has denounced the other’s initiatives. Partly reacting to perceived pressure from Beijing, Taiwanese leaders attacked Beijing’s positions as attempts to delude the world into thinking that the PRC regards Taiwan as anything other than a renegade region to be reduced to mere provincial status in a unitary China ruled by the CCP. Proclaiming an alarming drift toward separatism on Taiwan, Beijing sources branded the official articulators of Taiwan’s new positions as splittists, sinners against history, and insincere, closeted seekers of independence.<sup>5</sup>

Such rhetoric—which often reflected grappling with international legal concepts—is far removed from the 1970s and 1980s version of “one China.” The former formula and arrangement for cross-Strait relations had collapsed because they had come to serve less well political needs and agendas on both sides of the Strait. In Taiwan, the advent of democratic politics and Taiwanization of the KMT leadership made old-style claims to “one China” politically unnecessary or repugnant to leaders and their supporters. Such changes were nearly inevitable: the KMT had to compete for votes from a Taiwanese electorate, political groups that flirted with independence were allowed to run and win, and constituencies to which parties appealed increasingly identified with Taiwan as an entity distinct from the mainland.

<sup>4</sup>“President Lee Teng-hui’s Address at the 11th General Assembly of the National Reunification Commission, Aug. 4, 1995”; National Unification Council and Executive Yuan, ROC, *Guidelines for National Unification* (Taipei: 1991); Text of President Lee Teng-hui’s interview with Deutsche Welle Radio, July 9, 1999, reprinted in *Chung-yang Jih-pao*, July 10, 1999; Stephanie Low, “‘One China’ Too Simplified,” *Taipei Times*, May 30, 2000; Chen Shui-bian, Inaugural Speech, May 20, 2000; President Chen Shui-bian’s Sept. 6 (Fourth) Press Conference.

<sup>5</sup>Government Information Office, Executive Yuan, ROC, “Looking beneath the surface of the ‘one China’ question” (Taipei: Government Information Office, Mar. 1997), p. 3; Mainland Affairs Council, Executive Yuan, ROC, *Parity, Peace and Win-Win: The Republic of China’s Position on the ‘Special State-to-State Relationship’* (Taipei: Aug. 1, 1999), sec. II; “Li Teng-hui, Don’t Play with Fire,” *Jiefangjun Bao*, July 15, 1999; “Undermining the One China Principle is the Crucial Issue,” *Renmin Ribao*, July 14, 1999; “Trouble Continues under Chen Shui-bian,” *China Daily*, May 1, 2002.

In the PRC, implementation of deals for Hong Kong's and Macao's reversion weakened a key underpinning of Beijing's support for the old formula: that the resolution of the Taiwan question could be postponed indefinitely. Additional pressures included the CCP's growing turn to nationalism as a basis of legitimacy, Jiang Zemin's concern with securing his power and then his legacy, popular indifference toward the Taiwan issue, and powerful military circles' genuine or feigned concern over Taiwan's drift toward independence. All of this furthered the sense on the mainland that the old formal structure was obsolete.

At the same time, exponential growth of cross-Strait connections increased dissatisfaction with the formula of "one China, but which one?" The old rhetoric impeded the development of practical political, economic, and legal arrangements for a cross-Strait relationship marked by burgeoning trade and investment flows and numerous and sometimes very long-term social and business visits.<sup>6</sup>

In these circumstances, new formulations were needed to regain the advantages of the old "one China" arrangement: mutually acceptable principles for structuring the relationship that might contribute to stability, predictability, and practical deterrence of disruptions to a status quo acceptable to the relevant actors. Given the political volatility and growing economic stakes in cross-Strait ties, finding a new formula came to seem compelling indeed.

### **Varieties of Sovereignty in International Law**

One seemingly promising place to look was a set of international legal models establishing non-standard arrangements of sovereignty. Even in their most heated exchanges, Beijing and Taipei seemed inclined to address their relationship in terms of sovereignty, statehood, autonomy, and other concepts found in international law, and to do so with formulae that did not hew to the traditional model of unitary nation-states. Positions on both sides of the Strait avowedly envisioned Taiwan as more than a mere province but less than a full-fledged nation-state. Formal proposals, respectable discussion, and "trial balloons" roamed widely, invoking a vast range of legal concepts. A long history of international legal principles and practices originating before the modern nation-state's emergence as the "normal" structure for sovereignty and extending well beyond the nation-state's European heartland offered a rich menu of options for crafting a new formal arrangement for cross-Strait relations. Contemporary developments suggested that non-traditional sovereignty arrangements were becoming commonplace and, thus, a potential source of internationally acceptable and politically viable legal forms. The EU, with its ceded and shared, delegated and blended

<sup>6</sup>See Cal Clark, "Growing Cross-Strait Economic Integration," in this issue of *Orbis*.

sovereignty, seemed to be a signal development, particularly relevant in its focus on economic integration. The arrangements in the former Yugoslavia offered another possible analogy because of what they might suggest for handling explosive conflicts within entities that once were under sovereignty held by a conventional state.

There were many other varieties of sovereignty arrangements that might inspire a new formula for the cross-Strait relationship. Yet proposals approximating any existing models have received a chilly reception on one or both sides of the Strait. To understand why, it is useful to array the models along a continuum from those with the least to those with the most formal sovereignty accorded to the smaller, weaker party or to the constituent units in a larger whole.

