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I. INTRODUCTION

The surprise and drama of President Carter's recognition of the People's Republic of China as "the sole legal government of

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China"[1] have overshadowed the unique legal concepts on which his policy rests. Those concepts impact directly on private trade and investment transactions with Taiwan. They may also sound the death knell for traditional definitions of the term "recognition" in international law and diplomacy.

The recognition of a government such as the People's Republic of China (and the related termination of recognition of the Republic of China government) is a unique hybrid: a political act of the executive branch which directly affects the application of legal principles by the judicial branch. In the present instance the President sought, by executive directives and the introduction of legislation in Congress, to separate the political act from its traditional legal consequences. The resulting Taiwan Relations Act of 1979,[2] amounts to legislative re-recognition of the Republic of China government on Taiwan.

This article examines the domestic legal consequences of the international law concept of recognition, and the relevance of that concept in current diplomatic practice. It will also consider the effect of the Taiwan Relations Act of 1979, which restored legislatively the legal incidents normally flowing only from the executive act of recognition.

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1. Joint Communique on the Establishment of Diplomatic Relations between the United States of America and the People's Republic of China, January 1, 1979, 14 WEEKLY COMP. OF PRES. DOC. 2264 (December 18, 1978) [hereinafter cited as P.R.C.-U.S. Joint Communique]. The Communique, which President Carter read during his television address to the nation on December 15, 1978, states in part:

> The United States of America and the People's Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979.
>
> The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.
>
> The United States of America and the People's Republic of China reaffirm the principles agreed on by the two sides in the Shanghai Communique and emphasize once again that:***
>
> - The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.

For a recounting of the events leading up to the Joint Communique, see D. Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China,* 19 HARV. INT'L L.J. 931, 937-44 (1978).

2. Pub. L. No. 96-8, 93 Stat. 14 (1979) (to be codified at 22 U.S.C. § 3301).

II. Traditional Legal Consequences of Derecognition

International law generally acknowledges that the determination of which government is to be recognized as representative of a foreign state is a political question lying within the discretion of each individual state.[3] Regardless of any objective set of facts which might exist, such as the foreign government's actual military and political control of all of the territory of the foreign state, a state has no legal obligation to recognize any government's claim to represent a foreign state.[4] In the United States the President has the exclusive power to recognize foreign governments and establish diplomatic relations without consultation with other branches of government. That power flows from article II, section 3 of the United States Constitution, which provides that the President "shall receive Ambassadors and other public Ministers."[5]

While deferring to the executive branch for the determination of which government is to be recognized as representative of a foreign state, United States courts have as a formal matter reserved for themselves the right to determine the legal consequences of that recognition. This distinction was stated by the United States Supreme Court in *Guaranty Trust Co. of New York v. United States:*

> What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as well as to the underlying policy are to be addressed to it and not to the courts. Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them.[6]

In practice, the absence of United States recognition of a government has traditionally had significant adverse legal consequences under domestic law, despite the courts' reserved right to decide

3. *See* 1 O'Connell, International Law 135 (2d ed. 1970).

4. Restatement (Second) of Foreign Relations Law of the United States § 99 (1965).

5. U.S. Const. art. II, § 3. *See* Congressional Research Service, Library of Congress, The Constitution of the United States of America 541 (1973 ed.).

6. Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 137-38 (1938).

independently the nature and extent of such consequences. Some of the more significant consequences deserve discussion.

A. *Property Rights*

An unrecognized government may not exercise ownership rights in property owned by the State and located outside the territory under its effective control.[7] The courts have held that property of the state located outside the territory remains subject to control of the recognized government even when no part of the territory remains under its control.

B. *Effect of Laws*

Courts generally have not accepted the laws of an unrecognized government as a basis for establishing rights and resolving disputes among parties located outside the territory under its effective control even though such laws would otherwise be applicable under generally accepted choice-of-law or conflict-of-law principles. The Second Circuit Court of Appeals, the District Courts of that circuit and the New York courts have been the forums most frequently faced with deciding the effect to be given the laws of non-recognized governments. The cases have arisen primarily as a result of the protracted periods of United States non-recognition of the Soviet government and its Eastern European regimes. In many cases, the decisions seem tempered by the particular degree of controversy prevailing in United States-Soviet relations at the time and are not analytically consistent in all respects. The American Law Institute, however, offers a useful formulation of the general legal principle which emerges from the cases:

> A court in the United States will give the law of an unrecognized entity or regime which satisfies the requirements for recognition . . . the effect which it would have under the rules of conflict of laws if the entity or regime were recognized, to the extent only that such law relates to:
>
> (a) matters of an essentially private nature within the effective control of the unrecognized entity or regime or
>
> (b) the transfer of property localized at the time of the transfer in the territory of the unrecognized entity or regime and belonging then to a national thereof.[8]

7. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 107, Comment c (1965).

8. *Id.* § 113.

