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Keywords
commerce, Taiwan, Australia, international law

Cover Page Footnote
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LEGAL ASPECTS OF AUSTRALIA'S COMMERCIAL RELATIONSHIP WITH TAIWAN

By
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Introduction

As one of the 'four dragons' of Asia,[1] Taiwan occupies an enviable position as one of the strongest and wealthiest economies in the region. The amount of its foreign reserves is second only to Japan and it has a formidable spending power in the international market of trade and investment. That Taiwan should have become such an important trading partner and source of investment to countries such as Australia is not difficult to comprehend.[2] More difficult to comprehend, however, is the unconventional way in which the trading relationship has developed and the low profile, at least on an official level, which Taiwan maintains in Australia. Moreover, the difficulty increases when an attempt is made to understand the official view that Taiwan does not constitute a 'country' itself but forms a part of that country which is popularly known as China. How is this view reconcilable with what appears to be objective reality, namely that Taiwan operates as an independent sovereign state whose separate identity is reflected in the fact that it is referred to as Taiwan and not China?

This paper considers the legal aspects of Australia's commercial relations with Taiwan. Three broad objectives are targetted. The first objective is to identify the historical reasons for the unofficial nature of relations between Australia and Taiwan and the rationale behind the official view that Taiwan is not a sovereign state but a province of China. This requires a consideration of Taiwan's historical development and the status of Taiwan under international law. This is the subject of the second part of this paper.

The writer wishes to acknowledge the kind assistance given by Professor Malcolm Smith and Professor Michael Pryles in the preparation of this paper.

1 The countries constituting the 'four dragons' of Asia are South Korea, Hong Kong, Singapore and Taiwan.

2 Trade between Australia and Taiwan has tripled in the last decade and is now worth about $3.5 billion a year. This has made Taiwan Australia's sixth largest export market, ahead of the United Kingdom, Hong Kong, Germany and the People's Republic of China.

Although the issue of Taiwan's status under international law has its roots in historical events that occurred over forty years ago, it is also necessary to consider the issue in light of recent political developments in Taiwan. These developments will have a major impact on the future of Taiwan and are considered in part three.

The second objective of this paper is to identify the legal problems caused by Taiwan's status as an unrecognized state. On an international level, this requires a consideration of any restrictions which international law might impose on Australia's dealings with Taiwan in view of the fact that Taiwan is regarded as a territory of China. It also requires a consideration of the foreign affairs policies that the Federal Government has adopted with respect to its relations with the People's Republic of China (PRC). This is the subject of part 4. On a domestic level, the question of the legal problems caused by Australia's non-recognition of Taiwan requires a consideration of the effect of Taiwan's status in domestic courts. This is the subject of part 5.

The third objective of this paper is to consider the measures that the Australian Government has adopted to overcome the legal problems caused by Taiwan's status as an unrecognized state. In this regard, the main focus is on the enactment and operation of the *Foreign Corporations (Application of Laws) Act* 1989 (Cth). This Act is examined in part 6 and is compared with the approach that other countries have adopted with respect to Taiwan (part 7).

Although many of the legal issues raised in this paper are hypothetical in the sense that they are not based on problems that have occurred in reality, it is highly likely that such issues will arise in future in view of the exponential growth in Australia's commercial relations with Taiwan. In some respects, the success with which the Australian Government has managed to develop commercial relations within the framework of nonrecognition has meant that, up to this point in time, a direct consideration of many of these issues has been conveniently postponed. However, on the assumption that many of these issues will arise, it is appropriate to identify them and to consider the best way in which they can be resolved. This is the main purpose of this paper.

The Status Of Taiwan Under International Law

If the proposition that Taiwan is an independent sovereign state is to be denied, it is necessary to determine the status of Taiwan under international law and the impact of that status on its ability to operate in the international forum. The issue of Taiwan's status under international law has been debated for over forty years without any conclusive resolution. Many commentators have participated in this debate and some differ radically in their views. All of the views hinge on various interpretations of historical events, the true significance of which is often unclear. What is clear, however, is that

subsequent developments, in both domestic and world affairs, are continually undermining the premises on which these interpretations are based.

Before the views of these commentators are examined, it may be useful to state the official view adopted by the rival governments of China and Taiwan with respect to the status of Taiwan. The official view of these governments - a view that is reflected in the foreign affairs policies of virtually all countries - is that Taiwan is a province of a greater China that comprises the territory commonly referred to as 'mainland China' and the territory commonly referred to as 'Taiwan'.[3] Thus the debate between these two governments centres not on the status of Taiwan but on the identity of the government that has legitimate sovereignty over the greater China.

However, notwithstanding the wish of these governments to treat Taiwan as an inseparable part of a greater China, the evidence that Taiwan constitutes a part of Chinese territory is by no means conclusive under international law.

Perhaps the easiest way to examine the diversity of views concerning the *legal* status of Taiwan is to consider chronologically the historical events upon which the various commentators have relied in reaching their conclusions. Of essence is the true nature of the relationship between China and Taiwan as territories and the validity of the claims of the effective governments on those two territories.

Taiwan can only be said to have been a formal province of China for the eight years between 1887, when it was officially made into a province by the Qing Dynasty, and 1895 when it was ceded to Japan by the Treaty of Shimonoseki.[4] In the fifteenth and sixteenth centuries it was probably regarded by the Chinese Emperor as a tributary similar to such countries as Thailand and Burma[5] and it provided the destination for many dissidents fleeing mainland China. In fact, eighteen years after the Qing Dynasty was established in 1644, the son of the defeated ruler of the Ming Dynasty, Koxinga, led the remnants of his forces to Taiwan and expelled the Dutch who had established settlements there in the early years of the seventeenth century. Although nominal Chinese authority over Taiwan was asserted in 1683, the Qing Court did virtually nothing to govern or develop Taiwan.[6] In fact, as far as Chinese officials were concerned, a posting on Taiwan was tantamount to banishment or punishment for dereliction of duty.[7] In any

3 The full area of 'Taiwan' includes the island of Taiwan, the Pescadores and the offshore islands of Quemoy and Matsu.

4 The Treaty of Shimonoseki, by which Taiwan and the Pescadores were ceded to Japan, was signed by the government of the Ching Dynasty after the Sino-Japanese War of 1894.

5 See Chen LC and Reisman W H 'Who Owns Taiwan: A Search for International Title' (1972) 81 *Yale Law Journal* 599, 608..

6 Ibid.

7 See Long S *Taiwan. China's Last Frontier* (1991) as quoted in *Far Eastern Economic Review* (Hong Kong) 9 May 1991, 34.

event, regardless of the extent of China's sovereignty over Taiwan both before and after 1887, it is clear that sovereignty passed to Japan in 1895.

In 1941, the year in which war was declared between China and Japan, the Nationalist Government of the Republic of China (as it was then called) unilaterally repudiated the Treaty of Shimonoseki. The present government of China has relied on this action in asserting that sovereignty over Taiwan reverted to China in 1941.[8] This assertion has been widely criticised as an incorrect interpretation of international law. Kirkham, for example, states that under international law a state cannot merely by unilateral declaration regain rights of sovereignty which it has formally ceded by Treaty.[9] In addition, the view that the provisions of Treaties concluded between states are not ipso facto annulled by the outbreak of war is well supported by the authorities.[10]

The second event on which some commentators have relied to prove the transfer of sovereignty from Japan to China was Japan's surrender at the end of World War II. By its instrument of surrender, Japan accepted the provisions of the Potsdam Proclamation, made by the Allied Powers on 26 July 1945. The Potsdam Proclamation was an affirmation of the Cairo Declaration, made in 1943, under which the Allied Powers declared that it was their intention, after Japan's defeat, to restore to China all territories which Japan had stolen, such as Manchuria, Taiwan and the Pescadores.[11] The argument is that the provisions of the Cairo and Potsdam declarations operated either to transfer sovereignty over Taiwan from Japan to China[12] or to estop the parties to the declarations from denying that sovereignty would ultimately vest in China.[13] The problem with this argument is that there is a presumption under international law that the formal cession of territory after war requires a Peace Treaty.[14] Furthermore, the Japanese surrender was not a definitive renunciation of the territories but a commitment to renounce them in the Treaty of Peace.[15] Thus, there is a strong basis for the argument that

8 See Jain JP'The Legal Status of Formosa' (1963) 57 *American Journal of International Law* 16,44. See also Chiu H (ed)*China and the Taiwan Issue* (1979) 165.

9 See Kirkham D B 'The International Legal Status of Formosa' (1968) 6 *Canadian Yearbook of International Law* 144, 147.

10 See Oppenheim L *International Law* (7th ed Lauterpacht H.) (1952) 304 as quoted in Chiu op cit n 8 166.

11 Upon Japan's surrender, the Allied Powers authorised the ROC Government to accept the surrender of Taiwan and the Pescadores. See Chen and Reisman,op cit n 5,611.

12 This is the view that has previously been adopted by both the PRC and the ROC governments. See Crawford J *The Creation of States at International Law* (1979) 146.

13 See Chiu op cit n 8 164.

14 See Crawford, op cit 147 and O'Connell D P 'The Status of Formosa and the Chinese Recognition Problem' (1956) 50 *American Journal of International Law* 405, 407. Chiu questions this viewpoint, arguing that unless there are stipulations in the Peace Treaty to the contrary, conquered territory remains in the hands of the possessor. This, he argues, is an application of the principle of Uti possidetis (as you possess, you shall continue to possess): Chiu, op cit 162.