*Unitary Sovereignty.* At one extreme, unitary sovereign states can accord considerable autonomy to their subdivisions. By constitutional principle, legislative choice, or political custom, some states allocate many (or few) of the attributes of sovereignty to units of subnational governance. But the sovereign retains the right to revoke the powers it grants to its subdivisions. Traditionally, this analysis has applied to colonial territories as well, which are regarded as part of the legally undifferentiated realm of the metropolitan sovereign.

This model is objectionable on Taiwan and nicely captures Taiwanese charges about the PRC's real position: that Beijing regards Taiwan as a mere province and the promised "one country, two systems" arrangement would devolve into ordinary PRC-style central-provincial relations in keeping with the unitary state principle that underlies it. While these fears are consistent with PRC constitutional theory and political doctrine holding that a reintegrated Taiwan would be in international law and constitutional principle no more sovereign than Guangdong or Hebei, Beijing has been at pains to insist it is offering Taiwan something more.<sup>7</sup>

*"Special Autonomy" Regimes.* Next along the spectrum are "special autonomy" regimes. Under these structures, an entity within the larger state is granted a large "share" of sovereignty with respect to its geographic area and residents. Often this arrangement deals with an area that is home to an ethnic group invoking the right to self-determination of "peoples" that has become a pillar of the postwar international legal order. Often such arrangements

<sup>7</sup> For Taiwan views, see "Taiwan Voters Don't Buy 'One China, Two Systems' Scheme Says Premier," *Central News Agency*, Dec. 5, 2001; "President's 'State-to-State' Remarks Analyzed Linguistically for Nuance," *Central News Agency*, BBC Summary of World Broadcasts, Asia-Pacific, July 15, 1999; Parity, Peace, and Win-Win, sec. IV. For PRC views, see PRC Constitution (1978, 1982), preamble; PRC State Council Taiwan Affairs Office and State Council Information Office, *The Taiwan Question and the Reunification of China: White Paper* (Beijing: 1993); PRC State Council Taiwan Affairs Office and Information Office, *The One China Principle and the Taiwan Question: White Paper* (Beijing: 2000); "Zhu Urges Reunification at Early Date," *China Daily*, Oct. 2, 2000.

respond to pressures for secession. Notable examples include regions of India, Nigeria, and Spain. As these cases suggest, special autonomy regimes can include a wide variety of distributions of power to exercise sovereign authority.

This paradigm too has little appeal in Taiwan, in light of what “autonomy” has meant in the Chinese context. The Hong Kong Special Administrative Region (with its “high degree of autonomy”) is frequently cited as an example of a special autonomy regime. Beijing derived the SAR model for Hong Kong and Macao from the “one country, two systems” formula originally devised for Taiwan and has insisted that the established SARs are a starting point for a solution for Taiwan. For Taiwan, all this indicates that the two post-colonial reverted entities are what special autonomy regimes mean to the PRC.

Viewed from Taiwan, such arrangements are not enough. As Lee and others tirelessly have asserted, the Taiwan view is that “Taiwan is not Hong Kong.” ROC spokesmen and sympathetic critics claim that political autonomy in Hong Kong has already eroded in the half-decade following reversion. The “one country, two systems” arrangements of an SAR—even with additional “sweeteners” of retaining a separate military, flag, and a more robustly distinct government and political system—fall short of the recognition and guarantee of autonomy and continuity inherent in the ROC’s notion of its own sovereignty.<sup>8</sup> The other principal PRC use of the term “autonomy” is much less generous and thus, from Taiwan’s perspective, still more repugnant. Whatever critics might say about the HKSAR, it goes further in principle and in practice than the “autonomous region” arrangements of Tibet, Xinjiang, Ningxia, and Inner Mongolia.

Moreover, a key legal principle that underpins special autonomy regimes and their claim to international status and protection might not be fully available to a Taiwan SAR. While there has been much talk of the “new Taiwanese” during the Lee era and the sons of Taiwan under Chen’s presidency, ties of culture, history, language, and ethnicity link Taiwan residents to mainlanders and divide population groups on Taiwan in ways that make it difficult to claim that the island’s inhabitants are a people with an international legal right to self-determination.<sup>9</sup>

*Federalism.* Further along the spectrum is federalism. In federal structures, the “bundle of sticks” of sovereignty is divided between the

<sup>8</sup> See Byron Weng, “‘One Country, Two Systems’ From a Taiwan Perspective,” in this issue; Mainland Affairs Council, Executive Yuan, ROC, *There is No ‘Taiwan Question’; There is Only a ‘China Question’* (Taipei: Sept. 16, 1993); “Lee Affirms Commitment to Democracy, Freedom,” *Central News Agency*, July 3, 1997; “Soong Details China Policy, Adopting EU as Unity Model,” *China News*, Jan. 6, 2000.

<sup>9</sup> Lee Teng-hui, “Understanding Taiwan: Bridging the Perception Gap,” *Foreign Affairs*, Nov./Dec. 1999; “A New Phase of the Taiwan Experience is Underway: Full Text of an Address by ROC President Lee Teng-hui to the Closing Session of the Third Business Operators’ Forum” (1996) (<http://www.taipei.org/current/lee0914.htm>); “Chen Shui-bian’s Autobiography Launched,” *Central News Agency*, Dec. 2, 1999; Chen Shui-bian Inaugural Speech.

national or union government, which is a state under international law, and its constituent units, which retain some attributes of sovereignty. Although federal states are paradigmatically formed by a treaty among initially separate sovereigns, international law regards the union as the sovereign actor. Creating a federalist arrangement from the opposite direction is possible as well, through a less-than-complete dissolution of a once-unitary state. When constituent parts of a federal state enjoy international status or exercise foreign affairs powers, they are generally regarded as doing so only as agents of the larger, “real” state, and their capacity to do so is generally viewed as revocable by constitutional amendment or other changes in the federal state’s internal law.