Chief Judge Cardozo, in *Petrogradsky Mejdemarodny Kommerchesky Bank v. National City Bank of New York,* explained the courts' rationale succinctly, stating, "The decrees of the Soviet Republic nationalizing the Russian banks are not law in the United States, nor recognized as law . . . . They are exhibitions of power. They are not pronouncement of authority."[9] Courts, however, do not deny the effect of laws of an unrecognized government in regulating "the everyday transactions of business or domestic life" within the territory controlled by the non-recognized government.[10] In that situation a different test is advanced, which may result in application of laws of the non-recognized government.

> The question with us is whether, within Russia, the Soviet decrees have actually attained such effect as to alter the rights and obligations of parties in a manner we may not in justice disregard, even though they do not emanate from a lawfully established authority, recognized politically by the government of the United States.[11]

Some of the cases that refused to enforce particular laws of unrecognized governments have suggested in dicta that a different result might have been reached if the particular laws there in question, generally laws of expropriation, had not been the subject of specific criticism by the executive branch. One court noted in an aside that:

> [W]e do not have before us a mere failure to recognize in the absence of a strong executive policy against condoning in any way the Soviet occupation of Latvia. It might well be that in the absence of such a policy the usual rules applicable under the established doctrines of conflicts of laws would apply.[12]

The result in some cases may also be affected by the fact that a different holding would have placed additional resources in the control of "the very government not recognized as existent."[13]

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9. Petrogradsky Mejdemarodny Kommerchesky Bank v. National City Bank of New York, 253 N.Y. 23, 28, 170 N.E. 479, 481 (1930).

10. *Id.* at 28-29, 170 N.E. at 481.

11. M. Salinoff & Co. v. Standard Oil Co. of New York, 262 N.Y. 220, 225, 186 N.E. 679, 681 (1933).

12. Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000, 1002 (D.C. Cir. 1951).

13. Petrogradsky Mejdemarodny Kommerchesky Bank v. National City Bank of New York, 253 N.Y. 23, 170 N.E. 479, 481 (Ct. App. 1930).

C. *Judicial Decisions*

Decisions by courts of an unrecognized government do not appear to be given any greater effect than acts by other branches of such a government. On several occasions, United States courts have held that courts established by an unrecognized government are incapable of issuing effective process over residents of the territory controlled by that government.[14]

D. *Court Appearances*

An unrecognized government has not been permitted to appear as a litigant before United States courts. The Supreme Court states in *Guaranty Trust Co. of New York v. United States* that:

> [T]he principle controlling here and recognized by the courts of New York [is] that the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it . . . and that suit in its behalf may be maintained in our courts only by that government which has been recognized by the political department of our own government as the authorized government of the foreign state.[15]

Some very narrow distinctions, however, have been drawn by some courts between governmental and non-governmental entities. In *Bank of China v. Wells Fargo Bank & Union Trust Co.*,[16] a deposit of the Bank of China in a United States bank was claimed by rival managements sponsored by the recognized Republic of China government and the unrecognized government of the People's Republic of China. The Court, before deciding that award of the funds to either claimant would be premature, noted that "The funds here in controversy belong to a Chinese corporation, which has weathered previous governmental upheavals. Although by virtue of majority stock ownership, the Government of China controls this corporation, it is not a public corporation nor are its funds government funds."[17] Following the same logic, the court in *Walter Upright v. Mercury Business Machines Company, Inc.* permitted the plaintiff corporation, a seller of business machines, to recover on a

14. *See* The Signe, 37 F. Supp. 819, 821 (E.D. La. 1941); The Regent, 35 F. Supp. 985, 986 (E.D.N.Y. 1940).

15. Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 137 (1938).

16. 92 F. Supp. 920 (N.D. Cal. 1950).

17. *Id.* at 923.

trade acceptance even though the plaintiff was alleged to be "an arm and instrumentality of such unrecognized East German Government."[18] By contrast, the court in *The Maret* ignored the separate existence of the nominal claimant, the Estonian State Steamship Line, and concluded that "an unrecognized sovereign itself, the Soviet Republic of Estonia, is the actual party in interest . . . . [A] fortiori it may not be heard to assert a claim based upon ownership of the *Maret.*"[19]

E. *Statutory Interpretation*

Numerous United States governmental trade measures are of uncertain applicability in respect of the territory controlled by unrecognized governments. Under the Trade Act of 1974, which implements the Generalized System of Preferences, a country may be designated as a beneficiary developing country eligible for duty-free treatment on certain articles exported to the United States.[20] The term "country" as used in the statute includes both the state and government without distinction. Similarly, the Arms Export Control Act permits sale of weapons, defensive aircraft and other military equipment only to "friendly countries."[21] The absence of recognition tends to cast in doubt the availability of the benefits of these and similar statutes.

