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## The Grass Will Not Be Trampled Because the Tigers Need Not Fight

Markus G. Puder

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## The Grass Will Not Be Trampled Because the Tigers Need Not Fight<sup>1</sup>— New Thoughts and Old Paradigms for Détente Across the Taiwan Strait

*Markus G. Puder\**

### ABSTRACT

*This Article examines the relationship between the Federal Republic of Germany and the German Democratic Republic, and explores whether the German experience may contain lessons for the relations between the People's Republic of China and Taiwan.*

*The Author's analysis of the German situation begins with a discussion of the relations between the separate German states, with a particular emphasis on how that relationship was shaped by the Basic Treaty. That document provided for the*

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1. This is a free variation of the traditional Chinese proverb "the grass will be trampled when tigers fight." For the metaphor of the tigers, see, for example, Robb M. LaKritz, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT'L L. REV. 237 (1997) (predicting that the People's Republic of China will become the new tiger); Omar Saleem, *The Spratley Islands Dispute: China Defines the New Millennium*, 15 AM. U. INT'L L. REV. 527, 535 n.35 (2000) (applying the term to Hong Kong, Singapore, South Korea, and Taiwan); see also Angeline G. Chen, *Taiwan's International Personality: Crossing the River by Feeling the Stones*, 20 LOY. L.A. INT'L & COMP. L.J. 223 (1998) (invoking the image of dragons in the context of Taiwan's creation myth).

*promotion of peaceful relations, recognition of independence and sovereignty of each nation, as well as a normalization of the diplomatic relations. After ratification, the Bavarian State Government sought a declaration that the ratification law was incompatible with the Basic Law, which conceived of Germany as one nation. The German Federal Constitutional Court unanimously rejected the petition, finding that the Basic Treaty was compatible with the Basic Law. The Author examines the Court's methods of analysis, as well as the ramifications of the Court's decision.*

*The Author then turns to an examination of the relations between the People's Republic of China and Taiwan. He recognizes that the People's Republic of China advocates the One-China principle for achieving a peaceful reunification between the mainland and Taiwan. By contrast, the government of Taiwan maintains that China has been split into two separate and independent states with divergent political and economic systems.*

*The Author notes that such divergent viewpoints had plagued German rapprochement. Once the parties moved past their disagreements, however, the Federal Republic of Germany and the German Democratic Republic were able to launch a viable partnering mechanism that increased the permeability of the inner-German border, facilitated German-German dialogue, and alleviated the hardships of division. The Author suggests that the Chinese affinity for treaty frameworks in the context of legal and political arrangements may be harnessed for increased levels of interaction in social, economic, trade, and other venues. Furthermore, the Author contends, the success of the Basic Treaty has illustrated how increasing contacts and decreasing tensions can effectively enhance the relationship.*

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## I. INTRODUCTION<sup>2</sup>

On July 9, 1999, in an interview with the German Radio Station *Deutsche Welle*, the former President of Taiwan—the Republic of China (hereinafter Taiwan), Lee Teng-hui, characterized “cross-strait relations [between Taipei and Beijing] as . . . at least a special state-to-state relationship.”<sup>3</sup> These remarks sparked a flurry of reactions, including vehement criticisms from the Government of the People’s Republic of China,<sup>4</sup> subsequent clarifications by officials from

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2. The views as well as the translations of German legal sources and terms offered in this article are strictly those of the Author as a private individual.

3. For a full transcript of the interview, see Interview of Taiwan President Lee Teng-hui with *Deutsche Welle* Radio (July 9, 1999), at <http://www.taiwandc.org/nws-9926.htm> (last visited Apr. 8, 2001) (asserting that (1) Taiwan cannot be considered a “renegade province” because of “historical and legal viewpoints”; (2) the People’s Republic of China on the Chinese mainland has never ruled the sovereign state Republic of China and its territories of Taiwan, Penghu, Kinmen, and Matsu; (3) Taiwanese constitutional amendments have “designated cross-strait relations as a . . . special state-to-state relationship”; and (4) the concept of “one country, two systems” is not suitable for Taiwan); see also Seth Faison, *Taiwan President Implies His Island Is Sovereign State*, N.Y. TIMES, July 13, 1999, at A1; Michael Laris, *Taiwan Jettisons “One China” Formula*, WASH. POST, July 13, 1999, at A14.

4. E.g., *China’s Military Indignant Over Taiwan Leader’s Remarks*, CHINA DAILY, July 14, 1999, at <http://www.chinadaily.com.cn/highlights/taiwan/7152.htm> (last visited Apr. 8, 2001) (emphasizing the indignation of the People’s Liberation Army); *FM Spokesman on Lee Teng-Hui’s Separatist Remarks*, CHINA DAILY, July 12, 1999, at <http://www.chinadaily.com.cn/highlights/taiwan/7153.htm> (last visited Apr. 8, 2001) (providing the remark by Chinese Foreign Ministry Spokesman Zhu Bangzao that “Lee has gone too far on the dangerous road of playing with fire”); *Reunification Congress Deputies Criticize Taiwan Leader’s Remarks*, CHINA DAILY, July 15, 1999, at <http://www.chinadaily.com.cn/highlights/taiwan/7163.htm> (last visited Apr. 8, 2001) (printing the proposition that Lee “would be a sinner if he does not immediately stop traveling down this road”); see also Jeff Jacoby, *The End of “One China,”* BOSTON GLOBE, July 19, 1999, at A15 (reporting verbiage advanced by the Government of the People’s Republic of China that “any plot to challenge the ‘One-China’ principle . . . will fail . . . [and President Lee is] a criminal of the nation who will leave a stink for a thousand years”).

Taiwan,<sup>5</sup> and mixed pronouncements from different players in the United States.<sup>6</sup>

Dr. Lee Teng-hui's locution connotes a pattern molded by the late Chancellor of the Federal Republic of Germany, Willy Brandt (1968-74), who, against significant domestic resistance, based his policy of *détente* (*Entspannungspolitik*) on accepting the former German Democratic Republic as an equal.<sup>7</sup> After the completion of Germany's integration into the Western institutional, economic, and security frameworks that had dominated the Adenauer era,<sup>8</sup>

5. *E.g.*, STATEMENT FROM OFFICE OF PRESIDENT LEE TENG-HUI (July 16, 1999) (on file with author) (explaining that the President's "pragmatic, consistent, and innovative" statement carried a "three-fold significance" through: (1) the recognition that "[the People's Republic of China] has never exercised sovereignty over the Taiwan area"; (2) the continuity of policy in "promoting constructive dialogue and positive exchanges"; and (3) the opening of "room for innovations in cross-strait[s] relations"); STATEMENT FROM KOO CHEN-FU, TAIWAN CROSS-STRAIT NEGOTIATOR (July 30, 1999) (on file with author) (stating that a characterization of President Lee's remarks on the "two states theory" constitutes an oversimplification in light of the significance of the "special state-to-state relationship," which denotes (1) the "unique affection between the two sides"; (2) the unprecedented and unparalleled intensity of "cross-strait[s] exchanges in civil, commercial, as well as other sectors"; and (3) the "common will to pursue a unified China . . . on the basis of parity"). For Dr. Lee's political credos, see LEE TENG-HUI, *THE ROAD TO DEMOCRACY: TAIWAN'S PURSUIT OF IDENTITY* (1999).

6. For statements supportive of President Lee's posture, see, for example, Letter to the President, Senator Jesse Helms (Republican-North Carolina), Chairman of the Senate Foreign Relations Committee (July 21, 1999) (on file with author) (remarking that "[b]y having the courage to state the obvious—that the Republic of China on Taiwan is a de facto sovereign state—the distinguished President Lee has created an opportunity to break free from the anachronistic, Beijing-inspired [One-China] policy which has imprisoned U.S. policy toward China and Taiwan for years"); *Senators Write Clinton About Taiwan* (July 22, 1999), at <http://www.taiwandc.org/nws-9927.htm> (last visited Apr. 8, 2001) (citing Letter to the President, *supra*, and articulating that "while [U.S. policy does] not take a stand on the exact nature of Taiwan's status, [the authors] fully support democratically-elected President Lee and the people of Taiwan in their search for greater international status"). For critical positions, see, for example, Press Briefing, James P. Rubin, U.S. Dep't of State (July 13, 1999), at <http://secretary.state.gov/www/briefings/9907/990713db.html> (last visited Apr. 8, 2001) (observing that "[i]t is not helpful for the Taiwanese authorities to make statements that would make it harder to have dialogue"); Jacoby, *supra* note 4, at A15 (quoting James Foley of the U.S. Department of State with the remark that U.S. policy "is unchanged: Our 'One China' policy is longstanding and certainly well known").

7. James Lilley & Arthur Waldron, *Taiwan Is a "State"—Get Over It*, WALL ST. J., July 14, 1999, at A22 (observing that President Lee Teng-hui's state-to-state comment "follows almost verbatim what German Chancellor [and Nobel Peace Prize recipient] Willy Brandt said more than 30 years ago when he ended Bonn's long denial and embraced East Germany as an equal—thus beginning the process that led to German reunification").

8. For an overview of Germany's accession to the Council of Europe, the three European Communities, the North Atlantic Treaty Organization, the Western European Union, and the Organization for Economic Cooperation and Development, see, for example, MICHAEL SCHWEITZER & WALDEMAR HUMMER, *EUROPARECHT* 33-37 (1993); STAATSLEXIKON, STICHWORT "EUROPA" (Görres Gesellschaft ed., 1986).

Chancellor Brandt sought concrete steps for approaching the Eastern neighbors to lower tensions in Central Europe and improve inner-German relations.<sup>9</sup> Early in his tenure, Mr. Brandt proposed that the German Democratic Republic and the Federal Republic of Germany conclude a treaty on the mutual relations for the purpose of "arriving through regulated coexistence at togetherness."<sup>10</sup> Clarifying that his Government did not plan to recognize the German Democratic Republic under international law,<sup>11</sup> the Chancellor emphasized that the two states did not constitute foreign countries in relation to each other.<sup>12</sup> According to Mr. Brandt, the mutual relations between the Federal Republic of Germany and the German Democratic Republic were of a specific kind.<sup>13</sup> The offer, which was made in the context of renouncing the Hallstein doctrine<sup>14</sup> and forging the new conception of New East Policy (*Neue Ostpolitik*), ultimately resulted in the Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic (*Vertrag über die Grundlagen der Beziehungen zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik*).<sup>15</sup> The Treaty, which is also known as the Basic Treaty (*Grundlagenvertrag*), provided the agreement between the Federal Republic of Germany and the German Democratic Republic to develop good relations, desist from representing each other or exerting jurisdiction in the other's territory, and recognize that they constituted separate entities.<sup>16</sup> The Basic Treaty was designed to become the launching pad for a comprehensive treaty policy enveloping the Federal Republic of Germany and the German

9. Jochen Abr. Frowein, *Current Developments: The Reunification of Germany*, 86 AM. J. INT'L L. 152, 162 (1992).

10. For the original German language version of this quote, see BullBReg 1969 (132), 1121 ("um über ein geregeltes Nebeneinander zu einem Miteinander zu kommen").

11. *Id.*

12. *Id.*

13. *Id.*

14. The Hallstein doctrine treated the recognition of the German Democratic Republic by a third state as an unfriendly act toward the Federal Republic of Germany and, except in the case of the Soviet Union, advocated the severance of all diplomatic relations with the recognizing state. For a capsule summary of Walter Hallstein's biography, see *HANDELEXIKON DER EUROPÄISCHEN UNION* 293 (Wolfgang W. Mickel ed., 1998).

15. Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic (Basic Treaty), v.14.11.1972 (BGBl. II S. 423) (F.R.G.), 12 I.L.M. 16 (1973), reprinted in U.S. DEPT OF STATE, DOCUMENTS ON GERMANY: 1944-1985, at 1215 (1985); 1 THE FEDERAL REPUBLIC OF GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC IN INTERNATIONAL RELATIONS, SECOND SERIES: FROM COOPERATION TO UNIFICATION 395 (Günther Doeker-Mach & Lukas H. Meyer eds., 1991) [hereinafter F.R.G. & G.D.R. IN INTERNATIONAL RELATIONS].

16. Timothy Kearley, *German Division and Reunification, 1944-1990: An Overview via the Documents*, LAW LIBR. J., Winter 1992, at 1, 9.

Democratic Republic.<sup>17</sup> The Bavarian State Government challenged the constitutionality of the Basic Treaty under Germany's Basic Law.<sup>18</sup> The Federal Constitutional Court,<sup>19</sup> however, held that the

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17. For a comprehensive bibliography, see FUNDSTELLENNACHWEIS B, BEILAGE ZUM BUNDESGESETZBLATT TEIL II, 1989, ABSCHNITT: VERTRÄGE MIT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIC [BIBLIOGRAPHY B, ADDENDUM TO THE FEDERAL LAW GAZETTE, PART II, SECTION: TREATIES WITH THE GERMAN DEMOCRATIC REPUBLIC (1989)].

18. Grundgesetz [Basic Law] (F.R.G.). For a summary of the history and features of Germany's Basic Law, see, for example, Kearley, *supra* note 16, at 5 (noting that (1) in the summer of 1948, the Western allied military governors asked German officials in the western zones to convene a constituent assembly; (2) a committee produced the first draft of the Basic Law in August of that year; (3) a final draft was approved by the assembly nine months later; and (4) the Basic Law constitutes an occupation document, designed, according to its preamble, "to give a new order to political life for a transitional period"); Joseph M. McLaughlin, *The Unification of Germany: What Would Jhering Say?*, 17 FORDHAM INT'L L.J. 277, 281 (1994) (explaining that (1) the Basic Law (*Grundgesetz*) of West Germany was adopted on May 23, 1949; (2) the term "Constitution" (*Verfassung*) was avoided at the time because it was considered to potentially imply a permanent structure excluding East Germany; and (3) the [fourteen] sections and [almost 150] articles reflect the Basic Law's civil law tradition and "codify much of the federalist structure and individual rights [developed by the U.S. Supreme Court] through two centuries of interpretation"); Mathias Reimann, *Takeover: German Reunification Under a Magnifying Glass*, 96 MICH. L. REV. 1988, 1995 (1998) (noting that, when the division of Germany became clear in 1949, the Basic Law was drafted as a temporary constitution for the new Federal Republic of Germany); Bruno Simma, *Legal Aspects of East-West German Relations*, 9 MD. J. INT'L L. & TRADE 97, 101 (1985) (stating that under this view the Federal Republic of Germany constituted a "*Zweckverband nur administrativer Qualität*"—a purpose association of merely administrative quality).

19. For discussions of the Federal Constitutional Court (*Bundesverfassungsgericht*), see, for example, DIETER C. UMBACH & THOMAS CLEMENS, BUNDESVERFASSUNGSGERICHTSGESETZ: MITARBEITERKOMMENTAR UND HANDBUCH 699-1408 (1992) (explaining that the Federal Constitutional Court entertains a multitude of proceedings, which include: (1) forfeiture of basic rights; (2) political party prohibition; (3) election-and-seat evaluation; (4) impeachment of judges; (5) controversy among institutions; (6) federation-state controversy; (7) federation-state, state-state, and state-internal controversies; (8) federal constitutional court as state constitutional court; (9) abstract norms control; (10) concrete norms control; (11) determination of international law; (12) continuation of federal law; and (13) individual constitutional complaint); McLaughlin, *supra* note 18, at 285-87 (observing that (1) the Federal Constitutional Court serves as the final interpreter of the Basic Law but that it "takes a much more active role in the nuts and bolts of daily government than does the U.S. Supreme Court; (2) like the U.S. Supreme Court, it has the option to declare a measure null and void (*nichtig*) or merely incompatible (*unvereinbar*) with the Basic Law, which, in the case of a statutory provision, leaves the legislative branch with correcting the deficiency; (3) the Federal Constitutional Court, which "conducts . . . an on-going school of constitutional law" does not exercise general review; and (4) five "Supreme Courts—the Federal Court of Justice, the Federal Administrative Court, the Federal Social Court, the Federal Labor Court, and the Federal Finance Court—rule on all factual and legal other than constitutional questions").

Basic Treaty was not anti-constitutional.<sup>20</sup> After their admission into the United Nations<sup>21</sup> the Federal Republic of Germany and the German Democratic Republic exchanged permanent missions.<sup>22</sup> The New East Policy embodied in the Basic Treaty has been credited with having played a crucial role in the process of inner-German rapprochement that culminated with German reunification.<sup>23</sup>

This Article refreshes the historic German blueprint provided by the Basic Treaty. It explores the potential significance of the re-oriented German détente architecture for the relations between Beijing and Taiwan.<sup>24</sup> Rather than taking sides in one fashion or another, the Article intends to offer the proposition that unencumbered creativity in the long term may lead to results that were previously adjudged as inconceivable. In that sense, the paradigm associated with the Basic Treaty may assist the parties concerned with re-energizing the complex legal, political, philosophical, and psychological cross-strait kaleidoscope.