15 See Wright Q 'The Chinese Recognition Problem' (1955) 49 *American Journal of International Law* 320, 322.

Japan retained formal sovereignty over Taiwan until the Peace Treaty in 1951.[16]

The third event in which the question of sovereignty arises is the Communist victory over the Nationalists in 1949 and the establishment of the People's Republic of China on 1 October 1949. It was this event that forced the Nationalists to retreat to Taiwan to establish a provisional government of the Republic of China.[17] The contention made by the PRC Government is that, as the successor government to the Republic of China, it could lay claim to all of the territories occupied by the ROC Government, including Taiwan. However, as has been explained above, formal Japanese sovereignty over Taiwan was not relinquished until 1951 and it was only then that occupation by another state for the purpose of acquiring sovereignty over *terra delicta* became relevant. And, by this time, the PRC could no longer claim succession through the ROC authorities on Taiwan.[18]

Ironically, it was by no means certain in 1949 that a Peace Treaty with Japan would be necessary to settle the question of sovereignty over Taiwan. In January 1950, President Truman stated that the Allies had accepted the exercise of Chinese authority over the island and there is evidence to suggest that America intended to abandon the Nationalist regime to the planned invasion of Taiwan by the PRC.[19] However, the situation changed radically when the Korean war broke out in June 1950 and Truman dispatched the Seventh Fleet into the Taiwan Strait, declaring the 'neutralization of Formosa' in order to stem the threat from Communist China. Aware of the strategic importance of Taiwan, Truman stated that 'the determination of the future status of Taiwan must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.[20]

The formal Peace Treaty between 48 Allied Powers and Japan was entered into on 8 September 1951 and came into force on 28 April 1952.[21] By Article 2(6) of the Treaty, Japan renounced 'all right, title and claim to Formosa'. However, the Treaty was silent on the question of to whom sovereignty passed and did not employ the 'usual terminology of international conveyance'.[22] In 1952, a similar treaty was concluded between Japan and the Republic of China Government on Taiwan.[23]

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16 The argument that Japan retained sovereignty until the Peace Treaty is disputed by one writer who argues that since the sovereignty of the USSR over Sakhalin is undisputed, the ROC's de facto sovereignty over Taiwan should be similarly undisputed: Chou D S 'The International Status of the Republic of China' (1986) *Chinese Yearbook of International Law and Affairs* 161,162. The island of Sakhalin was one of the territories that Japan relinquished along with Taiwan.

17 On 8 December 1949, the Nationalists established the Republic of China (ROC) on Taiwan.

18 See Chiu op cit n 8, 615.

19 See Kerr G H *Formosa Betrayed* (1976) 386.

20 Chen and Reisman op cit n 5, 615.

21 136 United Nations Treaty Series 45.

22 O'Connell op cit n 14 409.

23 This treaty was also silent on the question of sovereignty.

Whatever the reason for the failure to deal with the question of sovereignty in the 1951 Peace Treaty,[24] it is clear that it has perpetuated the uncertainty surrounding Taiwan's legal status under international law. Crawford suggests that a possible effect of Japan' s relinquishment under the Peace Treaty was to re-vest sovereignty in China as a 'state' without specifically determining the government entitled to exercise that sovereignty.[25] The conclusion of this writer is that Taiwan's status is that of a consolidated local *de facto* government in a civil war situation.[26]

Other commentators argue that Taiwan became *terra nullius* upon Japan's relinquishment of sovereignty and therefore susceptible of appropriation by the ROC authorities on the basis of occupation. Kirkham, for example, argues:

> Because Taiwan became *terra nullius* only after the Peace Treaty of 1952, the first authority to exercise control over Taiwan after the Peace Treaty was no longer the government of China, notwithstanding its pretentions to that effect. Thus Taiwan was not annexed to China and Chiang [Kai-shek] could not annex Taiwan in the name of China (because he did not represent China)...Chiang has since shown his control over this independent territory to be effective and permanent, and at least acquiesced in by the people of the island. Under such circumstances, Chiang Kai-shek's government must be regarded (under international law) as the government of the sovereign state of Formosa.[27]

Kirkham further argues that because international law is concerned with objective criteria, and not with unrealistic claims by various regimes, the assertion by the Nationalist regime of sovereignty over mainland China cannot change its legal status. In other words, the continued existence of Taiwan as an independent territory, with its own *de facto* government, has converted Taiwan into a sovereign entity in the eyes of international law.[28]

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24 It has been suggested that many states, adopting the correct legal position, assumed that the reason behind the omission was to afford an opportunity to deal with this question in accordance with the UN Charter, taking into consideration the principle of self-determination and the expressed desire of the inhabitants of Taiwan: Chen and Reisman op cit n 5, 643.

25 Crawford op cit n 12, 148.

26 Ibid 151.

27 Kirkham op cit n 9, 153. See also O'Connell op cit n 14, 414, who argues that the theory of acquisition by occupation is the most inherently consistent in any analysis of the Taiwan situation. However, Crawford op cit n 12, 148, argues that the Japanese relinquishment could not have left Taiwan *terra nullius* since after 1952, as before, the island contined to be controlled by an effective, organised government. Chen and Reisman, op cit n 5, 640, regard the issue as a moot question on the basis that peremptory international norms *(jus cogens)* would have terminated the concept of *terra nullius* in international law as regards any populated territory.

28 Kirkham op cit n 9, 154. On the other hand, O'Connell, op cit n 14, 415, argues that since a government is only recognised for what it claims to be, the Nationalist Government cannot be recognised as the government of the independent State of Taiwan as it refuses to be recognised as such.

In conclusion, it is submitted that Taiwan must be regarded, at the very least, as a *de facto* entity with international personality.[29] This viewpoint accords with the international law definition of statehood as reflected in Article 1 of the Montivideo Convention on the Rights and Duties of States under which the qualifications for statehood are (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with other states.[30] It also accords with the practice of many states to regard Taiwan as a *de facto* sovereign state, notwithstanding the official position that it is a province of China and the refusal to recognize the government of Taiwan.[31]

However sound the above argument appears, the analysis of Taiwan's true status under international law would not be complete without mentioning the view, persuasively argued by Chen and Reisman in 1972, that the international legal title of Taiwan is suspended and that this position will continue until there is substantial conformity to international norms of territorial sovereignty.[32] The argument proceeds on the basis that the Nationalist Government of Taiwan was itself an invading force which cannot be regarded as representing the true wishes of the people of Taiwan until its legitimacy is fully confirmed by democratic processes. However, the political situation in Taiwan has changed dramatically in the nineteen years since Chen and Reisman wrote their article. These changes, and their implications for Taiwan's future, are briefly examined in the next chapter.

Recent Political Developments

Whilst a detailed analysis of Taiwan's recent political development is beyond the scope of this paper, this part will examine several political developments in the last few years. These developments are significant because they have important ramifications for Taiwan's future and the role that international law will play in resolving certain issues. They also demand a re-assessment of many of the grounds upon which the above views concerning Taiwan's status under international law are based.

Prior to 1986, Taiwan was a one-party state with political power firmly in the hands of the Nationalist Party or Kuomintang (KMT). Opposition parties were banned under martial law and political dissent was suppressed by repressive anti-sedition laws which were collectively referred to as the 'Temporary Provisions for the Suppression of Communist Insurgency'. These provisions were regarded as necessary in order to suppress both communist

29 This is supported by one writer who argues that this approach provides the best basis on which Taiwan's future is to be determined: Li, V H. 'The Legal Status and Political Future of Taiwan after Normalisation' in Starr JB (ed) *The Future of US-China Relations* (1981) Ch 4, 225 and 247.

30 (1933) 49 Stat 3097 T S 881.

31 The refusal to recognise the Taipei Government is now even less relevant in Australia due to the change in recognition policy. See text infra at n 73.

32 One of these norms is the principle of the rights of non self-governing people. See Chen and Reisman op cit n 5 654.

sympathizers and also those who advocated an independent Taiwan - a concept that was, and still is, anathema to the ruling K M T party.[33] A strict policy prohibited official contact with the government of mainland China and was known as the 'Three Nos' policy: no contact, no negotiations and no compromise. The refusal of the Nationalist Government to have any contact with Beijing, let alone recognize its existence, was a reflection of the official state of war that existed between the two governments.

The first sign of change appeared in 1986 when the first opposition party the Democratic Progressive Party - was formed and was allowed to participate in the elections held in December of that year. This was followed by the lifting of martial law in 1987 and the transfer of the Presidency to Lee Teng-hui, the first native Taiwanese to hold the position, after the death of President Chiang Ching-kuo in 1988.[34] On 1 May 1991, President Lee signed a decree terminating the period of communist rebellion on the mainland and repealed the 'Temporary Provisions'. In doing so, Lee acknowledged officially for the first time the existence of the communist government in Beijing.[35] While the desire to facilitate indirect trade between Taiwan and China, estimated at US$4 billion in 1990,[36] was clearly a factor in the decision to repeal the 'Temporary Provisions', an equally relevant factor was the need to bring policy into line with reality.[37] In addition, it was an important step in the KMT 's constitutional reform package, of which constitutional democracy was seen as the ultimate goal.[38] These developments are significant in two respects. Firstly, they strengthen Taipei's claim to legitimacy against the argument that the Government has no sovereignty over Taiwan because it does not represent the wishes of the people.[39] Secondly, to the extent that Taipei has abandoned its hopes of unifying China by force, it is no longer appropriate to refer to Taipei as a 'consolidated local government in a civil war context'.[40]

The recent political developments in Taiwan have had a significant impact on the ways in which Taiwan is viewed by other countries. They also have important ramifications for Taiwan's future. Most commentators, echoing the official line in both Beijing and Taipei, have regarded the effects of the

33 The desire of the ruling KMT party to regain control of the mainland is reflected in the fact that the capital in Taipei was only ever established as a provisional capital.