In addition to the foregoing, the particular circumstances of the derecognition of Taiwan raised questions concerning the applicability of certain other United States statutes which apply sanctions in respect of countries with which the United States has "terminated" or "severed" diplomatic relations. The Foreign Assistance Act, for example, provides that "[n]o assistance shall be furnished under this chapter or any other Act . . . in or to any country . . . with which the United States has severed or hereafter severs diplomatic relations . . . ."[22]

III. Political Basis of Recognition Policy

The hostility which United States courts have displayed toward the interests of unrecognized governments stems from the concep-

18. Upright v. Mercury Business Machines Co., Inc., 13 A.D.2d 36, 39, 213 N.Y.S.2d 417, 421 (1961).

19. The Maret, 145 F.2d 431, 442 (3d Cir. 1944).

20. 19 U.S.C. §§ 2461-65 (1976).

21. 22 U.S.C. §§ 2751, 2754 (1976).

22. 22 U.S.C. § 2370(t) (1976).

tion that the executive branch establishes national policy goals when it withholds recognition from a government.[23] The courts deem their own actions to be in furtherance of those goals.[24] Since recognition—with its implied cachet of accepted legitimacy—has frequently been used by states, including the United States, to communicate their approval or disapproval of the manner in which a change in government has been effected,[25] the position taken by the courts is founded on an obvious logic. It does not, however, comport with the shifting realities of diplomacy.

The policy of the United States in recognizing new governments has changed frequently. The changes have reflected the relative world power position of the United States at various points in its history, although generally couched in quite different rhetoric. In its infancy the United States generally based recognition upon the declaratory or *de facto* doctrine, which holds that recognition is in order if as a matter of fact the government in question exists as the ruling power in control of the country.[26] In 1868 with the nation's Civil War behind it, Secretary of State Seward advanced a "republican" test: "The policy of the United States is settled upon the principle that revolutions in republican States ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanency."[27] The post-World War II rationale of the United States combined national self-interest with an examination of whether the government in question fulfilled its "international obligations" as defined by the United States. This confluence of ideas was expressed by Secretary of State Dulles in reference to the People's Republic of China government:

23. "Non-recognition of a foreign sovereign and non-recognition of its decrees are to be as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition." The Maret, 145 F.2d 431, 442 (3d Cir. 1944).

24. "[W]hen the executive branch of the Government has determined upon a foreign policy, which can be and is ascertained, and the non-recognition of specific foreign decrees is deliberate and is shown to be part of that policy, such non-recognition must be given effect by the courts." Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000, 1003 (D.C. Cir. 1951).

25. *See generally* T. CHEN, THE INTERNATIONAL LAW OF RECOGNITION 105-116 (1951).

26. *Id.* p. 117.

27. 1 C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 162 n.8 (2d rev. ed. 1947).

> Internationally the Chinese Communist regime does not conform to the practices of civilized nations; does not live up to its international obligations; has not been peaceful in the past and gives no evidence of being peaceful in the future. Its foreign policies are hostile to us and our Asian allies. Under these circumstances it would be folly for us to establish relations with the Chinese Communists which would enhance their ability to hurt us and our friends.[28]

Another statement by Secretary Dulles was perhaps the most candid explanation of United States policy: "[W]e accord [recognition] when we think it will fit in with our national interest, and if it doesn't, we don't accord it."[29]

More recently, two important changes have taken place which undermine use of recognition as an emblem serving to inform the courts as to national policy goals of the Executive Branch. First, in accord with the changing balances in world power, the United States is returning to the declaratory policy of recognition, which it utilized as an infant nation, a policy which divorces recognition from legal or moral judgment. Deputy Secretary of State Warren Christopher has expressed this latest change as follows:

> the premise of our present policy is that diplomatic relations do not constitute a seal of approval . . . . [T]he reality is that, in this day and age, coups and other unscheduled changes of government are not exceptional developments. Withholding diplomatic relations from these regimes, after they have obtained effective control, penalizes us. It means that we forsake much of the chance to influence the attitudes and conduct of a new regime. Without relations, we forfeit opportunities to transmit our values and communicate our policies. Isolation may well bring out the worst in the new government.[30]

The second and most important change in United States recognition policy has been a gradual but firm movement away from defining relations with newly formed governments in terms of recognition, non-recognition or derecognition.[31] In the political arena,

28. Address by Secretary of State Dulles, Lions International Convention (June 25, 1957), *reprinted in* 37 DEP'T STATE BULL. at 94-95 (1957).

29. Secretary of State Dulles, News Conference (March 13, 1957), *reprinted in* 36 DEP'T STATE BULL. at 536 (1957).

30. Address by Secretary of State Christopher (June 11, 1977) *quoted in* Baxter, *Foreword* to L. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS—THE PRACTICE OF THE UNITED STATES at ix-x (1978).