20. 36 BVerfGE 1 (1973) (F.R.G.). For the English-language translation of the entire decision, see 1 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (FEDERAL CONSTITUTIONAL COURT) FEDERAL REPUBLIC OF GERMANY 244-69 (1992) [hereinafter DECISIONS].

21. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 61 (1992).

22. Protocol on the Exchange of Permanent Missions Between the Federal Republic of Germany and the German Democratic Republic, v.15.3.1974 (BGBl. II S. 933) (F.R.G.), 13 I.L.M. 878 (1974), reprinted in U.S. DEPT OF STATE, *supra* note 15, at 1265; see also Paul E. Gallis, *The Unification of Germany: Background and Analysis of the Two-Plus-Four Talks*, in CONGRESSIONAL RESEARCH OFFICE, LEGAL ISSUES RELATING TO THE FUTURE STATUS OF GERMANY 17 (1990) (observing that the Federal Republic did not recognize the German Democratic Republic as a fully sovereign state based on the absence of free elections).

23. For voices crediting the efforts of the Brandt Government, see, for example, Frowein, *supra* note 9, at 162; Gallis, *supra* note 22, at 19.

24. For historical depictions, see, for example, JOSEPH BALLANTINE, FORMOSA: A PROBLEM FOR UNITED STATES FOREIGN POLICY (1952) (outlining, *inter alia*, the mile posts of the Chinese Revolution: (1) the fall of the Manchu Dynasty on October 10, 1911, a date that became known as the Double Ten; (2) the foundation of the Republic of China after the abdication of the last emperor in February 1912; (3) the tenure of Dr. Sun Yat-sen who started the National People's Party—the Kuomintang—to implement the Three Principles of the People (San Min Chu I) of Nationalism, Democracy, and People's Livelihood; (4) the takeover of the Kuomintang by General Chiang Kai-shek after Dr. Sun's death in 1925; (5) the Japanese invasion in 1937; and (6) the surrender of Japan in 1945); Chen, *supra* note 1, at 228-30 (narrating pre-revolution historical developments shared by the mainland and Taiwan: (1) the investigation of Taiwan by an exploratory group dispatched by the Sui Emperor Yang-ti in 605 AD; (2) the migration of Chinese from the coastal provinces of Fujian and Guangdong to Taiwan in the second half of the thirteenth century; (3) the first Japanese establishments in northern Taiwan and Dutch VOC settlements in southwestern Taiwan in the late sixteenth century; and (4) the attack on Taiwan by the Ch'ing and the subsequent incorporation of Taiwan as a Chinese prefecture and military district of Fujian province in the late seventeenth century).



## II. FLASHBACK: THE DÉTENTE PARADIGM OFFERED BY THE BASIC TREATY

### A. General Content

On November 8, 1972, the Basic Treaty was initialed and published, along with several supplementary texts.<sup>25</sup> The Treaty was signed on December 21, 1972.<sup>26</sup> Several other legal instruments, including protocols, declarations, and correspondence were attached.<sup>27</sup> Prior to the signing, the Government of the Federal Republic of Germany had sent a letter on German unity to the Government of the German Democratic Republic.<sup>28</sup> The legislative bodies of the Federal Republic of Germany considered, debated, and

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25. 36 BVerfGE at 3; DECISIONS, *supra* note 20, at 245-46; *see also* BullBReg 1972 (115) 1841, 1853 (providing the Treaty and a number of supplementary texts, including the indication that the Federal Government would "before signing the Treaty send a letter to the Government of the German Democratic Republic setting out its objectives in the national question").

26. 36 BVerfGE at 5; DECISIONS, *supra* note 20, at 247.

27. 36 BVerfGE at 5-6; DECISIONS, *supra* note 20, at 247-48 (listing (1) a protocol note to the effect that "in view of the differing legal positions on questions of assets . . . these could not be settled by the Treaty"; (2) two recorded declarations stating for the Federal Republic of Germany that "[n]ationality questions have not been regulated by the Treaty" and for the German Democratic Republic "[t]he German Democratic Republic takes it as a basis that the Treaty will facilitate regulation of nationality questions"; (3) two recorded declarations by the Contracting Parties on application for membership in the United Nations; (4) a recorded declaration of both heads of the delegation on the tasks of the Boundary Commission; (5) a recorded declaration by the head of the delegation of the German Democratic Republic on administrative relations; (6) a declaration by both parties on the extension of agreements and settlements to West Berlin; (7) a declaration by both parties on "political consultation"; (8) recorded declarations in connection with the exchange of letters on possibilities of work for journalists; (9) a declaration by both parties on the extension of the agreement on possibilities of work for journalists to West Berlin; (10) an exchange of letters of December 21, 1972, on the reuniting of families, the facilitation of travel, and improvements in the non-commercial movement of goods; (11) an exchange of letters of December 21, 1972, on the opening of four more border-crossing points; (12) an exchange of letters of December 21, 1972, containing the tenor of the notes of the Federal Republic of Germany to the three Western powers and of the German Democratic Republic to the Soviet Union on Article 9 of the Treaty; (13) an exchange of letters on postal and telecommunication services; (14) an exchange of letters on the application by both states for membership in the United Nations; and (15) an exchange of letters on the possibilities of work for journalists).

28. 36 BVerfGE at 6; DECISIONS, *supra* note 20, at 248.

adopted the ratification law for the Basic Treaty.<sup>29</sup> On June 21, 1973, the Treaty entered into force.<sup>30</sup>

The Basic Treaty consisted of ten articles.<sup>31</sup> It committed the Federal Republic of Germany and the German Democratic Republic to "develop normal neighborly relations with each other on the basis of equality of rights."<sup>32</sup> Moreover, the sovereign equality of all states, respect for independence, autonomy, and territorial integrity, the right of self-determination, the preservation of human rights, and the principle of non-discrimination were espoused.<sup>33</sup> The Treaty affirmed the inviolability of the existing borders.<sup>34</sup> Furthermore, the two states were held unable to represent the other internationally or act in the other's name.<sup>35</sup> In addition, the Basic Treaty pledged the promotion of peaceful relations and disarmament.<sup>36</sup> The Treaty

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29. Act of June 6, 1973, on the Treaty of December 21, 1972, Between the Federal Republic of Germany and the German Democratic Republic on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic (providing in its Article 1 that "[t]he [Basic] Treaty . . . including [the following listed legal instruments] . . . is assented to").

30. 36 BVerfGE at 7; DECISIONS, *supra* note 20, at 249 (explaining that, according to the promulgation in the Federal Gazette of June 22, 1973, the Treaty entered into force on June 21, 1973, "following the exchange of corresponding notes between the Government of the Federal Republic of Germany and the Government of the German Democratic Republic, which took place on 20 June 1973 in Bonn").

31. 36 BVerfGE at 3-5; DECISIONS, *supra* note 20, at 246-47.

32. Article 1 provides: "The Federal Republic of Germany and the German Democratic Republic will develop normal neighbourly relationships with each other on the basis of equality of rights." Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic (Basic Treaty), v.14.11.1972 (BGBl. II S. 423) (F.R.G.), *reprinted in* DECISIONS, *supra* note 20, at 246.

33. Article 2 provides:

The Federal Republic of Germany and the German Democratic Republic will be guided by the aims and principles embodied in the Charter of the United Nations, in particular the sovereign equality of all States, respect for independence, autonomy and territorial integrity, the right of self-determination, the upholding of human rights and non-discrimination.

*Id.*

34. Article 3 provides:

In accordance with the Charter of the United Nations, the Federal Republic of Germany and the German Democratic Republic will resolve their disputes exclusively by peaceful means and refrain from the threat or use of force.

They reaffirm the inviolability of the frontier existing between them now and in the future and commit themselves to unrestricted respect for their territorial integrity.

*Id.*

35. Article 4 provides: "The Federal Republic of Germany and the German Democratic Republic take the position that neither of the two States can represent the other internationally or act in its name." *Id.*

36. Article 5 provides:

further stated that the sovereign power of each state was confined to its state territory and that each party was to respect the other's independence and autonomy in internal and external affairs.<sup>37</sup> The normalization process was directed at resolving practical and humanitarian questions as well as cooperating in a broad suite of areas.<sup>38</sup> The Basic Treaty also announced the exchange of permanent representations.<sup>39</sup> It clarified that existing bilateral and multi-lateral treaties and agreements remained unaffected.<sup>40</sup> Finally, the Treaty imposed a ratification requirement and regulated the modalities of its entry into force.<sup>41</sup>

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The Federal Republic of Germany and the German Democratic Republic will promote peaceful relations among European States and contribute to security and co-operation in Europe. They support efforts towards reduction of forces and armaments in Europe, without disadvantages for the security of the parties being allowed thereby to arise.

The Federal Republic of Germany and the German Democratic Republic will, with the object of general and complete disarmament under effective international control, support efforts serving international security at limiting armaments and at disarmament, in particular in the area of nuclear weapons and other weapons of mass destruction.

*Id.*

37. Article 6 provides: "The Federal Republic of Germany and the German Democratic Republic base themselves on the principle that the sovereign power of each of the two States is confined to its State territory. They respect the independence and autonomy of each of the two States in internal and external affairs." *Id.* at 246-47.

38. Article 7 provides:

The Federal Republic of Germany and the German Democratic Republic declare their readiness, in the course of normalization of their relationships, to regulate practical and humanitarian questions. They will conclude agreements, in order on the basis of this Treaty and for their mutual advantage to develop and promote co-operation in the area of the economy, science and technology, transport, legal relations, posts and telecommunications, health, culture, sport, environmental protection and other areas. Details are regulated in the Additional Protocol.

*Id.* at 247.

39. Article 8 provides: "The Federal Republic of Germany and the German Democratic Republic will exchange permanent representations. They will be set up at the seats of the respective governments. Practical questions connected with the setting up of the representations will be regulated subsidiarily." *Id.*

40. Article 9 provides: "The Federal Republic of Germany and the German Democratic Republic agree that through this Treaty bilateral and multi-lateral international treaties and agreements formerly concluded by them or affecting them are unaffected." *Id.*

41. Article 10 provides: "This Treaty shall require ratification and shall enter into force on the day following exchange of corresponding notes . . ." *Id.*

## B. *Legal Challenge Before the Federal Constitutional Court*

### 1. The Petitions

The Bavarian State Government petitioned the Federal Constitutional Court to declare the ratification law null and void for being incompatible with the Basic Law.<sup>42</sup> The petitioner reasoned that the Treaty contravened the constitutional precept of maintaining Germany's national unity and infringed the constitutional duty of care and protection vis-à-vis Germans residing in the German Democratic Republic.<sup>43</sup>

The Federal Government requested a finding that the ratification law was compatible with the Basic Law.<sup>44</sup> It alleged that the petitioner, under the guise of advancing legal principles, read its purely political concepts into the Basic Law.<sup>45</sup>

### 2. The Holding

The Court unanimously rejected the petition.<sup>46</sup> It held that the abstract norms-control proceeding was admissible but unfounded.<sup>47</sup>

#### a. Admissibility<sup>48</sup>

The Court affirmed the admissibility of the petition.<sup>49</sup> The Court read the Basic Law's requirement of parliamentary control in the form of a ratification law for all treaties with foreign countries regulating the political relations of the Federation or relating to matters of Federal legislation<sup>50</sup> to include treaties with the German

42. For the legal requirements governing this abstract-norms control proceeding, see Article 93, No. 2, of the Basic Law in conjunction with §§13, No. 6, 76 *et seq.* of the Federal Constitutional Court Act; UMBACH & CLEMENS, *supra* note 19, at 972-1011. For an English-language version of the petition, see, for example, U.S. DEP'T OF STATE, *supra* note 15, at 1248; F.R.G. & G.D.R. IN INTERNATIONAL RELATIONS, *supra* note 15, at 405.

43. 36 BVerfGE 1, 7-10 (1973) (F.R.G.); DECISIONS, *supra* note 20, at 249-51 (further alleging that the Treaty violated the constitutional provisions with respect to Berlin).

44. 36 BVerfGE at 10-12; DECISIONS, *supra* note 20, at 251-52.

45. 36 BVerfGE at 10-12; DECISIONS, *supra* note 20, at 251-52.

46. 36 BVerfGE at 13-37; DECISIONS, *supra* note 20, at 253-69.

47. 36 BVerfGE at 13-37; DECISIONS, *supra* note 20, at 253-69.

48. Under admissibility (*Zulässigkeit*) the jurisdictional issues posed by the petition are addressed.

49. 36 BVerfGE at 13; DECISIONS, *supra* note 20, at 253.

50. Article 59 of the Basic Law (1973) [Representation at international law] provides:

Democratic Republic.<sup>51</sup> The Court therefore distilled the ratification law and the Basic Treaty, including the Additional Protocol, as the appropriate subjects of its review.<sup>52</sup>

The Court identified the Basic Law as the measuring standard and added several considerations for exercising its prerogative of giving binding interpretations of the Basic Law.<sup>53</sup> It explained that mere treaty law was not able to alter the existing constitutional order.<sup>54</sup> The Court emphasized that among several possible interpretations of a treaty only those complying with the Basic Law were allowed.<sup>55</sup> It added that adherence to judicial self-restraint meant that the Court would not "play politics" or intrude into the space created and delimited by the Basic Law for free policy-making by the other constitutional bodies.<sup>56</sup> The Court concluded that in light of the Basic Law's decision for comprehensive constitutional review, the executive should not seek to out-manuever pending proceedings, and therefore a treaty should not enter into force before an abstract norms-control judgment was handed down.<sup>57</sup>

(1) The Federal President represents the Federation at international law. He concludes treaties with foreign countries in the name of the Federation. He accredits and receives delegates.

(2) Treaties that regulate the political relations of the Federation or relate to matters of Federal legislative jurisdiction shall require the consent or participation, in the form of a Federal law, of the bodies respectively competent for such Federal legislation. For administrative agreements, the provision concerning the Federal administration shall apply correspondingly.

51. 36 BVerfGE at 13; DECISIONS, *supra* note 20, at 253.

52. *Id.* (noting that the review also included protocols and that other notes, reservations, declarations, and letters served as important interpretational sources in this context); *see also* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 300-01 n.11 (Karl-Heinz Seifert et al. eds., 1988) (emphasizing that, since ratification laws rank below the Basic Law, they may be the proper subject of abstract-norms control proceedings).

53. 36 BVerfGE at 13-14; DECISIONS, *supra* note 20, at 253-54.

54. 36 BVerfGE at 13-14; DECISIONS, *supra* note 20, at 253-54.

55. 36 BVerfGE at 13-14; DECISIONS, *supra* note 20, at 253-54.

56. 36 BVerfGE at 14; DECISIONS, *supra* note 20, at 254.

57. 36 BVerfGE at 15; DECISIONS, *supra* note 20, at 254 (admonishing that, should a situation exceptionally arise—as in the present case—where the executive deems the earlier entry into force of a treaty indispensable, then the constitutional organ responsible must answer for any consequences that may arise therefrom).

b. Substance<sup>58</sup>

The Court determined that the Basic Treaty was compatible with the Basic Law.<sup>59</sup> The Court prefaced the details of the Treaty's constitutional assessment with an analysis of the legal status of Germany and a description of the relevant legal frameworks.<sup>60</sup>

The Court explained that, pursuant to the Basic Law, the Federal Republic of Germany was "partially identical" with the German Reich that continued to exist despite its incapability to act.<sup>61</sup>

58. Under substance (*Begründetheit*) the merits of the petition are addressed.

59. 36 BVerfGE at 15-37; DECISIONS, *supra* note 20, at 255-69.

60. 36 BVerfGE at 15-20; DECISIONS, *supra* note 20, at 255-58.

61. 36 BVerfGE at 15-16; DECISIONS, *supra* note 20, at 255 (citing the Preamble and Articles 16, 23, 116, and 146 of the Basic Law in support of the proposition that the German Reich had not perished as a result of its capitulation or the exercise of foreign sovereignty by the Allied Occupation Powers). The Preamble of the Basic Law provides:

In awareness of their responsibility before God and Men, animated by the will to preserve its national and state identity and to serve world peace as an equal member in a united Europe, the German People, in the Länder of Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern, in order to give state life for a transitional time a new order, have, by virtue of their constituent power, adopted this Basic Law of the Federal Republic of Germany.

They have also acted on behalf of those Germans that were denied from participating. The entire German People remain asked to accomplish in free self-determination Germany's unity and freedom.

Article 16 of the Basic Law [Deprivation of citizenship, extradition, right of asylum] provides:

(1) The German citizenship must not be revoked. The loss of citizenship may arise only pursuant to statutory law, and, against the will of the person affected, it may arise only if the person concerned does not thereby become stateless.