34 President Lee was formally inaugurated in May 1990.

35 See *Far Eastern Economic Review* (Hong Kong), 9 May 1991, 8.

36 See the trade statistics in *Far Eastern Economic Review* (Hong Kong), 6 June 1991, 40.

37 See the Editorial Age (Melbourne), 2 May 1991.

38 The constitutional reforms provide a basis for the establishment of fully representative government by early 1993. For a summary of these reforms, see *Taiwan Update* (Canberra), May 1991.

39 This is the argument put forward by Chen and Reisman op cit n 5, 654.

40 This is the phrase used by Crawford op cit n *12 151*. Note, however, that Taiwan's Premier, Hau Peitsun, has said that an official state of war will continue to exist between China and Taiwan until a formal ceasefire agreement is signed with China: *Far Eastern Economic Review* (Hong Kong), 28 February 1991, 13.

developments as moving Taiwan closer to reunification with the mainland.[41] However, an equally plausible interpretation of the effect of these developments is that the foundation is laid for an independent Taiwan. Although such an outcome conflicts with the avowed intentions of the KMT Government, it cannot be discounted as a possibility in the future, a possibility that becomes more likely when the difficulties associated with reunification are taken into account. Both Taipei and Beijing have different views about how reunification will take place. Beijing offers its 'one country, two systems' formula along the lines worked out for Hong Kong after 1997. Taipei's response is that this is unacceptable because it relegates Taiwan to the status of a local government and that reunification can only take place within a democratic framework. President Lee has reiterated that even direct investment will not occur until Beijing meets certain conditions such as democratization and economic liberalization on the mainland, the renunciation of the use of force against Taiwan and the cessation of its attempts to isolate Taiwan in international affairs.[42] However, it is highly unlikely that Beijing will relax its pressure on Taiwan and dispense with the option of using force in the event that 'foreign interference' occurs in Taiwan.[43] Moreover, the calls for independence among supporters of the opposition party and young people are becoming stronger.[44]

Foreign Relations

On 22 December 1972, Australia announced that it had recognized the PRC and severed relations with the Republic of China on Taiwan.[45] The decisions to recognize the PRC followed closely on the heels of the election of the Australian Labor Party (ALP) on 4 December 1972. It was the culmination of a review of Australia's China policy which had been initiated by the previous government in 1971 after the PRC was admitted to the United Nations, replacing the ROC as the China representative. The pressure to recognize the PRC intensified in early 1972 after President Nixon's visit to China and the signing of a joint communique between China and the US in Shanghai on 28 February 1972. This was the first step in the normalization of relations between China and the United States. Although the US did not formally recognize the PRC until 1979, it acknowledged in the joint communique that 'all Chinese on either side of the Taiwan Strait maintain that there is but one China and that Taiwan is part of China.'[46]

41 See 'Taiwan Visit to Beijing Breaks 43-Year Ice' Age (Melbourne), 30 April 1991. In this article, the writer comments that '[t]he way is now open for talks between Taiwan and China on direct trade, and eventually, on reunification'.

42 See 'Strait Talk' *Free China Review* (Taipei), January 1991,10.

43 By 'foreign interference', Beijing presumably means any foreign assistance that pushes Taiwan towards independence.

44 Recently, moves to amend the Constitution have been opposed by students demanding a new Constitution that effectively renounces the Government's sovereignty over all of China except Taiwan. See *Far Eastern Economic Review* (Hong Kong), 2 May 1991, 20.

45 See 'Australia recognises China' *Canberra Times* (Canberra), 23 December 1972, 1.

46 For the full text of the Shanghai Communique, see Lasater, ML, *The Taiwan Issue in Sino-American Strategic Relations* (1984) 253.

The commitment of the Whitlam Government to recognize the PRC had been part of the platform on which the ALP had run its election campaign in 1972.[47] The only factor which prevented the immediate establishment of diplomatic relations after the election was the time needed to reach agreement on the wording of the joint communique between Australia and the PRC. The Chinese were keen to adopt a formula by which Australia recognized the PRC's full sovereignty over Taiwan. The Australian Government, on the other hand, was reluctant to make such a concession, particularly in view of the firm relations which Australia had previously maintained with the ROC and the importance of trade with Taiwan. In the end, the following formula was adopted:

> The Australian Government recognizes the Government of the PRC as the sole legal government of China and acknowledges the position of the Chinese Government that Taiwan is a province of the PRC.

Such a formula is one of several formulae that have been adopted by other countries. At one end of the range, there is the formula that does not mention Taiwan at all but merely recognizes Beijing as the sole legal government of China.[48] At the other end is the Maldives formula:

> The Government of Maldives recognizes that the Government of the PRC is the sole legal government of China and that Taiwan is an inalienable part of the territory of the PRC.

Between these extremes is the formula adopted by Australia and other variations such as the Canadian formula by which Canada 'takes note of Beijing's position that Taiwan is an inalienable part of the territory of the PRC', and the Japanese formula by which Japan 'understands and respects' Beijing's position.[49]

With respect to the joint communique between Australia and the PRC, the extent to which Australia recognizes Beijing's claim to sovereignty over Taiwan clearly depends on an interpretation of the word 'acknowledges'. Furthermore, what is acknowledged is Beijing's 'position' that Taiwan is a province of China. Thus, a valid interpretation of the wording used is that Australia neither accepts Beijing's position that Taiwan is a province of China nor recognizes that Taiwan is a province of China. The only commitment that Australia gives is to take into account Beijing's view of any dealings between Australia and Taiwan in deference to its acknowledgment of Beijing's position in this regard.[50] The Chinese version, however, uses the

47 See Fung ESK and MacKerras C *From Fear to Friendship- Australia's Policies toward the PRC 1966-1982* (1985) 157.

48 This was the formula adopted by Austria and Ireland.

49 For a summary of the various formulae, see Shen L 'The Taiwan Issue in Peking's Foreign Relations in the 1970's: A Systematic Review (1981) 1 *Chinese Yearbook of International Law and Affairs* 74, 77.

50 This is the view of the Department of Foreign Affairs and Trade as revealed to the writer of this paper in an interview in February 1991.

same word (chengren) for the translation of the words 'recognize' and 'acknowledge'.[51] Although 'chengren' may mean either 'recognize' or 'acknowledge', the use of the word for 'acknowledge' may arguably represent a higher degree of acquiescence in the Chinese position that Taiwan is a province of China than the English equivalent. Of significance in this regard is the use of another Chinese word 'renshi' to mean 'acknowledge' in the Shanghai Communique between China and the US.[52] Whatever the reason for the use of 'chengren' to mean 'acknowledge', it is clear that its use in conjunction with the Chinese word for 'position' (lichang) indicates that there is no outright acceptance by Australia that Taiwan is a province of China.[53] Although the distinction may appear to be purely a semantic one, it has provoked a certain amount of controversy in China's relations with the United States. Chen Tiqiang, for example, argues that the use of 'chengren' in the 1979 Sino-American Communique was an intentional change from 'renshi' in the Shanghai Communique and that the US must be regarded as accepting that Taiwan is a province of China.[54] This has been strongly rejected by the US Government.[55] Chen goes on to argue that the joint communique is an international agreement, binding on the parties, and that it creates an obligation on the part of the US not to deal with Taiwan in a way which constitutes intervention in China's internal affairs.[56]

The PRC has often claimed a right to freedom from foreign intervention in China's internal affairs, particularly with respect to Taiwan.[57] Political obligations aside, an important question is whether, as Chen argues, the joint communique between Australia and the PRC creates any legal obligation under international law to avoid any dealings with Taiwan on the ground that it constitutes interference in China's internal affairs.

It appears well established that, under international law, such a joint communique does not have the status of a treaty so as to create legally binding obligations between the party states. Article 2 of the Vienna Convention on the Law of Treaties defines a treaty as an agreement whereby two or more states seek to establish a relationship between themselves governed by international law. Starke has said that so long as an agreement between states is attested and not governed by domestic national law, and

51 For the Chinese text, see *Renmin Ribao* (People's Daily), 28 December 1972.

52 It is argued that this is the correct translation of 'acknowledge': Li op cit n 29 227.

53 See Fung and MacKerras op cit 160.

54 Chen T 'Some Legal Problems in Sino-US Relations' (1983) 22 *Columbia Journal of Transnational Law*, 41, 45.

55 See 'China-Taiwan: US Policy', Before the House Foreign Affairs Committee, 97th Congress, 2d Session 6 (1982), Assistant Secretary of State John H Holdridge.

56 Chen op cit n 54 45.

57 See, for example, China's strongly-worded protest over Australia's draft airline agreement with Taiwan: 'Taiwan Air Deal Stirs China's Ire' *Financial Review* (Sydney), 4 February 1991, 1 . China's claim to freedom from foreign intervention in domestic affairs has also been made with respect to Hong Kong, despite the fact that sovereignty does not pass to the PRC until 1997. Take, for example, the controversy in 1991 over the attempts by the Hong Kong administration to build a second airport.

provided that it is intended to create a legal relationship, any kind of instrument or document may constitute a treaty.[58] However, a dividing line is generally drawn between documents such as communiques and joint statements, which establish political obligations between states, and those instruments which are intended to be of treaty status.[59] Moreover, it is unlikely that the parties to such a joint communique would intend to create a legal relationship as such an intention would exclude the possibility of changing the nature of diplomatic relations in future.[60] In any event, the joint communique is not regarded as a treaty under Australian law and practice, and is no more than a formal record of agreement which is politically binding on the two countries.[61]

It is clear that the Australian Government does not regard the expansion of mutually beneficial commercial relations with Taiwan as a contravention of the one-China policy as reflected in the terms of the 1972 Joint Communique.[62] Although the Australian Government will not countenance concessions of a diplomatic or political nature which imply recognition of Taiwan as a separate political entity, it has taken important steps to strengthen the unofficial and commercial relationship with Taiwan, reflecting the 'positive, forward-looking and pragmatic approach in Australia's unofficial relations with Taiwan.'[63]

The new pragmatism which Canberra has adopted with respect to Taiwan is undoubtedly due in part to Taiwan's increasing strength as a trading partner and source of investment. It is also due to the realization that in the present age, the lines between foreign policy and other policies with external application are rarely neat.[64]

The folly of adopting a literal approach to the 'one-China' policy and denying Australia the opportunity to pursue unofficial commercial contacts with Taiwan is self-evident. Taiwan's economic strength in Asia cannot be ignored and has commanded the attention of other countries despite the political influence of the PRC Canberra has acknowledged the role that Taiwan might play in regional dialogue and has recognized the strong arguments for including Taiwan in such regional bodies as the Asia Pacific

58 Starke J *Introduction to International Law* (10th ed 1989) 413.

59 See Myers DP 'The names and Scope of Treaties' (1957) 51 *American Journal of International Law* 574, 596.

60 Such an intention would render the suspension of diplomatic relations a breach of an international obligation!

61 This is the view of the Department of Foreign Affairs and Trade as revealed to the writer of this essay in an interview in February 1991.

