

Executive Summary Backgrounder

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Taiwan's "Unsettled" International Status: Preserving U.S. Options in the Pacific

John J. Tkacik, Jr.

Ma Ying-jeou, inaugurated as Taiwan's new president on May 20, 2008, has pledged to strengthen Taiwan's economic and political relationships with China. At the same time, he has good reason to preserve Taiwan's separate identity, and the U.S. has good reason to support him.

Taiwan is one of Asia's most dynamic democracies and one of America's top 10 trade partners. It is also a significant security partner in the Western Pacific, and its location astride East Asia's sea and air lanes gives it considerable geostrategic importance. It is therefore self-evident that the United States can gain no long-term benefit and would likely suffer long-term costs if it were to consign this major Asian democracy to the gentle care of Asia's most powerful dictatorship: the People's Republic of China (PRC).

The problem is that China claims sovereignty over Taiwan—a sovereignty that it has threatened to protect even with nuclear war. The United States has demurred to China's claims of sovereignty on the grounds that the Taiwan issue was left "unsettled" at the end of World War II.

Taiwan's "Unsettled" Status. "Unsettled" sovereignty status has advantages in the case of Taiwan. Although the United States recognizes the PRC's "sole legal government," it has remained ambiguous on the issue of who actually owns Taiwan. Calling Taiwan's status legally "unsettled" provides a legal framework for treating Taiwan as separate from China and enables the United States

to provide political and military support to this vibrant democracy.

However, interests in the U.S., Taiwan, and Asia—impelled by China—seek to settle the Taiwan issue sooner rather than later and in China's favor. As China's power and influence expand, its economic clout and new military might induce the United States to shy away from being too assertive in the Asia-Pacific region. Distracted by Iraq, Afghanistan, and a host of other crises, Washington asserts that China is very important to U.S. global foreign policy goals and has urged Taiwan to reconcile with China by opening trade and transportation links. Many in Taiwan believe that only the Taiwan government's own restrictions on trade and investment have prevented China's economy from swallowing Taiwan whole.

Over the past six years, American diplomats and national security officials have lost sight of Taiwan's unsettled status and have instead focused on assuaging China's angry outbursts regarding Taiwan. Only in 2007, after the United Nations issued a quiet declaration that it considers "Taiwan for all purposes to be an integral part of the People's

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Republic of China,” did American diplomats start becoming nervous. Some resuscitated the dormant doctrine of Taiwan’s unsettled status and prodded the U.N. to recant. Yet U.S. policy toward Taiwan lacks coherence because it lacks a conceptual context for understanding America’s interests in Asia, where China’s rise is rapid and assertive.

What the Administration and Congress Should Do. To protect U.S. allies and U.S. interests in Asia, the Bush Administration must reaffirm its existing definition of Taiwan’s undetermined status and the Taiwan Relations Act provisions that require the U.S. to treat Taiwan as an independent nation for purposes of domestic law. The Administration should:

- **Promptly and publicly back away from the stance that “Taiwan is not a state” in the international community.** While current U.S. relations with China make it impossible to declare that Taiwan is a state, nothing can justify the U.S. bureaucracy’s assertion that Taiwan is *not* a state. In fact, under the 1933 Montevideo Convention, Taiwan possesses all the attributes of a state.
 - **Reaffirm Taiwan’s unsettled status.** Taiwan’s territorial status may continue to be undetermined. The United States therefore does not accept the sovereign right of any third country to use any force against Taiwan.
 - **Reaffirm that Taiwan’s future rests on the assent of the people of Taiwan.** While current U.S. diplomatic formulae assert that the Taiwan issue is a matter for “the Chinese people on both sides of the Taiwan Strait” to resolve, the U.S. should clarify the context, giving preference to the people of Taiwan in determining their own future.
 - **Reaffirm the legitimacy of Taiwan’s elected leaders.** Taiwan’s new president will immediately need to engage his counterparts in Beijing. It is essential to his credibility and self-confidence that the United States reaffirm that Taiwan’s democratically elected leaders are the legitimate representatives of the people of Taiwan.
- **View Taiwan as a “de facto entity with an international personality.”** If Administration officials must say something about Taiwan’s status, they should at least describe Taiwan with some accuracy: It is in fact a “de facto entity with an international personality” within the context of the Taiwan Relations Act and Reagan’s Six Assurances.
 - **Encourage U.S. allies to support the status quo on Taiwan’s international status.** Japan, Canada, Australia, the United Kingdom, and other key U.S. allies share the U.S. understanding that Taiwan’s international status is unsettled, but they are unlikely to push the issue individually. Washington should take the lead in assembling a consensus to maintain Taiwan’s ability to function as an autonomous international actor.

Conclusion. Taiwan is on the front line of America’s Asia policy and has been a loyal U.S. ally for six decades, but a distracted Washington is allowing a laser-focused Beijing to shape the strategic agenda in the Pacific. America’s democratic friends and allies in Asia, from Japan to Singapore to India to Australia, are anxiously watching America’s new willingness to accept China’s new preeminence in the region.

How the United States defends democratic Taiwan’s international identity in its current crisis will tell Asia and the world much about Washington’s willingness to defend them against future challenges from China. America’s strategic posture in 21st century Asia rests on the collective decision of Asian democracies either to balance China or to bandwagon with it. Asia cannot balance without U.S. leadership.

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Background

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John J. Tkacik, Jr.

Ma Ying-jeou, inaugurated as Taiwan's new president on May 20, 2008, has pledged to strengthen Taiwan's economic and political relationships with China. At the same time, he has good reason to preserve Taiwan's separate identity, and the U.S. has good reason to support him.

Taiwan is one of the most dynamic democracies in Asia and one of America's top 10 trade partners. Taiwan is also a significant security partner in the Western Pacific, and its location astride East Asia's sea and air lanes gives it considerable geostrategic importance. It would therefore seem self-evident that the United States can gain no long-term benefit and would likely suffer long-term costs if it were to consign this major Asian democracy to the gentle care of Asia's most powerful dictatorship: the People's Republic of China (PRC).

The problem is that China claims sovereignty over Taiwan—a sovereignty that it has threatened to protect with war, even nuclear war.¹ The United States has thus far demurred to China's claims of sovereignty on the grounds that the Taiwan issue was left "unsettled" at the end of World War II. Moreover, the United States' has always maintained that the matter must be settled with the "assent of the people of Taiwan."

"Unsettled" sovereignty status is a rare but significant thorn in the body of international law. However, it does have advantages in the case of Taiwan. Although the United States recognizes the PRC's "sole legal government," it has remained ambiguous on the issue of who actually owns Taiwan. Calling Taiwan's

Talking Points

- The U.S. should publicly reaffirm that the sovereignty of Taiwan is unsettled.
- America's strategic posture in 21st century Asia rests on the collective decision of Asian democracies either to balance China or to bandwagon with it. Their decisions will be heavily influenced by how the United States defends democratic Taiwan's international identity.
- For the past several years, Washington has averted its eyes as Beijing has leveraged its military buildup, economic might, and global prestige against Taiwan.
- As the U.S. and the influence of its democratic values recede from the region, China fills the vacuum. A distracted Washington is allowing a laser-focused Beijing to shape the strategic agenda in the Pacific.
- While current U.S. relations with China make it impossible to declare that Taiwan is a state, nothing justifies the U.S. bureaucracy's assertion that Taiwan is not a state.

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status legally “unsettled” provides the United States with a legal framework for treating Taiwan as separate from China and enables the United States to provide political and military support to this vibrant democracy of 23 million people.