(2) No German must be extradited to a foreign country. Persons persecuted for political reasons enjoy the right of asylum.

Article 23 of the Basic Law [Scope of applicability of the Basic Law] provides: "This Basic Law applies at first in the territory of the Länder of Baden, Bavaria, Bremen, Great-Berlin, Hamburg, Hesse, Lower Saxony, North-Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. In other parts of Germany, it shall be entered into force after their accession."

Article 116 of the Basic Law (1973) [Definition of the term "a German," re-naturalization] provides:

(1) Subject to the reservation of regulation by statute otherwise, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers as of December 31, 1937, as a refugee or expellee of German ethnic origin or as the spouse or descendant of such a person.

In this sense, the sovereign power of the Federal Republic of Germany, as a newly organized part of Germany, was confined to the area covered by the Basic Law.<sup>62</sup> The Court added that, because the German Democratic Republic was also part of Germany, it did not constitute a foreign country in relation to the Federal Republic of Germany.<sup>63</sup> The Court identified reunification in the exercise of self-determination as a constitutional command.<sup>64</sup> Within this constitutional parameter, the Court continued, the Federal Government enjoyed a margin of evaluation and discretion with respect to the political ways and means to achieve the reunification goal.<sup>65</sup> The Court, however, admonished that the Basic Law barred the Federal Republic of Germany and its constitutional organs from relinquishing the constitutionally mandated legal title (*Rechtstitel*) to the realization of German unity and self-determination.<sup>66</sup> Similarly, creating a title incompatible with the Basic Law or becoming involved with the establishment of an anti-constitutional position were disallowed.<sup>67</sup> According to the Court, all constitutional organs were obliged to maintain the claim to reunification alive domestically and defend it with vigor externally. Any political conduct that forfeited the reunification goal was constitutionally outlawed.<sup>68</sup> The Court

(2) Former German citizens who, between January 30, 1933, and May 8, 1945, were deprived of their citizenship on political, racial or religious grounds, and their descendants, are re-naturalized on application. They are considered as not having been deprived of their German citizenship if they have established their residence in Germany after May 8, 1945, and have not expressed a contrary will.

Article 146 of the Basic Law [Duration of validity of the Basic Law] provides: "This Constitution loses its validity on the day when a constitution that has been freely decided in free determination by the German people enters into force."

62. 36 BVerfGE at 17; DECISIONS, *supra* note 20, at 255 (explaining that the Federal Republic of Germany consisted of the Länder mentioned in Article 23 of the Basic Law, including Berlin, albeit subject to the so-called reservation of the Governors of the Western Powers).

63. 36 BVerfGE at 17; DECISIONS, *supra* note 20, at 256 (clarifying that inter-zonal and German internal trade were not foreign trade).

64. 36 BVerfGE at 17; DECISIONS, *supra* note 20, at 256 (emphasizing that the Preamble to the Basic Law had legal content).

65. 36 BVerfGE at 18; DECISIONS, *supra* note 20, at 256 (stating that the policy-making bodies, as opposed to the Court, are responsible for making political choices).

66. 36 BVerfGE at 18-19; DECISIONS, *supra* note 20, at 256-57.

67. 36 BVerfGE at 18-19; DECISIONS, *supra* note 20, at 256-57.

68. 36 BVerfGE at 18-19; DECISIONS, *supra* note 20, at 256-57 (allowing political abstinence from using a legal title as long as forfeiture was avoided, as well as the new expression "German nation" if it were to be synonymous with "German body politic;" however, barring the characterization of the Four-Power responsibility for Germany as a whole as the (last) peg for the continued existence of Germany as a whole).

noted that it was not called upon in this case to decide whether a sole claim to represent Germany as a whole (*Alleinvertretungsanspruch für Deutschland als Ganzes*) potentially held by the Federal Republic of Germany was rooted in the Basic Law.<sup>69</sup> In summary, the Court found that the Treaty had not left the constitutional bedrock.<sup>70</sup>

The Court then discussed the Basic Treaty within its broader contexts.<sup>71</sup> According to the Court, the Treaty was part of the Federal Government's comprehensive East Policy directed at détente and expressed in the Treaties of Moscow and Warsaw.<sup>72</sup> The Basic Treaty, which did not contain a time limitation nor a denunciation clause, constituted a fundamental reorientation of the relations between the Federal Republic of Germany and the German Democratic Republic and provided the basis for future legal specifications with respect to shaping the new coexistence and togetherness of the two states.<sup>73</sup> The Court observed that the Basic Treaty was embedded in more comprehensive and specific legal frameworks.<sup>74</sup> This, according to the Court, was evidenced by the Treaty's reference to the United Nations and its clause leaving intact the bilateral and multilateral international treaties and agreements that were concluded by the Federal Republic of Germany and the German Democratic Republic as well as those affecting the two states.<sup>75</sup> The Court stated that, even in the absence of a formal recognition of the German Democratic Republic by the Federal Republic of Germany, the German Democratic Republic was a state and subject of international law.<sup>76</sup> In light of the consistent previous practice of explicitly denying a formal recognition to the German Democratic Republic, the Court characterized the Federal Republic of Germany's new policy of détente, especially the conclusion of the Basic Treaty, as a factual recognition of a specific kind (*besonderer*

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69. 36 BVerfGE at 19-20; DECISIONS, *supra* note 20, at 257-58 (noting that the Court had never made a pronouncement with respect to such a sole claim).

70. 36 BVerfGE at 20; DECISIONS, *supra* note 20, at 258 (concluding that the Treaty was interpretable in a manner that did not conflict with the constitutional requirements of the Basic Law).

71. 36 BVerfGE at 20-24; DECISIONS, *supra* note 20, at 258-61.

72. 36 BVerfGE at 20; DECISIONS, *supra* note 20, at 258.

73. 36 BVerfGE at 21; DECISIONS, *supra* note 20, at 258-59 (noting that future concretizations through subsequent agreements and accords were subject to constitutional limits).

74. 36 BVerfGE at 21-22; DECISIONS, *supra* note 20, at 259 (invoking Articles 2, 3, and 9 of the Treaty).

75. 36 BVerfGE at 21-22; DECISIONS, *supra* note 20, at 259 (listing, *inter alia*, the Western Treaties, the German Treaty, and the Moscow and Warsaw Treaties).

76. 36 BVerfGE at 22; DECISIONS, *supra* note 20, at 259 (highlighting the significance attached to the formulas used in the political debate: "existing special relationships between the two states" and "the Treaty has a special nature corresponding with these special circumstances").



Art).<sup>77</sup> The Court found that the Treaty had a dual character because, by its type, it exhibited an international law nature<sup>78</sup> and, by its content, it regulated “*inter se* relations” (*inter-se-Beziehungen*)<sup>79</sup>—a formula used for describing the special legal closeness between the two parties.<sup>80</sup> The Court concluded that not every “two-state model” (*Zwei-Staaten-Modell*) for Germany was anti-constitutional.<sup>81</sup>

The Court finally assessed the details of the Basic Treaty.<sup>82</sup> The Court found that the Preamble to the Treaty<sup>83</sup> and the letter on German unity<sup>84</sup> evidenced that the Federal Government did not relinquish the legal title and ability to promote the national unity of the German people through free self-determination and peaceful means in consonance with the general principles of international law.<sup>85</sup> The Court characterized the border between the Federal Republic of Germany and the German Democratic Republic as a border in national law<sup>86</sup> based on the continued existence of Germany as a whole.<sup>87</sup> The border confirmation, the Court added, amounted to a new and additional recognition by treaty that was compatible with

77. 36 BVerfGE at 23; DECISIONS, *supra* note 20, at 259-60.

78. 36 BVerfGE at 24; DECISIONS, *supra* note 20, at 260 (explaining that the Treaty was governed by international law; however, it involved two states that are part of a still-existing—albeit incapable of acting for lack of reorganization—state of the whole of Germany with a single body politic).

79. 36 BVerfGE at 23; DECISIONS, *supra* note 20, at 260 (reasoning that (1) permanent representations, as opposed to ambassadors, were envisioned; (2) “corresponding notes” rather than instruments of ratification were exchanged; and (3) both parties did not consider trade as foreign trade).

80. 36 BVerfGE at 23; DECISIONS, *supra* note 20, at 260.

81. 36 BVerfGE at 24; DECISIONS, *supra* note 20, at 261.

82. 36 BVerfGE at 24-35; DECISIONS, *supra* note 20, at 261-68.

83. 36 BVerfGE at 25-26; DECISIONS, *supra* note 20, at 261-62 (interpreting the phrase “national question” as the Basic Law’s position in maintaining the national unity of the German people).

84. 36 BVerfGE at 25; DECISIONS, *supra* note 20, at 261 (emphasizing that the letter’s content was announced before the conclusion of the negotiations and delivered to the other party prior to signature of the Treaty).

85. 36 BVerfGE at 25-26; DECISIONS, *supra* note 20, at 261-62.

86. 36 BVerfGE at 26; DECISIONS, *supra* note 20, at 262 (distinguishing between administrative borders, borders of demarcation, borders of spheres of interest, borders of the area within the scope of application of the Basic Law, borders of the German Reich as of December 31, 1937, national borders, and borders that enclose a whole state and those inside a composite state).

87. 36 BVerfGE at 26; DECISIONS, *supra* note 20, at 262 (reasoning that this assessment was compatible with (1) the agreement between the parties to promote normal neighborly relations, embrace sovereign equality, and confine sovereign power to the respective state theory; and (2) the Basic Law’s claim to keep the national question open).

the Basic Law.<sup>88</sup> The agreement between the parties of confining the exercise of their sovereign power to their respective territories was subject to the interpretation stipulating the continued existence of Germany as a whole.<sup>89</sup> The Court emphasized that the Basic Law prohibited the Federal Government from entering into a dependency, by treaty, that rendered incorporation of other parts of Germany subject to a prior agreement with its treaty partners.<sup>90</sup> In this sense, the Court explained, the Federal Republic of Germany was constitutionally bound to retain its role as the sole master of any future decisions with respect to other parts of Germany that were willing and able to accede to the Basic Law.<sup>91</sup> The Court summarized that the inclusion of other parts of Germany into one free German state had to remain legally possible after the entry into force of the Basic Treaty.<sup>92</sup>

The Court found the Treaty compatible with the constitutional citizenship provisions.<sup>93</sup> The broad notion of German citizenship, according to the Court, simultaneously applied to the citizens of the Federal Republic of Germany as well as to those Germans not currently residing in the Federal Republic of Germany.<sup>94</sup> The Court explained that all Germans, including the citizens of the German Democratic Republic, within the ambit of the Basic Law, were

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88. 36 BVerfGE at 27; DECISIONS, *supra* note 20, at 263 (noting that the Treaty's stipulation with respect to the existence and course of the border did not stand in the way of a future change by mutual agreement pursuant to the rules of international law).

89. 36 BVerfGE at 27-28; DECISIONS, *supra* note 20, at 263 (invoking the special situation of the Federal Republic of Germany and the German Democratic Republic as sub-states of Germany as a whole that was incapable of action for want of organization).

90. 36 BVerfGE at 28-29; DECISIONS, *supra* note 20, at 263-64 (explaining that, as a consequence of Article 23 of the Basic Law, the Federal Republic of Germany regarded itself as territorially incomplete and legally open to its desired growth in conjunction with the restoration of German unity).

91. 36 BVerfGE at 29; DECISIONS, *supra* note 20, at 264 (adding that the precondition for bringing about accession is a constitutional process inside the German Democratic Republic and outside the legal influence of the Federal Republic of Germany).

92. 36 BVerfGE at 29; DECISIONS, *supra* note 20, at 264 (admonishing that this legal view established by the Basic Law was to be asserted against the German Democratic Republic's political conception of confining German unification to the rise of a future communist state).

93. 36 BVerfGE at 29-31; DECISIONS, *supra* note 20, at 264-65 (referring to Articles 16 and 116 (1) of the Basic Law).

94. 36 BVerfGE at 30; DECISIONS, *supra* note 20, at 264-65 (emphasizing that the Basic Treaty did not convert the German Democratic Republic into a foreign country in relation to the Federal Republic of Germany and that the Basic Treaty barred the Federal Republic of Germany from recognizing a revocation of German citizenship by another state).

entitled to all guarantees of the fundamental rights<sup>95</sup> and the full protection by the courts as well as other avenues, such as the Federal Republic of Germany's diplomatic representations and membership in international organizations.<sup>96</sup>

The Court scrutinized the various areas of cooperation contemplated by the Basic Treaty for future agreements against the measuring standards of the Basic Law.<sup>97</sup> The Court emphasized that, in the areas of postal and telecommunications, the Federal Government was disallowed from handing away the guarantee of the secrecy of letters, postal, and telecommunications,<sup>98</sup> as well as from restricting the freedom to exchange opinions and information.<sup>99</sup> Moreover, according to the Court, trade between the Federal Republic of Germany and the German Democratic Republic was barred from becoming foreign trade through the erection of customs borders of

95. 36 BVerfGE at 31; DECISIONS, *supra* note 20, at 265 (admonishing that any curtailment of the rights accorded by the Basic Law, including the asset questions referenced in the protocol note, through the Basic Treaty proper or its implementation vehicles was anti-constitutional).

96. 36 BVerfGE at 31-32; DECISIONS, *supra* note 20, at 266 (noting that the Federal Government was empowered to raise its voice, assert its influence, and act for the interests of the German nation as well as to provide assistance whenever a German approached an office of the Federal Republic of Germany).

97. 36 BVerfGE at 33-35; DECISIONS, *supra* note 20, at 267-68 (referring to the additional protocol on Article 7 of the Basic Treaty).

98. 36 BVerfGE at 33; DECISIONS, *supra* note 20, at 267 (invoking Article 10 of the Basic Law). Article 10 of the Basic Law (1973) [Privacy of letters as well as postal and telecommunications] provides:

(1) The privacy of letters as well as the privacy of postal and telecommunication are inviolable.

(2) Restrictions may only be ordered pursuant to statutory law. If a restriction serves the protection of the free democratic basic order or the patrimony or security of the Federation or a State, the statutory law may stipulate that the person concerned shall not be informed and that the recourse to the courts shall be replaced by the review through the bodies and auxiliary bodies appointed by Parliament.

99. 36 BVerfGE at 33; DECISIONS, *supra* note 20, at 267 (referencing Article 5 of the Basic Law). Article 5 of the Basic Law [Freedom of opinion] provides:

(1) Everyone has the right to freely express and disseminate his opinion in word, writing, and image, and to freely inform himself from generally accessible sources without hindrance. The freedom of the press and the freedom of reporting by means of broadcasts and films are guaranteed. There will be no censorship.

(2) These rights are subject to the limitations in the provisions of the general statutes, in statutory provisions for the protection of the youth, and in the right to personal honor.

(3) Art and science, research and academia are free. The freedom of teaching does not release one from the allegiance to the constitution.

any type.<sup>100</sup> The Court further held that the Treaty was unable to alter the independence of developing television and broadcasting programs<sup>101</sup> or to restrict the freedom of association.<sup>102</sup> The Court added that the Treaty did not dispense the federal and state institutions from their constitutional duty to keep the public consciousness alive with respect to the common features as well as the ideological, political, and social distinctions between the Federal Republic of Germany and the German Democratic Republic.<sup>103</sup> The Court clarified that the practices at the border between the Federal Republic of Germany and the German Democratic Republic, including the wall, barbed wire, free-fire zones, and the order to shoot, were incompatible with the Treaty.<sup>104</sup> In sum, the Court held that the Basic Treaty, in the interpretation advanced in the decision, did not contradict the Basic Law.<sup>105</sup>

### c. Observations

The Basic Treaty decision ranks among the classics in the history of the Federal Constitutional Court. It reflects the Court's unique methodology and cautious, yet determined, adjudication of politically charged controversies.

The Court interpreted the Basic Treaty in such a way that it was not found violative of the Basic Law's requirement for the German

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100. 36 BVerfGE at 33; DECISIONS, *supra* note 20, at 267.

101. 36 BVerfGE at 33-34; DECISIONS, *supra* note 20, at 267 (explaining that the fundamental right under Article 5 of the Basic Law trumped any potential assertion by the German Democratic Republic that certain broadcasts contradicted the content and spirit of the Treaty as an intervention in its internal affairs).

102. 36 BVerfGE at 34; DECISIONS, *supra* note 20, at 267-68 (reasoning that the formation of associations in accordance with the Basic Law was not amenable to any restriction even if the German Democratic Republic found their goals and propaganda incompatible with the content and spirit of the Treaty). Article 9 of the Basic Law [Freedom of association and coalition] provides that: "(1) All Germans have the right to form associations and societies; (2) Associations whose purposes or activities conflict with the criminal statutes or direct themselves against the constitutional order or the concept of international understanding, are prohibited."