Especially in contemporary practice, federalist systems cover a vast range of arrangements for allocating sovereignty. In some cases, the subunits exercise extensive control over governance of “their” areas and enjoy powers to make international agreements. In other cases, they have much less. The conventional examples of federal states suggest the diversity of autonomy arrangements compatible with a federal structure: the United States, Germany, Canada, Switzerland, Australia, Nigeria, and the former USSR.

In the Chinese context, federalism has been notoriously problematic. PRC ideology has often deemed it unacceptable for reasons having little to do with the Taiwan question. As a matter of constitutional principle and as a political line in the sand against what the center views as national-unity-threatening decentralization, the official position has generally rejected federalism and embraced the principle of a “unitary state.” Taiwan has only flirted with federalist options.<sup>10</sup> The shrunken sovereignty of the constituent units in many formally federal systems—including the United States—would understandably give pause to any Taiwanese pondering the likely fate of a federal arrangement that links Taiwan and the PRC. The cross-strait context looks especially inauspicious for federalism. Imbalances in size and power and clashes of political orders are far greater than in most federal systems. The PRC is unlikely to accept a standard federalist premise that the union is the product of two previously separate and equal sovereigns entering into a treaty by which the parties retain some of their prior rights and status as equals.

*Suzerain and Similar Structures.* Next along the spectrum are several arrangements under which an entity that in principle could enjoy the full bundle of sovereignty associated with statehood does not do so because a significant portion of those powers—particularly in international relations—is

<sup>10</sup> On PRC views, see Arthur Waldron, “Warlordism versus Federalism: The Revival of an Old Debate?” *China Quarterly*, no. 121 (March 1990), pp. 116ff; Tahirih V. Lee, “The Future of Federalism in China,” in Karen G. Turner, James V. Feinerman and R. Kent Guy, eds., *The Limits of the Rule of Law in China* (Seattle, Wash.: University of Washington Press, 2000), pp. 271–303. For discussions in Taiwan, see, e.g., Ruey-Kuo Lee, “New Framework for Peace Across Strait,” *Chung Kuo Shi Bao*, Aug. 14, 2000.

assigned for exercise by another more powerful state on a permanent or protracted basis. Suzerain, protectorate, and “associated state” structures are all versions of this basic form. The differences among them are murky, but the list is ordinarily thought to entail a progressively lesser assignment of sovereign powers to the other state and, thus, to preserve for the lesser entity a stronger claim to statehood or other significant international status.

Regardless of the label, the degree of autonomy enjoyed by the lesser unit is primarily a product of the agreement creating the relationship. The situation often is not static. There is potential for progress toward independence (as happened with many such arrangements adopted in the era of decolonization) or degeneration into a loss of international status (as occurred with the interwar Austro-German Customs Union or Liechtenstein’s one-time association with Switzerland).

In another variation on this pattern, the “other” entity is a collectivity of states. In joint-protectorate or condominium arrangements, two or more outside states hold sovereignty over the object territory and its people, which often retain extensive self-rule on domestic matters. A contemporary example is Andorra, sovereignty over which is vested jointly in France and Spain and exercised by them (primarily in external affairs) and the Andorran assembly (primarily in domestic affairs). In the UN’s trusteeship system and the former League of Nations mandate system, the state designated as the administering authority holds and exercises nearly the full range of sovereign authority over a formerly colonial realm. The administering authority does so, however, as the supervised agent of the international organization or the community of states, which is generally viewed as retaining sovereignty over the administered entity, albeit with the expectation that sovereignty will eventually devolve to a state—typically a newly independent one. In these structures, the extent of autonomy and delegated practical exercise of sovereignty can vary substantially and depend heavily on the arrangements of the individual case.

Another variant on this theme is “internationalized territories,” where outside states place a territory under a special regime that restricts the preexisting sovereign’s authority without creating a new sovereign entity. Examples include the former Free City of Danzig, the Lithuanian territory of Meml during the interwar years, and postwar West Berlin.

The possible application of these arrangements in the cross-Strait context is intriguing. These types of international legal structures have generated little open discussion on either side of the Strait. Lack of explicit rejection, however, does not mean that any variant would survive scrutiny. Viewed from Taipei, suzerainty and protectorate arrangements are likely to look too much like federalism or special autonomy. Seen from Beijing, associated state, mandate, or trust territory-type arrangements surely will go too far in according Taiwan state status and a residual or presumptive claim to full sovereignty.

Arrangements involving more than two parties have particularly interesting and potentially provocative implications in the cross-Strait context. Their utility in structuring allocations of sovereignty among three or more entities of differing status might suggest ways to implement the notion of two entities within a single China proposed in Qian's formulations and in the ROC's evolving definition of a potential "one China." The multiparty variants of international law's most eclectic halfway house structures for sovereignty thus might suggest a framework for the PRC and ROC regimes jointly to hold, and jointly or severally to exercise, sovereign authority over Taiwan or all of China.

Here too, there are many points on which proposals could founder. Many pitfalls lie down the path of determining where the terms "PRC," "Taiwan," and "China" substitute for Spain, France, and Andorra, Mandatory Power or Trustee and Mandate or Trust Territory, joint condominium participants or joint protectors and the object of the condominium or protectorate. Still more obstacles would face attempts to allocate specific sovereign and governmental powers. The "internationalization" of the question of sovereignty that is inherent in such structures is exceptionally touchy in the cross-Strait context. While the PRC has resolutely resisted what it calls "internationalization" of the "Taiwan question," the ROC's strategy has largely consisted in trying to do just that.