However, interests in the U.S., Taiwan, and Asia—impelled by China—seek to settle the Taiwan issue sooner rather than later and in China’s favor. As China’s power and influence expand, its economic clout and new military might induce the United States to shy away from being too active in the Asia-Pacific region. Distracted by Iraq, Afghanistan, and a

host of other crises, Washington avers—with not enough demonstrable proof—that China is very important to U.S. global foreign policy goals.²

Accordingly, the U.S. has urged Taiwan to reconcile with China by opening trade and transportation links across the Taiwan Strait.³ China became Taiwan’s top trade partner in 2006, and PRC–Taiwan trade is growing by more than 25 percent per year.⁴ Many in Taiwan believe that only the Taiwan government’s own minimal restrictions on trade and investment have prevented China’s economy from swallowing Taiwan whole.

1. Zhang Wannian, senior general in the People’s Liberation Army, has suggested that China’s nuclear weapons can be used to “deter moves to split the sovereign state”—a clear reference to Taiwan. Larry M. Wortzel, *China’s Nuclear Forces: Operations, Training, Doctrine, Command, Control, and Campaign Planning* (Carlisle, Pa.: U.S. Army War College, Strategic Studies Institute, May 2007). Other top generals have envisioned using nuclear weapons at the outset of a Taiwan conflict. General Xiong Guangkai was quoted as saying in 1995 that China could act militarily against Taiwan without fear of intervention by the United States because U.S. leaders “care more about Los Angeles than they do about Taiwan.” Patrick Tyler, “As China Threatens Taiwan, It Makes Sure U.S. Listens,” *The New York Times*, January 24, 1996, p. A1, at <http://query.nytimes.com/gst/fullpage.html?res=9B01EEDC1F39F937A15752C0A960958260> (June 4, 2008). In 2005, Major General Zhu Zhenghu told a gaggle of foreign journalists: “If the Americans interfere into [a Taiwan] conflict, if the Americans draw their missiles and position-guided ammunition into the target zone on China’s territory, I think we will have to respond with nuclear weapons.” Danny Gittings, “General Zhu Goes Ballistic,” *The Wall Street Journal*, July 18, 2005, p. A13, at <http://online.wsj.com/article/0,,SB112165176626988025,00.html> (June 4, 2008).
2. Deputy Secretary of State John D. Negroponte testified in a U.S. Senate hearing on May 15, 2008, that “China is a permanent member of the UN Security Council. It possesses one of the world’s largest and most dynamic economies. It is a nuclear power, and it is the seat of a great civilization. U.S.–China cooperation is in our mutual interest.” The problem is that China has not exerted its influence in a way that helps achieve U.S. foreign policy goals. For example, Negroponte praised China for pressing “the Burmese regime to cooperate with the international community” and for urging “meaningful dialogue between the Burmese regime and the democratic opposition.” John D. Negroponte, “U.S.–China Relations in the Era of Globalization,” May 15, 2008, at <http://www.state.gov/s/d/2008/104932.htm> (June 4, 2008). In reality, China believes Burma’s human rights violations “are purely Myanmar’s internal affairs.” In fact, China “urges relevant parties,” particularly the U.N. and the U.S., “to take a cautious and responsible attitude to avoid actions that may further complicate the Myanmar issue.” Moreover, China has been consistently and “firmly opposed to the interference with the question of Myanmar by the UN Security Council.” Liu Jianchao, press conference, Foreign Ministry of the People’s Republic of China, January 11, 2007, at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t288589.htm> (June 4, 2008).
3. For example, Deputy U.S. Trade Representative Karan Bhatia explained to the House International Relations Committee his reluctance to move toward free trade agreement talks with Taiwan. “[F]or instance, [Taiwan’s] limitations on cross straits trade...placed increasing pressure on Taiwan as a destination for U.S. involvement, U.S. economic involvement... So one of the messages that I delivered to the people of—to the officials in Taiwan was that it would be very helpful, as we look forward to a deepening of the relationship, if they would rethink some of those policies or, perhaps, address some of these policies, to enable us to make a stronger case that there is a strong business interest in the deepening and the strengthening of that relationship.” Karan K. Bhatia, in hearing, *Asian Free Trade Agreements: Are They Good for the USA?* Committee on International Relations, U.S. House of Representatives, 109th Cong., 2nd Sess., July 20, 2006, p. 27. On March 20, 2007, the director of the American Institute in Taiwan noted that “[t]he United States understands and appreciates concerns here that Taiwan’s economy may be vulnerable because of its economic exposure to Mainland China” but nonetheless “look[s] forward to progress soon on expanding cross-Strait charter flights and further opening of Taiwan to tourists from the Mainland. For this place to prosper, people, goods and capital should be able to move more freely across the Strait.” Stephen M. Young, remarks to the 2007 Hsieh Nien Fan, American Chamber of Commerce in Taipei, March 20, 2007, at <http://www.ait.org.tw/en/news/officialtext/viewer.aspx?id=2007032101> (June 4, 2008).
4. Taiwan Board of Foreign Trade, Trade Statistics, at <http://cus93.trade.gov.tw/english/FSCE/FSC0011E.ASP> (June 4, 2008).

Taiwan is already deeply enmeshed in China's trade networks and supply chains, and this dependence continues to tighten. Additionally, as the American foreign policy bureaucracy increasingly views Taiwan as a near occasion of war, its enthusiasm for Taiwan will likely cool. Hence, Taiwan's ability to remain an autonomous actor in Asia will wane. Already, Taiwan's new leaders have been obliged to express some vague agreement that "Taiwan is part of One China," although they insist that they still reserve the right to "define one China" any way they wish.⁵

Over the past six years, American diplomats and national security officials have lost sight of Taiwan's unsettled status and have focused instead on assuaging China's angry outbursts regarding Taiwan. Only in 2007, after the United Nations issued a quiet declaration that it considers "Taiwan for all purposes to be an integral part of the People's Republic of China,"⁶ did American diplomats start becoming nervous. Some resuscitated the dormant doctrine of Taiwan's unsettled status and prodded the U.N. to recant. Yet U.S. policy toward Taiwan seems to lack coherence—a lack brought on by the absence of a conceptual context for understanding America's interests in Asia, where China's rise is rapid and assertive.

The Bush Administration should reeducate itself on Taiwan's unsettled international status if it intends to preserve America's broad strategic options in Asia for the next Administration.

Taiwan's Unsettled Status

Taiwan's sovereign status is perhaps the most celebrated case of "unsettled" dominion in the annals of international law.⁷ After losing World War II in 1945, Japan "renounce[d] all right, title, and claim to Formosa [Taiwan] and the Pescadores,"⁸ but *de jure* state sovereignty over Taiwan remained—purposefully—unassigned after the war.⁹

For nearly 60 years, U.S. policy has sought to nurture and strengthen Taiwan's autonomy from the People's Republic of China while denying China any pretext for increasing military tensions. This stratagem of tolerating China's claims of sovereignty over Taiwan while eschewing formal recognition of it has preserved Taiwan as one of Asia's most vibrant democracies, one of the top U.S. trading partners, and an important link in America's Western Pacific security architecture. Moreover, the United Kingdom, Australia, Canada,¹⁰ and Japan still hold similar views on Taiwan's sovereignty.¹¹

Beijing bristles at this view that Taiwan's status is unsettled. Over the past decade, it has ratcheted up