62 'Australia and China: Looking Back - and Forward' - Address by Senator Gareth Evans, Minister for Foreign Affairs and Trade, to the Eighth China-Australia Senior Executive Forum, Melbourne, 17 April 1991, 7.

63 Ibid.

64 'Australia in Asia: the Integration of Foreign and Economic Policies'- Address by Senator Evans to the Seminar on Australia and the North East Asian Ascendancy, Sydney, 22 November 1989. For the text, see *The Monthly Record* (Canberra) November 1989, 640.

Economic Cooperation Forum.[65]

In reality, however, the strengthening of economic ties between Australia and Taiwan and Canberra's unofficial recognition of Taiwan as a separate entity have made the 'one-China' policy less tenable. The upgrading of 'unofficial' relations between the two countries, together with the enactment of investment, protection legislation[66] and the establishment of direct air links, make it difficult, if not impossible, to escape the conclusion that Australia treats Taiwan as a separate political entity and not as a province of China.

Of course, the formal recognition of Taiwan as a sovereign state in its own right will remain unrealistic for as long as Beijing and Taipei insist that it is a province of China. However, notwithstanding the belief that Taiwan should properly be part of greater China the *de facto* recognition of Taiwan as an independent entity does not rule out the possibility of reunification in the future. This is proved by the existence of multi-system nations in other parts of the world such as Korea and pre-unification Germany. The concept of the multi-system nation may allow *de facto* recognition of the existence of states within a greater state with the ultimate goal of reunification understood.[67] The obvious impediment to the operation of this concept with respect to Taiwan is that both Beijing and Taipei insist on being recognized as the sole legal government of both parts of the 'divided' China, including that part over which each has no effective control. However, such a claim by each government should not prevent other states from treating Taiwan as a *de facto* entity - an approach which is more in accord with reality than the fiction that it is a province of China.

In view of the decision by the Australian Government to dispense with the recognition of governments[68] and the willingness of both Taiwan and Australia to pursue economic relations on an 'unofficial' basis, it may be pertinent to ask why it is necessary to consider the true status of Taiwan under international law. In other words, does it matter if the fictitious 'one-China' policy is maintained provided that it does not interfere with economic objectives?

The answer is that does not really matter if the present state of affairs is

65 The Asia Pacific Economic Cooperation Forum was initiated in January 1989 by Prime Minister Hawke. For acknowledgement of Taiwan's possible participation, see 'Australia and the "Pacific Century" - Address by Senator Evans to the Asia Society in New York on 3 October 1989, *The Monthly Record* (Canberra), October 1989, 566.

66 The legislation is considered infra under 'The Legislative Solution'.

67 See Chiu H 'The International Law of Recognition and Multi-system Nations - With Special Reference to the Chinese (Mainland - Taiwan) Case' (1981) *Chinese Yearbook of International Law and Affairs* 1,4. Chiu contrasts the exclusion of Taiwan from international affairs with the accommodation of the two Korean states by the international community and claims that the different treatment lies in the relative strength and size of the PRC over the ROC.

68 Discussed in text infra at n 73.

maintained. The extent to which Canberra has upgraded its unofficial relations with Taiwan, ostensibly within the framework of the 'one-China' policy, reflects the relative ease with which policy can be relegated to the background. It matters, however, when future trends are taken into account. As mentioned above,[69] Taiwan's reunification with China is by no means certain, given the difficulties involved and the growing disparity between Taiwan and mainland China. In addition, independence cannot be discounted as a possibility. Even if the present regime in Taipei is sincere about reunification with China, any attempts to isolate Taiwan and to stifle the voice which it deserves in regional affairs is counter-productive. In fact, Chiu has argued that only by allowing Taiwan the appropriate international status will the PRC and Taipei be able to prevent two Chinas from emerging and make unification more likely.[70]

Unfortunately, given the PRC's uncompromising position with respect to Taiwan, it is unlikely that Beijing will allow Taiwan a greater say in international affairs without a struggle. Ironically, it is in Beijing's interests for Taipei to continue its claim to sovereignty over China. Any concession on the part of Taipei that it only has effective sovereignty over Taiwan would be regarded by Beijing as a further step towards independence. In the same way as Beijing claims sovereignty over Taiwan on the basis of the unilateral repudiation of the Treaty of Shimonoseki by its predecessor government,[71] Beijing clings to its own brand of historical irredentism under which the PRC claims racial suzerainty over the people of Taiwan for eternity.[72]

The question of Taiwan's true status under international law also becomes relevant in the event that Taiwan declares its full independence. The PRC has always left open the option of using armed force against Taiwan should Taiwan decide to 'break away' from the mainland. The question which would then arise is whether such action would constitute aggression against another state and whether self-defence would be the right of Taiwan under international law.[73] Obviously, the answer would depend on whether Taiwan constitutes a state under international law or whether the PRC could claim immunity from foreign intervention on the ground that it was an 'internal affair'. To the extent that Australia's 'one-China' policy would give credence to the view that it would be an internal affair, it is submitted that such a policy is misguided.

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69 Supra in text at n 41.

70 Chiu op cit n 67, 11.

71 Discussed in text at n 8.

72 Even though no such theory allows self-elected leaders of a 'race' to claim the territory on which their people happen to live, an exception seems to have been granted to the PRC with respect to such territories as Taiwan and Tibet. See Chen and Reisman op cit n 5, 651.

73 The right to self-defence appears in Article 51 of the UN Charter. The argument that Taiwan would have a right to self-defence under international law is put by Cheng DC 'A Communist Chinese Armed Attack on Taiwan: Some Inquiries of International Law and Politics' (1987) *Chinese Yearbook of International Law and Affairs* 182.

At this point, it may be relevant to consider briefly the recent change in Australia's recognition policy and the way in which it may operate with respect to a fully independent Taiwan.

On 19 January 1988, the Federal Government announced a change in its recognition policy. No longer would the Government extend formal recognition - *de facto* or *de Jure* - to new governments overseas. Instead, the decision would be whether to recognize the state.[74]

The new policy obviously has a significant impact on the way in which Australia can respond to new governments in existing states. This is reflected in the greater ease with which Australia can maintain its relations with unconstitutional governments such as the Fijian Government installed after the coup in 1987.[75] However, it is not clear whether the change in policy affects the criteria on which Australia might extend recognition to a new state such as an independent state of Taiwan. In view of the fact that Taiwan already possesses the qualifications for statehood under international law, it may be anomolous to talk about a new state of Taiwan emerging. In theory, the only real obstacle to its being recognized as a state is the refusal of the Taipei Government to be recognized as the government of Taiwan.[76] However, to the extent that the new policy removes recognition of government from the question of recognition of states, it may logically imply that Taiwan should be recognized as a state since Taipei's claim to sovereignty over mainland China would no longer be a relevant factor.

The Consequences Of Non-Recognition

Under traditional principles of private international law, the question of recognition is regarded by the courts as antecedent to a determination of the status of the acts or laws of a foreign state. In other words, the degree of recognition accorded to a foreign state (or government) determines the effect which the courts will give to its public acts and laws. A determination that a foreign state or government is unrecognized by the forum government has traditionally had the following consequences: (i) the foreign state has no standing to sue in the forum courts;[77] (ii) its acts cannot be given effect to by the forum courts,[78] and (iii) it cannot claim jurisdictional immunity.[79] The reason for these prohibitions has been attributed to the absence of comity between the forum state and the foreign state or government.[80]

74 Age (Melbourne), 20 January 1988. For a detailed analysis of the new policy, see Charlesworth H, 'The New Australian Recognition Policy in Comparative Perspective' (1991) 18 MULR 1.

75 See Charlesworth op cit 2.

76 The main practical obstacle, of course, is the PRC's claim to sovereignty over Taiwan.

77 *Luther v Sagor* [1921] 1 KB 456. In America, the principle is defined by *Russian Socialist Federated Soviet Republic v Cibrario* 139 NE 259 (1923).

78 Even acts that affected private rights were denied effect: *Adams v Adams* [1971] P188.

79 *City of Berne v Bank of England* (1804) 9 Ves Jun 347; 32 All ER 636.

80 Starke, op cit n 58, 142. Another factor was the need for the judiciary and executive to speak with the same voice in matters involving recognition: *The Arantzazu Mendi* [1939] AC 256.

