



**TAIWAN: SOVEREIGNTY AND PARTICIPATION
IN INTERNATIONAL ORGANIZATIONS**

By Jacques deLisle

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STATEHOOD?

The question of Taiwan's sovereignty and status generally evokes three strands of discussion. First, does Taiwan meet the criteria for statehood or something very close to statehood in the international system—and specifically in international law? Here the *locus classicus* is a dusty old document called the Montevideo Convention that states what most people consider to be the standard under customary international law. What does it take to be a state? According to the Convention, there are four criteria. A state must have a distinct and substantial territory. Taiwan, of course is an island (with a few small offshore islands), and there are few better geographical arrangements than a good-sized island (roughly 23,000 square kilometers, smaller than most countries but larger than dozens) for meeting the “territory” criterion.

A state also must have a distinct and substantial population. In Taiwan's case, the population of approximately 23 million people (ranking around fiftieth in the world), without a lot of immigration or emigration, offers a solid *prima facie* case for satisfying the “population” criterion. The once possibly problematic divide between a “Mainlander” or *waishengren* minority and a “Taiwanese” or *benturen* majority has faded enough as a social and political phenomenon that it no longer can do much to discredit the notion of a coherent and distinct group of Taiwan residents. And the residence of a growing number of Taiwanese on the Mainland (estimated at up to one million) is not enough to undermine decisively a claim that Taiwan has the required “population.” A state must also have a government, one that provides order at home and that does not answer to any higher government or any government abroad. In practice, the Republic of China (ROC) meets any plausible metrics for Taiwan with respect to this criterion.

After that, unfortunately for Taiwan, satisfying the standard for statehood gets trickier. The fourth criterion for state status, according to the Montevideo Convention and customary international law, is the capacity to engage in relations with other states. Here, Taiwan has some troubles on the “formal” side. No other country formally recognizes Taiwan as a separate state and only a small number of countries (now twenty-three) either recognize the ROC government or merely maintain formal diplomatic relations with it. This number has stabilized in recent years with the emergence of *de facto* “diplomatic truce” between Taipei and Beijing. On another measure of the capacity to engage in full formal international relations, Taiwan has faced difficulties as well. At Beijing's insistence, Taiwan has been excluded from some key international organizations, including the United Nations, its principal affiliated organs and other ostensibly state-member-only organizations. The opportunity for “Chinese Taipei” to participate as an observer at the U.N.-linked World Health Assembly (WHA) meetings since 2009 (but not in the World Health Organization (WHO)) brought a modest but still tenuous and unreplicated breakthrough on this front.

On the “informal” dimension of capacity to engage in international relations, Taiwan has done quite well, with a robust and extensive network of quasi-diplomatic or informal relations with the governments of many states, membership in many international organizations, including some intergovernmental organizations and myriad international nongovernmental organizations, and participation without membership in a good many others.

An additional difficulty for Taiwan is the implicit fifth of the four criteria for statehood under international law: some assertion by the relevant authorities that the entity is, in fact, a state. Taiwan's position with respect to this fifth quasi-

criterion is quite complicated. Of course, in the era of Presidents Chiang Kai-shek and Chiang Ching-kuo, the answer to the question of whether Taiwan declared itself to be a separate state was a resounding “no.” There was one China which included Taiwan, and the only question was which government was the proper government of that single, unitary China—the People’s Republic of China (PRC) government in Beijing or the ROC government ostensibly temporarily in Taipei. President Lee Teng-hui’s 1999 reference to cross-strait relations as being nation-to-nation or special state-to-state, and not fully international but not fully domestic, was nearly a claim (and arguably was a fifth-criterion-satisfying claim) to separate statehood. So too was his contemporaneous assertion that the Republic of China (ROC) was an independent sovereign state since the founding of the ROC, now nearly 100 years ago. Lee’s successor Chen Shui-bian went farther still with, among other things, repeated references to the sovereignty of Taiwan, a declaration that there was “one country on each side” of the Taiwan Strait, and a failed quest to attain membership in the United Nations—often (if not wholly accurately) characterized as open only to states—under the name of Taiwan. Chen’s successor and current ROC President Ma Ying-jeou has taken a step back from the brink (or the point beyond the brink) favored by Chen. He has spoken of the sovereignty of the ROC and sovereignty of the nation and has insisted on equality in cross-Strait negotiations. Ma has also articulated a principle of “mutual non-denial” between the governments on the Mainland and Taiwan. At the same time, Ma has abandoned Chen’s references to the sovereignty of Taiwan and has said recently that references to cross-Strait relations or contrasts should be to Taiwan and the Mainland rather than Taiwan and China. With all of this, Ma has moved official positions concerning the “fifth criterion” back into more ambiguous territory, in some ways evocative of the murk of the Lee Teng-hui years.