5. For a discussion of President-elect Ma's position, see Ruan Ming, "Sovereignty and 'One China' Not Compatible," *Taipei Times*, April 13, 2008, p. 8, at <http://www.taipetimes.com/News/editorials/archives/2008/04/13/2003409139> (June 4, 2008).
6. Ban Ki Moon, U.N. Secretary-General, letter to the Nauru mission to the United Nations, March 28, 2007 (emphasis added).
7. Other examples include the West Bank and Gaza, the Turkish Republic of North Cyprus, and (until recently) Kosovo. For a discussion of the Palestine case, see James R. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford, U.K.: Oxford University Press, 2006), pp. 421–448.
8. Treaty of Peace with Japan, Article 2, September 8, 1951, at U.S. TIAS 2490; 3 UST 3169, 3172; 136 UNTS 45, 48, 50.
9. U.S. Secretary of State John Foster Dulles asserted in 1954 that "technical sovereignty over Formosa and the Pescadores has never been settled...because the Japanese Peace Treaty merely involves a renunciation by Japan of its right and title to these islands. But the future title is not determined by the Japanese Peace Treaty nor is it determined by the Peace Treaty which was concluded between the Republic of China and Japan." *U.S. Department of State Bulletin*, Vol. 31, No. 896 (1954).
10. Australia, Canada, and Ireland expressed the view that technical sovereignty over Taiwan "has never been settled." Lung-chu Chen and Harold D. Lasswell, *Formosa, China, and the United Nations* (New York: St. Martin's Press, 1967), p. 377, footnote 13.
11. The author has been informed by senior diplomats from Britain, Canada, and Japan that these countries continue to maintain their San Francisco Treaty understanding of Taiwan's international status. See also Crawford, *The Creation of States in International Law*, p. 208, footnote 54; Steve Tsang, *The Cold War's Odd Couple: The Unintended Partnership Between the Republic of China and the UK, 1950–58* (London: I. B. Tauris, 2006), pp. 65–66; Robert Boardman, *Britain and the People's Republic of China 1949–1976* (London: Macmillan, 1976), pp. 149–150; and Y. Frank Chiang, "One-China Policy and Taiwan," *Fordham International Law Journal*, Vol. 28, No. 1 (December 2004), pp. 38–39.

its military threats against Taiwan in a thus-far-successful campaign to weaken the Bush Administration's ardor for the island. Under the weight of Beijing's new economic, political, and military clout, Washington—with varying degrees of success—has pressured Taipei's leaders to bite their collective tongue about Taiwan's separate identity from China.

This tactic, however, overshot the mark. Receiving a bare minimum of legitimation and moral support from the United States for their continued *de facto* separation from Communist China, democratic Taiwan's people and their political leadership now believe that they have little choice but to accommodate China. How bad can it be? After all, Beijing has promised to grant Taiwan “a high degree of autonomy”¹²—rather like Hong Kong, some say.¹³

Putting Taiwan's unsettled status back on track is not as difficult as it sounds. China has long understood the U.S. position¹⁴ and, while it does not like it, can hardly complain that the U.S. is violating any understandings, explicit or otherwise. Moreover, the Taiwan Relations Act (TRA) and existing U.S. policy are still buttressed by the consistent, albeit tacit, positions on Taiwan's international status held by

several top American allies, including Japan, Canada, Australia, and the United Kingdom. Together, they can provide a coherent framework for maintaining Taiwan's full autonomy separate from China.

Nudging Taiwan Closer to China

For over 60 years, under both Democratic and Republican Presidents and Congresses, the United States has declined to recognize Chinese sovereignty over Taiwan. U.S. diplomats confusingly call this “our one China policy” in the hope that simply adding “our” to the phrase will more easily differentiate it from Beijing's “one China principle.”¹⁵ It is confusing because the United States' “one China policy” does not treat Taiwan as part of “one China” at all. Instead, it treats Taiwan as a sovereign state for the purposes of U.S. domestic law in language that was explicitly intended by Congress to preserve America's security and economic interests in the Western Pacific.¹⁶

Over the past year, the State Department has quietly but unmistakably reaffirmed that the United States has important interests in maintaining Taiwan as a competent international actor separate from China.

12. The PRC State Council reiterated the pledge of granting Taiwan a “high degree of autonomy” in white papers issued in 1993 and 2000. People's Republic of China, State Council, Taiwan Affairs Office and the Information Office, “The Taiwan Question and the Reunification of China,” August 31, 1993, at <http://www.china.org.cn/english/taiwan/7953.htm> (June 5, 2008), and “The One-China Principle and the Taiwan Issue,” February 21, 2000, at <http://english.people.com.cn/features/taiwanpaper/taiwan.html> (June 5, 2008).
13. For example, both Article 2 of the Macau Basic Law and Article 2 of the Hong Kong Basic Law read: “The National People's Congress authorizes the... Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.” The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, National People's Congress, 7th Cong., 3rd Sess., April 4, 1990, at http://www.info.gov.hk/basic_law/fulltext/Basic_Law.pdf (June 8, 2008), and Basic Law of the Macao Special Administrative Region of the People's Republic of China, National People's Congress, 8th Cong., 1st Sess., March 31, 1993, at <http://www.umac.mo/basiclaw/english/main.html> (June 8, 2008).
14. Wang Jisi, “Meiguo Zhanlue Tiaozheng Dui Zhong Mei Guanxide Yingxiang” (Impact of U.S. strategic adjustment on Sino-U.S. relations), *Xuexi Shibao* (Beijing), August 16, 2004.
15. U.S. Assistant Secretary of State for East Asia and the Pacific James Kelly told a congressional panel in 2004 that “the definition of ‘One China’ is something that we could go on for much too long for this event. In my testimony, I made the point ‘our One China,’ and I didn't really define it, and I'm not sure I very easily could define it. I can tell you what it is not. It is not the One-China policy or the One-China principle that Beijing suggests.” James Kelly, in hearing, *The Taiwan Relations Act: The Next Twenty-Five Years*, Committee on International Relations, U.S. House of Representatives, 108th Cong., 2nd Sess., April 21, 2004, p. 75, at http://commdocs.house.gov/committees/intlrel/hfa93229.000/hfa93229_of.htm (June 5, 2008).
16. U.S. House of Representatives, conference report on Taiwan Relations Act, March 24, 1979: “[T]he Congress finds that the enactment of this Act is necessary...to help maintain peace, security, and stability in the Western Pacific.” 22 U.S. Code § 3301(a).

Alas, this has not been a consistent stance. President George W. Bush was said to hold a personally jaundiced view of Chen Shui-bian, Taiwan's outgoing president, who harbored aspirations of an independent Taiwan but, practically, sought simply to keep Taiwan separate from China. Washington pulled every available lever to rein in President Chen, from calling him "provocative" to denying his aircraft rest stops en route to visits to Latin America. In the end, President Bush even declined to approve the sale of military equipment that Taiwan desperately needs.¹⁷

President Bush's personal animus dispirited the Chen government—which was perhaps too insistent on Taiwan's sovereignty—and Taiwanese voters, who polling data indicate have begun to believe that the U.S. truly wants Taiwan to submit to China's claims of sovereignty over their island.¹⁸ Likewise, Taiwan's incoming administration believes that the United States wants them to reconcile with China economically, politically, and mili-

tarily. In addition to many other reasons that President Ma Ying-jeou has given for building closer cross-strait relations, he has long argued that in terms of U.S. security and diplomatic policy in Asia, his policies on China would help to achieve the U.S. goals of peace and economic development in the Pacific region.¹⁹

Taiwan's incoming government was elected on a platform of broadening economic and trade linkages with China. Taiwan will soon establish civil aviation links across the Taiwan Strait and will welcome 3,000 Chinese tourists daily by the end of 2008, increasing to 10,000 per day by 2012.²⁰ Taiwan will open up to Chinese investment, and a real estate delegation from China has promised to invest \$16 billion in Taiwan land development this summer.²¹ The new government also promises to eliminate barriers on outbound Taiwan industrial investments in China, including the most advanced microelectronics projects, and to explore a currency convertibility arrangement between Taiwan and China.²²