31. Baxter, *Foreword* to L. GALLOWAY, *supra* note 30 at ix.

there is little that the unrecognized government has not been able to achieve in its relations with other recognized and unrecognized governments. Non-recognition does not preclude membership and participation in global or regional organizations. It does not prevent the negotiation and execution of treaties with non-recognizing governments. Non-recognition generally does little to interfere with the normal intercourse of states.[32] Professor D. P. O'Connell notes that "It is possible for a government to have almost normal intercourse with another and yet not recognize it, allowing only the consequences of its intercourse and excluding the other consequences which would flow from recognition."[33] The relationship of the United States and the People's Republic of China prior to the recognition announcement in December 1978 illustrates this point. Without recognizing each other the United States government and the People's Republic of China government had many contacts: they served together as members of international organizations;[34] both agreed to the text of joint communiques;[35] they exchanged visits of political leaders;[36] they exchanged diplomatic representations through the establishment of liaison offices in each other's capital and became co-signers of multilateral treaties.[37] For all the tradition and custom that surround the concept of recognition in international law, it may now simply be, as one commentator has observed, that it "has little substantive content."[38]

Political development in the field of governmental recognition has not yet, however, been matched by judicial perception that in the current world of non-recognition may reflect a variety of pres-

32. The phenomenon of dealing directly with unrecognized governments is sometimes described as recognition of the *de facto* existence of a government or as "*de facto* recognition." The latter formulation, however, confusingly focuses on the legal status of the act of recognition rather than, more properly, on the accepted legal status of the government in question. 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 3-4 (1963).

33. 1 O'CONNELL, *supra* note 3 at 153.

34. United Nations Security Council Restoration of the Lawful Rights of the People's Republic of China in the United Nations, G.A. Res. 2758, 26 U.N. GAOR, Supp. (No. 29) 2, U.N. Doc. A/8429 (1971).

35. *E.g.*, P.R.C.-U.S. Joint Communique, *supra* note 1; Shanghai Joint Communique, February 27, 1972, 8 WEEKLY COMP. OF PRES. DOC. 473 (1972).

36. Frankel, *A Quiet Greeting*, N.Y. Times, Feb. 21, 1972, at 1, col. 8 (President Nixon's 1972 visit to Peking).

37. *E.g.*, Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295.

38. Schwebel, *Is the Recognition of Governments Obsolete?* Washington Post, Feb. 23, 1972, at 16, col. 3.

sures and relationships which do not necessarily include a national policy of animosity toward the unrecognized government.[39] Accordingly, President Carter's terminating recognition of the Republic of China as the government of China created the problem that his action would likely produce the unacceptable domestic legal results described above. Although the special circumstances surrounding the Taiwan situation might have led the courts to re-examine the prevailing judicial attitudes towards non-recognition, one could not reasonably have expected prudent businessmen to maintain normal commercial relations with Taiwan on the speculation that courts would not follow the principles established in prior decisions. President Carter sensibly opted for a legislative solution, submitting to Congress a proposed bill[40] which would have extended to Taiwan a limited number of the legal attributes of a recognized government.[41]

IV. Diplomatic Status of Taiwan

The ROC government is the successor to the revolutionary government of China begun in 1912 under Dr. Sun Yat-Sen following the overthrow of the Manchu dynasty. The ROC government fled to the offshore island of Taiwan in December 1949 and since that time has controlled no mainland territory. The People's Republic of China government ("PRC"), formed under the leadership of

39. Conversely, recognition should perhaps be less automatically accepted as a cachet of national approbation in light of the executive branch's current readoption of a declaratory policy of recognition. Some courts have acknowledged that the withholding of recognition "does not necessarily stamp all of its acts with disapproval or brand them unworthy of judicial notice . . . . [Executive policy] is a fact which properly should be weighed along with the other facts before the court." Bank of China v. Wells Fargo Bank & Union Trust Co., 104 F. Supp. 59 (N.D. Cal. 1952).

40. S. 245; H.R. 2479, 96th Cong., 1st Sess., *reprinted in Hearings on S. 245, infra* note 62 at 3. The bill was substantially revised before final enactment as the Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 14 (to be codified at 22 U.S.C. § 3301-16 & scattered sections of 26 U.S.C.).

41. To bridge the gap in time between January 1, 1979, the effective date of the action recognizing the PRC, and the date on which the Taiwan legislation would become effective, the President on December 30, 1978, issued a "Memorandum for All Departments and Agencies" in which he directed the government to carry out substantially all of the terms of the proposed legislation prior to its enactment. 44 Fed. Reg. 1075 (1979). No legal basis for the directive has ever been advanced, although the memorandum begins with a dangling reference to the President's "constitutional responsibility for the conduct of the foreign relations of the nation."

Mao Tse-tung in October 1949 and seated in Peking, has controlled the mainland provinces of China since the flight of the ROC government. Thus, since 1949 the PRC has been the *de facto* government of the mainland territory and the ROC has been the *de facto* government of Taiwan. The United States, however, although steadfastly retaining its position that the ROC was the *de jure* government of all of China, never officially acknowledged that Taiwan again became a part of China following World War II.[42]

In January 1950, President Truman stated that "in keeping with [the Cairo and Potsdam] declarations, [Taiwan] was surrendered to Generalissimo Chiang Kai-shek, and for the past four years, the United States and the other Allied powers have accepted the exercise of Chinese authority over the Island."[43] A different note was sounded upon the outbreak of hostilities in Korea in June 1950. President Truman declared the "neutralization" of the Taiwan Strait and stated that determination of the future status of Taiwan was to "await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations."[44] The following year, Secretary of State Dulles observed that "technical sovereignty over [Taiwan] and the Pescadores has never been settled" and "the future title is not determined by the Japanese peace treaty."[45]