SECESSION?

This question of “asserting statehood” shades into a second strand of discussion and controversy regarding Taiwan’s status: Has Taiwan separated from China, or from Mainland China? This is essentially a question of secession, a question of whether there has been a change from a preexisting state of affairs, rather than a question of how Taiwan measures up against some objective criteria of statehood. To answer this second question, one needs to consider the consequences of a long inventory of historical events. This is why the PRC writes lengthy white papers that trace matters back to the Qing Dynasty and before, and does so partly in response to contrary characterizations of the relevant history by Beijing’s interlocutors and critics across the Strait. The relevant question here is, what is it that could have changed status with Taiwan? The answers are that many things might have (although, in the PRC view, none did so, at least not lastingly). I will review the long litany only briefly, incompletely and generally chronologically.

There is the strong assertion, prevalent among some Taiwan independence supporters, that China may never have held sovereignty over Taiwan. The exercise of the powers of rule, according to this view, was very thin through the late nineteenth century—perhaps so thin that China never established sovereignty or, at least, that its weak and perhaps merely inchoate claim could be relatively easily extinguished. Assuming Taiwan initially was under Chinese sovereignty, a common view is that it left, coming under the sovereignty of the Japanese Empire with the Treaty of Shimonoseki that ended the war between China and Japan near the close of the nineteenth century. Following the period of Japanese rule, Taiwan was only very briefly and controversially (in light of the repression of a nascent independence movement) ruled by a central Chinese government from 1945 (when the Japanese forces on the island surrendered) to 1949 (when the ROC government lost the Civil War on the Mainland and decamped to Taiwan). According to this line of analysis, there has been no need for Taiwan to secede or otherwise take action to separate from a larger China in the years since.

Of course, the PRC pushes back hard against these assertions, contending that Taiwan was a part of China since Qing times and before, that Taiwan never left China because the Treaty of Shimonoseki was an “unequal” and therefore invalid treaty, or that Taiwan returned to China when Japan invaded in 1937 and thereby breached its obligations under the treaty that had ceded Taiwan in return for peace. From the PRC’s viewpoint, events during and after World War II remove any remaining doubt. The soon-to-be-victorious Allied powers agreed, as part of the Cairo and Potsdam Declarations, that Taiwan would return to Chinese sovereignty after the defeat of Japan. Additionally or alternatively, the surrender of Japanese forces to ROC forces on Taiwan in 1945 meant that Taiwan, on this theory, went back to the China (then governed by the ROC), and one can argue, as the PRC does, that whatever the ROC had in 1945, the PRC got in 1949 when it became the government of China.

That is not the only possible reading, however. One could take the other view that the ROC resumed sovereignty over Taiwan in 1945 and never gave it up. The *reductio* of the logic of this latter perspective is possibly that the PRC-ruled Mainland seceded from the ROC-governed preexisting China, but that is a highly complicated and challenging international legal argument.