17. Veteran Washington-watcher Christopher Nelson noted that "Taiwan F-16's...are not going to happen soon, if at all, and this is a decision made at the White House...and that means President Bush himself, as we have so often reported, maintains...his control of US-Taiwan policy. Bush's basic concern: that anything the US does at the present time may give inadvertent encouragement to actions by President Chen Shuibian which may imperil the peaceful status quo with China." Christopher Nelson, *The Nelson Report*, September 28, 2007.
18. For example, a poll in 2004 indicated that 23 percent of Taiwanese voters believed the U.S. would *not* come to Taiwan's aid in a war with China. That number grew to 37 percent in 2008 but accounted for 51 percent of those voting for the winning candidate, Ma Ying-jeou. Central News Agency, "63% Favor Cross-Strait Peace Agreement: Poll," July 22, 2004, and Emerson Niou, "Taiwanese Public Opinion and Stability in the Taiwan Strait," PowerPoint presentation at Duke University, April 2, 2008.
19. Ma Ying-jeou frequently expressed his belief that the Kuomintang Party's policies of improving relations with China would enhance Taiwan's relations with the United States. For example, when visiting the U.S. in 2006, Ma said that enhancing Taiwan's relations with China "will really reduce the U.S. security responsibility as far as [the] Taiwan Strait is concerned. [The] Taiwan Strait now stands as one of the two flash points in Asia, the other one being the Korean peninsula. But if we can achieve peace and prosperity, these are the two things that I have in mind, I think not only our relations—Taiwan and United States—will be enhanced as a result and our energies could be put into economic development instead of only purchasing arms." Ma Ying-jeou, speech at American Enterprise Institute, Washington, D.C., March 22, 2006, at <http://www.aei.org/events/filter.eventID.1276/transcript.asp> (June 5, 2008).
20. Loa Iok-sin, "Tourism Industry Says It's Ready for Chinese Tourists," *Taipei Times*, April 17, 2008, p. 3, at <http://www.taipeitimes.com/News/taiwan/archives/2008/04/17/2003409458> (June 5, 2008).
21. "Dalu Fuhao tuan di tai tan fangshi, 9 ren shenjia 164 yi Meiyuan, shangye qianli juda, Taiwan ge xianshi jingpan touzi xiangmu zhaoshou" (Mainland tycoon group in Taiwan to explore real estate; 9 person group to bring \$16.4 billion, business potential massive, all Taiwan's counties and cities compete to attract investment projects), *Shijie Ribao* (New York), April 21, 2008, p. A1, at http://www.worldjournal.com/wj-ch-news.php?nt_seq_id=1704770 (June 5, 2008).
22. Yao Yingru, "Jiang Bingkun: zhi hang, guanguang, huidui 7 yue shanglu" (PK Chiang: On road by July to discuss direct air links, tourism and foreign exchange), *China Times* (Taipei), April 15, 2008. See also Joyce Huang, "Financial Officials Preparing for Yuan Exchange Process," *Taipei Times*, April 16, 2008, p. 1, at <http://www.taipeitimes.com/News/front/archives/2008/04/16/2003409364> (June 5, 2008).

At the same time, heeding Beijing's concerns, sometimes preemptively, the Bush Administration has inadvertently helped to isolate Taiwan diplomatically, economically, and militarily in the international arena. For example, Vincent Siew, Taiwan's new vice president, visited China in early April 2008 and conferred directly with Chinese President Hu Jintao, but Washington refused to permit Siew to visit the United States, fearing that it would somehow upset the Chinese.

The Bush Administration is still refusing to consider Taiwan's urgent request for replacement F-16C/D fighter aircraft, despite the Pentagon's reported judgment that the aircraft are a "military necessity."²³ The White House apparently hopes that President Ma will decide after his inauguration that requesting F-16s would jar his negotiations with China and will back away from it. Whether President Ma makes the request will speak volumes about his vision for cross-strait relations.

Denying Taiwan's request for defense articles that the Pentagon considers a military necessity violates both the spirit and the letter of the Taiwan Relations Act (TRA), which requires that "The United States will make available to Taiwan such defense articles... in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability."²⁴

The Status Quo for Six Decades

For 60 years, the United States has remained strictly agnostic about Taiwan's legal status in the

international community. To be precise, the United States has "not formally recognized Chinese sovereignty over Taiwan and [has] not made any determination as to Taiwan's political status."²⁵ This policy has given legitimacy under international law to the U.S.'s long-term defense commitment to aid the Taiwan people's resistance to Beijing's claimed "sovereign" right to control them.

This long-standing position dates at least to April 11, 1947, when Acting Secretary of State Dean Acheson stated that the transfer of sovereignty over Taiwan from Japan to China "has not yet been formalized."²⁶ Consequently, the United States chose to preserve its say in the disposition of Taiwan. As a "top secret" State Department position paper explained:

[The future status of Taiwan] was deliberately left *undetermined*, and the U.S. as a principal victor over Japan has an interest in their ultimate future. We are not willing that that future should be one which would enable a hostile regime to endanger the defensive position which is so vital in keeping the Pacific a friendly body of water.²⁷

For this reason, Taiwan's formal international political status was left undetermined by the San Francisco Peace Treaty, which formally ended World War II in the Pacific.²⁸ The Soviet delegate declared that the inability of the victors in the Pacific War to reach a consensus on the disposition of Taiwan was a major reason that the Soviet Union refused to sign the treaty.²⁹ Japan, the United King-

23. Washington international trade analyst Christopher Nelson deduced from his contacts in the Bush Administration that "PACOM has formally told DOD Secretary Gates the jets are a 'military necessity', and Gates has so informed the White House." This deduction is shared by others in the Administration who decline to be named, although views differ about how formally the White House has been informed. Christopher Nelson, *The Nelson Report*, April 8, 2008.

24. 22 U.S. Code § 3302(a) (emphasis added).

25. This language was articulated most recently in Susan Bremner, Deputy Taiwan Coordination Advisor, U.S. Department of State, letter to Margaret S. Lu, M.D., June 26, 2007. There is also an entire literature on this issue. See John J. Tkacik, Jr., *Reshaping the Taiwan Strait* (Washington, D.C.: The Heritage Foundation, 2007).

26. Dean Acheson, cited in Robert L. Starr, "Legal Status of Taiwan," U.S. Department of State, Office of the Legal Advisor, memorandum to Charles Sylvester, Director of the Office of Republic of China Affairs, July 13, 1971. In dispatches to the State Department, the U.S. Embassy in Nanking, China, referred to Taiwan's "present Japanese *de jure* sovereignty status" as late as March 6, 1947. "Ambassador to China (Stuart) to the Secretary of State," March 6, 1947, *The Far East: China*, Vol. 7 of *Foreign Relations of the United States, 1947* (Washington, D.C.: U.S. Government Printing Office, 1972-1973), p. 433.

27. *China and Japan*, Vol. 14, Part 1, of *Foreign Relations of the United States, 1952-1954* (Washington, D.C.: Government Printing Office, 1970-1989), p. 760 (emphasis added).

dom, Canada, Australia, and other signatories of the treaty still hold the position that Taiwan's status is undetermined.

Yet even as the United States formally recognized Chiang Kai-shek's Republic of China (ROC) government as the sole sovereign government of China on the mainland, where in fact it had no authority, it refused to recognize ROC sovereignty over Taiwan, where it did have authority. It was a logical paradox: The United States was pledged to defend only those parts of ROC territory that were not sovereign Chinese land—the island of Taiwan.³⁰

This paradox became plain during the hearings on ratification of the U.S.–Republic of China Mutual Defense Treaty in 1955. The Senate Foreign Relations Committee report on the Treaty notes that Secretary of State John Foster Dulles “informed the committee that the reference...to ‘the territories of either of the Parties’ was language carefully chosen to avoid denoting anything one way or another *as to their sovereignty*.”³¹

That few of Taiwan's allies recognized that the Taipei-based Republic of China exercised sovereignty over Taiwan was not only an accepted fact of life in the ROC government; at times, even the ROC government itself seemed to recognize it. When asked about “the status of Taiwan” during congressional hearings on the ROC–Japanese Peace Treaty of 1952, Taiwan's foreign minister replied:

[T]he delicate international situation makes it that [Taiwan does] not belong to us. Under present circumstances, Japan has no right to transfer [Taiwan] to us; nor can we accept

such a transfer from Japan even if she so wishes.... In the [ROC]–Japanese peace treaty, we have made provisions to signify that residents including juristic persons of [Taiwan] bear Chinese nationality, and this provision may serve to mend any future gaps when Formosa and the Pescadores are restored to us.³²

Leaving the United Nations

By 1971, most of the rest of the world had decided that the Communists in Beijing, not the Nationalists in Taipei, were the only authorities competent to speak for China in the United Nations. The nuance of Taiwan's anomalous unsettled status was lost in the cacophony of the broader debate over Chinese representation. As U.N. General Assembly members chose up sides on the China seat, the Nationalists were certain to lose the vote.