In this context, the Joint Communique of December 15, 1978, stated that the United States recognized the PRC as "the sole legal government of China."[46] The unanswered question is whether the United States now at last acknowledges Taiwan is part of China. The Communique itself continues the semantic game earlier played in the 1972 Shanghai Joint Communique. In the 1972 document the United States "acknowledge[d] that all Chinese on ei-

42. Historically, Taiwan was an independent, largely tribal area until it was conquered by forces of the Manchu Chinese Empire in 1683. In 1895 China ceded Taiwan to Japan by the Treaty of Shimonoseki, bringing the Sino-Japanese War to a close. ROC forces assumed control of Taiwan upon Japan's World War II surrender in 1945.

43. Statement by Pres. Truman, White House (Jan. 5, 1950), *reprinted in* 22 DEP'T STATE BULL. at 79 (1950).

44. Statement by Pres. Truman (June 27, 1950), *reprinted in* 23 DEP'T STATE BULL. 5 (1950).

45. CHINA AND THE QUESTION OF TAIWAN, DOCUMENTS AND ANALYSIS 128 (H. Chiu, ed. 1973). The Japanese peace treaty with the Allies in 1952 did not formally cede Taiwan to China; Japan merely "renounced all right, title and claim to Taiwan." *Id.* at 245.

46. P.R.C.-U.S. Joint Communique, *supra* note 1.

ther side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States does not challenge that position."[47] The 1978 Communique uses a variation of the same theme: "The Government of the United States acknowledges the Chinese position that there is but one China and Taiwan is part of China."[48] In acknowledging the "Chinese position" rather than the fact itself, the President deliberately left ambiguous the precise legal view which the United States takes concerning the status of Taiwan.[49] The inherent ambiguity of the word "acknowledge"[50] is accentuated by the context. The ambiguity, however, extends only to the bare legal issue. On a practical level the Communique states that "our current commercial, cultural, trade and other relations with Taiwan" will be maintained "through non-governmental means," which constitutes acceptance of the separate existence of Taiwan for a number of significant purposes.[51] The United States objective of continuation of separate

47. Shanghai Joint Communique, *supra* note 35. For an examination of the linguistic discrepancy between the English and Chinese terminology used, see Li, *The Law of Non-Recognition: The Case of Taiwan,* 1 NORTHWESTERN J. INT'L LAW AND BUS. 134, 137 n.12 (1979).

48. P.R.C.-U.S. Joint Communique, *supra* note 1.

49. Recognition of governments must be distinguished from recognition of states. An interesting question exists whether Taiwan should properly be regarded as a separate nation state. Statehood is generally found to require an entity that has a defined territory and population under the control of the government and that engages in foreign relations. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 100 (1965). In a similar vein, the 1933 Convention on Rights and Duties of States provides in Article (1) that: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States." Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881. In the case of Taiwan, requirements (a), (c), and (d) are probably satisfied, but requirement (b) (*i.e.,* a defined territory) occasions some difficulty. If the government of Taiwan simply claimed competence in relation to the territory of Taiwan (including the Pescadores), one might easily conclude that Taiwan complies with the requirements of statehood in international law, and should therefore be considered as an independent nation state. The ROC government, however, claims competence over mainland China in addition to Taiwan. For that reason alone, it might be argued that Taiwan does not comply with the requirements of statehood because it does not possess a defined territory.

50. "Acknowledge" may mean "to take notice of" or, more strongly, "to recognize as genuine." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (14th ed. 1961).

51. Subsequent enactment of the Taiwan Relations Act with all its provisions

relations with Taiwan, however, is inconsistent under traditional legal principles with the political decision that Taiwan has no recognized government and that it may indeed be a province of another recognized state.

V. THE TAIWAN RELATIONS ACT

A. *General Provisions*

The Taiwan Relations Act[52] goes significantly further than the legislation first proposed by President Carter. It legislatively accords to the ROC all of the legal attributes normally extended to states and governments through the political act of recognition. The Act approaches the Taiwan relations question on two levels. At the private level, the Act provides that "the law of the United States shall apply with respect to Taiwan in the same manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979," and that "[t]he absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan."[53]

At the public level, all inter-governmental relations between the United States government and its agencies and the ROC government and its agencies are funnelled through two officially designated entities, which the Act euphemistically refers to as

for the continuance of commercial, cultural and other relations between Taiwan and the United States must at least amount to recognition of the *de facto* control of the ROC on Taiwan. Although not determinative of recognition, such provisions clearly lead to the conclusion that the United States recognizes the existence of some form of international entity with a competent governing authority. While various provisions in the Act might be cited, the most conclusive provision is Section 4(b)(i) which provides that "whenever the laws of the United States refer or relate to foreign countries, nations, states, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." 22 U.S.C.A. § 3303(b)(1) (Supp. 1 1979). Section 4(c) provides for the "continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law." *Id.* § 3303(c). Finally, Section 4(d) provides that "nothing in this act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any international organization." *Id.* § 3303(d).