*Sui Generis Entities.* Still farther along the spectrum is another grab-bag of sovereignty arrangements often called *sui generis* entities, or "near-states." These entities hold many attributes of sovereignty associated with statehood but lack full standing as states. They typically fail to satisfy one of the elements of statehood reflected in the 1933 Montevideo Convention (the *locus classicus* of international legal definitions of statehood), whether it be a substantial, stable, and contiguous territory; a permanent, numerous, and identifiable population; a government that effectively rules the territory and people without being accountable to another state's government; or capacity to engage in relations with other states. In some cases, the issue is the failure to satisfy another implicit factor, that of claiming to be a state.

These near-states ordinarily differ from those in the preceding cluster in one crucial respect: generally, no other state clearly possesses the swath of sovereign qualities that the *sui generis* entity lacks. Contemporary examples include the Holy See/Vatican City and the Palestinian Authority/Palestinian Territories.

Although many international legal analyses add the ROC/Taiwan to the list, analogies to those cases seem doomed to failure in the cross-Strait setting. As the category's label of "*sui generis*" suggests, recognized instances share little that can be stated systematically. The oddly dual names that international practice attaches to the principal cases warns that a workably clear definition of the legal character of the category is problematic.

Moreover, Taiwan's self-perception as something more state-like than other members of the purported class makes any attempt to draw parallels to *sui generis* entities unappealing on the east side of the Strait. At the same time, the extensive state-like status—with attendant assumptions about the location of sovereignty—that *sui generis* entities enjoy is more than Beijing has been willing to contemplate as a matter of legal principle for Taiwan. From both perspectives, the Palestinian case in particular warns of peril. For Beijing, there is much that would be noxious if applied to Taiwan in the widespread argument that the Palestinian entity may and certainly should be seen as en route to conventional statehood. For Taipei, Palestine teaches a disconcerting lesson about the vulnerability of a *sui generis* entity when a more powerful neighboring state with not-fully-renounced claims to the entity's territory deems the status quo an unacceptable threat to national security.

*Commonwealth.* Commonwealth lies next along the continuum. This structure is difficult to define because it is so tied to a single dynamic case (the British Commonwealth) and because the term has often been applied to situations that do not fit any plausible international legal definition of the category (such as Puerto Rico or Pennsylvania). In international law, the members of a commonwealth are unquestionably states. But they are states of a slightly limited type. At least some abstract or ultimate dimensions of sovereignty are in hands outside of the member states (or of all but one of the member states). Member states consider one another to be less than fully foreign, and relations among them to be less than fully international. Commonwealth members undertake some international commitments and legal acts as a multi-state bloc.

As the principal contemporary cases—the British Commonwealth and, more controversially, the Commonwealth of Independent States—suggest, the commonwealth form is closer to the paradigmatic multi-state/separate sovereignty structure than federalist or similar arrangements are. Contrast, for example, the degree of sovereignty held by post-colonial British Commonwealth states, on the one hand, and earlier British colonies, Wales, or Scotland, on the other; or the former situation of CIS members as republics of the Soviet Union with their current status. As the histories of the British Commonwealth and the CIS illustrate, commonwealths usually emerge from dismantling a multinational, legally unitary sovereign entity, and commonwealth arrangements permit substantial variety in allocating sovereignty and its practical exercise.

Among the established paradigms, the commonwealth concept seems relatively promising in the cross-Strait setting, perhaps offering a way to make operational some of the seemingly accommodating but vague concepts floated by Qian (placing Taiwan and the PRC within a single, larger “China”), Chen (moving toward a possible future “one China,” the definition of which remains unsettled), and Lee (contemplating reunification in stages amid major domestic changes in the PRC).

Here too, apparent potential may prove illusory. The commonwealth approach has generated only tepid or marginal support on Taiwan and no significant interest from the PRC.<sup>11</sup> Such a lack of enthusiasm hardly bodes well, and the absence of a sharp rejection may simply stem from the model's not having been much explored. If it were, the protagonists would have to agree on specific features to flesh out an exceptionally general model or accept attributes drawn from one of the existing Commonwealths. Elements unacceptable to one or both sides would likely emerge to doom the model.

*Confederation.* Confederations and similar associations of states occupy a point still farther along the spectrum of sovereignty. Here, several conventional, unquestionably sovereign states cede some powers to a collectivity of states, typically for exercise by supranational institutions accountable to the member states. Exit from the regime is possible but can be cumbersome and costly.

Often such arrangements have developed in part to manage and encourage international economic ties. Although typically limited, the reallocation of sovereign powers away from the individual states can become extensive and wide-ranging. The current archetypal example of confederation-like arrangements is the EU, with its capacity to constrain, guide, or displace national decision-making in matters of economic regulation, human rights, social welfare policy, fiscal and monetary matters, and more.

The confederation model would seem to have obvious resonance in the cross-Strait context, given such arrangements' use in addressing and extending economic integration in regions with common historical experiences and cultural values. Moreover, confederation has drawn significant support and interest on Taiwan. President Chen and People's First Party chief James Soong have pointed to the EU as a possible source of inspiration for addressing the cross-Strait relationship, and the KMT and its leader Lien Chan have endorsed the concept of a confederation. While Beijing has not warmed to the idea, it at least has not unleashed the vigorous attacks that it has directed at "two-state theories" and "divided-state" models.<sup>12</sup>

<sup>11</sup> "Lee Says Unification Would be 'A Miracle,'" *China News*, Sept. 2, 1998; "MAC Official Unveils Four Pillars on 'Mainland Policy,'" *Central News Agency*, Nov. 14, 2001; "Taiwanese Official Says Reunification Must be in Interests of All Chinese," BBC Summary of World Broadcasts, Mar. 19, 1996; "Candidates Offer Ideas for Ending Tensions," *South China Morning Post*, Mar. 10, 1996, p. 6.