In July 1971, the United States abandoned its “one China” policy that would allow only one Chinese government—in the U.S.'s opinion, the Nationalist government—to represent China in the United Nations. The U.S. instead proposed a dual representation formula in which both the Beijing and Taipei regimes would be represented in the General Assembly, and the Security Council would decide which regime would control China's seat on the Security Council.³³ As Henry Kissinger points out, Taiwan's unsettled status was “the legal buttress of State's dual-representation position.”³⁴

While the U.S. mission to the United Nations under then-Ambassador George H. W. Bush made “valiant efforts” (in Henry Kissinger's words),³⁵ the

28. See U.S. Department of State, *Record of the Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan*, Publication 4392, 1951, p. 78.

29. The Soviet delegate wrote that “this draft grossly violates the indisputable rights of China to the return of integral parts of Chinese territory: Taiwan, the Pescadores, the Paracel and other islands.... The draft contains only a reference to the renunciation by Japan of its rights to these territories but intentionally omits any mention of the further fate of these territories.” Starr, “Legal Status of Taiwan.”

30. *Ibid.*

31. *Ibid.* (emphasis added).

32. *Ibid.*

33. See Jaw-ling Joanne Chang, “Taiwan's Policy Toward the United States,” in William C. Kirby, Robert S. Ross, and Gong Li, eds., *Normalization of U.S.–China Relations: An International History* (Cambridge, Mass.: Harvard University Press, 2005), pp. 221–232.

34. Henry Kissinger, *White House Years* (Boston: Little, Brown, 1979), p. 772.

White House clearly had little enthusiasm for “dual representation.” Taiwan’s ambassador even admitted to Secretary of State William Rogers that “a lot of people think that the President [Richard Nixon]...doesn’t have his heart in it.”³⁶

In the end, the U.N. General Assembly passed Resolution 2758, expelling the U.N. mission of the Chinese Nationalists,³⁷ and seated in its stead the Chinese Communists’ mission from the People’s Republic of China. Taiwan *qua* “Taiwan” was technically never expelled from the United Nations. It was not a matter of Taiwan’s representation, but of China’s representation.

Interestingly, when Resolution 2758 came to a vote on October 25, 1971, the United States along with 34 other members, including Australia and Japan, voted *against* seating China because it meant displacing Taiwan.³⁸

When the General Assembly vote concluded, the “representatives of Chiang Kai-shek” stormed out of the building rather than wait to see whether the ROC mission could at least be permitted to continue to represent Taiwan. No further vote on Taiwan’s representation took place despite the U.S. position that Taiwan’s people should have a voice in the forum.

Why had the Nationalists walked out? Chiang Kai-shek wanted to fight it out on an all-or-nothing basis. There are also reports that Chiang’s advisors convinced him that if the ROC mission stayed to represent Taiwan, Chiang would be under pressure

to demonstrate in some constitutional way that his Chinese government-in-exile represented the people of Taiwan rather than the vast population of China. Doing so would require Chiang to dismantle his existing regime (which was elected in 1947 on the Chinese mainland and continued to rule in Taiwan under emergency martial law provisions without benefit of elections), adopt an entirely new constitution, and install an entirely new government.³⁹

The fact that both the Nationalist Chinese in Taiwan and the Communist Chinese in Beijing implied that Taiwan’s status was indeed settled and that Taiwan was assuredly part of China made the U.S. “unsettled” proposition somewhat fragile.

The Shanghai Communiqué and Beyond

On his historic opening visit to China, President Richard Nixon finessed the dilemma of Taiwan’s status in the Shanghai Communiqué by observing: “The United States *acknowledges that all Chinese on either side of the Taiwan Strait* maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position.”⁴⁰ As long as both Chiang Kai-shek and Mao Zedong claimed that Taiwan was part of China, Nixon could simply leave it at that. Yet in the painfully negotiated translation of the Shanghai Communiqué, the United States insisted that the term “acknowledge” be translated as *renshidao* (takes note of) rather than as *chengren* (recognize)⁴¹ to remind the Chinese that the United States was not quite prepared for a final settlement of Taiwan’s status.

35. *Ibid.*, p. 784.

36. Richard Nixon, conversation with Henry Kissinger and William Rogers, October 17, 1971, transcribed from National Archives, Nixon White House Tapes, Conversations 11-102 and 11-105, at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB70/doc9.pdf> (June 5, 2008).

37. “Restoration of the Lawful Rights of the People’s Republic of China in the United Nations,” Resolution 2758, U.N. General Assembly, October 25, 1971. The resolution referred uncharitably to the Nationalist mission as “the representatives of Chiang Kai-shek.”

38. Greece and Luxembourg abstained from voting. However, the United Kingdom, Canada, and the rest of America’s NATO allies voted to seat China and expel Taiwan.

39. Taiwan’s Vice Foreign Minister Yang Hsi-kun explained this to the American ambassador in Taipei in November 1971. Steven E. Phillips, ed., *China, 1969–1972*, Vol. 17 of Edward C. Keefer, ed., *Foreign Relations of the United States, 1969–1976* (Washington, D.C.: U.S. Government Printing Office, 2003–2006), pp. 601, at <http://www.state.gov/documents/organization/70132.pdf> (June 6, 2008).

40. U.S. Department of State, “Joint Communiqué of the United States of America and the People’s Republic of China,” February 28, 1972, at http://usinfo.state.gov/eap/Archive_Index/joint_communique_1972.html (June 6, 2008) (emphasis added).

Even until 1976, regardless of what Kissinger had told his Chinese counterparts, the United States still viewed the status of Taiwan as undetermined, a point that Kissinger agonized over in secret policy sessions at the State Department. Kissinger asked his top China aides: “[I]f Taiwan is recognized by us as part of China, then it may become irresistible to them.... [O]ur saying we want a peaceful solution has no force, it is Chinese territory, what are we going to do about it?”⁴² Arthur Hummel, the State Department’s senior China hand and later ambassador to Beijing, sighed, “Down the road, perhaps the only solution would be an independent Taiwan.”⁴³

Given political sensitivities in both Taipei and Beijing at the time, the United States could not quite abide Hummel’s idea of “independent Taiwan,” yet even when the Carter Administration normalized relations with China, it carefully stated in the Normalization Communiqué of December 16, 1978, that the “United States *acknowledges*” China’s position that “Taiwan is part of China.” Again, this did not necessarily connote formal U.S. recognition of the Chinese position, as Deputy Secretary of State Warren Christopher stressed in several congressional hearings.⁴⁴

Accordingly, when Congress passed the Taiwan Relations Act in 1979, Congress felt at liberty to mandate that Taiwan be treated as a sovereign for-

eign state for the purposes of U.S. law, including anti-boycott laws and military sales. Congress also intended that Taiwan should continue to be represented in international organizations: “Nothing in this [law] may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or *any other international organization*.”⁴⁵

President Ronald Reagan took a personal part in reiterating the U.S. position on Taiwan’s undetermined status by communicating Six Assurances directly to Taiwan’s President Chiang Ching-kuo on July 14, 1982, pledging that “[t]he United States had not altered its longstanding position regarding sovereignty over Taiwan.”⁴⁶

The Six Assurances have been embraced by all subsequent U.S. Administrations as part of the canon of U.S. policy toward Taiwan.⁴⁷

The U.N. and Taiwan

Regrettably, U.N. Secretary-General Ban Ki Moon appears intent on settling the matter of Taiwan’s sovereignty on his own. On March 28, 2007, without consulting with the United States or any other Security Council members except presumably China, he issued a letter asserting under the terms of U.N. General Assembly Resolution 2758 that “the United Nations considers Taiwan for all purposes to

41. For a Chinese-language version of the Shanghai Communiqué, see Zhonghua Renmin Gonghe Guo he Meilijian Hezhong Guo Lianhe Gongbao (Shanghai Gongbao), February 28, 1972, at http://news.xinhuanet.com/ziliao/2002-01/28/content_257045.htm (June 6, 2008).

