

Creating International Space for Taiwan: The Law and Politics of Recognition

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This morning we have had the opportunity to engage in a lively debate about the current status of Taiwan. Is it an independent state? Is it an entity with an international legal personality entitling it to a certain degree of international space? Or is it an integral political unit of China?

To better understand the political and legal choices facing Taiwan, one must conceive of Taiwan as being perpetually poised on the cusp of independence. Notably, Taiwan is not teetering on the cusp of independence, but it is securely poised just before that last step necessary to actualize its independence. Taiwan has come to be poised on the cusp of independence as a result of the international community's "one China but not now" policy.

The Chinese government is comfortable with this policy as it acknowledges that Taiwan is not formally independent, while for the Taiwanese government it is also currently acceptable as it permits Taiwan to exercise a certain degree of international space. The United States and the European Union member states, as well, are comfortable with this interim arrangement as it prevents the issue of the permanent status of Taiwan from detracting from other foreign policy initiatives with respect to both China and Taiwan.

The task of this presentation is to analyze the potential legal and political reaction to an attempt by Taiwan to move its current status over the cusp and into the realm of independence, or an alternative attempt by China to back down Taiwan into a one China with the one system policy. The movement of the status of Taiwan could occur in a number of ways. There was some discussion this morning about the military capability of China to forcibly re-integrate Taiwan into its political system, and there has been much discussion of the ability of

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Taiwan to continue to expand its international space and maybe court, and request independence from other states. There has also been discussed the option of pursuing the so called Hong Kong model where there would be a one country with two systems. I will not address this latter option, only to note that if this approach were taken, it would substantially pull back Taiwan from the cusp of independence and it might then take a significant amount of time to re-establish the status quo if Taiwan found this arrangement unacceptable.

The question we now turn to is, assuming that Taiwan has exercised its rights under the very confusing and vague international law doctrine of self-determination, what legal rules would govern a request by Taiwan for recognition by the international community? For precedent we must look to the requests of recognition from the recently dissolved states of the former Soviet Union, Yugoslavia, and Czechoslovakia. Bearing in mind, which few international lawyers tend to do, that the rules of the modern law of state recognition, which has been established as a result of these three dissolutions, are guiding parameters, there are a handful of basic rules and maybe some guidelines that indicate how the United States government and the member states of the European Union might react if Taiwan were to assert its independence either upon its own volition, or subsequent to a military incursion by China.

The first observation is that the United States has taken what can be called the "traditional approach-plus" position, in that it follows a modified declarative view of recognition. According to the policy of the United States, if a state meets the criteria of recognition, which are that it posses a territory and a population that is subject to the control of a government which is the sovereign, the United States will consider that entity to meet the first threshold for recognition and is therefore entitled to the rights and privileges of a state. Importantly, however, the United States does not consider itself obligated to formally recognize that entity as a state. For example, the United States refused to announce formal recognition of Macedonia for over one and a half years, but it did recognize that Macedonia occupied international space. As such, it was entitled to qualify for bilateral aid, General System of Preferences Trade benefits, and was even subject to trade sanctions by the United States government.

The "plus" part of the United States policy on recognition, is that the United States must consider a state to be viable before it will agree to announcing formal recognition. The viability criteria became most apparent when the United States considered the recognition of Bosnia and Herzegovina. Bosnia was subject to territorial aggression from Serbia and Montenegro to the extent that over seventy percent of its terri-

tory was occupied by these hostile forces combined with domestic Serbs opposed to Bosnian independence. In addition, the central government of Bosnia was quite weak, and was unable to exercise any control over the seventy percent of the territory under the control of those forces hostile to its very existence. The United States originally concluded that Bosnia did not qualify as a viable state and was thus not entitled to recognition.

Notably, this criteria does not currently apply to Taiwan. However, it might become relevant if Taiwan becomes engaged in some act of military conflict with China, and a significant portion of Taiwanese territory is occupied by Chinese forces, or if there is a significant dissolution of the Taiwanese government. If Taiwan were to seek recognition from the United States under these circumstances the United States would seek to determine whether it considered Taiwan to be viable. And if not, then it might consider itself legally prohibited from recognizing Taiwan. Interestingly, however, in the case of Bosnia, the United States eventually determined that its recognition of Bosnia would create a more viable Bosnia and therefore it could recognize Bosnia on the basis that this recognition would promote the attainment of the "plus" criteria. The United States might employ the same logic with any potential recognition of Taiwan.

The European Union approach to recognition is slightly more complicated. The European Union has adopted the constitutive approach, which holds that an entity is not a state, whether that entity be Georgia, Ukraine, Bosnia, or Croatia until the European Union formally recognizes that entity as a state. And not only must a state meet the four legal criteria plus viability, they must also meet an additional set of political criteria. The European Union approach is thus appropriately referred to as earned recognition. With the successor states of the Soviet Union, the European Union applied an additional seven criteria, and with the case of the successor states of the former Yugoslavia it applied twelve criteria, including the commitment to institute market reforms, protect human rights, and promote democracy.

Although Taiwan meets many of the criteria articulated by the European Union, the European Union would likely feel free to create any additional criteria it believed to be relevant. Moreover, unlike the United States, the member states of the European Union are very reluctant to afford an entity any of the rights and obligations pertinent to statehood until that entity has been formally recognized by the European Union. And before the European Union will recognize a state, it generally requires that state to seek recognition from the European Union, which then might refer the request to an arbitration commission, which

after considering the request would fashion a recommendation as to whether the entity should be recognized as a state or not. The result is a significant time lag for recognition by the European Union.

Another significant element of the United States and European Union's approach to recognition is that they require the consent of the central government authority before recognizing a constituent entity of that state. This element was particularly important in the case of the American and European recognition of Ukraine, and the European recognition of the Baltic states. In these cases it was considered an affront to the territorial integrity of the USSR to recognize as independent its constituent entities. In the case of Taiwan, the United States or European Union might determine that recognition of Taiwan would constitute an infringement of China's territorial integrity. Notably, however, in the case of the dissolution of the former Yugoslavia, the European Union sought the consent of the people of the constituent entities rather than the center of political power. In the case of Bosnia in particular, they required that Bosnia hold a referendum before it would consider granting Bosnia recognition as a state. Taiwan might be able to successfully rely upon this precedent to assert that any declaration of independence would not be an affront to the territorial integrity of China, so long as it was supported by a public referendum in Taiwan.

To best preserve its interests, Taiwan may wish to seek to create some degree of international space, which would keep it just below the cusp of independence while permitting it to engage in a one China, but two international legal personalities type of arrangement. Here it might be useful to examine some of the arrangements between Russia and its constituent entities which permit the constituent entities to conduct diplomatic relations, enter into economic treaties, maintain independent trade relationships, and adopt certain types of security treaties while technically remaining part of the Russian Federation. These arrangements have permitted certain Russian republics to engage in economic and foreign policy relations with other states as well as a limited level of diplomatic relations without formally negating Russian sovereignty or affecting its territorial integrity.

Such an arrangement would bring us full circle back to this morning's discussion where it was noted that Taiwan's and China's mutual interest lie in promoting stability without causing an affront to either entity's sense of sovereignty. If such stability can be achieved within a creative evolution of the concept of sovereignty, without having to bring the issue within the legal and political thicket of recognition, then this would likely be the most profitable means of moving forward.