Early postwar developments introduce additional complexities. One line of argument was pressed by Chen Shui-bian in litigation in Washington, D.C. when he was trying to avoid criminal prosecution in Taiwan. Chen contended that Taiwan has been under U.S. occupation continuously since the end of the war, that the United States as the leader of the allied powers established a postwar occupation regime that has never ended. If accepted, this view throws Taiwan into a legal limbo of unsettled sovereignty. That position also draws some minimal sustenance from the State Department’s never-fully-retracted (but long-marginalized) early postwar statement that sovereignty over the island remained to be determined.

The postwar treaties further complicate the picture. Japan renounced sovereignty over the island as part of the San Francisco Treaty, but where that sovereignty went was left unclear. The Treaty of Taipei moved more firmly toward the former colonial power's renunciation of sovereignty in favor of the state represented by the ROC government. But the ROC position in those days was that it was the rightful government of a unitary China, and in the PRC view the ROC government after 1949 had no right to exercise any authority at all, including the authority to enter into any treaty addressing or assigning sovereignty over Taiwan.

The final piece of this story is the notion that postwar Taiwan may be a case of incomplete decolonization. Japan gave up sovereignty over Taiwan, much as European colonial powers gave up their sovereignty over colonies in Africa and Asia in the decades following the Second World War. Unlike in the vast run of postwar decolonization, postwar Taiwan did not go through the formal and legally conventional processes that led clearly to new (if not always long-term viable) states.

Here, the events of more recent years start to weigh all the more heavily. Sixty-plus years of *de facto* separate rule would seem to count for something. Whatever the legal niceties may be about the events that may or may not have formally reassigned sovereignty, more than half a century of functionally independent exercise of sovereignty is a fact about the world that perhaps international law needs to take into account, and that international politics (and the states and other actors that make international law and shape international politics) have taken into account.

Finally, secession or separation from a larger preexisting state is partly a state of mind, as well as a state of affairs. It typically comes with (and often functional autonomy is preceded by) a declaration of independent statehood. Wisely (given the predictable reactions in Beijing, Washington and elsewhere), no Taiwanese leader has dared to flirt with a full-blown July 4-like moment. Nonetheless, several of the statements and moves that I referred to above by Taiwanese leaders concerning Taiwan's status have come close to asserting that the magic declaration-of-independence moment occurred at some time in the unspecified or distant past.

INTERNAL FACTORS AND INTERNATIONAL STATUS

The third and last set of pieces of the puzzle of Taiwan's international status has to do with internal factors. Key among these are those that bear on the question of self-determination. Is there a distinct people of Taiwan or a "Taiwanese people"? If there is, then the Taiwanese people have a right to something which may—although it also may not—be full statehood. International law grants a distinct "people" a right of self-determination that includes some level of autonomy, but how much autonomy? How much self-rule and accommodation is sufficient?

On the first question, there is a debate about the extent to which the residents of Taiwan are a separate Taiwanese "people." The imperative to assert that they are (or at least might be) helps explain why the Mainlander / Taiwanese divide matters for Taiwan's status, why Lee Teng-hui advanced the notion of a "New Taiwanese" and a Taiwan Gemeinschaft that transcended the old divide, and why Chen Shui-bian regularly spoke of the people of Taiwan and sneered at the Kuomintang as "the Chinese Nationalist Party." A grappling with the same underlying issues runs through Ma's mixture of reemphasizing the common, largely cultural and historic Chineseness of Taiwan and Mainland residents while also not abandoning the notion of the distinctive and shared identity of the people of Taiwan who include a Hong Kong-born "Mainlander" such as himself.

Here, too, China has understood the game and has been resolute in asserting the contrary position. Reflected in the Shanghai Communiqué and regularly repeated in myriad contexts, Beijing's view (once fully officially shared by the ROC) is that people on both sides of the Strait are indisputably members of a single Chinese people. Any exercise of self-determination concerning Taiwan, therefore, is a matter to be decided collectively by and on behalf of the more than 1.3 billion residents of the Mainland and Taiwan.