<sup>12</sup> See, e.g., "MAC Official Unveils Four Pillars of 'Mainland Policy' "; "Chen Says Concept of 'Confederation' Warrants Discussion," *Central News Agency*, Apr. 21, 2000; "Soong Details China Policy, Adopts EU as Unity Model"; "Lian Chan Once Again Proposes Confederation," BBC Summary of World Broadcasts, Jan. 4, 2001; Kuomintang, "Confederation: A Window of Opportunity Across the Taiwan Strait" (Taipei: 2001); Chen Shui-bian, New Year's Address (Jan. 1, 2001); "Taiwan President Calls for Economic, Cultural Integration with China," *Agence France Presse*, Dec. 31, 2000; "Taiwan's Chen Ready to Mull Confederation with China," *Asian Political News*, Apr. 24, 2000; "Beijing Unlikely to Accept EU-Style Confederation," *China Post*, Feb. 23, 2001.

Once again, any apparent promise is likely to go unfulfilled. A confederation-like solution faces practical problems of context. Confederations generally have arisen in response to external security threats against which the members sought to make common cause (the Warsaw Pact, in the European case). Such facilitating circumstances are absent in the cross-Strait relationship, in which the PRC deeply resents and resists—and Taiwan clings desperately to—the threat of intervention by the greatest extraregional power.

Confederation's prospects are dim for substantive reasons, too. The attraction and repulsion on opposite sides of the Strait are readily explicable in terms of where confederation falls on the spectrum of sovereignty. For all the cessions of sovereignty to supranational institutions, the EU (like other confederations) proceeds from the premise that its members are full-fledged states with residual, fully reclaimable sovereignty. Reallocated sovereign power is exercised by bodies composed of EU member states, which exercise that power under arrangements that provide substantial equality among member states and protect small states and states in the minority. Applying such an arrangement to Taiwan would require accepting Taiwan's preexisting sovereign state-like status, promising Taiwan significant influence and power in a confederated China, and allowing Taiwan to exit if dissatisfaction ensued. These are features which could be widely appealing on Taiwan in principle but which would face such intractable obstacles as resistance from many in Taiwan skeptical about the credibility and durability of such pledges, opposition from proponents of independence or near-independence for Taiwan, and rejection by the PRC.

*Divided States.* Another category still farther along the spectrum is that of divided states. These entities each hold the full bundle of sovereign rights and powers and function as separate states in the international order. But they do so under an arrangement that—however close to a conventionally “two-statist” configuration—is recognized as an abnormal departure from merger into a larger (re)unified state. As the major recent and contemporary examples—Germany, Korea, and Vietnam—illustrate, divided states typically are the products of war, suffer slightly diminished international status because of diplomatic rejection by one another and their respective great power patrons and allies, yet regard the often hostile relationships *inter se* as special and closer than ordinary international relations.

In light of these features, potential for application to contemporary China would seem to be strong. China too had been divided at the Strait as a legacy of war and, indeed, a civil war, as had occurred in Korea and Vietnam. An international community that had chosen up sides (as it had in Korea, Germany, and Vietnam) now appears willing to deal with the PRC and Taiwan much as it had come to deal with the two Germanys and the two Koreas. While Taiwan no longer holds the formal international legal and diplomatic acceptance that the two Germanys and the two Koreas once

enjoyed, that is largely a product of conditions the PRC set for diplomatic relations. It does not reflect the preferences of many other states, nor has it impeded states' conduct of dense and extensive informal state-like relationships with Taiwan.<sup>13</sup> Further, the German outcome and a plausible trajectory in Korea suggest that the divided-state arrangement could move smoothly to a reunified state, and that reunification could rebundle the formerly divided sovereignty in ways that were acceptable to the people on both sides of the former border.

The divided-state paradigm has much evident appeal on Taiwan. Lee and Chen have explicitly invoked the German and Korean cases as providing a fruitful source of potential analogies for the long-term reunification of China.<sup>14</sup> But the attraction may be largely tactical, in that it accepts a chimerical (or at least very distant) prospect of an end to the abnormal situation of division in return for an interim, very long-term arrangement that is nearly indistinguishable from two fully separate, conventional sovereign states. A more fundamental commitment to the divided-state model would be of doubtful appeal to Taiwanese dedicated to the preservation of Taiwan's current order and autonomy. While the German and Korean patterns suggest that divided-state situations may be "resolved" in merged regimes that are market-oriented, democratic, and human rights-protecting (which the ROC's Guidelines on National Unification specify as conditions for reunification), they may teach a different lesson far less appealing on Taiwan: reunification may bring absorption of the smaller partner into the system of the larger.

Whatever the positions on Taiwan, the divided-state model has faced rejection in Beijing, not least because of its obvious similarity to a traditional model of two fully separate sovereign states. The PRC's standard line has dismissed Korean and German analogies as inapposite, presenting circumstances that are "completely different" from the Chinese case, where no war-ending international treaty reallocated the formerly unitary national sovereign power and where no outside occupying power holds any of the sticks comprising the bundle of sovereignty over the divided state. Taiwanese proposals that invoke divided-state paradigms are, in official Beijing's view, indistinguishable from an unacceptable "two-state thesis."<sup>15</sup>

*Two States.* Finally, at the other end of the spectrum, stands the arrangement of two fully distinct and separate states. This is how sovereignty

<sup>13</sup>The United States' Taiwan Relations Act is only the most important, formal, and extensive commitment to such relations which, in weaker form, are commonplace.