52. 22 U.S.C.A. § 3301 *et seq.* (Supp. 1 1979).

53. *Id.* § 3303.

"unofficial instrumentalities."[54] The official instrumentality for the United States is the American Institute in Taiwan, a nonprofit corporation organized under the laws of the District of Columbia.[55]

The American Institute has two missions. First, it conducts and carries out "[p]rograms, transactions and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan . . . in the manner and to the extent directed by the President."[56] Thus, the American Institute will function as an intermediary for the United States government and its agencies in any activities which would otherwise deal with the ROC government or its agencies. Second, since the United States will no longer have official diplomatic service personnel in Taiwan, the American Institute is authorized to perform normal consular functions, including administering oaths, taking affidavits or depositions, performing notarial acts, and assisting and protecting the interests of United States persons by performing other consular acts.[57] In this latter role, the American Institute, headed and staffed by former personnel of the United States Foreign Service, is successor to the United States embassy in Taipei and the consulates elsewhere in Taiwan.

The Act also requires that the Taiwan government establish its own unofficial instrumentality. The ROC government has duly created the Coordinating Council for North American Affairs[58] and President Carter has determined that the Taiwan Council possesses "the necessary authority . . . to provide assurances and take other actions on behalf of Taiwan."[59] Thus, the President and United States agencies, within the limits set by the President, are authorized to deal with the Taiwan Council in substantially the same way in which they previously dealt with the ROC

54. *Id.* §§ 3305, 3309.

55. *Id.* § 3305. The American Institute was incorporated in the District of Columbia on January 10, 1979. Significantly, the Act in Section 6(c) provides that its terms preempt any inconsistent terms of the laws of the District of Columbia or any other State in which the American Institute is doing business. *Id.* § 3305(c). Governmental control of the actions of the American Institute is assured by Section 6(a)(2), which authorizes the President to designate "a comparable successor non-governmental entity." *Id.* § 3305(a)(2).

56. *Id.* § 3305(a).

57. *Id.* § 3306.

58. N.Y. Times, Feb. 16, 1979, at A4 col. 2.

59. 22 U.S.C.A. § 3309 (Supp. 1 1979). By Exec. Order No. 12,143, 44 Fed. Reg. 37,191 (June 26, 1979), Pres. Carter determined that the Taiwan Council conformed to the requirements of the Act.

government.[60] In addition, the Taiwan Council's central office in Washington and its eight branch offices throughout the United States have replaced the ROC embassy and consulates.[61]

Although an exaltation of form over substance, the "unofficial instrumentality" format promises to be an effective, albeit clumsy, mechanism for resolving the conflicting diplomatic and economic interests of the United States. In testimony before the Senate Committee on Foreign Relations, Deputy Secretary of State Christopher has pointed out the successful experience of other countries which utilized an unofficial alter ego after terminating diplomatic relations with the ROC and recognizing the PRC.[62] Japan, which changed its diplomatic recognition from the ROC to the PRC in 1972, is generally credited with pioneering the approach.[63]

B. *Effects at Governmental Level*

1. Treaty Relations

The United States and Taiwan were parties to some 59 bilateral and multilateral treaties, including the Mutual Defense Treaty of 1954,[64] the Treaty of Friendship, Commerce and Navigation,[65] and the Agreement for Cooperation concerning Civil Uses of Atomic Energy.[66] The Act approves the continuation of all such agreements "unless and until terminated in accordance with law."[67] State Department representatives have testified that President Carter intends to allow all of the treaties to remain in force except the Mutual Defense Treaty of 1954, which he acted to terminate

60. 22 U.S.C.A. § 3309 (Supp. 1 1979).

61. Although the Act authorizes the President to extend to the Taiwan Council and its personnel on a reciprocal basis "such privileges and immunities . . . as may be necessary for the effective performance of their function," Sec. 10(c), 22 U.S.C. 3309, none have been extended to date. It is unlikely that the President will elect to extend full diplomatic privileges and immunities. The Georgia Senate, however, has adopted a resolution according diplomatic privileges and immunities to personnel of the Taiwan Council office located within its borders. Ga. S. Res. 194, March 21, 1979.

62. *Hearings on S. 245 Before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. 30 (1979).

63. D. Scheffer, *supra* note 1, at 941 n.33.

64. 6 U.S.T. 433; T.I.A.S. 3178; 248 U.N.T.S. 213.

65. 63 Stat. 1299; T.I.A.S. 1871; 25 U.N.T.S. 69.

66. 23 U.S.T. 945; T.I.A.S. 7364.