Since recognition is regarded as an executive act of government, the courts have traditionally accorded judicial deference to the acts and statements of the executive to determine whether a foreign state or government is recognized. Often the courts have accepted executive certificates as conclusive evidence of the fact of recognition.[81]

However, the question of whether a court will regard a certificate as conclusive depends largely on the content of the certificate and the extent to which the executive has provided a complete and unambiguous answer to the question put to it.[82]

In *Anglo-Czechoslovak Credit Bank v Janssen*,[83] the question confronting the Victorian Supreme Court was whether Germany's occupation and administrative control of Czechoslovakia could be recognized for the purpose of determining the existence of the plaintiff bank. The defendant argued that the bank no longer existed since the German authorities had enacted a decree dissolving the bank. At first instance, the trial judge O'Bryan J requested and obtained an executive certificate which stated that the Australian Government had not recognized Germany's *de facto* administrative control over Czechoslovakia. As a result, O'Bryan J. felt himself bound to deny recognition to the decree of dissolution. On appeal, the Full Court held that the certificate was not conclusive evidence on the question of whether Germany was exercising *de facto* control over Czechoslovakia.[84] Furthermore, the Court stated that in cases where there was no uncertainty as to who had effective control of a territory, *de facto* occupation could be proved by other evidence or the fact may be 'notorious as a matter of common public knowledge.'[85]

The decision in *Anglo-Czechoslovak* indicates that the absence of recognition on the part of the forum government does not preclude a court from accepting that a foreign government has effective control of a disputed territory. Indeed, a refusal to accept the existence of control in such a situation would not accord with reality. In addition, the decision indicates that an executive certificate does not have the same significance where courts are concerned with questions of usurpation of sovereignty as it has

81 In some instances, the conclusiveness of the certificate has been stipulated in legislation. See, for example, s 40 of the *Foreign States Immunities Act* 1985 (Cth). On the other hand, the *Foreign Corporations (Application of Laws) Act* 1989 has the effect of removing the executive certificate as a relevant factor in the determination of questions to which the Act applies. This is discussed supra under 'Removal of Recognition as a Factor'.

82 See Edeson WR 'Conclusive Executive Certificates in Australian Law' (1976) 7 *Australian Year Book of International Law* 1, 5.

83 [1943] VLR 185.

84 In fact, the Full Court (Mann CJ, Lowe and Martin JJ) held that the drafter of the certificate had misapprehended the nature of the information sought and was really dealing with the attitude of the Government towards the question of *de jure* sovereignty: [1943] VLR 185, 198.

85 [1943] VLR 185, 197.

when the courts are concerned with relations with foreign states.[86] This is particularly so when the question of *de facto* control relates to the determination of private rights and not to the merits or demerits of the occupying power.

The executive certificate also loses much of its significance where the main issue is the interpretation of a term in a contract or a statute. In such a case, it is clear that the question is one of interpretation of the terms used by the parties, and therefore a matter of law for the court, rather than one to be determined by executive certificate.[87] There are a few cases involving Taiwan which illustrate this point. In *Luigi Monta of Genoa v Cechofracht Co Ltd*,[88] the English High Court (Queen's Bench Division) held that Taiwan constituted a 'government' under a charterparty clause, stating that the criterion required of a government was the 'exercise of full executive and legislative control over an established territory'.[89] In *Rogers Attorney-General v Cheng Fu Sheng et al*,[90] the District Court of Columbia held that Taiwan was a 'country' under the US *Immigration and Nationality Act* so as to constitute a place to which the plaintiffs (illegal Chinese immigrants) could be deported.[91]

The argument against the conclusiveness of an executive certificate is particularly persuasive where the issue is the interpretation of the rules of private international bodies. In *Reel v Holder*,[92] The English Court of Appeal held that Taiwan was a 'country' under the rules of the International Amateur Athletic Federation so as to entitle it to continue its membership of the association. The Court held that the word 'country' was used in order to delineate territorial areas of authority, not in the sense of recognized sovereign states. This decision was reached despite a statement from the Foreign Office at first instance that Taiwan was not recognized as a state.[93]

The Departure from the Strict Approach

Notwithstanding the strict approach adopted by courts in the past with respect to non-recognition, the courts have sometimes been prepared to give effect to the acts of an unrecognized state or government and to allow the agents or corporate creatures of unrecognized governments standing to sue. The exception appears to be based on an acceptance that recognition is

86 This was acknowledged by the Court in *Adams v Adams* [1971] 188.

87 See Ryan KW (ed), *International Law in Australia* (1984) 131.

88 [1956] 2 QB 552.

89 Ibid 564 per Sellers J.

90 280 F2d 663 (1960).

91 A similar interpretation of a statutory term arose in *Re Al-Fin Corporation's Patent* [1970] Ch 160. In this case, North Korea was held to constitute a 'foreign state' under the *Patents Act* 1949.

92 [1981] 1 WLR 1226.

93 A similar problem was considered by the English Court of Appeal in *Shen Fu Chang v Stellan Mohlin* (unreported, 5 July 1977). In this case, the question concerned Taiwan's membership of the International Badminton Federation.

decisive if the foreign state or government is suing, or seeking immunity from the process, but less decisive when the issue is simply one of applying the appropriate foreign law to determine private rights.[94] Moreover, the absence of comity, as a ground for denying standing to unrecognized governments in the forum courts, is less relevant when the suit involves an enterprise created by the foreign government to engage in trade and commerce. In recognizing an exception to the rule, the courts have been cognisant of the harsh, and often illogical, consequences of applying the strict approach, particularly where private rights and commercial transactions are involved. It is difficult for the courts to ignore the fact that, despite the absence of recognition by the executive, there may still be a government which is in effective control of a territory and that laws are in place which regulate the day-to-day affairs of the people, such as marriage and other private relationships.[95] Moreover, to ignore the foreign law as it relates to such things as marriage, ownership of assets and the legal status of companies might lead to absurd results .

There is also the problem that arises if companies of the nonrecognizing state are unable to sue to enforce commercial transactions entered into with companies incorporated under the laws of the unrecognized state. The problem is complicated by the fact that such transactions often involve government enterprises. Due to their close relationship to the unrecognized government, the prohibition against allowing the foreign government to sue would conceivably apply with equal validity to the enterprises themselves. The dilemma becomes acute when the government of the nonrecognizing state allows, or even encourages, trade between the two countries.[96] One case in which the question of the standing of state enterprises from unrecognized states was considered is the American case of *Upright v Mercury Business Machines Co.*[97] Although this action involved an assignee of a state-controlled enterprise, the US Supreme Court made some important comments about the position of the statecontrolled enterprise itself.

In *Upright*, the assignee of a state-controlled enterprise of the unrecognized German Democratic Republic (GDR) sued in New York to

94 See Greig DW 'The Carl Zeiss Case and the Position of an Unrecognised Govenment in English Law' (1967) 87 *Law Quarterly Review* 96, 117.

95 See the comments of Lord Denning MR in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] QB.205, 212.

96 In November 1990, the Federal Government completed a review of policy towards Taiwan. Although deciding not to vary the 'One-China' policy, the Government announced its plans to 'develop a healthy commercial relationship with Taiwan'. The measures taken by the Government to encourage trade and investment between Australia and Taiwan include the expansion in the unofficial representative office in Taipei, the establishment of a visa facilitation service in this office, the encouragement of a subsidiary of Qantas in its negotiations with the Taiwan aviation industry to operate a direct airlink between the two countries and efforts to open up market access in Taiwan for Australian beef, wheat and fresh fruit: Minister for Foreign Affairs and Trade, 'Australian Policy Toward Taiwan' News Release 12 November 1990.

97 213 NYS 2d 417 (1961).

recover money owed by the defendant under a trade acceptance. The trade acceptance represented an obligation to pay for typewriters sold and delivered to the defendant by the East German corporation and had been assigned to the plaintiff prior to the action. The defendant argued that the assignee had no standing to sue on the ground that the assignor, whose rights it had been assigned, was a branch of an unrecognized government. Because the East German corporation would not have had a right to sue on the trade acceptance itself, it could not assign such a right to its assignee.

The Court decided that the *de facto* existence of the GDR was juridically recognizable for the purpose of upholding the validity of the assignment. On the question of the assignee's standing to sue, the Court held that the lack of standing on the part of the GDR or its creature corporation did not render the transaction unenforceable at the suit of the assignee.[98] Although stating unequivocably that the GDR Government itself had no standing to sue in American courts, the Court left open the possibility that the GDR Corporation could have sued on the transaction. Steur J stated by way of *obiter* that the prohibition against according standing to a branch of government referred to a branch that performed governmental functions as the alter ego of the government.[99] The implication was that an exception is made for other 'branches' such as government-controlled enterprises which do not perform such functions.

Some writers have criticized the imposition of any restrictions on the standing of corporations of unrecognized governments in the courts of the non-recognizing state. The criticism is based on the argument that if commercial transactions are permitted between the citizens of the non-recognizing state and persons or entities subject to the authority of unrecognized governments, it is anomolous to deny a forum in which disputes arising from such transactions may be resolved.[100]

With respect to the standing of unrecognized governments themselves, the Anglo-American approach has been inconsistent. In England, the courts have resorted to somewhat artificial means to overcome the consequences of denying standing. In two cases, this has involved treating the unrecognized government as an agent of a recognized government in order to allow a

98 Ibid 421.

99 Ibid 424.

100 See Lubman S 'The Unrecognised Government in American Courts: *Upright v Mercury Business Machines*' (1962) 62 *Columbia Law Review* 275, 300; Greig op cit n 94, 153. In *Amtorg Trading Corporation v United States* 71 F 2d 524 (1934), a New York corporation used by the Russians as their state trading agency in the US was allowed standing to sue. In *Kinder v Everett* 2 Brit ILC 15, an agent for an unrecognized government was permitted to sue in his own name on the proviso that he had the authority of the unrecognized government to draw on the funds in question.

transaction to be enforced.[101] In America, the rule in *Cibrario* has been eroded by the recent practice of relying on State Department statements as to whether standing should be allowed.[102] In addition, there appears to be a trend towards according standing to unrecognized governments except where foreign policy dictates otherwise. Fountain has proposed that courts should begin with a presumption that all foreign governments have a right of standing and that the presumption should be limited only where deference to the foreign policy of the executive is proper. In language that reflects the reasoning of such writers as Greig, Fountain argues that when the US Government has itself entered into informal relations with an unrecognised government, or sanctioned or facilitated intercourse between that government and US citizens, it is inequitable to prevent the unrecognized government from enforcing its rights arising from those relations.[103]

In Australia, it is uncertain how the question of standing will be approached by the courts in view of the change in recognition policy.[104] Charlesworth has suggested that there are three possibilities. The first is for the court to interpret the dealings that Australia has with an unrecognized state, using the executive certificate as a guide. The second is for the Department of Foreign Affairs and Trade to supply information to a court similar to the practice in the United States. The third is for the courts to act on a presumption that all effective foreign governments and their acts should be accorded status in Australian courts.[105]

With respect to foreign corporations from unrecognized states, the common law in Australia has now been supplanted by legislation. This legislation is considered in the next chapter.