<sup>14</sup>Lee Teng-hui's interview with Deutsche Welle Radio; Chen Shui-bian, New Year's Address (Jan. 1, 2001); "Taiwan President Calls for Economic, Cultural Integration with China"; "President Chen Extends Another Olive Branch," Central News Agency, June 20, 2000.

<sup>15</sup>"Beijing Demands Taiwan Drop Independence Stance," Associated Press, June 21, 2000; "Researcher Says German Model Not Suitable for Taiwan Reunification," Xinhua News Agency, BBC Summary of World Broadcasts, Asia-Pacific, Dec. 17, 1998; "Taiwan Issue Cannot Follow German or Korean Model," Xinhua English Newswire, Nov. 8, 1999.

is paradigmatically arranged in the Westphalian model and how it is usually allocated today, notwithstanding reports of the demise of state sovereignty. Any number of pairs of states illustrate the model: Australia and Zaire, Guyana and Ghana, Iraq and Kuwait, Canada and the United States, and the former USSR and the former Czechoslovakia. As these examples suggest, high levels of mutual autonomy are the norm despite power imbalances, geographic proximity, contested territorial claims, or confusingly similar names. But, as these examples also show, the legal structure of two fully distinct states can accommodate extensive influence by one state over another's exercise of sovereignty without raising serious questions about the influenced entity's claim to full statehood.

There is a plausible argument that a formal two-state arrangement expresses the reality of the cross-Strait situation. The ROC regime exercises all attributes of sovereignty over Taiwan but not the mainland (or anywhere else). The parallel situation obtains with respect to the PRC on the mainland side of the Strait. One could dismiss the formal asymmetries (such as widespread denial of diplomatic relations and recognition to Taiwan or Taiwan's exclusion from states-member-only organizations) as superficial distortions introduced by the PRC's morally and legally questionable use of political power to deter straightforward application of legal principle and formal acceptance of what is clearly the real distribution of sovereignty.

Other aspects of the cross-Strait relationship are not necessarily fatal to application of the two-state paradigm. Extensive economic integration and close cultural ties (such as those between the United States and Canada) and one state's unsuccessful assertion of sovereignty over the other (as with Iraq's claims to Kuwait) is compatible with the coexistence of two states. Neither significant disparities in power and size (the U.S. and Canada, and Iraq and Kuwait), nor dependence of the weaker state on the protection of a distant great power (Kuwait and the United States against Iraq), nor confusingly similar names (Guyana and Ghana) necessarily vitiate the two-state model.

Advocates of Taiwanese independence long ago embraced a two-state model and claimed that Taiwan is a sovereign, independent republic. Sources in Taiwan have recently flirted with characterizing cross-Strait relations as similar to those between the PRC and Singapore. But the two-state model is simply off the table as a formal arrangement for the allocation of sovereign authority across the Strait. Beijing has clearly identified any move to declare Taiwan independence as a *causus bellum* and has pushed very hard to get other states to accept its position (as the United States did most fully with the Clinton administration's three-nos). Among the most heavily emphasized official PRC denunciations of Lee's "state-to-state" locution was the charge that it was in reality a two-state theory and hence thoroughly unacceptable. Beijing's choicest epithets for Lee and Chen portray them as "splittists"—that is, leaders who seek to

split the Chinese motherland into two fully distinct states, the PRC and Taiwan.<sup>16</sup>

On the other side of the Strait, Beijing's message has been unwelcome but not unheeded. Whatever the true preferences of the Taiwanese electorate and the leaders they have chosen (most notably, Lee, Chen, and Vice President Annette Lu), they have consistently stopped short of fully embracing the two-state paradigm. Opinion polls consistently show little support for a full, formal assertion of Taiwan's independence as a separate state under current conditions. Even pro-independence politicians have temporized, with the Democratic Progressive Party notably dropping its calls for a Republic of Taiwan and a referendum on independence as the DPP approached its now-achieved goal of becoming Taiwan's ruling party. Taiwan's presidents have been careful to obfuscate. Lee's "state-to-state" formula derived from a convoluted passage characterizing cross-Strait relations as "state-to-state or at least a special type of nation-to-nation relations" distinct from relations between a central government and local authorities and that involved a party (the ROC) that had no need to re-declare independence because it had obtained independent sovereign status at its founding almost a century earlier. Although strongly insisting on the sovereignty of the state on Taiwan, Chen has pledged not to constitutionalize Lee's two-state formulation or push forward toward formal independence (absent Beijing's "intention" to use military force) and has characterized the cross-Strait relationship as potentially evolving toward a "future" one China.<sup>17</sup>

### **Why the Models Really Don't Work**

None of the established models of hybrid or intermediate arrangements of sovereignty provides a solution suitable for current cross-Strait circumstances. All have faced daunting problems of political rejection or poor empirical fit on one or both sides of the Strait.