67. 22 U.S.C.A. § 3303 (Supp. 1 1979).

effective January 1, 1980.[68] On December 13, 1979, the United States Supreme Court dismissed without oral argument an action brought by Senator Barry Goldwater and 23 other members of Congress,[69] which alleged that the President lacked the power to terminate that treaty without Congressional concurrence.[70]

The stability and military security of Taiwan should be unaffected by the outcome of the Goldwater litigation. In fact, the Act probably offers Taiwan stronger defense assurances than does the Mutual Defense Treaty itself. The Act reiterates the basic thrust of the treaty that "any effort to determine the future of Taiwan by other than peaceful means" will be considered "a threat to the peace and security of the Western Pacific area and of grave concern to the United States."[71] The Act, however, goes further in expressly stating that boycotts and embargoes would also constitute such a threat,[72] and in affirmatively stating that "the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability."[73]

2. Export-Import Bank

Taiwan credits represent the third largest concentration of financing by the Export-Import Bank of the United States. One of

68. *Hearings on S. 245, supra* note 62, at 188.

69. Goldwater v. Carter, 48 U.S.L.W. ____ (S. Ct. 1979). Six Justices did not reach the merits of the case, four finding it nonjusticiable, one finding it not ripe for judicial review, and one concurring in dismissal without specifying his grounds.

70. *Id.* Pursuant to Article X of the treaty, one year's notice of termination is required. The right of the President to terminate such a treaty unilaterally has been the topic of continuing debate. Among those who claim that the President does not have the right are Senator Goldwater, *Abrogating Treaties,* N.Y. Times, Oct. 11, 1977, at p. 37, col. 1; Goldwater, *Treaty Termination is a Shared Power,* 65 A.B.A.J. 198, 202 (1979); Professors Reisman and McDougal of the Yale Law School, Reisman and McDougal, *Who Can Terminate Mutual Defense Treaties?,* The Nat'l Law J., May 21, 1979, at 19, col. 1; and J.T. Emerson, *The Legislative Role in Treaty Abrogation,* 5 J. LEGIS. 46 (1978). Those who argue in favor of the President's power to terminate the Treaty unilaterally include Senator Kennedy, Kennedy, *Normal Relations with China: Good Law, Good Policy,* 65 A.B.A.J. 194, 195 (1979); and, predictably, Dep't of State Legal Advisor, H. Hansell, Memorandum for Secretary of State, President's Power to Give Notice of Termination of U.S.-ROC Mutual Defense Treaty, *reprinted in Hearings on S. 254, supra* note 62 at 189.

71. 22 U.S.C.A. § 3301(b)(4) (Supp. 1 1979).

72. *Id.*

73. *Id.* § 3302(a). *See also id.* § 3301(b)(4).

the first questions raised upon derecognition of Taiwan was the future policy of the United States toward outstanding and future loans to Taiwan customers. Over one billion dollars in credits and guarantees are presently outstanding to borrowers in Taiwan. Eximbank has now made it clear that credits to private business enterprises in Taiwan will continue substantially as in the past. Credits to the ROC government or its commercial agencies such as the Bank of China or Taiwan Power Company will require the interposition of one or both of the American Institute and the Taiwan Council.[74]

3. Overseas Private Investment Corporation

Taiwan's position with the Overseas Private Investment Corporation, the government-sponsored corporation that insures the foreign investment of United States investors against expropiration, currency blockage and other political risks,[75] is explicitly improved by the Act.[76] OPIC's enabling legislation requires it to favor activities in countries with annual per capita income below $1,000 adjusted to 1975 value.[77] The per capita income in Taiwan has for the first time exceeded that figure,[78] and it would in due course have been removed from the preference list. The Act, however, specifies that the $1,000 restriction will not apply to investment projects commenced in Taiwan within three years from the date of the Act's enactment.[79] All other criteria remain the same.[80]

4. Governmental Properties

Principles of international law suggest that property located in the United States and owned by the Chinese state must be viewed as subject to the control of the recognized government of China,

74. Address by W. Glick, General Counsel for Eximbank, Taiwan: Legal Fallout of Derecognition, ALI-ABA Course of Study (June 1, 1979).

75. OPIC was established by the Foreign Assistance Act of 1969, Pub. L. No. 91-175 § 231, 83 Stat. 809 (1969) (codified at 22 U.S.C. § 2191 (1976)).

76. 22 U.S.C. § 3304. Of the total U.S. investment in Taiwan of approximately $500 million, approximately $144 million was insured by OPIC. S. REP. No. 96-97, 96th Cong., 1st Sess. 22-23 *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 671-72.

77. 22 U.S.C.A. § 2191 (1979).

78. S. REP. No. 96-97, *supra* note 76 at 28, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 677.

79. 22 U.S.C.A. § 3304(a) (Supp. 1 1979).

80. *Id.* § 3304(b).

which is now the PRC.[81] Because of the tremendous growth in external assets of the ROC's government since December 1949, the State Department expressed the view that real estate owned by China prior to that time (such as the embassy property in Washington) would become subject to control of the PRC, while property subsequently acquired[82] (apparently presumed to include all personal property, such as bank accounts) would remain subject to control of the Taiwan government.[83] No legal authority was cited for this position, and the question was not addressed in the legislation proposed by the President.