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101 *Carl Zeiss Stiftung v Rayner & Keeler* [1967]1 AC 853; *Gur Corporation v Trust Bank of Africa Ltd* 3 WLR 583. This approach has been criticised by two writers: see Greig, op cit; Beck A 'A South African Homeland Appears in the English Courts: Legitimation of the Illegitimate?' (1987) 36 *International and Comparative Law Quarterly* 350. Note that these two writers, although agreeing on the artificiality of such reasoning, take opposite positions on whether unrecognized governments should have standing. Greig favours according standing to unrecognized governments: op cit 98 and 136. Beck, on the other hand, argues that to accord standing would undercut the policy of non-recognition. In addition, Beck argues that commercial considerations should not be a factor in the determination of standing, agreeing with the view of Steyn J at first instance in Gur that persons who contract with unrecognised governments should sue them in their own courts or bear the risk of being non-suited: *op cit* 360.

102 For a discussion of cases in which the State Department has issued such a statement, see Fountain EL 'Out From the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to sue in US Courts' (1989) 29 *Virginia Journal of International Law* 473, 494.

103 Ibid 510.

104 The question of the standing of the Taiwan Government to sue in Australian courts is considered further infra under 'The Standing of Taiwanese Corporations'.

105 Charlesworth, op cit 24. Charlesworth appears to favour the third possibility, arguing that '[t]he presumption that the effective government should have full status in Australian courts would be strengthened if there had been public and/or private contacts with the regime in question': opcit 25. In the case of Taiwan, private contacts with the regime are encouraged by the Australian Government and have been facilitated by measures adopted by Canberra. See supra n 96.

The Legislative Solution

It is possible to identify two main objectives behind the enactment of the *Foreign Corporations (Application of Laws) Act* 1989 (the 'Act'). Both of these objectives are interrelated in the sense that each one provides the *raison d'etre* for the other. The first objective, which may be defined as the 'economic' objective, is to facilitate and encourage investment from Taiwan. In order to take full advantage of the potential which such investment offers, it is necessary to treat Taiwanese investment in the same way as investment from other foreign countries.[106] The second objective, which may be defined as the 'legal' objective, is to remove any legal impediments to the recognition of Taiwanese law as it applies to Taiwanese corporations and, consequently, to provide for the security of their investments in Australia. As mentioned above, the legal impediments would have arisen as a result of the non-recognition of Taiwan and the possible refusal of courts to recognize Taiwanese law as applying to matters involving Taiwanese corporations. Such matters include the validity of their incorporation and their rights and obligations.[107]

Although the Act does not refer specifically to Taiwan and applies with equal validity to other non-recognized entities such as Northern Cyprus and the Bantu homelands in South Africa, the economic context which precipitated its enactment indicates that the major concern was investment from Taiwan.

The catalyst for the drafting of the Act was the proposal by the China Steel Corporation from Taiwan to construct a US$4 billion steel mill in Australia. The project was expected to create 6,000 jobs and generate annual export income for Australia of around AUS$400 million.[108] Although Australia was a serious contender for the mill,[109] China Steel expressed concerns about the security of its investment in view of the fact that it was a state-owned corporation.[110] The main concern probably related to the threat of expropriation by mainland China - a possibility that is ruled out by section 8 of the Act.[111] A related concern, although not specifically mentioned in the course of negotiations, could have been the nonrecognition of China Steel in Australia and its lack of standing in Australian courts. Under the common law, there was no clear answer to the question of whether state-owned enterprises from non-recognized states enjoyed standing to sue in the forum

106 Such a necessity has been acknowledged by Senator Evans: Commonwealth of Australia, *Parliamentary Debates*. Senate, 4 December 1989, 3755.

107 The uncertainty of the previous common law approach was acknowledged by the Minister for Trade Negotiations, Mr Duffy, in the Second Reading Speech for the Bill: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 December 1989, 3480.

108 See 'Australia in line-up for US$4 billion China Steel Investment' *Asia Today* (Sydney), October 1989, 23.

109 The investment ultimately went to Malaysia.

110 'Australia in line-up etc' supra n108.

111 Discussed infra under 'Protection from Expropriation by the PRC'.

courts. The apparent trend was to deny standing on the ground that it would amount to the deemed recognition of the jural status of the unrecognized state itself.[112] It is here that the Act represents the most significant modification of the common law.

The Removal of Recognition as a Factor

The pivotal provision in the Act is section 9. It is this provision that removes recognition or non-recognition as a relevant factor in the operation of the Act. Section 9 provides as follows:

> (1) It is the intention of the Parliament that the application of this Act is not to be affected by the recognition or non-recognition, at any time, by Australia:
>
> (a) of a foreign state or place; or
> (b) of the government of a foreign state or place; or
> (c) that a place forms part of a foreign state; or
> (d) of the entities created, organised or operating under the law applied by the people in a foreign state or place.
>
> (2) Without limiting subsection (1), it is also the intention of the Parliament that the application of this Act is not to be affected by the presence or absence, at any time, of diplomatic relations between Australia and any foreign state or place.

A consequential effect of this provision is that the executive certificate is no longer relevant to the determination of questions to which the Act applies. This is because the main purpose of the executive certificate has traditionally been to convey the executive's attitude with respect to the existence of certain facts. These facts include the exercise of sovereignty over foreign territory and the existence of foreign states or governments. As indicated earlier,[113] the courts have often regarded an executive certificate as conclusive evidence of these facts and serious consequences have flowed from this. However, the effect of section 9 is that the application of the Act 'is not to be affected' by various matters which would have traditionally fallen within the purview of the executive certificate. The effect of this section on matters relating to Taiwan is that the operation of the Act is not to be affected by Australia's non-recognition of Taiwan and its government or the official view of the executive that Taiwan is a part of China.

The Application of Foreign Law

Section 7, which applies where it is necessary to refer to foreign law in the

112 See, for example, the comments of the court in *Upright v Mercury Business Machines Co* 213 NYS 2d 41 7, 421 (1961). Note, however, that Steuer J limited the process by according a narrow definition to a branch of government, supra n 99.

113 Supra under 'The Consequences of Non-Recognition.'

determination of a question under Australian law (s7(1)), has the effect of referring courts to Taiwanese law for the determination (where necessary) of certain questions involving Taiwanese corporations. These questions include the validity of their incorporation and their legal capacity and powers.

The provision avoids the necessity of referring specifically to unrecognized states such as Taiwan by using the word 'place' which is defined in section 3 as 'a place that, in practice, applies a separate system of law.' Section 7(2), for example provides that any question relating to whether a body or person has been validly incorporated in a place outside Australia is to be determined by reference to the law applied by the people in that place. Section 7(3) applies the same formula with respect to a list of other matters such as the status of a foreign corporation and the rights and liabilities of its members, officers or shareholders. Thus, section 7 overcomes the traditional common law approach by which the acts and laws of an unrecognized state or government in matters involving corporations could not be referred to by the courts.

Protection from Expropriation by the PRC

Section 8 of the Act has the effect of denying recognition to the act of a foreign state where the act purports to affect a foreign corporation and is based on the assertion of sovereignty over the place in which the foreign corporation is incorporated. An exception is made where the act would be given effect to by the people in the place in which the foreign corporation was incorporated. This exception would clearly apply to the acts of the Taiwanese Government for as long as it remained the effective authority in Taiwan. The main thrust of the provision is directed at any acts by the PRC which purport to affect Taiwanese corporations (or their assets in Australia) based on its assertion of sovereignty over Taiwan. Such acts might include decrees of the PRC expropriating or confiscating the assets of Taiwanese corporations in Australia.[114]

The Standing of Taiwanese Corporations to Sue or be Sued in Australian Courts

As mentioned above, section 7 of the Act directs courts to refer to Taiwanese law in the determination of such questions as the legal capacity and powers of Taiwanese corporations. A determination that a Taiwanese corporation is validly formed under Taiwanese law would presumably confer on the corporation the same legal capacity and powers that are enjoyed by a legal person such as the capacity to sue or be sued. To the extent that it accords standing in Australian courts to Taiwanese government corporations, the Act

114 *It is highly unlikely* that Australian courts would recognise such decrees anyway because of the well-established principle against the recognition of confiscatory laws having extra-territorial effect: *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] 2 WLR 24; *Bank Voor Handel en Scheepvaart v NV Slafford* [1953]1 QB 248.

represents a significant advance on the previous position under the common law.[115] As mentioned earlier,[116] the strict common law approach may have denied standing to such corporations.

An interesting question, to which the Act does not appear to provide an answer, is whether Australian courts would accord standing to the Taiwan Government or its agent to sue on a commercial transaction. Although it may only be in exceptional circumstances that such a question would arise, it is not beyond the realms of possibility, particularly in view of the close economic relationship that is being fostered between Australia and Taiwan. It is conceivable that a situation could arise in which an Australian company enters into a contract involving the Government of Taiwan for, say, the construction of public works and attempts to sue on the contract in Australian courts.