The failure of such models is more striking than the foregoing litany makes apparent. The vast, growing, and shared economic stake in PRC-Taiwan relations, coupled with the increasingly crisis-prone politics of recent years, provides ample motive to restore the stability that the legal-diplomatic formulations of the Shanghai Communiqué version of the "one China" principle embodied. The "foreignness" of "Western" international legal paradigms is not an insuperable barrier. On both sides of the Strait, leaders long have been accustomed to dealing in those categories. Beijing is one of

<sup>16</sup> See PRC 2000 White Paper, sec. III; "Undermining the One China Principle is the Crucial Issue"; "Undermining the Basis of Cross-Strait Relations Will Absolutely Not Be Allowed," Xinhua News Agency, July 18, 1999; "Chen Insincere on One-China Principle," *China Daily*, May 17, 2002; "Taiwan New Leader Lacks Sincerity," [www.china-embassy.org/eng/7121.html](http://www.china-embassy.org/eng/7121.html).

<sup>17</sup> Lee Teng-hui Deutsche Welle Interview; Chen Shui-bian Inaugural Address.

the most ardent contemporary proponents of the Westphalian notion of the nation-state and its hearty nineteenth-century descendants. Taipei has been adept at deploying arguments of traditional Western and cutting-edge international law in its quest for international status for Taiwan. Moreover, many of international law's esoteric or unconventional arrangements of sovereignty resonate with patterns from the Chinese past. For example, something akin to the divided-state paradigm held sway through much of China's history (especially its early history): China was fragmented into states that claimed, held and exercised the full range of sovereignty with respect to their own territories and populations and no other, but, at the same time, regarded such an arrangement as a morally regrettable departure from the preferred and repeatedly achieved unity in a single state under a sovereign emperor. Also, the last centuries of the imperial era saw the development of a tribute system for international relations that resembled suzerainty, protectorate, or associated state-like arrangements in modern international law—so much so that the language of “vassalage” has often been used to render relevant Qing and Ming terms into Western languages.

Moreover, the current political unacceptability of a particular arrangement to one side or the other is not necessarily fatal. What is politically intolerable in cross-Strait relations has hardly been immutable. Political and economic changes in the PRC that were scarcely imaginable when they began in the late 1970s, along with the dramatic political transformation on Taiwan that began almost a decade later, have radically altered some protagonists' senses of what is necessary, possible, and sufferable in handling the sovereignty question (and indeed have contributed greatly to the old formal arrangement's demise). Such processes of change continue. Moreover, on either side of the Strait, there is clearly no single view on the sovereignty question. Individuals and groups with potential to influence cross-Strait policy on Taiwan and in the PRC hold widely varied positions (and not necessarily fixed ones) on whether one international legal model or another might attain desirability or acceptability. Of late, there has been much ferment in both Taiwan and the PRC over paradigms drawn from international law theory and practice.

Yet proposals and ideas rooted in international legal models have produced little consensus and seem unlikely to do so soon, for reasons more fundamental than the above inventory adequately conveys. The fatal flaw lies primarily in the fact that established legal forms and examples all proceed from one of two opposite premises about sovereignty. Legally and conceptually, one of two very different things happens when a new formal arrangement for sovereignty appears. Sometimes, two separate entities, each possessing the full bundle of sovereign states' powers, partially merge their respective bundles. Other times, a single sovereign entity (essentially, a state) allocates to a lesser entity that does not possess full sovereign status some portion of its bundle.

That particular cases of hybrid or intermediate sovereignty might be characterized in both ways does not change this basic dichotomy. The apparent overlap merely shows that one can describe an empirically messy phenomenon from different actors' perspectives or in pursuit of different political agendas. That several of the established forms historically have come about through either merger or division is also beside the point, as is the disagreement about how to characterize the more obscure forms near the middle of the spectrum of sovereignty. In each historical case, the type of process that produced the hybrid or intermediate structure typically has been either undisputed or a point of contention so severe that it threatened the arrangement's survival. The question of baselines and starting points matters primarily in locating marginal and underlying sovereignty, which resides in quite different places under the two conflicting premises. The real point of struggles over characterizing the conditions *ex ante* is their implication for allocations of sovereignty *ex post*.

An array of models that invite or demand such a focus on first principles of sovereignty could hardly be more ill-suited to addressing cross-Strait problems today. Beijing and Taipei are most at loggerheads on precisely those issues, more than on matters of practical integration and functional autonomy. That much is amply indicated by the contrast between, on the one hand, the two sides' apparent agreement that Taiwan does—and should going forward—enjoy much autonomy and Taipei's and Beijing's promotion of legal and policy frameworks for economic integration, and, on the other hand, Beijing's insistence on the unitary sovereignty of a China that includes Taiwan while Taiwanese leaders asymptotically approach declaring separate sovereign statehood for Taiwan.

There is in all this a perverse echo of the old “one China, but which one?” legal-diplomatic formula, which reflected agreement on abstract principles of sovereignty and acceptance of the functional status quo. Today there are elements of a new but far more dysfunctional consensus on principles that can be characterized as “fully sovereign state(s), but how many?” That question captures what is really at issue in proposals for structuring cross-Strait sovereignty, ranging from the apparently sweeping and ostensibly durable promises of autonomy in Beijing's “one country, two systems” formula that stops short of renouncing sovereign discretion to reverse such pledges to Taiwan's statements that seek to maximize practical autonomy and assert sovereignty but dare not cross the Rubicon to declare a state of Taiwan that is newly independent or has been independent since 1949.

This underlying legal-political stand-off should not be surprising to students of the concept of nation-statehood in modern international law, especially in the last century and in the Chinese world. The many legal forms for blended, altered, or intermediate sovereignty bear strongly their birthmarks as departures from the baseline and dominant international legal

order based on “black box” unitary nation-states. However much that old order has begun to yield to more porous notions of the state, transnationalism, and globalization, those forces of change have had least impact in places like China and Taiwan.