103. 36 BVerfGE at 34; DECISIONS, *supra* note 20, at 268 (stating that any attempt to limit the freedom of the Federal Government in this sphere was contrary to the Treaty).

104. 36 BVerfGE at 35; DECISIONS, *supra* note 20, at 268 (qualifying the Treaty as an additional basis for the Federal Republic of Germany to bring about the abolition of these inhuman conditions).

105. 36 BVerfGE at 35-37; DECISIONS, *supra* note 20, at 268-69 (clarifying the significance of the grounds of the decision for the appropriate interpretation of the Treaty in full compliance with the Basic Law, which is predicated upon (1) the dissent between the Federal Republic of Germany and the German Democratic Republic on the "national question"; (2) the rise of follow-up treaties; and (3) the German Democratic Republic's full cognizance of the Federal Republic of Germany's constitutional requirements).

people to work for unity.<sup>106</sup> The Court saved the Basic Treaty through a technique that is known as “interpretation in conformance with the constitution” (*verfassungskonforme Auslegung*).<sup>107</sup>

Deciding that under the Basic Treaty Germany could still be conceived as one nation, that had been reorganized temporarily into two entities, the Court advanced the position that the German state represented by the Reich never ceased to exist.<sup>108</sup> This was the premise of the four principal continuation theories (*Fortbestandstheorien*), which held that the German state did not perish with the surrender in 1945<sup>109</sup> or at any time later.<sup>110</sup> The state-nucleus theory (*Staatskerntheorie*) asserted the identity of the Federal Republic of Germany and the German Reich, however, distinguished between the state territory and the scope of application of the Basic Law.<sup>111</sup> The shrink-state theory (*Schrumpfstaatstheorie*) posited that the state territory of the German Reich was reduced to the state territory of the Federal Republic of

106. Kearley, *supra* note 16, at 9 (emphasizing the Constitutional Court's finding that under the Basic Treaty, Germany could still be conceived of as being one nation that had been reorganized temporarily as two entities because, among other things, the Preamble included the phrase “without prejudice to the differing views of the Federal Republic of Germany and the German Democratic Republic on questions of principle, including the national question”).

107. UMBACH & CLEMENS, *supra* note 19, at 1004 (explaining that (1) the technique is applied when the wording and purpose of the tested legal provisions allow several readings; (2) the Federal Constitutional Court in its role as “negative legislator” is barred from intruding into the sphere of the legislator through imposition of a specific interpretation; (3) the technique employed by the Court reflects the unity of the legal order, the presumption of constitutional conduct for the legislative branch, and the respect for the tasks bestowed upon the democratically legitimated legislator; (4) this type of interpretation does not exhibit clear contours; (5) the route is foreclosed if the text under scrutiny is clear and unambiguous; and (6) the interpretation must not change or basically re-determine the contents and purpose of the tested legal provision).

108. MICHAEL SCHWEITZER, *STAATSRECHT III: STAATSRECHT, VÖLKERRECHT, EUROPARECHT* 195-96 n.481 (1995).

109. For the surrenders signed at Rheims and at Berlin, see *Terms Between the United States of America and the Other Allied Powers and Germany, Signed at Rheims May 7, 1945 and at Berlin May 8, 1945*, 59 Stat. 1857 (1945).

110. DIETER BLUMENWITZ, *WHAT IS GERMANY? EXPLORING GERMANY'S STATUS AFTER WORLD WAR II* 30 (1989) (diagnosing that the sovereignty of the occupation forces lay over Germany like a blanket but did not interrupt the continuity of German statehood); GERMAN INFORMATION CENTER, *RELATIONS BETWEEN THE TWO STATES IN GERMANY* 1, 2 (1987) (emphasizing that “Germany continue[s] to exist, although under the responsibility of the four powers” and that “the legal status of Germany as a whole has never been altered and exists up to the present time”); Gallis, *supra* note 22, at 7, 17 (observing that despite the requirement of unconditional surrender, the division of Germany into four sectors, and the imposition of an occupation regime by the Allies, “both the Federal Republic and the Western Allies continue to hold the view that the whole German state was neither annexed nor abolished at Yalta or Potsdam, or by any succeeding conventions or agreements”).

111. SCHWEITZER, *supra* note 108, at 195 n.478.

Germany.<sup>112</sup> The roof theory (*Dachtheorie*) diagnosed that the German Democratic Republic and the Federal Republic of Germany were two legal entities existing under the one roof of the invisible, but extant, German Reich.<sup>113</sup> The partial-identity theory (*Teilidentitätstheorie*) contended that the Federal Republic of Germany was (at least partially) identical with the Reich and exerted German state power as the allies relinquished it,<sup>114</sup> even though the Federal Republic of Germany did not control all of the territory formerly belonging to the Reich.<sup>115</sup> In contrast to the continuation teachings, the two main termination theories (*Untergangstheorien*) held that the German Reich perished as a subject of international law due to the unconditional capitulation or certain subsequent events.<sup>116</sup> The total-conquest theory (*Debellationstheorie*) provided that the surrender of the German Reich and the takeover of the government by the allied powers extinguished

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112. *Id.* (using the term interchangeably with core state theory, *Kernstaatstheorie*).

113. Georg Ress, *Germany, Legal Status After World War II*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 191, 197-98 (1987) (explaining that the occupation powers were fiduciaries in the exercise of government power on behalf of the German Reich which continued to exist as a state albeit incapable of acting).

114. For documentation in support of the progressive sovereignty gains of the Federal Republic of Germany, see Kearley, *supra* note 16, at 4-8 (listing for the time interval between 1949 and 1955 the following main documents: (1) Agreements Between the United States of America, France, and the United Kingdom Respecting Basic Principles for Merger of the Three Western German Zones of Occupation, Apr. 8, 1949, 63 Stat. 2817, 140 U.N.T.S. 196, *reprinted in* U.S. DEPT OF STATE, *supra* note 15, at 215; (2) Occupation Statute Defining the Powers to be Retained by the Occupation Authorities, Apr. 8, 1949, *reprinted in* U.S. DEPT OF STATE, *supra* note 15, at 212; 1 F.R.G. & G.D.R. IN INTERNATIONAL RELATIONS, *supra* note 15, at 85; (3) Letter from the Military Governors of the Three Western Zones of Occupation to the President of the West German Parliamentary Council Approving, with Reservations, the Basic Law for the Federal Republic of Germany, May 12, 1949, *reprinted in* U.S. DEPT OF STATE, *supra* note 15, at 260; 1 F.R.G. & G.D.R. IN INTERNATIONAL RELATIONS, *supra* note 15, at 75; (4) Convention on Relations Between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 U.S.T. 4251, *amended by* Schedule I of the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 25, 1954, 331 U.N.T.S. 327; *reprinted in* U.S. DEPT OF STATE, *supra* note 15, at 425; 1 F.R.G. & G.D.R. IN INTERNATIONAL RELATIONS, *supra* note 15, at 111; (5) Protocol on Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, 331 U.N.T.S. 253, *reprinted in* U.S. DEPT OF STATE, *supra* note 15, at 434; 2 F.R.G. & G.D.R. IN INTERNATIONAL RELATIONS, *supra* note 15, at 32; and (6) Proclamation by the Allied High Commission Revoking the Occupation Statute and Abolishing the Allied High Commission and the Offices of the Land Commissioners in the Federal Republic of Germany, May 5, 1955, *reprinted in* U.S. DEPT OF STATE, *supra* note 15, at 444).

115. SCHWETZTER, *supra* note 108, at 195 n.478.

116. *Id.* at 195 n.477 (providing that the proponents of this theory offer various events with respect to the alleged collapse of the German Reich: (1) the establishment of the Federal Republic of Germany and the German Democratic Republic in 1949; (2) the recognition of full sovereignty by the respective occupation powers in 1954; and (3) the entry into force of the Basic Treaty in 1973).

the element of state power and replaced it with a "condominium."<sup>117</sup> The dismemberment theory (*Dismembrationsthorie*) stipulated that the German Reich split into two new parts that were not her legal successors.<sup>118</sup>

The legal positions of the German Democratic Republic and the Federal Republic of Germany changed several times. The German Democratic Republic initially asserted its full identity with Germany as a whole and denied the existence of two German states.<sup>119</sup> After a short flirt with the roof theory, the German Democratic Republic switched to the total-conquest theory arguing that, in the wake of the extinction of the German Reich, two independent successor states had emerged.<sup>120</sup> The Federal Republic of Germany viewed itself as the only legitimate successor to German state power formerly exerted by the Reich.<sup>121</sup> The associated claim to sole representation of Germany as a whole in the international arena, however, failed vis-à-vis the Western Powers and the other countries at large.<sup>122</sup> The New East Policy exhibited aspects of the shrink state and roof theories.<sup>123</sup> The Federal Constitutional Court tilted toward the partial-identity theory.<sup>124</sup> The Federal Republic of Germany most ostensibly expressed its assertion of responsibility for Germany as a whole in the area of nationality and citizenship.<sup>125</sup> The case law of the

117. See generally Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518 (1945). For a definition of condominium, see VON GLAHN, *supra* note 21, at 67 ("[a] territory jointly governed by two or more states").

118. SCHWEITZER, *supra* note 108, at 194 n.477.

119. Constitution of the German Democratic Republic, art. 1, *reprinted in* U.S. DEPT OF STATE, *supra* note 15, at 278 (claiming that Germany is an "indivisible democratic republic" and that there is "only one German nationality").

120. JENS HACKER, *DER RECHTSSTATUS DEUTSCHLANDS AUS DER SICHT DER DDR* 137, 154 (1974); see also Kearley, *supra* note 16, at 3 (noting that, as the policy of the German Democratic Republic changed in this regard, so did the relevant wording of later constitutions).

121. 1 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 326 (1963); Frowein, *supra* note 9, at 157 n.30 (explaining that (1) the Federal Republic of Germany had always considered itself to be the continuation of the German state founded in 1867-1871; (2) in 1867, the North German Federation, *Norddeutscher Bund*, was established under the political leadership of Prussia; and (3) pursuant to the generally accepted view, the southern German states acceded to this federation in 1871).

122. SCHWEITZER, *supra* note 108, at 195 n.480.

123. *Id.*

124. For another leading case, see the Teso Decision, Judgment of Oct. 21, 1987, 77 BVerfGE 134 (1987) (providing that the state Federal Republic of Germany exhibited "subject identity" with the "subject of international law German Reich").

125. Frowein, *supra* note 9, at 161-62 (explaining that (1) in the minds of the German people the existence of a common German nationality was the most important bond with Germany as a whole; (2) pursuant to Article 116 of the Basic Law persons

Federal Constitutional Court basically confirmed the broad approach to German nationality.<sup>126</sup>

International law suggested that the German Reich had not perished.<sup>127</sup> At the same time, however, the dismemberment of the German Reich and subsequent rise of two new states<sup>128</sup> or, in the alternative, the secession of the German Democratic Republic and corresponding shrinking of the German Reich to the territory of the Federal Republic of Germany<sup>129</sup> remained plausible constructions. The assessment problems associated with evidencing the processes underlying a status determination for Germany was for practical purposes resolved on the basis of divided-state or two-states models.<sup>130</sup> This pragmatic approach constituted the basis for

who held German nationality in 1949 are German in the constitutional sense; (3) the Federal Republic of Germany included in the ambit of the provision all those who had acquired German nationality in accordance with legislation; (4) for those who also held German Democratic Republic nationality, German nationality provided an "open door"; (5) all citizens of the German Democratic Republic were entitled to place themselves under the protection of the Federal Republic; (6) the Federal Republic of Germany convinced many states of the practice of letting the individual decide which of the two German nationalities he or she wanted to invoke; and (7) the justification for that practice arose from the special status of Germany and the persistent bar to the free exercise of self-determination endured by the German people).

126. 77 BverfGE at 137 (finding that persons naturalized in the German Democratic Republic acquired German nationality).

127. SCHWEITZER, *supra* note 108, at 196 n.483 (reasoning that the four allied powers asserted rights and responsibilities for Germany as a whole).

128. *Id.*

129. *E.g.*, Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 803 (1996) (offering that valid instances of secession should contain the following three elements: "(1) the territory in question must have the traditional characteristics of a state; (2) the prospective state must be willing to follow the principles laid out in the U.N. Charter; and, (3) the international community should demand that the prospective new state obtain the consent and follow the applicable laws of its current sovereign (the 'prospective predecessor')"; Salvatore Massa, *Secession by Mutual Assent: A Comparative Analysis of the Dissolution of Czechoslovakia and the Separatist Movement in Canada*, 14 WIS. INT'L L.J. 183, 218 (1995) (presenting arguments advanced in support of a right to secession: "(1) the 'liberal democratic theory,' (2) human rights, (3) a 'calculation of legitimacy,' and (4) a territorially based test that evaluates the nature and extent of a historical grievance and whether such grievance has been kept alive"). For case evaluations, see, for example, SCHWEITZER, *supra* note 108, at 196 n.483 (qualifying, in light of reunification, the temporary existence of the German Democratic Republic as a failed attempt at succession); Andreas J. Jacovides, *Cyprus—The International Law Dimension*, 10 AM. U. J. INT'L L. & POL'Y 1221 (1995) (condemning the "attempted secession").

130. For a discussion of the divided state, see, for example, VON GLAHN, *supra* note 21, at 61 (offering that a divided state is "[a state] divided into two entities, each equipped with an operative government").



admitting the Federal Republic of Germany and the German Democratic Republic to the United Nations.<sup>131</sup>

Without transcending into the realm of clairvoyance, the Federal Constitutional Court's Basic Treaty decision identified the constitutional lever for German reunification<sup>132</sup>—the exercise of the right to self-determination coupled with the process mechanism of accession.<sup>133</sup> When the German Democratic Republic dissolved and merged into the existing state subject to international law—Federal Republic of Germany,<sup>134</sup> a formal referendum<sup>135</sup> was not held.<sup>136</sup> Thus, the exact scope of the right, especially the identity of those entitled to make the determination—the peoples in each German state separately or the German people as a whole—was never fully vetted.<sup>137</sup> In contrast to the Constitution of the German Democratic

131. *Id.*; see also Parris Chang & Kok-ui Lim, *Taiwan's Case for United Nations Membership*, 1 UCLA J. INT'L L. & FOREIGN AFF. 393, 425 (1996-97) (stating that (1) admission to the United Nations as a divided country is contingent on the equivalence of qualifications held by the competing governments and the mutual acquiescence of the rival governments; and (2) admission for a divided German state occurred only after a *détente* was reached between the two rivals).

132. 36 BverfGE 1, 28-29 (1973) (F.R.G.); DECISIONS, *supra* note 20, at 263-64.

133. For an analysis of Article 23 of the Basic Law, see GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, *supra* note 52, at 203-05 nn.1-5.

134. German reunification featured self-determination within an enlargement scenario. For the right to self-determination, see Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES 2625 (1970) (including in the right "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people").

135. Massa, *supra* note 129, at 209 (providing that (1) state practice acknowledges the use of plebiscites in self-determination; (2) the concept of establishing a referendum does not in itself constitute an expression of self-determination but rather a mechanism for gaging the future political status of a territory; and (3) "[g]enerally, the principle of plebiscites has been adhered to with exceptions in cases where rival claims of sovereignty exist"); see also LAWRENCE T. FARLEY, PLEBISCITES AND SOVEREIGNTY: THE CRISIS OF POLITICAL ILLEGITIMACY 145 (1986) ("[p]olitical legitimacy arises from the people's will—it does not descend deductively from the Westphalian principles of state sovereignty").

136. PETER E. QUINT, THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN REUNIFICATION 52-53 (1997) (asserting that theoretically the Federal Republic of Germany had no choice to accept the accession; in reality the choices were made by the political leadership of both states); Frowein, *supra* note 9, at 159 (suggesting that the outcome of the last elections in the German Democratic Republic was considered a sufficient expression of the desire for reunification); Reimann, *supra* note 18, at 1998 n.20 (diagnosing that "[t]he takeover was 'friendly' because [the Government of] the German Democratic Republic . . . cooperated"; and (2) "[a]lthough the Eastern government actually voted for unification, it is highly questionable whether it would have supported in all regards the manner in which unification ultimately took place").