Congress stopped at no such halfway measures in the Act. The Act provides that recognition of the PRC shall not affect private property rights of Taiwan.[84] It has been suggested that the provision may be void because it contravenes international law, and it may be that the PRC will test the validity of the provision. Whatever the particular merits of such a position with respect to the consular property, there appears to be no serious basis for challenging the legislative solution of the Act with respect to monetary deposits and other commercial properties.

5. Trade Law Status

United States trade with foreign countries is subject to significant regulation under United States laws, which frequently define restrictions and incentives in relation to "countries" or use similar terms connoting a separately definable entity. Section 4 of the Act continues the application of United States laws to Taiwan in the same manner that such laws previously applied. The section expressly provides that whenever the laws of the United States relate to foreign countries, nations, states, governments, or similar entities, such terms include Taiwan, regardless of the absence of recognition and diplomatic relations.[85] The Act thus insures that Taiwan will not be treated as a province of a Communist country for the purposes of legislative restrictions applicable to such countries. Taiwan will remain eligible under such laws as the Arms Export

81. *See* text accompanying note 7 *supra*.

82. Such property would include all personal property such as bank accounts.

83. Interview with Steven Orlins, attorney, Dep't of State, Legal Advisor's Office (January 11, 1979).

84. 22 U.S.C.A. § 3303(b)(3)(B) (Supp. 1 1979).

85. *Id.* § 3303(a).

Control Act of 1968,[85] the Atomic Energy Act of 1954,[87] the Export-Import Bank Act of 1945,[88] the Foreign Assistance Act of 1961,[89] the Mutual Educational and Cultural Exchange Act of 1961,[90] and the Trade Act of 1974.[91] Included under the 1974 Trade Act are provisions for nondiscriminatory trade treatment and for the benefits accorded lesser developed countries under the generalized system of preferences. Exports from Taiwan to the United States will not be combined with those from the PRC for purposes of orderly marketing agreement limits.

C. *Effects at Private Level*

1. Immigration and Visas

The immigration laws, like other laws of the United States, continue to apply to Taiwan and its nationals as previously.[92] Hence, there should be no difference in the criteria applied in the issuance of visas, and in the manner in which the entry of Taiwanese nationals into the United States is administered. The removal of diplomatic and consular facilities from the island of Taiwan and the substitution of the American Institute has resulted in some change in the procedure for the issue of visas. The Institute is not authorized to issue visas for entry into the United States because the American Institute is a private corporation and not an agency of the United States government. Any person in Taiwan wishing to apply for an entry visa into the United States may submit an application for a visa to any United States diplomatic or consular office, the nearest of which is in Hong Kong. Taiwanese nationals applying for a visa may submit applications for visas to the American Institute in Taiwan for transmission to Hong Kong. Passports and visas may still be received at the American Institute after their processing. The Act provides that Taiwan[93] shall be eligible for the annual limitation of 20,000 immigrant visas authorized for any single foreign state under the Immigration and Nationality Act of

86. 22 U.S.C. § 2751-54 (1976).
87. 42 U.S.C. § 2011 *et seq.*
88. 12 U.S.C. § 635-35i.
89. 22 U.S.C. § 2151 *et seq.*
90. *Id.* § 2451-59.
91. *Id.* § 2101 *et seq.*
92. 22 U.S.C.A. § 3303(a) (Supp. 1 1979).
93. *Id.* § 3303(b)(6).

1952.[94] For the United States businessmen and tourists travelling to Taiwan, the offices of the Taiwan Council will continue to provide visas.

2. Resort to the Courts

The Act provides that the capacity of Taiwan to sue and be sued in the courts of the United States shall not be affected in any way by the absence of diplomatic relations or recognition.[95] The Act then defines Taiwan to include, as the context may require, "the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities (including political subdivisions, agencies and instrumentalities thereof)."[96]

3. Conflicts Questions

The Act provides that whenever the application of the laws of the United States depends upon the law applicable on Taiwan, the ROC law shall be considered applicable.[97] The United States thus continues to recognize the legal system in effect on Taiwan, and reference will be made to the laws of Taiwan whenever required by choice of laws rules.

4. Private Property

The Act preserves private property rights: the "absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan."[98]

94. 8 U.S.C. § 1152 (1976).
95. 22 U.S.C.A. § 3303(b)(7) (Supp. 1 1979).
96. *Id.* § 3314.
97. *Id.* § 3303(b)(4).
98. *Id.* § 3303(b)(3)(A).

VI. CONCLUSION

Taiwan has rapidly become one of the pre-eminent capitalist showplaces among countries of the developing third world. It is also a major United States trade partner. The events devolving from the Joint Communique of December 15, 1978, have been notable not only for facilitating the continuation of normal United States-Taiwan relations without interruption, but also as a benchmark in application of United States recognition policies. The executive branch, with the cooperation of the legislative branch, has succeeded in divorcing the diplomatic act of governmental recognition from its traditional non-diplomatic consequences. The ability thus to utilize the Congress to establish the specific consequences of recognition or de-recognition in a particular case should serve to make recognition policy a more flexible diplomatic tool in the future.