42. As a matter of international law, formal recognition of China’s territorial claim to Taiwan requires acquiescence to China’s sovereign right to use force to recover territory in rebellion. See Lassa Oppenheim, *Oppenheim’s International Law: Peace*, 8th ed. (1955), cited in Y. Frank Ching, “One China Policy and Taiwan,” *Fordham International Law Journal*, Vol. 28, No. 1 (December 2004), pp. 6–8.

43. William Burr, ed., *The Kissinger Transcripts: The Top-Secret Talks with Beijing and Moscow* (New York: New Press, 1999), p. 464.

44. Deputy Secretary Christopher was called to testify before the Senate Foreign Relations Committee after the committee had learned that the Chinese translation of the communiqué used *chengren* and not *renshidao*. The official U.S. position was that there was no “controlling language” for the text and that the United States would view English as controlling and China would consider Chinese as controlling. Christopher said, “We regard the English translation as official for our purposes” and told Senator Jacob Javits (R-NY) that “I simply give you assurance on that point.” U.S. Department of State Legal Advisor Herbert Hansell testified that “we have not taken a position on the question [of Taiwan’s sovereignty] insofar as the U.S. Government is concerned.” Hearings, *Taiwan*, Committee on Foreign Relations, U.S. Senate, 96th Cong., 1st Sess., February 6, 7, 8, 21, and 22, 1979, p. 29 and 95. The TRA conference report specifically noted that while the Carter Administration had “acknowledged” the “Chinese position” that Taiwan is part of China, “the United States has not itself agreed to this position.” U.S. Senate, Committee on Foreign Relations, *Taiwan Enabling Act*, Report No. 96–7, 96th Cong., 1st Sess., March 2, 1979, p. 7.

45. 22 U.S. Code § 3303(d) (emphasis added).

be an integral part of the People's Republic of China."⁴⁸ Even though the letter was unpublicized and low-key, it was a tremendous coup for Beijing. It had finally persuaded the United Nations to take sides with China and against the United States and Taiwan on the matter.

China has worked assiduously to bar Taiwan's public health officers from participating in the World Health Organization (WHO). In 2003, Taiwan was one of the countries hit worst by the transnational epidemic of severe acute respiratory syndrome (SARS),⁴⁹ primarily because its medical infrastructure had no institutional communications with the WHO. Yet China, which had failed to keep the WHO apprised of SARS outbreaks on its own territory, successfully pressured the WHO to refuse to deal with Taiwan except through China's WHO mission.⁵⁰

In early 2007, the U.S. Department of Agriculture became alarmed that Beijing's representatives to the World Organization for Animal Health,⁵¹

which develops international health standards for food animals, were asserting jurisdiction over Taiwan animal disease issues. Unlike Taiwan, China refuses to accept U.S. beef, and the Department of Agriculture was concerned that China would find some way to complicate U.S. beef exports to Taiwan.⁵²

Then, in December 2007, the Chinese embassy in Thailand reportedly deposited at the International Civil Aviation Organization (ICAO) regional office in Bangkok notification of a new civilian aviation route along the median line of the Taiwan Strait, adjacent to Taiwan's air defense identification zone. Taiwan learned about it from "friendly civil aviation officials" who had casually notified their Taiwan air traffic control colleagues of the action. China did not request approval. It simply notified the ICAO of the new route.⁵³

U.S. experts reportedly believe that the new air route was an initiative of the People's Liberation

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46. The U.S. government did not formally publish the Six Assurances, but Paul Wolfowitz repeated their substance to the Senate Committee on the Judiciary: "[I]t is important to bear in mind some things that we did not agree to in the communiqué. We have not agreed to consult in advance with the PRC on arms sales to Taiwan, nor shall we do so. We have not changed our position that the Taiwan question is a matter for the Chinese on both sides of the strait to resolve, and we will not interfere in this matter or pressure Taiwan to enter into negotiations. *We have not changed our longstanding position on the issue of sovereignty over Taiwan.* We do not seek any of these changes nor should we seek to change the protection of the Taiwan Relations Act itself." Paul Wolfowitz, in hearings, *Taiwan Communiqué and Separation of Powers*, Subcommittee on the Separation of Powers, Committee on the Judiciary, U.S. Senate, March 10, 1983 (emphasis added). For further information on the Six Assurances, see Larry M. Wortzel, "Why the Administration Should Reaffirm the 'Six Assurances' to Taiwan," Heritage Foundation *Backgrounder* No. 1352, March 16, 2000, at www.heritage.org/Research/AsiaandthePacific/BG1352.cfm.
47. For example, on April 21, 2004, Assistant Secretary of State James Kelly told the House International Relations Committee that "[o]ur position continues to be embodied in the so-called 'six assurances' offered to Taiwan by President Reagan." James Kelly, *The Taiwan Relations Act: The Next Twenty-Five Years*, p. 40.
48. "In [U.N. General Assembly Resolution 2758], the General Assembly decided 'to recognize the representatives of the People's Republic of China as the only legitimate representatives of China to the United Nations.' In accordance with that resolution, the United Nations *considers Taiwan for all purposes to be an integral part of the People's Republic of China.* In the light of the above, any 'instrument of accession' emanating from persons purporting to represent the 'Republic of China (Taiwan)' could not be received by the Secretary General in his capacity as depository of the said convention." Ban Ki Moon, letter to Nauru mission to the United Nations (emphasis added).
49. After China and Hong Kong, Taiwan recorded the third-largest number of SARS cases. World Health Organization, "Cumulative Number of Reported Probable Cases of SARS," revised June 4, 2003, at http://www.who.int/csr/sars/country/2003_06_02/en/index.html (June 6, 2008).
50. World Health Organization, "Implementation of the Memorandum of Understanding Between the WHO Secretariat and China," July 12, 2005. This memorandum referred to the memorandum of understanding signed on May 14, 2005, which designated the Permanent Mission of China in Geneva as the "focal point" for all Taiwan communications with the WHO.
51. Formerly known as Office Des International Epizooties.
52. Private briefings with U.S. officials.

Army, which is responsible for all of China's civil aviation routing. One U.S. observer suggested that "if Taiwan had more status at the international aviation decision-making authority, it perhaps could react to the PLA route request with less anxiety."⁵⁴ While the United States generally supports Taipei in organizations like the ICAO when China begins "nibbling away at the island's strategic depth," the observer commented that the conflict between the U.S. and President Chen Shui-bian "may have reduced greatly our incentive to carry Taiwan's water in ICAO."⁵⁵ The U.S. State Department expressed concern to China about the move, and while China has not yet begun using its claimed air corridor over the Taiwan Strait, neither has China withdrawn the notification.⁵⁶

China's successes in persuading the U.N. Secretariat and the bureaucracies of various U.N. specialized agencies to assert Chinese authority over Taiwan's international presence is doubly disturbing because it lends U.N. legitimacy to China's right to use military and non-military coercive force against Taiwan—a right that China wrote into its national legal code with the Anti-Secession Law of March 2005.