137. Frowein, *supra* note 9, at 153-54 n.10 (observing that "[i]t is a moot question . . . to what extent such a right would have existed if only a minority in the

Republic,<sup>138</sup> the Basic Law of the Federal Republic of Germany provided for the constitutional accession of other parts of Germany.<sup>139</sup> This voluntary process,<sup>140</sup> which involved the extension of the Basic Law to the newly incorporated territories,<sup>141</sup> had already been successfully tested during the entry of the Saar in 1956.<sup>142</sup> The alternative route offered by the Basic Law seemed to envisage the election of an all-German constituent assembly tasked with drafting a constitution for a reunited Germany. Neither the nature and requirements of this provision nor its relationship to the accession option were ever settled with finality.<sup>143</sup> The interim approach of establishing a more or less loose confederation between the two German states for a transition period was only briefly discussed.<sup>144</sup> The accession option prevailed because it proved more expedient.<sup>145</sup> The principal political actors considered time as being of the

[German Democratic Republic] had opted for unification and a majority could only have been formed by including the people of the Federal Republic of Germany" and that "[u]nder German constitutional law, as well as under public international law, it seems that the Federal Republic would have had to respect a decision by the majority in the [German Democratic Republic] to retain a second German state"); *see also* Karl Doehring, *Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts*, 14 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 7 (1974).

138. QUINT, *supra* note 136, at 48 (observing that the German Democratic Republic constitution of 1968, as revised in 1974, envisaged the division of Germany as final and thus did not provide for unification at all).

139. Basic Law, art. 23; *see also* Reimann, *supra* note 18, at 1995 n.14 (emphasizing that (1) Article 23 of the Basic Law, in its original version, has since become obsolete; (2) after German reunification and renunciation of all claims to the territory east of the Oder and Neisse, now Poland, no other parts left to accede; and (3) the original text of the provision has been replaced with a completely different provision on the role of Germany in the European Union).

140. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, *supra* note 52, at 205 n.5 (commenting that the Basic Law renounces the instrument of annexation).

141. Kearley, *supra* note 16, at 10 (noting that no new state was created; rather the Federal Republic of Germany was expanded by the incorporation of the former German Democratic Republic); Reimann, *supra* note 18, at 1996 (observing that the Basic Law of the Federal Republic of Germany simply became the constitution for the reunited Germany).

142. For more detail, see Ingo von Münch, *Zum Saarvertrag vom 27. Okt. 1956*, 18 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES RECHT (ZAÖRV) 1 (1957-58).

143. Reimann, *supra* note 18, at 1995-96 (observing that the question of a potential requirement for a new constitution upon reunification under Article 146 of the Basic Law remained open).

144. QUINT, *supra* note 136, at 47-48; *see also* VON GLAHN, *supra* note 21, at 57-58 (offering that "[c]onfederations are encountered when a number of independent states are linked by treaty in a union with central governmental organs of its own, interested with specific powers over the member states but [in contrast to federal states] not over the citizens of those states").

145. QUINT, *supra* note 136, at 82, 87 (offering that "the spirit of article 23" triumphed over "the spirit of article 146" and that a constitutional compromise of any sort thus did not occur).

essence.<sup>146</sup> Less than a year after the collapse of the Berlin Wall, the accession process culminated in the entry into force of the Unification Treaty (*Einigungsvertrag*)<sup>147</sup> and the Final Settlement with respect to Germany.<sup>148</sup>

### III. SNAPSHOT: THE CROSS-STRAIT STALEMATE

The positions advanced by the People's Republic of China and Taiwan reflect the deep fault lines that exist in determining and achieving a post-reunification end state.

#### A. *The Position of the Government of the People's Republic of China*

The Government of the People's Republic of China advocates the One-China principle as the sole appropriate template for achieving

146. Frowein, *supra* note 9, at 154 n.12 (noting that "[a]lthough such a procedure was possible in theory, it certainly did not meet the requirements of the situation in 1989-1990").

147. Treaty on the Establishment of German Unity, Aug. 31, 1990, v.28.9.1990 (BGBl. II S. 889), 30 I.L.M. 457 (1991), *amended by* Agreement on the Execution and Interpretation of the Unification Treaty, Sept. 18, 1990, v.28.9.1990 (BGBl. II S. 1239); *see also* Kearley, *supra* note 16, at 10 (observing that (1) the Unification Treaty, which went into effect on October 3, 1991, contains only 45 articles but has attached to it three annexes of some 230 pages detailing how unification is to be accomplished; (2) pursuant to Article 1, unification was achieved through the accession of the German Democratic Republic to the Federal Republic of Germany's Basic Law; (3) the Unification Treaty also changes the Basic Law in several respects; and (4) the Unification Treaty rendered most of the Treaty Establishing a Monetary, Economic and Social Union (*Staatsvertrag*), May 18, 1990, v.25.6.1990 (BGBl. II S. 518), 29 I.L.M. 1108 (1990), superfluous but did not abrogate it).

148. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, S. TREATY DOC. NO. 101-20, at 14 (1990), 29 I.L.M. 1186 (1990); Exchange of Notes Concerning the Relations Convention and the Settlement Convention, Sept. 28 1990, 30 I.L.M. 454 (1991); Declaration Suspending the Operation of Quadripartite Rights and Responsibilities, Oct. 1, 1990, 30 I.L.M. 555 (1991); *see also* Frowein, *supra* note 9, at 160-62 (noting that (1) "[f]orty-five years, three months, and six days after the four Allied powers assumed supreme authority over Germany, they agreed to terminate their rights; and (2) over the centuries, "German constitutional structures have frequently been established or affected by international treaty systems," as illustrated by the peace treaties concluded after the Thirty Years' War in 1648, the settlement after the Napoleonic Wars in 1815, and the Versailles Treaty of 1919); Kearley, *supra* note 16, at 10-11 (explaining that the final settlement agreement between Germany, the United States, the United Kingdom, France, and the U.S.S.R. resolved the issues that remained between the World War II adversaries, "end[ed] the artificial division of Germany and Berlin . . . [and] terminate[d] all remaining Four-Power rights and responsibilities for Berlin and for Germany as a whole"). For a discussion of German reunification and the European Communities, *see, for example*, Frowein, *supra* note 9, at 160 (offering that the supranational framework "amounted in many respects to an additional constitutional dimension").

the orderly and peaceful reunification between the mainland and Taiwan.<sup>149</sup> The three-pronged concept postulates China's sovereignty and territorial integrity.<sup>150</sup> According to the doctrine, only one China exists in the world; Taiwan forms an inalienable part of China, and the Government of the People's Republic of China represents the sole legal government for the whole of China.<sup>151</sup> The Government of the People's Republic of China asserts that China has not split into two states.<sup>152</sup> Taiwan merely constitutes a contumacious province.<sup>153</sup> In the international arena, the replacement of Taiwanese representatives with a delegation from the People's Republic of China

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149. TAIWAN AFFAIRS OFFICE & INFORMATION OFFICE OF THE STATE COUNCIL, THE ONE-CHINA PRINCIPLE AND THE TAIWAN ISSUE pt. II (Feb. 22, 2000), at <http://www.chinadaily.com.cn/highlights/taiwan/whitepaper.html> [hereinafter TAIWAN AFFAIRS OFFICE, WHITE PAPER] (last visited Apr. 8, 2001) (advising that (1) "[t]he One-China Principle is the foundation stone for the Chinese government's policy on Taiwan"; (2) "[o]nly by adhering to the One-China Principle can peaceful reunification [and stability in the Asia-Pacific region] be achieved"; and (3) "on the premise of the One-China Principle, any matter can be negotiated").

150. *Id.* pt. I (asserting that the One-China principle is "both de facto and de jure . . . unshakable").

151. *Id.* (presenting the mainland's account of critical historic stages in support of the One-China proposition: (1) the unequal Treaty of Shimonoseki of April 1895, which led to Japanese occupation of Taiwan; (2) the Japanese attack against China of July 1937; (3) the Proclamation of China's Declaration of War Against Japan of December 1941, which announced the abrogation of all treaties, agreements and contracts governing Sino-Japanese relations, as well as the intent to recover Taiwan; (4) the Cairo Declaration of 1943, which stipulated that Japan should return to China certain territories, including Northeast China, Taiwan and the Penghu Archipelago; (5) the Potsdam Proclamation of 1945, which announced that "[t]he terms of the Cairo Declaration shall be carried out"; (6) the Japanese surrender of August 1945, which promised compliance with the obligations established in the Potsdam Proclamation; (7) the recovery of Taiwan by the Chinese Government on October 25, 1945; (8) the proclamation of the Central People's Government of the People's Republic of China on October 1, 1949, which replaced the Republic of China; and (9) the long-standing support of the One-China Principle by the Taiwanese authorities themselves).

152. *Id.* pt. IV (arguing that (1) since 1949, the Government of the People's Republic of China enjoys and exercises inseparable state sovereignty over the whole of China, including Taiwan; (2) the international community at large recognizes the One-China Principle; and (3) only "the intervention of foreign forces and the obstruction of the separatist forces in Taiwan" have thus far prevented a settlement of the Taiwan question).

153. *Id.* pts. I, II, IV (advising that (1) the Government of the People's Republic of China replaced the Government of the Republic of China and brought "the historical status of the Republic of China to an end"; (2) the Government of Taiwan "has always remained only a local authority in Chinese territory"; (3) "[a]lthough the two sides of the Straits remain to be reunified, the long-term existence of this abnormal situation has not imbued Taiwan with a status and rights in international law, nor can it change the legal status of Taiwan as a part of China"; and (4) in light of the applicable domestic and international law as well as the proper construction of the concepts of people's sovereignty and self-determination, Taiwan's status cannot be changed through a referendum).

in the United Nations,<sup>154</sup> the Joint Statement between China and Japan,<sup>155</sup> the three Sino-U.S. Joint Communiques in combination with subsequent U.S. pronouncements,<sup>156</sup> and the number of diplomatic ties between the People's Republic of China and members of the international community bolster the proposition of One-China.<sup>157</sup> In sum, according to the Government of the People's Republic of China, cross-strait relations are barred from being subsumed under deviating formulas, including "two governments," "two reciprocal political entities," "Taiwan is already a state with independent sovereignty," "state to state relations, or at least special state to state relations," "one China, one Taiwan" and "two Chinas."<sup>158</sup>

The Government of the People's Republic of China envisions the policy of "one country—two systems" for the reunified China.<sup>159</sup> This approach pledges that, while the Chinese mainland will continue with its socialist system, Taiwan will be allowed to maintain its capitalist structures for a substantial period of time.<sup>160</sup> Under this

154. *Id.* pt. I (referencing the replacement of the Taiwanese representatives by the delegation of the People's Republic of China in the United Nations on October 25, 1971).

155. *Id.*

156. *Id.* pts. II, III (emphasizing that U.S. commitments include not to support "Taiwan independence," "two Chinas," or "one China, one Taiwan," or Taiwan's participation in any international organization whose membership is restricted to sovereign states).

157. *Id.* pt. I (emphasizing that the People's Republic of China entertains diplomatic relations with 161 countries and that "[i]t is ready to establish diplomatic relations with all foreign governments . . . willing to abide by the principles of equality, mutual benefit and mutual respect for each other's territorial integrity and sovereignty").

158. *Id.* pt. III (admonishing that (1) "[s]eparatist forces in Taiwan are bent on violating the One-China Principle"; (2) "[u]nder the direction of Lee Teng-hui, the Taiwan authorities have adopted a series of measures towards actual separation; (3) "the Taiwan authorities are seeking to transform Taiwan into an 'independent political entity' through a 'constitutional reform,' so as to suit the needs of creating 'two Chinas'"; and (4) "[i]n foreign relations, the Taiwan authorities have spared no effort to carry out the activities for 'expanding the international space of survival,' with the aim of creating 'two Chinas,'" as exhibited by the attempts to join the United Nations and the U.S.-Japanese Theater Missile Defense System).

159. *Id.* pt. II (advising that (1) "[o]n Comrade Deng Xiaoping's initiative, the Chinese government has, since 1979, adopted the policy of peaceful reunification and gradually evolved the scientific concept of 'one country, two systems'"; (2) the concept is premised upon the One-China Principle; and (3) the Government of the People's Republic of China "acknowledges the differences between Taiwan on the one hand and Hong Kong and Macao on the other and . . . is prepared to apply a looser form of the 'one country, two systems' policy in Taiwan than in Hong Kong and Macao").

160. *Id.* pt. IV (admonishing that (1) the "controversy about democracy and system is an excuse for obstructing the reunification of China"; (2) "[t]o allow the two different social systems on both sides of the Straits to coexist without imposing them on

format, Taiwan is promised a high degree of autonomy unencumbered by troops or administrative personnel from the Chinese mainland.<sup>161</sup> The Government of the People's Republic of China articulates its preference for a peaceful and expeditious process<sup>162</sup> brought about by the Chinese on both sides of the Taiwan Straits<sup>163</sup> through dialogue, procedural consultations, and official political talks.<sup>164</sup>

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one or the other . . . is best able to embody the wishes of compatriots on both sides of the Straits and is itself democratic"; (3) "[i]t is totally unreasonable and undemocratic for the Taiwan authorities to seek to obstruct reunification on the pretext of the 'controversy about democracy and system' and to force the more than 1.2 billion people living on the Chinese mainland to practice the political and economic systems in Taiwan").

161. *Id.* (emphasizing that the wish of the "Taiwan compatriots" to "govern and administer Taiwan by themselves" will be respected and that "Taiwan's international space for economic, cultural and social activities compatible with its status, the political status of the Taiwan authorities, and other questions" will successfully be finally settled).

162. *Id.* pt. II; *Conclusion* to TAIWAN AFFAIRS OFFICE, WHITE PAPER, *supra* note 149 (emphasizing that (1) "as yet, the state of hostility between the two sides of the Straits has not formally ended"; (2) the Government of the People's Republic of China "will do its best to achieve peaceful reunification, but will not commit itself to rule out the use of force"; (3) "[p]eaceful means would be favorable to the common development of the societies on both sides of the Straits, and to the harmony and unity of the compatriots across the Straits"; (4) in pursuance of peaceful reunification a series of legal and policy changes have successfully increased cross-straits visits, trade volumes, and investments; (5) that "adhering to the One-China Principle is the basis and prerequisite for peaceful reunification"; (6) "[i]f Taiwan denies the One-China Principle and tries to separate Taiwan from the territory of China, the premise and basis for peaceful reunification will cease to exist"; (7) if the United States sabotages the One-China Principle, "the external conditions necessary for the Chinese [G]overnment to strive for peaceful reunification" will be destroyed; (8) "if a grave turn of events occurs leading to the separation of Taiwan from China in any name, or if Taiwan is invaded and occupied by foreign countries, or if the Taiwan authorities refuse, *sine die*, the peaceful settlement of cross-straits reunification through negotiations, then the Chinese Government will only be forced to adopt all drastic measures . . . including the use of force"; (9) the "Taiwan issue" must be resolved "as early as possible" and cannot be "postponed indefinitely"; and (10) this language is "by no means directed against Taiwan compatriots, but against the scheme to create an 'independent Taiwan' and against the foreign forces interfering with the reunification of China").

163. *Id.* pt. II (stating that "[r]esolution of the Taiwan issue is an internal affair of China" and that "there is no call for aid by foreign forces").

164. *Id.* (admonishing that (1) "negotiations should be held and an agreement reached on an official end to the state of hostility between the two sides under the [One-China] principle"; (2) the successful format of the "Wang Daohan-Koo Chen-fu talks" of 1993 and 1998 should serve as fruitful examples of interactions based on equal footing; and (3) as soon as possible, direct trade, postal, and air and shipping services should be started).