An analogous situation arose for determination in the *Gur* case[117] which involved an attempt by an English corporation to recover money under a guarantee which it had made available to the Republic of Ciskei. Although in this case, the Republic of Ciskei was accorded standing on the ground that it was a subordinate body of South Africa, it has been suggested that the Court was influenced by the commercial implications in refusing standing.[118] The same commercial implications would arise in relation to Taiwan. Although an argument may be put that persons who contract with unrecognised governments should sue them in their own courts or bear the risk of being non-suited,[119] it seems anomalous for such a result to prevail when the non-recognizing government actively encourages and promotes such commercial transactions with the foreign state or government.

When compared with the approach of other countries concerning the laws of non-recognized states, the *Foreign Corporations (Application of Laws) Act* 1989 is quite unique. Its uniqueness is due to the fact that it overcomes the common law problems without mentioning Taiwan by name. It thus achieves the intended result without making any diplomatic concessions to which the PRC could object.[120] In this regard, it may be useful to consider briefly the approach adopted by other countries in dealing with legal problems involving Taiwan. The next chapter considers the various approaches adopted by three countries - the United Kingdom, Japan and the United States.

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115 The Act's conferral of locus standi on state-owned corporations is particularly relevant with respect to Taiwan as major sectors such as finance, steel, shipbuilding, utilities, transportation and petrochemicals have traditionally been dominated by state-run enterprises.

116 Supra in text at n 96.

117 [1986] 3 WLR 583.

118 See Beck op cit n 101 354.

119 See supra n 101.

120 Ironically, the main objections to the enactment of the *Foreign Corporations (Application of Laws) Act* 1989 (Cth) have come from the Taiwan Government which argues that the legislation does not go far enough! See 'Concessions urged for Taiwan air agreement' *Financial Review* 31 January 1991.

The Approach Of Other Countries

The United Kingdom

In the United Kingdom, confusion over the legal status of corporations incorporated in unrecognized states has led to the enactment of the *Foreign Corporations Act* 1991 (UK). The Act appears to have the same effect as the *Foreign Corporations (Application of Law) Act* 1989 (Cth). In other words, the Act enables UK courts to recognize the legal capacity of corporations incorporated under the laws of territories which are not recognized as states by the UK. As a result, issues such as the capacity of a company to enter into a particular transaction and the powers of its directors will be decided by courts in the same way as would be the case had the corporation come from a recognized state.

The approach adopted by the Act differs from the approach under the Australian Act. Whereas the Australian Act refers courts to the question of whether a corporation was formed in a 'place that, in practice, applies a separate system of law', the UK Act refers courts to the question of whether a corporation was established by laws 'recognized by the courts of a settled legal system in the territory concerned'.

The formulation adopted by the UK Act appears to be narrower than the Austraiian Act as it requires the existence of a settled legal system. Thus, stability is obviously a factor which the courts will have to take into account. The Act itself does not provide a definition of 'settled' and so the scope of its meaning will have to await judicial interpretation.[122]

Japan

Japan normalized relations with the PRC in September 1972, approximately three months before the establishment of diplomatic relations between the PRC and Australia. Since 1972, Japan has closely adhered to the spirit of the Sino-Japanese Communique by which diplomatic relations with the PRC were established. However, Japan's status as one of Taiwan's leading trading partners and its control of Taiwan prior to 1945 have made the PRC 'suspicious of Japan's relations with Taiwan'.[123] One of the most controversial aspects of Japan's relationship with the PRC is the long-standing *Kokaryo* case, a case that reflects the approach of Japanese courts to the problem of recognition under private international law.

The *Kokaryo* case involved a dispute over ownership of a student dormitory in Kyoto called Kokaryo that the Republic of China bought in

121 The *Foreign Corporations Act* 1991 (UK) came into force on 25 September 1991.

122 For further comment on the Act, see *New Law Journal* (UK) 3 May 1 991, 602 and *Business Law Brief* (UK) May 1991,10.

123 Newby L *Sino-Japanese Relations - China's Perspective* (1988) 57.

1952 for Chinese students studying in Kyoto. In 1977, the ROC brought an action to evict a group of leftist students who were occupying the dormitory and refusing to leave on the ground that the ownership of the property belonged to Beijing as a result of Japan's recognition of the PRC in 1972. At first instance,[124] the Kyoto District Court, while recognizing the ROC's standing to sue, dismissed the action on the ground that the land and building were public property and that the ownership therein had been transferred to Beijing after Japan recognized the PRC in 1972. This finding arose as a result of the operation of the doctrine of government succession. However, on appeal, the Osaka High Court reversed the judgment of the lower court, holding that the fact that the ROC had *de facto* sovereignty over Taiwan made the succession of government from the ROC to the PRC as a result of Japan's switch in recognition an incomplete succession. The theory of incomplete succession of government was reiterated by the full bench of the Osaka High Court to which a second appeal was brought in 1987.[125] After recognizing the fact that the ROC had exercised exclusive and continuous control over Taiwan since the establishment of the PRC and that Japan had sustained trade relations with the ROC after 1972, the High Court observed:

> In international law it is reasonable to consider that when a government has completely gone out of power and a new government replacing it has become established (complete succession of government), all the assets owned by the former shall succeed to the latter. On the other hand, when the old government has not completely terminated and is still dominating part of the territory effectively (incomplete succession of government), only the assets of the former that are located in the territory dominated by the latter shall succeed to the latter.[126]

In the judgment of the Court, the only exception to the principle outlined above was the situation where the issue involved diplomatic assets or assets used for the exercise of state powers. The dormitory building did not fall within this exception and, accordingly, ownership remained in the ROC.

The ruling of the Osaka High Court that the ROC had *de facto* sovereignty over Taiwan reflects the willingness of Japanese courts to deal with matters involving foreign governments without being influenced by questions of recognition. Despite strong objections from the PRC, the Japanese Government has refused to interfere with the ruling, citing the doctrine of the separation of powers as the reason behind its refusal.[127]

One Japanese writer, although agreeing with the outcome of the case, is critical of the basis on which the decision was made. Instead of dealing with

124 For the decision of the Kyoto District Court, see *Japanese Annual of International Law* 22 (1978) 151.

125 For the decision of the Osaka High Court, see *Japanese Annual of International Law* 31 (1988) 201.

126 Ibid 203.

127 Newby op cit n 123, 60.

the matter in accordance with public international law concepts such as incomplete succession, the Osaka High Court, it is argued, should have determined title in accordance with the private international law concept of 'effective' law. In other words, the courts should have recognized the title of the ROC on the sole ground that it possessed *de facto* sovereignty over Taiwan and was thus able to acquire property in its own name.[128]

The United States

In 1979, Washington established diplomatic relations with the PRC and terminated its formal diplomatic relations with Taipei. However, Washington was anxious to ensure that the recognition of the PRC Government did not affect, in practical terms, the relationship which had previously existed between Taiwan and the US The continuation of the close relationship with Taiwan was guaranteed by the enactment of the *Taiwan Relations Act* 1979 (the 'TRA').[129]

The effect of the TRA is, inter alia, to treat Taiwan as a recognized state for the purpose of applying the laws of the United States. Section 4 provides as follows:

> (a) The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979 [the date on which diplomatic relations were terminated].

The section goes on to provide that whenever US laws refer to foreign countries, nations, states, governments, or similar entities, such terms shall include, and such laws shall apply with respect to Taiwan (s 4(b)(1)). Furthermore, whenever a question arising under US law refers to the law in Taiwan as the applicable law, the law applied by the people on Taiwan shall be considered the applicable law for that purpose (s 4(4)). Except in so far as this provision mentions Taiwan by name, its effect is similar to the *Foreign Corporations (Application of Laws) Act* 1989.

Unlike the Australian Act, the TRA specifically provides that the capacity of 'Taiwan' to sue and be sued in American courts shall not be affected by the absence of diplomatic relations or recognition (s 4(7)). Section 15 provides that:

> (2) The term 'Taiwan' includes, 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 organised under the laws applying

128 Tsutsui, 'Subjects of International Law in the Japanese Courts' (1988) 37 *International and Comparative Law Quarterly* 325, 329.

129 Public Law 96-8, 93 Stat 14 (10 April 1979).

> on those islands, and the governing authorities on Taiwan recognised by the United States as the Republic of China prior to January 1, 1979, and successor governing authorities (including political subdivisions, agencies, and instrumentalities thereof).

Thus it goes further than the Australian Act in terms of specifically conferring standing to sue and be sued on both government corporations and also the government of Taiwan itself. Although the TRA places relations between the US and Taiwan on an unofficial and commercial basis, courts in the US have applied the TRA in a manner that treats Taiwan as a sovereign entity. In a series of cases, courts have applied sovereign immunity concepts and the 'act of state' doctrine to Taiwan, and have regarded Taiwan as having a government with authority to promulgate laws and capacity to engage in external relations.[130]

One of the clearest examples of the tendency of US courts to treat Taiwan as a sovereign entity is *Millen Industries v Coordination Council for North American Affairs*.[131] In *Millen*, the plaintiff company established a manufacturing plant in Taiwan, allegedly in reliance on representations made by the defendant (CCNAA), an organization that operated as the agent of the ROC government in the US. The plaintiff claimed that the CCNAA induced it to invest in Taiwan by promising, *inter alia*, that the plaintiff would be able to import its supplies into Taiwan on favourable terms. When the plant turned out to be a money-losing operation, the plaintiff closed it and sued CCNAA in the US. Although from one angle, the transaction could have been viewed as an ordinary commercial one between a US company and a Taiwan 'association', the Court regarded it as involving an exercise of the 'sovereign prerogative' to regulate exports and imports to and from Taiwan.[132] Thus, the CCNAA could claim immunity under the *Foreign Sovereign Immunities Act* on the ground that the representations had been made in a 'sovereign' capacity and were not purely commercial. In addition, the 'act of state' doctrine was applied so as to prevent the Court from inquiring into acts by the sovereign power within the territory of Taiwan.[133]

The factual circumstances in *Millen* could easily arise in Australia. Although the ROC Government, through its unofficial agent in Australia, could not claim sovereign immunity under the Foreign States Immunities Act 1985 (Cth), it is uncertain how an Australian court would deal with a suit by an Australian company against an unofficial ROC agency such as the Taipei Economic & Cultural Office (TECO). As an incorporated associations, the TECO can sue or be sued on any commercial transaction into which it has entered. However, even though it is not entitled to claim sovereign immunity in Australia, it is difficult to conceive of a situation

130 For a summary of these cases, see Damrosch LF 'The Taiwan Relations Act After Ten Years' *Journal of Chinese Law* 3 (1989) 157, 174.