A more disquieting scenario is that a China that can successfully assert its sovereignty over Taiwan could also claim sovereign jurisdiction over the waters of the Taiwan Strait. In its 1992 Territorial Sea Law,⁵⁷ China claims sovereign jurisdiction in the waters of and airspace over 24 nautical miles in the Taiwan Strait. Theoretically, China already considers the Taiwan Strait a domestic waterway for civil aviation and maritime navigation purposes. If

at some point in the future China gained Taiwan's acquiescence and an international consensus that Taiwan is sovereign Chinese territory, China would be in a legal position to restrict international transit of the Taiwan Strait.

Top U.S. defense officials indicate that they have already crossed swords with their PLA counterparts over transit of the strait. Commander of the U.S. Pacific Command Admiral Timothy Keating has said, "We don't need China's permission to go through the Taiwan Straits...and we'll do that whenever we need to, let me rephrase that. Whenever we choose to."⁵⁸ But if the United States tacitly accepts China's claims of sovereign jurisdiction over Taiwan—especially if Taiwan is also pressured to accept them—the U.S. should ultimately expect that the U.S. Navy's freedom of transit in the Taiwan Strait will be attenuated accordingly.

Resurrecting Taiwan's "Unsettled" Status

The matter of Taiwan's international status vis-à-vis the United Nations is neither academic nor trivial. To counter Secretary-General Ban's edict, some State Department offices have begun to resurrect the long-standing agnostic undetermined/unsettled formula on Taiwan's international status. In June 2007, the State Department included the following phrase in standard letters to citizens concerned about Taiwan: The United States has "not formally recognized Chinese sovereignty over Taiwan and [has] not made any determination as to Taiwan's political status."⁵⁹

This was the first time in 25 years that the State Department had expressed on paper that "the

53. "Tai Hai shuding shibiequ? Shou shu mu, Chen Shuibian shuofa Mei fang guanqie, Zhongguo Waijiaobu fayan ren: 'wo mei tingshuo'" (Attention drawn to whether there is a new ADIZ in the Taiwan Strait—Chen Shui-bian says U.S. side is concerned, PRC MFA says "haven't heard about it"), *Shijie Ribao* (New York), December 12, 2007, at http://www.worldjournal.com/wj-ch-news.php?nt_seq_id=1637870 (June 6, 2008).

54. Christopher Nelson, *The Nelson Report*, December 11, 2007.

55. *Ibid.*

56. David Lague, "China Planning Taiwan Strait Route for Commercial Aviation," *International Herald Tribune*, January 6, 2008, at <http://www.ihf.com/articles/2008/01/06/business/aviation.php> (June 6, 2008).

57. The Law on the Territorial Waters and Their Contiguous Areas of the People's Republic of China, National People's Congress, 24th meeting, February 25, 1992, English translation at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/law-of-the-peoples-republic-of-china-concerning-the-territorial-sea-and-the-contiguous-zone-1992.html> (June 6, 2008).

58. Admiral Timothy Keating, Commander, U.S. Pacific Command, transcript of press roundtable, Beijing, January 15, 2008, at http://hongkong.usconsulate.gov/ustw_others_2008011501.html (June 6, 2008).

59. Bremner, letter to Margaret S. Lu, M.D.

United States takes no position on the question of Taiwan's sovereignty."⁶⁰ However, a standard letter to concerned citizens was perhaps insufficient for the United Nations. In July 2007, the United States reportedly presented a nine-point demarche in the

form of a "non-paper" to the U.N. Under-Secretary-General for Political Affairs that both restated the U.S. position that it takes no position on the question of Taiwan's sovereignty and specifically rejected recent U.N. statements that the organization con-

U.S. Non-Paper on the Status of Taiwan

1. The United States reiterates its One China policy which is based on the three US–China Communiqués and the Taiwan Relations Act, to the effect that the United States acknowledges China's view that Taiwan is a part of China. We take no position on the status of Taiwan. We neither accept nor reject the claim that Taiwan is a part of China.
2. The United States has long urged that Taiwan's status be resolved peacefully to the satisfaction of people on both sides of the Taiwan Strait. Beyond that, we do not define Taiwan in political terms.
3. The United States noted that the PRC has become more active in international organizations and has called on the UN Secretariat and member states to accept its claim of sovereignty over Taiwan. In some cases, as a condition for the PRC's own participation in international organizations, Beijing has insisted the organization and its member states use nomenclature for Taiwan that suggests endorsement of China's sovereignty over the island.
4. The United States is concerned that some UN organizations have recently asserted that UN precedent required that Taiwan be treated as a part of the PRC and be referred to by names in keeping with such status.
5. The United States has become aware that the UN has promulgated documents asserting that the United Nations considers "Taiwan for all purposes to be an integral part of the PRC." While this assertion is consistent with the Chinese position, it is not universally held by UN member states, including the United States.
6. The United States noted that the UN General Assembly resolution 2758 adopted on 25 October 1971 does not in fact establish that Taiwan is a province of the PRC. The resolution merely recognized the representation of the government of the PRC as the only lawful representation of China to the UN, and expelled the representative of Chiang Kai-shek from the seats they occupied at the UN and all related organizations. There is no mention in Resolution 2758 of China's claim of sovereignty over Taiwan.
7. While the United States does not support Taiwan's membership in organizations such as the UN, for which statehood is a prerequisite, we do support meaningful participation by Taiwan's experts as appropriate in such organizations. We support membership as appropriate in organizations for which such statehood is not required.
8. The United States urged the UN Secretariat to review its policy on the status of Taiwan and to avoid taking sides in a sensitive matter on which UN members have agreed to disagree for over 35 years.
9. If the UN Secretariat insists on describing Taiwan as a part of the PRC, or on using nomenclature for Taiwan that implies such status, the United States will be obliged to disassociate itself on a national basis from such position.¹

1. U.S. non-paper provided to the author by a confidential source.

siders “Taiwan for all purposes to be an integral part of the PRC.”⁶¹

Nonetheless, as 2007 progressed, Beijing’s diplomats and propagandists were on the verge of persuading the more uninformed of their U.S. counterparts to turn a blind eye as the United Nations administers the *coup de grâce* to one of America’s most stalwart friends in democratic Asia. Despite furtive protests from the United States, the U.N. bureaucracy has not retracted its illicit—but formal—position that Taiwan is an “integral part of the PRC.”

While some U.S. diplomats were aghast, others were unconcerned by the U.N.’s move. On August 30, 2007, when asked about Taiwan’s bid to join the United Nations, a senior White House Asia expert pronounced that “Taiwan, or the Republic of China, is not at this point a state in the international community,” although he added, “The position of the United States government is that the ROC—Republic of China—is an issue *undecided*, and it has been left undecided, as you know, for many, many years.”⁶² By saying this, he may have started a process of erosion in the U.S. policy that Taiwan’s status is “undetermined” by effectively *determining* that Taiwan is “not... a state in the international community.”

Under most accepted definitions of “state” in international law, Taiwan’s Republic of China government does qualify. Indeed, 23 other members of the United Nations maintain full diplomatic relations with Taiwan. Even U.S. law treats Taiwan precisely as it treats all “foreign countries, nations, states, governments, or similar entities.”⁶³ To state flatly that Taiwan is not a state is both gratuitous and harmful, and it edges U.S. policy a bit closer to

tacit acceptance that Communist China has sovereignty over democratic Taiwan.

What the Administration and Congress Should Do

To protect U.S. allies and U.S. interests in Asia, the Bush Administration must reaffirm its existing definition of Taiwan’s undetermined status and the TRA provisions that require the U.S. to treat Taiwan as an independent nation for purposes of domestic law.