### B. *The Position of the Taiwanese Government*

The Taiwanese Government maintains that, until the successful conclusion of the unification process, the definition of One-China should be subject to the respective interpretations of each side.<sup>165</sup> Pursuant to the Taiwanese position, China has split into two separate, sovereign, and mutually independent states featuring highly divergent political and economic systems.<sup>166</sup> The Republic of

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165. GOVERNMENT INFORMATION OFFICE, PRESIDENT CHEN SHUI-BIAN'S FIRST PRESS CONFERENCE, OPENING REMARKS AND QUESTIONS AND ANSWERS (June 20, 2000), at [http://www.taiwanstudies.org/issues/view\\_story.php3?24](http://www.taiwanstudies.org/issues/view_story.php3?24) (on file with author) [hereinafter CHEN SHUI-BIAN PRESS CONFERENCE] (stating that "[i]f we are to say that there was an agreement, then it was that we 'agreed to disagree' . . . [w]e agreed that the two sides could have their own opinions"); MAINLAND AFFAIRS COUNCIL, EXECUTIVE YAN, REPUBLIC OF CHINA, PRESS RELEASE ON THE "ONE CHINA" ISSUE (June 28, 2000), at [http://www.taiwanstudies.org/issues/view\\_story.php3?14](http://www.taiwanstudies.org/issues/view_story.php3?14) (on file with author) (explaining that (1) when meeting in Hong Kong in October 1992, representatives from the Republic of China and the People's Republic of China discussed the question of One-China; (2) in an attempt to break the stalemate, the Republic of China suggested "put[ting] this debate aside" and allowing "each side to have its own respective interpretation"; (3) the People's Republic of China committed to "respect and accept once" this suggestion; (4) the two sides never reached consensus on the One-China Principle; and (5) the three program definition of One-China advanced under the interpretation of the People's Republic of China was unacceptable to the Republic of China); MAINLAND AFFAIRS COUNCIL, EXECUTIVE YAN, REPUBLIC OF CHINA, HOW WE VIEW BEIJING'S WHITE PAPER: "ONE CHINA PRINCIPLE AND THE TAIWAN ISSUE" (Feb. 22, 2000), at <http://www.mac.gov.tw/english/MacPolicy/890222e.htm> (last visited Apr. 8, 2001) (proposing that (1) the definition of One-China should be subject to respective interpretations reached by the two sides in 1992; (2) such a consensus would serve to circumvent the issue of political identity; and (3) this approach would facilitate an early solution of the cross-strait issues); MAINLAND AFFAIRS COUNCIL, EXECUTIVE YUAN, REPUBLIC OF CHINA, STATEMENT ON MAINLAND CHINA'S WHITE PAPER (Feb. 25, 2000) [hereinafter MAC STATEMENT] (on file with author) (making the criticism that (1) the People's Republic of China "unilaterally narrows the definition of '[O]ne China' [in an attempt to impose it on us and the international community], meanwhile, over-expands the definition of 'Taiwan's independence'; and (2) "[a]s a result, the room for '[O]ne China respectively interpreted by each side' is intentionally squeezed"); SU CHI, CHAIRMAN, MAINLAND AFFAIRS COUNCIL, EXECUTIVE YUAN, REPUBLIC OF CHINA, PRESS CONFERENCE: QUESTIONS AND ANSWERS (Feb. 25, 2000), at <http://www.mac.gov.tw/english/MacNews/enews/89022502e.htm> (on file with author) [hereinafter SU CHI PRESS CONFERENCE] (asserting that (1) the phrases of "special state-to-state relationship" and "One China interpreted respectively by each side" do not contradict each other, since Lee Teng-hui's formula is characterized as the Taiwanese description of the cross-strait status at present period of time; (2) the 1992 agreement successfully gave rise to the subsequent talks between the two associations—the Straits Exchange Foundation and the Association for Relations Across the Taiwan Straits—in 1993, 1994, and 1995; and (3) the two sides should follow the 1992 consensus so as to bypass the differences regarding sovereignty and the definition of One-China).

166. MAC STATEMENT, *supra* note 165 (emphasizing that (1) the mainland policy of the ROC government has consistently been based on the respect for separate rule of

China, founded in 1912, exercises jurisdiction over Taiwan, Penghu, Kinmen, and Matsu, whereas the People's Republic of China, established in 1949, controls the mainland.<sup>167</sup> The Taiwanese Government disputes the contention of the Government of the People's Republic of China that the Republic of China has terminated its historical status.<sup>168</sup> In consequence, One-China does not currently exist.<sup>169</sup> It can only be achieved in the future through unification.<sup>170</sup>

The Taiwanese Government calls for a peaceful,<sup>171</sup> pragmatic,<sup>172</sup>

the two sides of the Taiwan Strait; and (2) the stark contrast between the two sides features democracy against totalitarianism and peace versus violence); PRESIDENT CHEN'S INAUGURAL SPEECH: TAIWAN STANDS UP: ADVANCING TO AN UPLIFTING ERA (May 20, 2000), at <http://www.mac.gov/tw/english/MacPolicy/cb0520e.htm> (last visited Apr. 8, 2001) [hereinafter CHEN SHUI-BIAN INAUGURATION SPEECH] (opining that "due to the long period of separation, the two sides have developed vastly different political systems and ways of life, obstructing empathy and friendship between the people on the two sides, and even creating a wall of divisiveness and confrontation").

167. MAC STATEMENT, *supra* note 165.

168. *See id.*

169. SU CHI PRESS CONFERENCE, *supra* note 165 (explaining that (1) One-China should be characterized in the future tense; (2) "[s]ince unification is not here today, Mainland China calls itself the People's Republic of China"; and (3) "we are the Republic of China").

170. MAC STATEMENT, *supra* note 165 (expressing the hope that the People's Republic of China and the Republic of China "can gradually move toward a new China with democracy, freedom and equitable prosperity according to the short, middle and long term phases of the Guidelines for National Unification").

171. MAC STATEMENT, *supra* note 165 (admonishing that (1) the People's Republic of China has repeatedly threatened the Republic of China "with military bluff"; and (2) the White Paper exposes the "aggressive nature and hegemonic mindset" of the People's Republic of China); SU CHI PRESS CONFERENCE, *supra* note 165 (suggesting that the two sides should avoid conflicts, remove the potential for war, foster peaceful relations, and pursue mutual benefit).

172. CHEN SHUI-BIAN PRESS CONFERENCE, *supra* note 165 (explaining, in response to Question 7, that (1) "[t]he major problem is reopening dialogue between the two sides of the strait, like in the Koo-Wang Talks"; and (2) "[i]f we cannot reach this step, the 'three links' (direct mail, transportation, and trade with the Chinese mainland) and the 'three mini links' (direct mail, transportation, and trade with the Chinese mainland) are hopeless"); MAC STATEMENT, *supra* note 165 (expressing the desire that "the two sides . . . should, under the consensus of 'one China respectively interpreted' restore bilateral talks as soon as possible and strengthen exchanges to develop constructive cross-strait relations with joint efforts"); SU CHI PRESS CONFERENCE, *supra* note 165 (explaining that (1) practical issues include the three direct links (mail, transportation, commerce), diplomatic affairs, and cultural exchanges; (2) differences in defining One-China have created a stalemate, since both sides have been very firm; and (3) Taiwan used to treat Mainland China as a rebel group, "[h]owever, nine years ago, under President Lee's instruction, the ROC government made a pragmatic revision . . . [to] no longer treat them as a rebel group, which is a goodwill gesture"). For earlier pronouncements, see, for example, GUOJIA TONGYI GANGLING [GUIDELINES FOR NATIONAL REUNIFICATION], PASSED BY THE NATIONAL UNIFICATION COUNCIL, FEB. 23, 1991 AND BY THE EXECUTIVE YUAN AT ITS 2223RD MEETING, MAR. 14, 1991, reprinted in JOHN I. COOPER, WORDS ACROSS THE TAIWAN STRAIT: A CRITIQUE OF BEIJING'S "WHITE PAPER" ON CHINA'S REUNIFICATION



parity-based,<sup>173</sup> and cooperative<sup>174</sup> approach leading to a new China.<sup>175</sup> While reserving all future options,<sup>176</sup> the Taiwanese Government has pledged not to declare formal independence, change the island's name to Republic of Taiwan, insert into the constitution

125-27 (1995) (envisaging the achievement of a "democratic, free and equitably prosperous China" through a gradual three-stage process of reunification that includes: (1) in the short term, the organization of reciprocal exchanges; (2) the pledge of trust and co-operation through the of official communication channels and direct postal, transport, and communication links; and (3) in the long term, the establishment of a consultation organization for unification, which would develop a new constitutional system based on the will of the people in both the mainland and Taiwan).

173. MAC STATEMENT, *supra* note 165 (rejecting the format of the principal and the subordinate); SU CHI PRESS CONFERENCE, *supra* note 165 (noting that the Government of the People's Republic of China proposed talks between political parties).

174. CHEN SHUI-BIAN PRESS CONFERENCE, *supra* note 165 (calling upon Mr. Jiang Zemin for a moment of "handshakes and reconciliation," along the model of the Koreans and the past contacts, dialogue, or negotiations conducted between Taipei's Straits Exchange Foundation and the Association for Relations Across the Taiwan Strait in Beijing); SU CHI PRESS CONFERENCE, *supra* note 165 (stating that the imposition of a "time element" or deadline for talks will further impede cross-strait exchanges, talks, and progress toward peaceful unification and that "[t]en years ago, when the exchanges between two sides were not allowed, Taiwan's public opinion polls showed that more than 60% of Taiwan's people supported unification, but less than 10% do so now").

175. CHEN SHUI-BIAN INAUGURATION SPEECH, *supra* note 166 (offering that (1) "[t]he same ancestral, cultural, and historical background and similar historical experiences should bring mutual understanding between the people on the two sides of the Taiwan Strait, setting a solid foundation for pursuing freedom, democracy and human rights together"; (2) "[u]nder the leadership of Mr. Deng Xiaoping and Mr. Jiang Zemin, the mainland has created a miracle of economic openness"; and (3) "in Taiwan, in over a half century, not only have we created a miracle economy, we have also created the political marvel of democracy"); MAC STATEMENT, *supra* note 165 (expressing (1) the support for the integration of the mainland system into the international free economic system at an early date as well as for reforms of the mainland's political system and social structure because of their positive effects on social stability, long-term democratization, cross-strait relations, and national unification in the future; and (2) the hope that through dialogue, exchanges, and a process of assimilation the two sides can become a democratic, liberal, and equitably prosperous new China).

176. CHEN SHUI-BIAN PRESS CONFERENCE, *supra* note 165 (emphasizing, in response to Question 10, that (1) in lieu of pre-established premises or conclusions, Taiwan will proceed with an open mind "on the entire matter in order to leave plenty of room for input from leaders on the Chinese mainland side"; and (2) "[o]nly the 23 million residents of Taiwan have the right to decide which way they will go in the future"); SU CHI PRESS CONFERENCE, *supra* note 165 (advising that (1) "[t]he Republic of China, as a democracy, is open to a full spectrum of opinions"; (2) "the process of opinion-articulation is wide open, but the process of decision-making is very thorough"; (3) "[t]he process will include all possibilities for all of the people in Taiwan to decide in the future, not by the person in charge today"; (4) "[t]he 'confederation model' [as one version of 'respective interpretations'] still remains theoretical and is not a government policy"; and (5) with respect to "Taiwan independence" or an "independent Taiwan," "[t]he majority in Taiwan as shown in public opinion polls supports the status quo, i.e. neither independence nor unification")

the formula of a "special state-to-state relationship," or promote a referendum with respect to the questions of independence or unification.<sup>177</sup>

### C. Discussion

The construction and the role of the One-China principle reside at the core of the Chinese reunification controversy. The People's Republic of China asserts that Taiwan must return to mainland rule under a One Country—Two Systems arrangement, whereas Taiwan requires the full democratization of the mainland prior to a merger.

The One-China doctrine embodies for the People's Republic of China its fundamental national interest to complete the territorial scope of the Chinese nation.<sup>178</sup> After the return of Hong Kong and Macau, the People's Republic of China still faces an unfinished national reunification agenda and the recurrence of centrifugal movements in Xizang (Tibet), Neimeng (Inner Mongolia), and Xinjiang.<sup>179</sup> The People's Republic of China seeks to insulate the reunification process from internationalization. It considers Taiwan an inalienable part of its sovereign domain firmly held and not adjudicable under international law.<sup>180</sup> From the perspective of the People's Republic of China, this posture entails significant consequences. A Taiwanese declaration of independence would be viewed as an illegal secession.<sup>181</sup> Moreover, any involvement of other

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177. CHEN SHUI-BIAN INAUGURATION SPEECH, *supra* note 166 (making this four-fold pledge subject to the condition that the People's Republic of China has no intention of using military force against Taiwan).

178. *E.g.*, *Forward to TAIWAN AFFAIRS OFFICE, WHITE PAPER, supra* note 149 (emphasizing that the "[s]ettlement of the Taiwan issue and realization of the complete reunification of China embodies [sic] the fundamental interests of the Chinese nation"); Zhengyuan Fu, *China's Perception of the Taiwan Issue*, 1 *UCLA J. INT'L L. & FOREIGN AFF.* 321, 327 (1996-97) (noting that, in 1980, Deng Xiaoping identified the reunification with Taiwan as one prong in the three-fold mission of the Chinese Communist Party); *see also* Guiguo Wang & Priscilla M.F. Leung, *One Country, Two Systems: Theory Into Practice*, 7 *PAC. RIM L. & POL'Y J.* 279, 281 (1998) (explaining that since Chiang Kai-Shek's defeated Nationalist forces fled to Taiwan in 1949, the Government of the People's Republic of China has proclaimed Taiwan a renegade province).

179. *E.g.*, Sean Cooney, *Why Taiwan Is Not Hong Kong: A Review of the PRC's "One Country Two Systems" Model for Reunification with Taiwan*, 6 *PAC. RIM L. & POL'Y J.* 497, 498 (1997) (observing that "Beijing faces one remaining obstacle to its goal of national reunification, what it calls the 'Taiwan question'"); *Forward to TAIWAN AFFAIRS OFFICE, WHITE PAPER, supra* note 149 (stating that "[t]he Chinese government has worked persistently toward this goal in the past 50 years"); Fu, *supra* note 178, at 324 (opining that "nationalism has become the only effective ideological glue which binds the 1.2 billion people as a nation under the rule of the [Chinese Communist Party]").

180. Chang & Lim, *supra* note 131, at 416.

181. TAIWAN AFFAIRS OFFICE, WHITE PAPER, *supra* note 149, pt. III.

nations would be construed as an unlawful intervention in Chinese internal affairs.<sup>182</sup> The People's Republic of China justifies the continued reservation to use force<sup>183</sup> and the persistent blockade of Taiwanese attempts at gaining diplomatic recognition and participation in international organizations as appropriate levers to uphold the One-China linchpin.<sup>184</sup> In this light, international law and foreign relations<sup>185</sup> become utilitarian tools to serve national

182. *Id.* pt. IV.

183. *E.g.*, Glenn R. Butterson, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait*, 47 CATH. U. L. REV. 51, 97 (1997) (listing as potential triggers a declaration of independence, foreign intervention, or serious civil unrest on Taiwan); Fu, *supra* note 178, at 329 (identifying similar circumstances); Lang Kao, *A New Relationship Across the Taiwan Strait*, 27 ISSUES & STUDIES 44, 53-57 (1991) (adding the scenario of a Taiwanese refusal to negotiate reunification); James Pringle, *Peking Ends Military Manoeuvres off Taiwan*, TIMES (London), Mar. 26, 1996, at 11 (stating that threats to use force are backed up by war games conducted in the Straits of Taiwan during Taiwanese elections, as illustrated during the 1996 presidential elections); Omar Saleem, *The Spratley Islands Dispute: China Defines the New Millennium*, 15 AM. U. INT'L L. REV. 527, 532 (2000) (explaining that under the 1995 Positive Defense Strategy, *Jixi Fang*, the People's Republic of China has established a military security perimeter bounding an area from its southeast to its northeast coast and that this belt encompasses Taiwan); *see also* Fu, *supra* note 178, at 323 (offering that, although the traditional Chinese political culture has often been characterized as Confucian, the Legalists, *fa jia*, "who were more Machiavellian than Machiavelli," have shaped Chinese Realpolitik under the motto "enrich the state and strengthen the army"—*fuguo qiangbing*).

184. Kao, *supra* note 183, at 53-57.

185. For the basic international law theories, *see* Saleem, *supra* note 183, at 543-45, 554, 559, 560 (explaining that (1) the sovereign or enforcement theory envisions international law as a series of mandates established and enforced by an overseer; (2) the treaty theory approximates international law to a contractual agreement of the parties; (3) the natural law theory invokes the law of God exercised by rational beings through international treaties, customs, and general legal principles; (4) the realist theory, which places international law into the context of domination, balance of power, or total chaos; (5) the People's Republic of China, prior to the leadership of Deng Xiaoping and particularly during the Mao Zedong era, embraced the Austin-Hart position that international law was simply a form of international morality; (6) between 1965 and 1979 the amount of scholarship in international law was meager in the People's Republic of China; and (7) the People's Republic of China considers treaties as the most important source of international law because they reflect the actual agreement between nations). For the role of perception in foreign relations, *see*, for example, ROBERT JERVIS, *PERCEPTIONS AND MISPERCEPTIONS IN INTERNATIONAL POLITICS* (1976) (analyzing in detail the mechanics and significance of the perception theory); Fu, *supra* note 178, at 322 (summarizing that "[p]olicy making, especially decisions involving foreign relations, can be best understood only by comprehending what the decision-makers . . . define as the national interest and their perception of the international and domestic environment"); Samuel S. Kim, *China and the World in Theory and Practice*, in *CHINA AND THE WORLD: CHINESE FOREIGN RELATIONS IN THE POST-COLD WAR ERA* (Samuel S. Kim ed., 1994) (presenting the perception theory with respect to the People's Republic of China).

policy.<sup>186</sup> In sum, the One-China doctrine exhibits the psychocultural disposition of the People's Republic of China that connects the achievement of reunification with the full restoration of Chinese national honor.<sup>187</sup>

After decades of competition between Taiwan and the People's Republic of China for the right to constitute and represent China,<sup>188</sup>

186. Saleem, *supra* note 183, at 543-60 (explaining that (1) the "unequal treaties" have created in the People's Republic of China a sense of mistrust of international relations; (2) as a permanent member of the UN Security Council, the People's Republic of China has sought to influence international relations and world political decisions in its own interest; (3) for example, the veto policy of the People's Republic of China in the Security Council with respect to Guatemala, Haiti, and Macedonia has been designed to urge the severance of relations with Taiwan and the recognition of the People's Republic of China as the sole government of China).