On the second question—what status being a "people" brings—the stakes are high and the answer highly contingent. Under international law, a people's right to self-determination often can be satisfied by accommodations within a larger state—something that resonates with the promises China has made under the "one country, two systems" policy adopted in Hong Kong and Macao and proffered, with modifications, for Taiwan. But, where the central authorities do too little to protect and provide for the rights of a separate people within their state's borders, the oppressed people have a right to a separate state of their own—something that the international community has been willing to support, at least in some relatively extreme cases. Advocates for Taiwan independence and the much wider constituencies opposed to the one country, two systems model have engaged this point (more or less consciously) when they have emphasized the contrasts in the human rights and political powers of citizens on opposite sides of the Taiwan Strait.

Domestic factors other than "peoplehood" are relevant to Taiwan's status as well. Democracy and human rights matter, and not just as things to which a "people" might be entitled. Having a democratic polity and demonstrating respect for internationally recognized human rights will not get a less-than-state entity over the threshold into internationally accepted statehood. Conversely, a state with a bad record on democracy and human rights does not, therefore, fall below the threshold for statehood in the international system. But, especially for entities in the gray zone of contested or disputed statehood, it is a

good thing to be in step with international norms such as human rights and democracy and respect for international law. This has become much more important in the context of the post-Cold War world, in which powerful, largely Western states' recognition of new states and the de facto status accorded to entities with marginal claims to statehood (or teetering on the brink of being failed states) has increasingly turned on the ability and will to satisfy such criteria.

IMPLICATIONS FOR TAIWAN'S PARTICIPATION IN INTERNATIONAL ORGANIZATIONS: STRUCTURE MATTERS

I now turn to the second principal task at hand, examining the implications of these issues of Taiwan's international or sovereign status for Taiwan's membership and participation in international organizations. In this arena, there are a couple of issues that need to be untangled. The first is a question of organizational type or structure. Many international organizations are not states-member-only organizations, and Taiwan has had relatively high success in participating in those and often in joining them as a full member. The World Trade Organization (WTO) is the biggest example—a large, robust and highly important international organization that Taiwan has entered as a full member. Asia-Pacific Economic Cooperation (APEC) is another. Other key examples include the Asian Development Bank and the International Olympic Committee. There are also other mostly-governmental-organizations and many, many international nongovernmental organizations as well. Taiwan has been able to participate widely and actively in these entities, albeit at the cost of indignities of nomenclature (“Chinese Taipei” and so on) and other affronts.

But the pattern is very different with organizations that are states-member-only or at least are arguably (or generally claimed to be) states-member-only. The U.N. and its affiliated agencies are the classic category here. The Clinton Administration's “three no's” position more or less accepted this categorization and the policy stance that Beijing had long insisted upon. And the U.N.'s status as the principal ostensibly states-member-only international organization is what made the U.N. entry referendum that Chen Shui-bian pushed in 2008 particularly incendiary—so much so that it brought a stern rebuke from Washington as well as outrage from Beijing.

What are Taiwan's options and possible tactics for addressing organizations that are or might be state-member-only? One is to say Taiwan is a state and meets the criteria for membership. There may be much intellectual force to this argument, but politically it is something of a nonstarter. An alternative is to point out a more subtle aspect of the hypocrisy of purportedly state-member-only organizations that exclude Taiwan. Many entities that are not full-fledged, indisputable, separate states have participated fully and indeed been members in the U.N. The two Germanys were concurrent U.N. members despite being arguably a Mainland-Taiwan-like example of at least temporary separation of a prior unitary state. Nobody really thought that Belorussian and Ukrainian Soviet Socialist Republics were separate states when the Soviet Union had, in effect, three seats in the U.N.

Most of the game for Taiwan with supposedly states-only organizations has not been to take on the membership question. Instead, Taiwan has famously attempted to engage with these kinds of organizations without securing full membership. There are two routes here. One is a less-than-full-membership status, something like observer status (or perhaps something less than that), which has been accorded to some nonstate actors in the U.N. system. The other is to focus on some right or opportunity for participation without broaching the status question. Taiwan has employed both tactics in dealing with the U.N. and particularly the U.N. specialized agencies.