131 855 F 2d 879 (1988).

132 855 F 2d 879, 885.

133 See further Damrosch op cit 175.

where an Australian court would entertain an action against it where matters of sovereign prerogative, such as the regulation of exports and imports, were involved. The decision in *Anglo-Czechoslovak Credit Bank v Janssen*[134] appears to suggest that a court might look beyond the executive certificate and accept that an unrecognized foreign government has effective control of a disputed territory. Consequently, the court might refuse to intervene in matters of sovereign prerogative. However, the difficulties would be compounded by the fact that, unike the CCNAA in the US which enjoys statutory recognition under the TRA as the agent of the governing authorities in Taiwan, the TECO is not officially recognized as the agent of the Taiwan Government in Australia. Any move by the court to accord such recognition would clearly run counter to the policies of the executive.

Although the size and influence of the US have enabled it to preserve its relationship with Taiwan without jeopardising its diplomatic relations with the PRC, the operation of the TRA has provoked much opposition from the government in Beijing. The main criticism is that it violates international law and constitutes intervention in China's internal affairs. The alleged violation of international law is based on the view that the TRA is contrary to the US - China Joint Communique of 1979 under which diplomatic relations were established. The argument is that the joint communique establishes legal obligations under international law and that the US cannot plead its own law as an excuse for nonperformance of its international obligations.[135]

As discussed earlier,[136] there is strong authority for the contention that such a joint communique does not create legally binding obligations under international law. Thus, the recognition of Taiwan by US domestic law cannot be regarded as violating international law. Nevertheless, although the *Taiwan Relations Act* may be a valid means of overcoming problems relating to Taiwan's status under the domestic law of the US, it still does not answer the question of how Taiwan should be regarded under international law.[137] For the US, the question of Taiwan's status under international law may not be of immediate relevance in view of the operation of the TRA. For Australia, however, the question will still be relevant with respect to those matters not covered by the provisions of the *Foreign Corporations (Application of Laws) Act* 1989. Such matters include the standing of the Taiwan Government in Australian courts and the role which Taiwan should

134 [1943] VLR 185. This case was discussed in text supra at n 38.

135 For an explanation of this argument, see Chen op cit n 54, 46; Hsia T The PRC's Attitude Toward the Taiwan Relations Act; in Chen F (ed), *China Policy & National Security*(1984) Ch 9, 195.

136 Supra in text at n 59.

137 Section 4(c) of the TRA 'approves the continuation in force of all treaties and other international agreements, including multilateral conventions' that had previously been in effect between the US and the Republic of China. However, the Act avoids recognizing Taiwan as a state for the purpose of continuing the mutual obligations under such agreements by establishing an agency structure as the substitute for inter-governmental relations. The agencies for the US and Taiwan are the American Institute on Taiwan (AIT) and the Coordination Council for North American Affairs (CCNAA) respectively.

be able to perform in regional bodies. In addition, the strengthening of economic ties between Australia and Taiwan, as evidenced by the establishment of a direct airlink, will increase the likelihood that Australia will one day have to deal with Taiwan on an official level. Consider, for example, the situation that would arise if an accident occurred on the Australia-Taiwan air route or if one of the airplanes were hijacked. Would the Australian Government be prepared to recognize the Taiwan Government for the purpose of direct negotiations in accordance with international practice or would negotiations have to take place through unofficial channels?[138]

Conclusion

In the four decades since the 1949 revolution on mainland China, Taiwan has established itself as an independent territory with full capacity to perform the international duties of a sovereign state. That many states have not recognized it as such is due to Taipei's refusal to be recognized as the government of the sovereign state of Taiwan, and the mutually exclusive claims to sovereignty over a greater China by Taipei and Beijing. It is certainly not due to any disabilities arising outside the realm of politics.

Politics, however, will continue to play a determinative role in the shaping of Taiwan's future. Whatever international law has to say about the criteria for statehood, the question of recognition is still dependent on policy considerations rather than objective reality. For as long as Beijing and Taipei insist on being regarded as the sole legitimate government of all of China, including Taiwan, their coexistence will present problems in international affairs.

On the subject of legitimacy, there is no doubt that Beijing has earnt the right to be regarded as the successor government to the Republic of China government that existed on the mainland prior to 1949. To the extent that the ROC Government re-established itself on Taiwan as a government-in-exile after 1949, there have certainly been valid questions as to its legitimacy over Taiwan, even if Taiwan never reverted to Chinese sovereignty after Japan's defeat in 1945. However, as this essay has revealed,[139] recent political events in Taiwan have changed the ethos of society in Taiwan and it is now less valid to reject the legitimacy of the government in Taipei on the ground that it does not represent the true wishes of the people of Taiwan. As democratic

138 Such a scenario occurred in 1984 when a British Airways jetliner on route to Shanghai was diverted to Taipei. Both Taipei and London were parties to the 1970 Hague Anti-Hijacking Convention and as such, they cooperated to solve the problem: see Ma Y Two Major Legal Issues Relating to the International Status of the ROC (1986) *Chinese Yearbook of International Law and Affairs* 171,176, n24. Ma points out that even though Beijing regards the ROC's signatures, ratifications and accessions to a given treaty null and void, Beijing could hardly have requested London to negotiate with it instead of Taipei in this case.

139 See Supra Recent Political Developments.

reforms begin to take hold in Taiwan, it is inevitable that Beijing's claim to sovereignty over Taiwan will weaken. This in turn will raise questions about the validity of Chinese irredentism, as reflected in the 'One-China' policy, under which Taiwan is regarded as an inseparable part of China.

In countries such as Australia, the inconsistencies caused by the 'One-China' policy will become more apparent as economic ties with Taiwan become stronger and gradually force an acknowledgment of objective reality. Such objective reality is implicit in the ways in which Australia has upgraded its unofficial relations with Taiwan and in the effect of the *Foreign Corporations (Application of Laws) Act* 1989. Furthermore, the changes in recognition policy, although not of immediate relevance to Taiwan, will obviously have an effect on the ways in which the Australian Government might respond to the question of Taiwan's status in future.

With respect to the Act, the change in recognition policy is relevant to the extent that the standing of the government of an unrecognised state is no longer a factor in the determination of legal questions involving foreign corporations from that state. However, a contradiction is caused by, on the one hand, the Australian Government's official adherence to the notion that Taiwan is a province of China and, on the other hand, its enactment of the legislative basis for a determination by the courts that it is, in effect, a sovereign state. The contradiction is clearly avoided by section 9 of the Act and the consequential elimination of the executive certificate as a determinative factor in the process. However, the contradiction still remains and demonstrates the extent to which policy lags behind economic, and legal, reality.

The purpose of this essay has been to demonstrate that there is no legal impediment to Australia's treatment of Taiwan as a de facto independent state and to identify certain areas in which problems still remain, even after the enactment of the *Foreign Corporations (Application of Laws) Act* 1989.

These problems include the standing of the Taiwanese Government in Australian courts and the inconsistencies caused by the 'One-China' policy. With respect to the operation of the Act, the Australian Government has been forthright in its view that 'as a matter of public policy, the foreign relations considerations should not normally be the overriding factor in the determination of private legal rights, particularly those involving commercial transactions'.[140] On this basis, it would appear logical for the courts to accord standing to the Taiwanese Government in cases involving commercial transactions. As noted earlier, the courts may be closer to according standing to unrecognised governments in view of the new recognition policy. However, there is still uncertainty as to how the new policy will operate. To the extent that the courts will be able to look at Australia's unofficial

140 Mr Duffy in the Second Reading Speech for the Bill: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 December 1989, 3480.

relations with Taiwan to determine whether there has been implied recognition, there will obviously be greater flexibility than was allowed by the previous situation in which the executive certificate played a dominant role. The strong trading relationship between the two countries and Canberra's policies for the development of economic ties would obviously lend weight to the contention that standing should be accorded in appropriate circumstances. Such a result would appear consistent with the policy of separating foreign policy considerations from matters involving private rights. However, the 'One-China' policy might still present a dilemma for the Government if the courts were to adopt the American practice of seeking guidance from the executive as to whether standing should be accorded in the circumstances of a particular case. Any overt support from the Government that standing should be accorded in appropriate circumstances would clearly fall foul of the 'One-China' policy

In the debate following the Second Reading of the Bill, one of the members of the Opposition expressed the opinion that the China policy was due for review and that the Bill was a step towards the recognition of Taiwan which was long overdue.[141] Although formal recognition of Taiwan depends on the occurrence of certain events over which Australia has no control, there are certainly means by which Australia can encourage the strengthening of economic relations with Taiwan. *The Foreign Corporations (Application of Laws) Act* 1989 is one example of the means available to the Australian Government and will hopefully lay the foundation for further growth in Australia's commercial relationship with Taiwan.

141 Mr Smith (Liberal Party, Bass): Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 December 1989, 3482.