187. *E.g.*, Cooney, *supra* note 179, at 548 n.329 (observing that the reunification project is invested with near spiritual significance, as expressed in the phrase "the sacred mission and lofty purpose of all Chinese people"—"suoyou Zhongguoren de Shensheng Shiming he Chonggai Mubiao"); Fu, *supra* note 178, at 321, 332-34 (diagnosing that (1) in the eyes of the leaders of the People's Republic of China the achievement of reunification forms "an essential component of the national psyche"; (2) independent of a democratization on the mainland, "[a]ny act of formal secession by Taiwan [would be] perceived by the Chinese people as an insult" . . . and "the imposition of [an intolerable] national shame"; and (3) if Taiwan declared independence with the support of the United States or Japan, the specter of foreign aggression would rise again); Kao, *supra* note 183, at 53-57 (explaining that the nationalistic appeal is based on traditional Chinese ideas that China can only be strong and prosperous if it is unified). For a psychocultural analysis of Chinese foreign policy, see, for example, CHIH-YU SHIH, *THE SPIRIT OF CHINESE FOREIGN POLICY: A PSYCHOCULTURAL VIEW* (1990).

188. Cheri Attix, Comment, *Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT'L L.J. 357 (1995) (noting that "[f]rom 1949 to 1991, the People's Republic of China and Taiwan were locked in a diplomatic battle over which would be the internationally recognized representative of China"); Butterson, *supra* note 183, at 67-68 n.35 (explaining that, subsequent to the 1996 "war games" crisis, as a symbol of autonomy, President Lee "launched a plan to dismantle the official provincial government of Taiwan, which to a considerable degree [had] structurally paralleled and functionally duplicated the national government"); Fu, *supra* note 178, at 326-40 (observing that (1) during the 1960s and most of the 1970s, both sides believed that there was only "one China, and Taiwan [was] a part of China"; (2) while no longer insisting on the "recovery of the mainland" since the 1970, the Taiwanese leaders have remained highly suspicious of the leadership of the People's Republic of China; (3) since the mid-1980s, the People's Republic of China has been confronted with a stronger voice for independence from Taiwan; (4) until 1987, the official position of the Taiwanese Government toward the Government of mainland China has been "three no's"—the rejection of contact, negotiation, and compromise); Tzu-wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT'L L. & FOREIGN AFF. 351, 354 (1996-97) (stating that, on its own initiative, Taiwan implicitly recognized the People's Republic of China in 1991 and that in 1994, Taiwan officially relinquished the competition with the People's Republic of China for the right to represent China in the international community); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 879, 895 (1999) (diagnosing that the shared One-China policy had allowed both governments to maintain the fiction that each was the legitimate ruler of the other and that reunification might someday occur).

Taiwan now claims its own separate room in the international space.<sup>189</sup> This posture, which is based on the assertion that the People's Republic of China has not superseded the Republic of China, connotes the assertion of statehood status.<sup>190</sup>

The status of Taiwan involves different layers of controversy among legal scholars. The traditional international law standards for statehood posit that a human community effectively exercises full self-government over a defined space.<sup>191</sup> The state population consists of the physical citizenry;<sup>192</sup> the state territory constitutes an area under the territorial sovereignty and free disposition of the state;<sup>193</sup> and the state power refers to the sovereign right to exercise government power over persons and things.<sup>194</sup> All statehood elements must effectively exist with a perspective of sustained

*But see* Chen, *supra* note 1, at 225 (commenting that "the historical policy of 'one country, two governments' embraced by both [the People's Republic of China] and Taiwan has belied the reality of 'two countries, two governments' for nearly half a century").

189. CHEN SHUI-BIAN INAUGURATION SPEECH, *supra* note 166 (speaking of "Taiwan's room for survival in the international arena").

190. Jau-Yuan Hwang, *Constitutional Change and Political Transition in Taiwan Since 1986: The Role of Legal Institutions* 259-72, 286-87 (1995) (unpublished S.J.D. dissertation, Harvard University) (on file with the Harvard University Library) (arguing that Taiwan has adopted a divided-states approach).

191. *E.g.*, Conference on Yugoslavia Arbitration Committee, Opinion No. 1, July 4, 1992, 31 I.L.M. 1494, 1495 (1992) (declaring that "a state is commonly defined as a community which consists of a territory and a population subject to an organized political authority" and that "such a State is characterized by sovereignty"); Convention on Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, art. 1, 165 L.N.T.S. 19, 25 (providing for the following statehood qualifications: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States"); *see also* MALCOLM N. SHAW, *INTERNATIONAL LAW* 140 (1991) (adding that other factors may be relevant, such as self-determination and recognition).

192. SCHWEITZER, *supra* note 108, at 166-68 nn.406-09 (explaining that (1) citizenship is acquired through domestic law within the international law boundary of a genuine connection or link; (2) acquisition grounds include birth to citizens (*jus sanguinis*), birth on the territory (*jus soli*), marriage, adoption, legitimation, and naturalization; (3) the loss of citizenship is a matter for each state; and (4) due to the margin of maneuver for each state, double citizenship or statelessness may occur).

193. *Id.* at 172-73 nn.417-19 (providing that the territorial authority over an area constitutes a lesser prerogative than full territorial sovereignty and that international law distinguishes between the land territory and the coastal sea).

194. *Id.* at 176-77 nn.430-32 (adding that state power manifests itself through independence in the external arena and, internally, through full self-government and that legitimacy does not play a determinative role in this context). For discussions of democratic legitimacy as an additional criterion, *see, for example*, Chang & Lim, *supra* note 131, at 398-400. *See generally* SHAW, *supra* note 191, at 144; Winston Hsiao, *The Development of Human Rights in the Republic of China on Taiwan: Ramifications of Recent Democratic Reforms and Problems of Enforcement*, 5 PAC. RIM L. & POL'Y J. 161 (1995).

duration, especially when a civil war may have given rise to a new state.<sup>195</sup> In application of these criteria some voices in the literature find that Taiwan merely hosts a consolidated, local, de facto government-in-exile exercising only territorial authority<sup>196</sup> over its population.<sup>197</sup> Two principal findings are alleged in support of this assessment. Sovereignty over the island has been suspended.<sup>198</sup> Moreover, independence<sup>199</sup> through self-determination<sup>200</sup> has never

195. *E.g.*, Lee, *supra* note 188, at 382-86.

196. SCHWEITZER, *supra* note 108, at 172 n.417 (contrasting territorial authority with full territorial sovereignty).

197. Chang & Lim, *supra* note 131, at 404 (explaining that the aborigines (*yuanzhumin*), the Hoklo (Fukienese Chinese descent), the Hakka (Chinese descent), and the "Chinese mainlanders" comprise the main ethnic groups on Taiwan); Cooney, *supra* note 179, at 499 n.7 (providing that the Taiwanese people includes the Minnan Chinese who commenced emigrating many centuries ago, the "mainlanders" who fled in 1949, the Hakka minority, and the indigenous people); *see also* Fu, *supra* note 178, at 333 (observing "'reverse discrimination' against the so-called 'outside province people,' people whose parents were not born in Taiwan (the waishing ren)").

198. *E.g.*, Lung-chu Chen & W.M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599, 611 n.43 (1972) (arguing that sovereignty has been unresolved because the Peace Treaty with Japan left the issue open); Gene T. Hsiao, *The Legal Status of Taiwan in the Normalization of Sino-American Relations*, 14 RUTGERS L.J. 839, 840 (1983) (offering that, after the war, technical sovereignty over the island was not settled); *see also* Butterton, *supra* note 183, at 66 (observing that "[t]he ambiguous status of Taiwan is at least partly rooted in the victorious Allied Powers' plans during and following World War II"); Lee, *supra* note 188, at 368 (noting that "[t]he question of Taiwan's legal status would have been much simpler had Taiwan always remained part of Chinese territory . . . if the episode of cession to Japan, return to the Chinese administration, [and] renouncement of right in the two Peace Treaties by Japan had not occurred").

199. The best evidence of an entity's assertion of independent statehood is a formal declaration of independence, which makes an official request to assert sovereign status and is an invitation to the members of the international community to extend their recognition. For the significance of independence, *see*, for example, SHAW, *supra* note 191 (explaining that independence constitutes the "essence" of the capacity to enter into relations with other states"); VON GLAHN, *supra* note 21, at 56 (offering independence as the "final and decisive requirement"); Massa, *supra* note 129, at 206 (offering that, in the case of an illegal unilateral declaration of independence, the potential international recognition may legitimize the new legal order and that "[t]he success of breakaway colonies demonstrates the viability of a declaration of independence"); *see also* JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 151 (1979) (maintaining that "Taiwan is not a State, because it does not claim to be"). Others have argued that Taiwan's constitutional reforms—which, *inter alia*, confine the electorate to Taiwan—and the separating declarations of the Taiwanese Government amount to a "quasi declaration of independence." *E.g.*, Cooney, *supra* note 179, at 508 n.51 (referring to an unpublished dissertation in support of the proposition that the Taiwanese Government does not openly declare itself a state due to the People's Republic of China's unlawful threat of force and that the failure to make an open declaration does not constitute a denial of statehood); Jin Huang & Andrew Xuefeng Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Laws in China*, 5 DUKE J. COMP. & INT'L L. 289, 302 n.85 (1995) (observing that independence models under discussion in Taiwan include "yizhong yitai (one China, one Taiwan), liangge zhongguo (two Chinas) or alternatively, taidu (Taiwan independence) and dutai (an independent

Taiwan)"). For the posture of Taiwan President Chen, see, for example, Harvey Feldman, *Chen's First Month Demonstrates His Adroit, Prudent Approach*, in 3 TRI PUBLICATIONS, TAIWAN PERSPECTIVE (June 2000) (on file with author) (emphasizing President Chen's triple pledge not to declare formal independence, change the island's name to Republic of Taiwan, or insert the "special state-to-state relationship" language into the constitution); see also Attix, *supra* note 188, at 378 (stating that the political career of the current President of Taiwan, Mr. Chen, has been devoted to the fight for democracy and independence); Attix, *supra* note 188, at 377 n.171 (stating that, during a campaign, Mr. Chen flew the Taiwanese national flag at his campaign headquarters); Fu, *supra* note 178, at 333 (noting the Japanese loyalty exhibited by some Taiwanese advocating independence); Huang & Qian, *supra*, at 302 n.85 (observing that the Democratic Progressive Party in Taiwan "has placed Taiwanese independence at the top of its agenda").

200. Chen, *supra* note 1, at 241 (characterizing self-determination as premised on "the right of a people to declare and establish its own sovereign state freely"). For self-determination in the context of the rise of new nations, see, for example, *The Aland Island Question*, at 27, League of Nations Doc. B7.21/68/106 (1921) ("To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity."); Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, *supra* note 134; LEE C. BUCHHEIT, SECESSION 87 (1978) ("The history of the United Nations practice lends substantial support to the thesis that the principle of [self-determination], as interpreted by that body, is primarily a vehicle for decolonization, not an authorization of secession."); SHAW, *supra* note 191, at 145 (offering self-determination as a potential additional criterion of statehood, in addition to its role in the assessment of government operations); Chen, *supra* note 1, at 241 n.99 (noting that "[t]he concept of self-determination has its inception in a moral mandate directed at decolonizing European and Japanese colonies during the period following World War II"); S. Chowdhury, *The Status and Norms of Self-Determination in Contemporary International Law*, in FREDERICK E. SNYDER & SURAKIART SATHIRATHAI, THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW 86-99 (1987) (discussing four norms of the right and manner of self-determination: (1) beneficiaries of the right and the manner of its exercise; (2) territories and situations where applicable; (3) modes of implementation; and (4) duties of the state-rights of the people); Massa, *supra* note 129, at 213 (observing that the Charter of the United Nations mentions the term "self-determination" twice in conjunction with the goals of promoting "friendly relations among nations" and the "equal" rights of "peoples"); Massa, *supra* note 129, at 214 (stating that the 1966 International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights "reinforces the right of self-determination in the traditional colonial context"); Massa, *supra* note 129, at 183, 208, 218-19 (observing that (1) "the vast majority of international law applies to challenges arising from non-consenting parties with at least one party demanding independence and another upholding the status quo"; (2) more than one hundred insurgent groups currently aspire to break up or redefine national borders; (3) the former Czechoslovak state proceeded along the modus operandi provided by its 1968 Constitution and, in 1993, became the first entity to separate peacefully into two independent states through a negotiated settlement; and (4) "[t]he the ascent of 'ministates' such as San Marino, Micronesia, the Marshall Islands, and Andorra into the United Nations reflects a trend toward regionalism"); see also Chen & Reisman, *supra* note 198, at 662 (proposing that an internationally supervised plebiscite of the Taiwanese enable them to determine their future status); Huang & Qian, *supra* note

been activated.<sup>201</sup> Other commentators argue that Taiwan meets the basic statehood elements,<sup>202</sup> especially when viewed in the context of its democratization<sup>203</sup> and economic standing in the world economy.<sup>204</sup>

An interlinked and controversial threshold involves measuring the rise of statehood as a function of international stature accrued through recognition.<sup>205</sup> The constitutive theory holds that a new state attains international legal personality only through recognition by other states.<sup>206</sup> The declaratory theory, which criticizes the

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199, at 302 n.85 (asserting “[t]he possible reunification of Taiwan is especially contentious in Taiwan”).

201. Massa, *supra* note 129, at 209 (offering that “[g]enerally the principle of plebiscites has been adhered to with exceptions in cases where rival claims of sovereignty exist”).

202. *E.g.*, Cooney, *supra* note 179, at 508 n.51 (finding that Taiwan “arguably” satisfies the standards); Peter R. Rosenblatt, *What is Sovereignty? The Cases of Taiwan and Micronesia*, 32 NEW ENG. L. REV. 797, 798 (1998) (noting that Taiwan does meet the criteria).

203. Hsiao, *supra* note 194, at 180 (anchoring democratization to the end of martial law on July 15, 1987); Edwin A. Winckler, *Taiwan Transition?*, in POLITICAL CHANGE IN TAIWAN 221, 224 (Tun-jen Cheng & Stephan Haggard eds., 1992) (describing the Taiwanese democratization as an evolution from “hard authoritarian” rule (1945-1960) to a “remunerative hard authoritarianism” (1960-1975) to “soft authoritarianism” (1975-1990)).

204. Chen, *supra* note 1, at 238-39 (identifying Taiwan’s trade and economic power as a strong statehood indicator); Lee, *supra* note 188, at 355 (explaining that Taiwan has a strong claim to statehood in view of its economy, gross national product, trade volume, and level of foreign investment).

205. For definitions, see, for example, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485, 1486-87 (1992) (articulating a common position on the process of recognition of such new states and referring specifically to the principle of self-determination); HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 1 (1947) (providing that the “recognition of States is not a matter governed by law but a question of policy”); GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 566 (6th ed. 1976) (offering that recognition constitutes “the acknowledgment of a situation with the intention of admitting the legal implications of such a state of affairs”); VON GLAHN, *supra* note 21, at 86-7, 87-93, 93-110 (distinguishing between express-explicit and implied-tacit recognition and between recognition of states and recognition of governments); M.J. Peterson, *Recognition of Governments Should Not Be Abolished*, 77 AM. J. INT’L L. 31, 50 (1983) (providing that “[i]f recognition of governments is to perform its proper functions, and confusion among acknowledgment of status, communication, and approval is to be avoided, recognition decisions must be based solely on whether the new government has control of its state”); see also Butterson, *supra* note 183, at 68 (adding that “one clear exception to the aiding-a-recognized-government rule arises in the form of state-to-non-state conflict known as civil war”); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1645 (1984) (observing that “recognized governments have a right to receive external military assistance and outside states are free to furnish such aid”).