The “strong” legal conception of the sovereign state holds on most tenaciously with states that are or perceive themselves as being weak and vulnerable, the potential targets of ostensibly legitimate outside interference. Although the PRC has ascended rapidly toward great power status, its enduring habits in addressing international legal questions and international relations exhibit considerable continuity with the period of China’s weakness, when it first encountered and began to adopt and adapt Western notions of international law in the mid-nineteenth century. That experience produced a fragmentation of Chinese sovereignty (including the loss of Taiwan) that the PRC has zealously and relentlessly rejected as a matter of law and morality and sought to reverse in practice. For Taiwan, the problem of weakness and the resulting appeal of a “strong sovereignty” conception is too obvious to warrant much elaboration. Put starkly, Taiwan’s embrace of a vision that claims for Taiwan a status as near as possible to the “black box” nation-state and that rejects piecemeal reassignment of sovereign powers is important to Taipei’s assertion, as a matter of international law and (Taiwanese leaders hope) the world community’s perception, that PRC coercion of Taiwan would be more like Iraq’s invasion of Kuwait than Beijing’s repression of secessionists in Xinjiang or Tibet.

Just as the common feature of both sides’ agreement on abstract principles of sovereignty has not made the “fully sovereign state(s), but how many?” a promising successor to “one China, but which one?,” so too the persistence of a relatively high degree of acceptance on both sides of the Strait of the functional status quo does not portend a viable formal structure for defining sovereignty across the Strait. Here, the seeming virtue of a flexible relationship between international legal models of hybrid or intermediate sovereignty and the specific allocation and practical exercise of sovereign powers proves to be a vice. Such models are problematic precisely because unitary state, federalist, confederal and two-state paradigms and intermediate alternatives are, on the one hand, all in principle compatible with sweeping dispersals and with dense, durable integration of sovereign powers and, on the other hand, ordinarily associated in practice with a relatively narrow band on the spectrum of sovereignty.

Given these features, Taiwanese could easily envision that Beijing’s initial commitment to seemingly tolerable or generous formal legal terms for allocating sovereignty across the Strait might be followed by a gradual erosion of Taiwan’s autonomy in practice and, in turn, by pressure on Taiwan and the international community to accept a recharacterization of the basic sovereignty arrangement as something more nearly approaching the unitary nation-state model, in keeping with the limited effective autonomy that

Taiwan would then enjoy. Alternatively, Beijing might be expected to exploit international law's weak link between the legal forms of sovereignty and the practical arrangements for its exercise to persuade the outside world and constituencies on Taiwan that sweeping practical autonomy would be granted provided that Taiwan acquiesce in a relatively unitary-state-like structure for the formal allocation of sovereignty. With an agreement on such a structure in place, Beijing could then deploy its familiar negotiating tactics to press the other side to accept the PRC's interpretation of the nominally shared principles—an interpretation that would countenance erosion of Taiwan's promised autonomy and, thus, the basis for resisting a later recharacterization of the basic arrangement of sovereignty over Taiwan. PRC leaders haunted by the specter of Taiwan separatism could conjure similarly dire, mirror-image prognostications of formal independence built upon accretion of accepted functional autonomy if Beijing were to concede too much in negotiating the practical or principled terms of the cross-Strait relationship.

### **Law's Thin Promise: Facilitating Political Solutions**

If, in the end, what seems to be a richly diverse and functionally flexible array of legal models offers so little help and threatens harm in the quest for a durable, stability-enhancing structure for cross-Strait relations, should we dismiss international legal paradigms and categories as useless or pernicious? Not necessarily.

International law's models and concepts might help to implement something akin to what political theorists have called an “overlapping consensus”—a situation in which both sides accept a concrete set of rules and institutions but each party grounds them in a set of underlying principles that it finds acceptable but that the other need not.<sup>18</sup> Something akin to Chen's version of the 1992 consensus or Qian's notion of the PRC and Taiwan both “belonging to China” suggests the sort of formulation that might someday do the job.

If such a political consensus and will to forge a new formal arrangement for cross-Strait relations come into being, then law and legal concepts can help them to reach fruition. They can provide the necessary rhetorical tools for crafting a suitably precise agreement, or papering over disagreements that might undo a mutually desired deal, or permitting an otherwise daunting comprehensive project to be broken up into manageable parts. In building the structures to effectuate and sustain a politically forged new deal for cross-Strait relations, elements of the established formal models of sovereignty at international law could provide inspiration—a sort of tool-kit rather than a turn-key plant.

<sup>18</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

At a more mundane level, domestic or bilateral legal arrangements for governing practical elements of cross-Strait relations (such as the “three links” or regulations governing the flow of people, goods and capital, or preliminary aspects of political integration) could be building blocks in constructing an overlapping consensus and its political requisites and, in turn, a viable institutional arrangement for the exercise of sovereignty in the cross-Strait region—one that might have a broad functional and structural resemblance to established models of sovereignty at international law but with distinctive Chinese characteristics.

For now, there are few signs of the political will needed to undergird an overlapping consensus that legal concepts and formal structures could facilitate and embody. There is too little agreement about the expected impact of ongoing political changes on both sides of the Strait and of deepening cross-Strait economic ties. There is too much distrust on each side about what the other side might do to exploit the room for manipulation and erosion that the established menu of formal arrangements for hybrid or intermediate sovereignty seems to offer in abundance. Until political preferences and assessments of risk change in Beijing or Taipei or both, muddling through on the basis of shared interests in the on-the-ground status quo is the best that can be hoped for. The pursuit of grand formal solutions to the sovereignty question is likely to remain fruitless or even irresponsible.