The United States should publicly restate its long-standing position on Taiwan’s sovereignty in the same terms that it used with the U.N. Under-Secretary-General. This is necessary because to do otherwise would imply a declaration that America can and does recognize that China has the sovereign right to use force, military or otherwise, against the island. The TRA states explicitly that any attack on Taiwan would be a threat to international peace and security. This is a position that is well understood in Beijing, where scholars continue to comment on the fact that the United States may “not support Taiwan independence,” but neither does it “oppose it.”⁶⁴

The Administration should:

- **Promptly and publicly back away from the stance that “Taiwan is not a state” in the international community.** While current U.S. relations with China make it impossible to declare that Taiwan is a state, nothing can possibly justify the U.S. bureaucracy’s assertion that Taiwan is *not* a state. In fact, under the 1933 Montevideo Convention, Taiwan possesses all the attributes of a state.⁶⁵ Under any reading, the United States tacitly accepts that Taiwan functions in the international community as a sovereign state. All trea-

60. “We regard this as a question to be determined by the Chinese people on both sides of the Strait.” *Ibid.* See also hearings, *Taiwan Communiqué and the Separation of Powers*, Subcommittee on the Separation of Powers, Committee on the Judiciary, U.S. Senate, September 17, 1982, p. 140.

61. U.S. non-paper provided to the author by a confidential source. The U.S. reportedly delivered it to the U.N. For the full text, see the text box. See also John J. Tkacik, Jr., “Dealing with Taiwan’s Referendum on the United Nations,” Heritage Foundation *WebMemo* No. 1606, September 10, 2007, at <http://www.heritage.org/Research/AsiaandthePacific/wm1606.cfm>.

62. Dennis Wilder and Dan Price, press briefing, The White House, August 30, 2007, at <http://www.whitehouse.gov/news/releases/2007/08/20070830-2.html> (June 6, 2008).

63. 22 U.S. Code § 3303(b)(1).

64. Wang, “Meiguo Zhanlue Tiaozheng Dui Zhong Mei Guanxide Yingxiang.”

ties in force between the U.S. and Taiwan prior to January 1, 1979, remained in force, and the United States continues to conduct defense and security affairs, including arms sales, with Taiwan as an entity wholly autonomous from the People's Republic of China.

- **Reaffirm Taiwan's unsettled status.** Taiwan's territorial status may continue to be undetermined. The United States therefore does not accept the sovereign right of any third country to use any force against Taiwan.
- **Reaffirm that Taiwan's future rests on the assent of the people of Taiwan.** While current U.S. diplomatic formulae include assertions that the Taiwan issue is a matter for "the Chinese people on both sides of the Taiwan Strait" to resolve, the context must be clarified. As President Ronald Reagan pledged, the United States "will not...prejudice the free choice of, or put pressure on, *the people of Taiwan*" about their future.⁶⁶ As a reflection of America's democratic values, the United States must give preferential

weight to the people of Taiwan in determining their own future.

- **Reaffirm the legitimacy of Taiwan's elected leaders.** Taiwan's new president will immediately need to engage his counterparts in Beijing. It is essential to his credibility and self-confidence that the United States reaffirm that Taiwan's democratically elected leaders are the legitimate representatives of the 23 million people of Taiwan. The United States must continue to urge the Chinese government to open a dialogue with Taiwan's elected leaders.⁶⁷
- **View Taiwan as a "de facto entity with an international personality."**⁶⁸ If Administration officials must say something about Taiwan's status, they should at least describe Taiwan with some accuracy. Whatever else Taiwan may or may not be, it certainly is a "de facto entity with an international personality" within the context of the Taiwan Relations Act and President Reagan's Six Assurances.

65. That is, it possesses a defined territory, functioning government, and fixed population and maintains the capacity to conduct relations with other states. See Convention on Rights and Duties of States (inter-American), December 26, 1933, Article 1, at <http://www.yale.edu/lawweb/avalon/intdip/interam/intam03.htm> (June 6, 2008). Recent U.S. foreign relations law admittedly posits an additional requirement of sovereignty: "Claiming statehood." While this fifth condition may describe U.S. diplomatic practice, it is inconsistent with Montevideo. It also suggests that the United States may recognize Taiwan as a state only if it declares itself a state. See American Law Institute, *Restatement of the Law, The Foreign Relations Law of the United States*, 3rd ed., Vol. 1, Section 201 (St. Paul: Minn.: American Law Institute Publishers, 1987), pp. 72–74.

66. "Presidential Statement on Issuance of Communiqué," August 17, 1982, in hearing, *China–Taiwan: United States Policy*, Committee on Foreign Affairs, U.S. House of Representatives, 97th Cong., 2nd Sess., August 18, 1982, p. 33 (emphasis added).

67. An established mantra of U.S. policy is that Beijing should talk directly with the democratically "elected leadership" on Taiwan. Dennis Wilder, National Security Council Senior Director for Asian Affairs, told reporters, "We also think that Beijing could do more to reach out to the duly elected leaders in Taiwan. We're hopeful, for example, that once elections take place in Taiwan that Beijing will do more to reach out to those leaders." Wilder and Price, press briefing.

68. Professor Victor Li of the University of California at Berkeley posited this formula to the Senate Foreign Relations Committee on March 2, 1979. "We know what Taiwan is *not*: it is not the *de jure* government of the state of China. Much less clear, however, is the question of what Taiwan is." Professor Li asserted that the U.S. obviously does not treat the PRC as the successor government to the Republic of China on Taiwan because the United States considers all treaties between the U.S. and Taiwan that were in force before January 1, 1979, to continue in force. Nor does the United States consider that Taiwan "has no capacity to conduct foreign affairs, except...insofar as the PRC consents." Professor Li posited that while Taiwan is "no longer regarded by the United States as a *de jure* government or state, nevertheless, Taiwan continues to control a population and territory and to carry out the usual functions of government" and indeed fits the description of a state insofar as the Convention on Rights and Duties of States is concerned. In other words, whether Taiwan is regarded as a state or juridical person in international law depends on whether it carries out the usual functions of a state and not whether it is recognized *de jure* by other states. See hearings, *Taiwan*, Committee on Foreign Relations, U.S. Senate, 96th Cong., 1st Sess., February 6, 7, 8, 21, and 22, 1979, pp. 147–148.

- **Encourage U.S. allies to support the status quo on Taiwan's international status.** Japan, Canada, Australia, the United Kingdom, and other key U.S. allies share the U.S. understanding that Taiwan's international status is unsettled, but these countries are unlikely to push the issue individually. Washington should take the lead in assembling a consensus among them to preserve an international status quo that withholds recognition of Chinese sovereignty over Taiwan and maintains Taiwan's ability to function as an autonomous actor in the international community.

Conclusion

The people of Taiwan voted an avowedly pro-independence government out of office on March 22, 2008. The Bush Administration believed that this government had provoked various Chinese leaders into intemperate threats of war, even nuclear war. President Ma Ying-jeou, who is committed to a new relationship with China and campaigned with the best wishes of the Bush Administration, took office in Taipei on May 20. However, he will be left to bargain with Beijing with little material or moral support from the Bush Administration.

The United States can do much better by its loyal democratic ally. For the past several years, Washington has averted its eyes as Beijing has leveraged its military buildup, economic might, and global prestige against Taiwan. Perhaps Washington has

judged that China's cooperation, such as it is, in various crises from North Korea and Iran to Burma and Sudan is too important to jeopardize with a restatement of decades-long U.S. policy.

It is time to take stock of where America's real long-term interests lie. At its base, the Chinese Communist Party is a Leninist, state-mercantilist entity that runs a regime grounded in dangerous and aggressive nationalism. As the U.S. and the influence of its democratic values recede from the region, China fills the vacuum. A distracted Washington is allowing a laser-focused Beijing to shape the strategic agenda in the Pacific. America's democratic friends and allies in Asia, from Japan to Singapore to India to Australia, are anxiously watching America's new willingness to accept China's new preeminence in the region.

How the United States defends democratic Taiwan's international identity in the current environment will tell Asia and the world much about Washington's willingness to stand against the broader challenge from China. In the final tally, America's strategic posture in 21st century Asia rests on the collective decision of Asian democracies either to balance China or to bandwagon with it. Asia cannot balance without U.S. leadership.

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