206. 1 OPPENHEIM’S INTERNATIONAL LAW 109 (1st ed. 1905) (offering that “[a] state is and becomes an International Person through recognition only and exclusively”); see also Ebenroth & Kemner, *supra* note 129, at 759 (finding that scholarship in the United States leans toward the constitutive theory of statehood).



constitutive approach for creating a complex relativity matrix with respect to recognizing and non-recognizing states, provides that recognition merely affirms the legal status of statehood once the three basic elements are met.<sup>207</sup> The modified declaratory theory—an intermediate approach—responds to scenarios when recognition is withheld through the figure of the *de facto* regime, which, while not being completely denied international law subject status, holds a reduced minimal standard of rights and duties.<sup>208</sup>

Taiwan exhibits a mixed recognition record.<sup>209</sup> It is fully recognized only by a limited number of nations.<sup>210</sup> Many countries recognize the People's Republic of China,<sup>211</sup> while conducting unofficial

207. *E.g.*, PAUL REUTER, *DROIT INTERNATIONAL PUBLIC* 177-78 (1993) (offering that “[l]a pratique internationale admet en général que l’existence de ces trois éléments est une condition nécessaire de l’existence d’un Etat, mais pour que cette existence soit opposable pleinement à un autre Etat il faut que cet Etat ait reconnu cette existence”); SHAW, *supra* note 191, at 142 (noting that “the more sparse international recognition is, the more attention will be focused upon proof of actual adherence to the [statehood] criteria concerned” and that recognition by others impacts the capacity of entities to enter into relations with other countries); VON GLAHN, *supra* note 21, at 87 (providing that “[t]he new state exists, regardless of whether it has been recognized by other states, when it has met the factual requirements of statehood”); *see also* CRAWFORD, *supra* note 199, at 20 (stating that the declaratory theory constitutes the more accepted position in international law); Ebenroth & Kemner, *supra* note 129, at 759 (suggesting that scholars in Continental Europe favor the declarative theory of statehood).

208. SCHWEITZER, *supra* note 108, at 179 n.438.

209. Lee, *supra* note 188, at 370 (observing that if Taiwan claims to be the sole government that represents the State of China, then the choice between competing governments is at issue; and that by contrast, if Taiwan does not claim to be the sole representative government of China, then a case of recognition of states arises); Massa, *supra* note 129, at 207 (suggesting that “[c]ompeting claims of governance undercut international recognition”).

210. ROBERT G. SUTTER, CONGRESSIONAL RESEARCH SERVICE, *TAIWAN: RECENT DEVELOPMENTS AND U.S. POLICY CHOICES* 4 (July 1998) (noting that most countries that have recognized Taiwan are small states in Central America, Africa, and the South Pacific); Lee, *supra* note 188, at 387 (providing that Taiwan has been recognized by thirty states). *But see* Taiwan, *Macedonia and East Timor* (Jan. 31, 1999), at <http://www.taiwandc.org/nws-9904.htm> (last visited Apr. 8, 2001) (suggesting that Taiwan’s newly established political ties with Macedonia may serve as a foot-in-the-door to the rest of Europe). *See also* Attix, *supra* note 188, at 386 (arguing that “[i]nternational recognition of the division of China at the Taiwan Straits would make those States a frontier for purposes of the use of force and take the issue of Taiwan out of Beijing’s internal domain”); Lee, *supra* note 188, at 354 (finding that the potential creation of two Chinas through Taiwan’s pursuit of international recognition is a question for the recognizing state).

211. Lee, *supra* note 188, at 357-59 (presenting nine categories of communiques, that involve, albeit not universally, 123 countries and the People’s Republic of China: (1) 33 countries recognize the People’s Republic of China as the sole legitimate government of China (or the sole legitimate government representing all Chinese people) and “recognize” its claim that Taiwan is a province of the People’s Republic of China or an inalienable part of China; (2) eight countries recognize the People’s Republic of China as the sole legitimate government of China and acknowledge the

relations with Taiwan pursuant to the "Japanese formula."<sup>212</sup> A similar

People's Republic of China's claim that Taiwan is an inalienable part of the People's Republic of China; (3) 16 countries recognize the People's Republic of China as the sole legitimate government of China and "take note" of the People's Republic of China's claim that Taiwan is an inalienable part of the People's Republic of China; (4) two countries recognize the People's Republic of China as the sole legitimate government of China and "understand and respect" the People's Republic of China claim that Taiwan is an inalienable part of the People's Republic of China; (5) one country respects and supports the position of the People's Republic of China over Taiwan; (6) two countries recognize that the People's Republic of China is the sole legitimate government of China and respect their claim that Taiwan is a province of the People's Republic of China; (7) one country, the United States, recognizes the People's Republic of China as the sole legitimate government of China and "acknowledges" the Chinese position that Taiwan is part of China; (8) 41 countries recognize the People's Republic of China as the sole legitimate government of China without even mentioning the Taiwan sovereignty issue; and (9) 19 countries neither recognize the People's Republic of China as the sole legitimate government of China nor mention the Taiwan sovereignty issue); see also Attix, *supra* note 188, at 381 (providing that (1) the non-recognition of Taiwan by most nations is a result of the pressure exerted by the People's Republic of China; (2) "[t]here is no indication that these states are withholding recognition because they find Taiwan's existence repugnant or its actions in violation of any *jus cogens* principle of international law"; and (3) Taiwan's trading partners are caught between Taiwan's burgeoning democracy and desire for international status and the mainland's historical claim to Taiwan as a part of the former Chinese empire). Most nations recognizing the People's Republic of China simply "take note of" or "acknowledge" its claim over Taiwan rather than "accepting" or "supporting" it). Attix, *supra* note 188, at 385-86.

For the basic principles underlying Sino-U.S. relations, see the Shanghai Communiqué, Feb. 27, 1972, reprinted in H.C. HINTON, 5 THE PEOPLE'S REPUBLIC OF CHINA 1949-1979: A DOCUMENTARY SURVEY 2363 (1980); the Sino-U.S. Joint Communiqué, Dec. 15, 1978, reprinted in HINTON, *supra*, at 2951 n.670; the Sino-American Communiqué, Aug. 17, 1982, reprinted in China, U.S. Issue Joint Communiqué, BEIJING REV., Aug. 23, 1982, at 14. For a more recent pronouncement from the Clinton Administration, see Press Briefing, James P. Rubin, U.S. Dep't of State (July 6, 1998), at <http://secretary.state.gov/www/briefings/9807/980706db.html> (on file with author) ("We do not support Taiwan independence; we do not support Taiwanese membership in organizations where statehood is required; we do not support a two-China policy or a one-China/one-Taiwan policy.").

212. E.g., LAUTERPACHT, *supra* note 205, at 346-47 (coining the descriptor of "informal intercourse"); VON GLAHN, *supra* note 21, at 63 (describing the conduct of business through unofficial, para-diplomatic, or private channels in replacement of formal embassies); Attix, *supra* note 188, at 364 (explaining that unofficial relations may include unofficial agreements and may be accompanied by an exchange of representatives; without more, however, no legal effect arises).

For the distinct concept of implied recognition, see LAUTERPACHT, *supra* note 205, at 371 (admonishing that the distillation of recognition from conduct is "particularly inappropriate when the general attitude of the State in question points to its continued determination to deny recognition"); Attix, *supra* note 188, at 379-85 (discussing trade relations and implied recognition).

For arrangements between the U.S. and Taiwan, see, for example, U.S. DEPT OF STATE, BACKGROUND NOTES: TAIWAN 7 (Oct. 1998) (noting that (1) the Taiwan Relations Act, P.L. 96-8, created domestic legal authority for the conduct of U.S.-Taiwan relations; (2) U.S. interaction with the people of Taiwan occurs through the American Institute in Taiwan, a private non-profit corporation; (3) the Taipei Economic and Cultural Representative Office offers the Taiwanese counterpart; and (4) the U.S.

situation prevails in international organizations.<sup>213</sup>

In sum, the picture of Taiwan's status appears multifaceted. This observation reflects the decentralized nature of the international legal system that does not provide for a single body to rule authoritatively whether a particular entity meets the statehood criteria.<sup>214</sup> A pragmatic approach counters that the exact categorization of Taiwan within international law notions does not seem dispositive for Taiwan's sustained role as a significant global player.<sup>215</sup>

#### IV. OUTLOOK: THE PATH FORWARD

At present, the various sides in the debate between the People's Republic of China and Taiwan find it difficult to communicate.<sup>216</sup>

has terminated its Mutual Defense Treaty with Taiwan but has continued the sale of defensive military equipment to Taiwan).

213. Taiwan is at present attempting to gain entry into the UN and the World Trade Organization. Taiwan has participated in the Asian Development Bank and the Asia-Pacific Economic Cooperation forum. For a snapshot of Taiwan's membership in international organizations, see Hungdah Chiu, *The International Law of Recognition and the Status of the Republic of China*, 3 J. CHINESE L. 193, 193 n.6 (1989); see also Chang & Lim, *supra* note 131, at 425 (asserting that United Nations G.A. Res. 2758 of 1971 has already determined that there is only one China and that its legal government is situated in Beijing). *But see* Lee, *supra* note 188, at 366 (opining that the resolution does not explicitly recognize the sovereignty of the People's Republic of China over Taiwan).

214. *E.g.*, Chiu, *supra* note 213, at 194-97 (offering that the decision is left to individual states of the international community through the system of recognition); Lee, *supra* note 188, at 366, 367 (finding that, "[u]nder the UN system, the International Court of Justice is the only judicial organ which is in a position to pass judgment upon the question of who has sovereignty over Taiwan").

215. *E.g.*, Attix, *supra* note 188, at 379 (finding that Taiwan's trading partners are attempting to carry on relations with Taiwan in the way they always have); Chen, *supra* note 1, at 254 (diagnosing that "Taiwan is already a *de facto* sovereign nation"); Chiu, *supra* note 213, at 196 (suggesting that, in practice, nations such as the United States, which do not officially recognize Taiwan as a *de jure* state, treat it as a *de facto* state); Rosenblatt, *supra* note 202, at 798-800 (finding that (1) Taiwan is freely pioneering in the management of a form of *de facto* independence, which has no name but may achieve some degree of recognition; (2) despite its curious status, Taiwan constitutes enough of a state to receive support against the threat of military attack, conducts varying degrees of non-official, non-diplomatic relations with most nations of the world, and represents an important economic factor with a major role in world trade; and (3) in light of altered perceptions of sovereignty and independence, the world community may one day conclude that Taiwan's non-status is essentially irrelevant to the undeniable fact of its existence on the international scene and the rights of its people).

216. See *Point-Counterpoint: The International Legal Status of Taiwan*, 1 UCLA J. INT'L L. & FOREIGN AFF. 320, 320 (1996-97) (opining that "proponents of 'One China'

Although the finality scenario of reunification remains favored<sup>217</sup> over intermediary approaches,<sup>218</sup> the controversy centers around the political and economic organization of the future Chinese state. The People's Republic of China and Taiwan exhibit significant differences between their constitutional, legal and political systems, economies, administrative and educational structures, and societies.<sup>219</sup> The former features a single-party government and a command-and-control economy still under development, whereas the latter boasts a capitalistic society with a pluralistic legal and political system and a free-wheeling economy.<sup>220</sup> Bridging the seemingly unbridgeable gap may involve compromising between the contributions of each player or adopting one of the existent system alternatives. The Government of the People's Republic of China proffers the absorption of Taiwan under the "one country—two systems" model as a middle-ground approach.<sup>221</sup> In contrast, the Government of Taiwan insists that a viable implementation process cannot be commenced unless the

rely on historical and cultural arguments while those in favor of Taiwanese autonomy often . . . stress the legal basis for their claims").

217. In contrast to the Taiwanese Constitution, the Constitution of the People's Republic of China proffers a reunification and indivisibility clause, but, unlike the German Basic Law, it does not provide a process mechanism. XIANFA [Constitution] pmb. para. 9 (1982), *reprinted in 2 CONSTITUTIONS OF NATIONS* 94, 95 (Amos J. Peaslee ed., 1985); XIANFA art. 51, *reprinted in 2 CONSTITUTIONS OF NATIONS, supra*, at 94, 95.

218. For an alternative model within the spectrum between independence and reunification, see generally Rosenblatt, *supra* note 202, at 797 (discussing voluntary compacts of freely associated states that allow for the preservation of sovereignty, the retention of the right to self-determination and termination of the relationship, and membership in international organizations).

219. See Edwin L.-C. Lai, *The Economic Implications of the Reunification of Hong Kong with China*, 30 VAND. J. TRANSNAT'L L. 735, 737 (1997) (comparing the systems of China and Hong Kong).

220. *E.g.*, SUTTER, *supra* note 210, at 1, 6-9; U.S. DEP'T OF STATE, *supra* note 212, at 3-5.

221. For further discussions of the doctrine, see, for example, Cooney, *supra* note 179, at 497 (providing a critical examination of this approach based on autonomy and accountability deficiencies); Huang & Qian, *supra* note 199, at 290 n.4, 327-28 (explaining that (1) "the dominant Confucianism in China's legal history has several central precepts: *ren* [feeling of humanity], *i* [moral integrity], and *li* [customary rules of proper individual and social conduct]"; (2) post-Deng Xiaoping China is gradually entering a unique stage of legal development; (3) it will feature "three law families" (civil law, common law, and socialist law systems) and "four compound [legal] regions"; (4) like other countries with federal systems, China—currently a non-federal system country—will need to develop inter-regional conflicts rules; and (5) in order to mollify those who doubt or resist the concept of "one country, two systems," the mainland "must formulate specific proposals that will accommodate the needs and concerns of all of China's regions"); Lai, *supra* note 219, at 744 (observing that the idea of a "highly independent economic entity but not a political or legal entity independent from mainland China" represents a paradox to most Western academics and that "this dualism could be sustained and eventually eliminated if China itself continues to evolve in favor of the interests of the emerging capitalist class and its affiliated middle class").

mainland abandons its socialist system and embraces a democratic form of government.<sup>222</sup>

A similar chasm had plagued German rapprochement.<sup>223</sup> By agreeing to disagree, however, the Federal Republic of Germany and the German Democratic Republic were able to launch a viable partnering mechanism that increased the permeability of the inner-German border, facilitated German-German dialogue, and alleviated the hardships of division. Even despite the osmosis effect generated by the closer relationship, post-reunification Germany experienced severe political, economic, and societal tremors.<sup>224</sup> Avoiding similar disturbances may present the most formidable challenge involved with creating a viable finality scenario for the Chinese nation. Independent of a neat transfer of the particulars of the German blueprint,<sup>225</sup> the responsible players may feel encouraged by the

222. Cooney, *supra* note 179, at 507 n.49 (referring to Taiwan's Guidelines for National Reunification); Fu, *supra* note 178, at 335 (emphasizing that most Chinese dissidents who live abroad are opposed to the imposition of communist autocratic rule on Taiwan). *But see* TAIWAN AFFAIRS OFFICE, WHITE PAPER, *supra* note 149, pt. IV (committing the People's Republic of China to a socialist system).

223. Reimann, *supra* note 18, at 1994 (noting that four decades of membership in opposing European blocs magnified the difficulties in German reunification).

224. For a critical evaluation, see generally QUINT, *supra* note 136 (providing that (1) Eastern legal, administrative, and institutional structures were replaced by those of the West, without mutual adjustment or harmonization; (2) the civil service, the judiciary, and the universities were restructured to conform with the Western model, entailing the replacement of the majority of Eastern personnel by imports from the West; (3) the issues associated with real property rights lost through communist expropriation or by emigrants from the German Democratic Republic were settled very much in favor of Western interests; (4) to the detriment of the Eastern economy, Eastern production facilities were sold off or liquidated hastily, according to Western market principles; (5) in early 1990 Western political parties and party politics already had taken over East German election campaigns, marginalizing or eliminating the grassroots organizations and citizens' alliances that had carried the 1989 revolution; and (6) bureaucrats in Western ministries drafted the Treaty of Economic Union and the Unification Treaty with very little Eastern input); McLaughlin, *supra* note 18, at 280 (analyzing German reunification and challenges associated with that process against the backdrop of Jhering's plea for the feeling of legal right, *Rechtsgefühl*, in his *The Struggle for Law, Kampf ums Recht*).

225. For a rejection of the application of the "two German states formula" to the relationship between the mainland and Taiwan, see generally TAIWAN AFFAIRS OFFICE, WHITE PAPER, *supra* note 149 (arguing that (1) the German and Chinese cases differ in their roots and nature, status under international law, and actual conditions of existence; (2) the outcome of World War II and external factors drove and dominated the German division into two states and reunification, while the Taiwan question arose as a remnant of a civil war falling exclusively into China's internal affairs; (3) distinct fates for Germany and China were stipulated in the applicable international treaties; and (4) the Federal Republic of Germany and German Democratic Republic, unlike China and Taiwan, were geostrategically positioned in a Cold War hot spot). *But see* Lilley & Waldron, *supra* note 7, at A22 (noting that, in the Chinese case, "a parallel arrangement would be *yi zhong liang guo* ('one China, two states')").

German experience that unencumbered creativity may in the long term lead to results that were previously adjudged as inconceivable. The Chinese affinity for treaty frameworks in the context of legal and political arrangements may be honed to institutionalize levels of mutual interaction and reinvigorate social, economic, trade, and other exchanges. In this sense, the success of the Basic Treaty has illustrated how the proportional relationship between increasing contacts and decreasing tensions can effectively be brought to full fruition.

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