The World Health Assembly serves as one example of Taiwan's delicate and intricate dance. Beginning in 2009, Taiwan began to attend the WHA annual meeting on a semi-ad hoc basis with an unclear long-term status. Efforts to extend the WHA model or something akin to it are underway with the U.N.-affiliated International Civil Aviation Organization (ICAO) and the U.N. Framework Convention on Climate Change. The latter was talked about in the run-up to the Hu-Obama summit in January 2011. And there is currently discussion about how Taiwan might achieve “meaningful participation,” at least on the technical side of the ICAO.

There are, thus, several attempts at incremental progress, but it is important to recognize the limitations for Taiwan. These moves do not address the core organs of the U.N., only specialized affiliated agencies. And they also do not seek full membership (nor do they attain a lesser but clearer status). What has been sought and received involves alternative, non-member methods of participation. The problem with this approach is, of course, that it is hard to build momentum or great security against backsliding. Beijing puts down many markers saying the ROC cannot use participation at some level in one entity as a precedent that is easily extended to other institutional contexts. And there are technical legal points to consider as well: each of the U.N. specialized agencies has its own peculiar structure and thus presents obstacles to simple replication of the WHA (or any other) approach.

IMPLICATIONS FOR TAIWAN'S PARTICIPATION IN INTERNATIONAL ORGANIZATIONS: SUBJECT MATTER MATTERS

The second aspect of the question of what “type” of international organization concerns the entity's substantive focus. Subject

matter matters. It matters in at least three ways. First, is Taiwan an important player in the regulated field such that it can claim that it serves the global interest to allow the ROC to participate in the regime in question? The answer clearly is yes for the WTO, given Taiwan's stature in international trade. The answer would seem to be a strong yes for the WHA and WHO, especially after SARS and amid recurring fears of pandemics starting in the Chinese mainland and spreading via Taiwan. And affirmative answers would seem at least defensible for international organs that regulate financial institutions and other economic behavior, shipping, fishing, civil aviation, nuclear energy, potential dual-use technology—all areas in which Taiwan is a significant actor whose actions have substantial international consequences.

Second, is the regulated field particularly important to Taiwan? This is a fairness argument: Where Taiwan is being hurt by being excluded for no reason beyond Beijing's political opposition, this can be attacked as fundamentally unjust. The rest of the world may be hurt as well, but, from this perspective, what matters is the unwarranted harm or risk to Taiwan in an area that really matters for Taiwan. SARS / public health, international trade and international regimes for cooperation on criminal law matters are areas where the answer to this second question is yes and where Taiwan authorities have so argued.

Third, has China wrong-footed it in seeking to exclude Taiwan, given the nature of the substantive issue and the character of China's response? In other words, has China misplayed this situation in a way that has created sympathy for Taiwan and Taiwan's position? This is, as events played out, very much the story with SARS and Taiwan's pursuit of engagement with the WHA / WHO. It may turn out to be part of the story with human rights and Taiwan's Beijing-enforced exclusion from participation in the relevant U.N. organs—especially if we juxtapose Liu Xiaobo's Nobel Prize and Beijing's reaction with Taiwan's strong human rights record and recent ratification of the long-ago-signed U.N. human rights covenants.

These developments concerning human rights also illustrate one further strategy available to Taiwan to pursue greater engagement with international organizations, including especially those of the difficult-to-reach U.N. system. Taiwan can, and sometimes does, pursue not membership, and not participation, but what I call “as-if participation.” Taiwan commits unilaterally but publicly and solemnly to acting as if it is (or as if it were) a member of an international organization or regime, pledging to live up to all relevant standards.

A high level of functional performance of the obligations that go with membership can strengthen Taiwan's case for greater access to institutions and regimes from which it has been excluded. But much of the point of “as if” participation is about the question of Taiwan's international status—the issue with which this discussion began: the more Taiwan can walk and talk and act like a member of a regime that is open primarily or exclusively to states, the more hope it has of securing the benefits of state (or nearly state-like) status in the international system.

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