The Republic of China's Statehood and Taiwan's Legal Status: With Advocating a Common Roof Framework

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Abstract

This article finds that there are two kinds of problems underlying issues of the ROC's statehood and sovereignty. First, international laws are trumped by political influences, mainly from the US and PRC. Second, the current international laws are practically infeasible for dealing with divided-nation situations, particularly in the ROC case.

Referring to the first problem, the implications of

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associated legal basis, in the name of international law are questionable. For example, as to the statehood issue, the ROC satisfactorily meets the Montevideo criteria and the requirement of the predominant declaratory theory. However, the ROC fails the less-popular constitutive theory test due to lack of the “recognition” element of it, resulting in failure of statehood. From the diplomatic history of the ROC, we see the evolution of recognition and derecognition towards this country, and the causes of it indeed being political influences mainly conducted by the US and PRC.

The assertion that “Taiwan sovereignty is being undetermined” is baseless. It is noted that, the Treaty of Taipei, together with the ROC's own abrogation of all unequal treaties with Japan, is significant because even, assuming *arguendo* that the Treaty of Shimonoseki became effective, or in the absence of the Cairo/Potsdam instruments, the ROC would be the sole country entitled to recover Taiwan.

The assertion of “never claiming Taiwan is a State”, when applied to the ROC regarding the territory of Taiwan, is based on an erroneous conclusion that the ROC lacks statehood, and Taiwan is *terra nullius*. It is a false proposition because the ROC never ceased to be a country, and the sovereignty of Taiwan had been transferred to the ROC, and therefore there is no reason to claim Taiwan is a state.

Referring to the second problem, the current types of international personalities limited to be States by Westphalian theory, is practically infeasible for the recognition issue in the divided-nation situation, especially in the situation of the ROC case. A review of Chinese

history would provide a clearer picture to illustrate the divided-nation situation than does the Westphalian theory.

The ROC has established *sui generis* foreign relations and impliedly recognized among nations over the course of time, irrespective of Westphalian sovereignty challenges. However, these implied recognitions in the divided-nation situation are still subject to numerous restrictions and challenges.

Regarding the future of the ROC, maintaining the status quo, would not be effective either for now or in the long run, while the seeking to be independent would end up with a devastating result. This article suggests a "common roof" framework to be the solution for cross-strait reunification.

These problems – statehood, recognition, unequal treaties, sovereignty in Taiwan, etc., are either caused by foreign manipulation or erroneous western concepts, or the PRC. If both the ROC and PRC can agree with each other under this common roof framework, China can solve these problems by herself, and bring peace to the Taiwan Strait.

Keywords: statehood, unequal treaty, 1992 Consensus, roof theory

I. Introduction

At a first glimpse of this article's main title, some may wonder that the two issues are essentially only one – "whether Taiwan is a country". For those who so wonder, their cognition is based on the notion that "the Republic of China" (ROC) equates to "Taiwan".

"ROC" and "Taiwan" are two distinguishable subject matters where, literally speaking, the former is the name of a country and the latter a geographical territory. Therefore, the first issue is whether the ROC is a country, whereas the second is whether the geographical territory Taiwan belongs to the ROC. These two issues are indeed separate, though interrelated.

Nevertheless, such cognition does reveal a phenomenon that the official country name "the ROC" had been diluted and to some degree replaced by the geographical term "Taiwan". This phenomenon calls into question of the ROC's statehood and sovereignty.

To find out answers to this complicated question, two background information need to be kept in mind. First, China is in a divided-nation situation since 1949, with the ROC and People's Republic of China (PRC) on each side of the Taiwan Strait respectively. Second, the issue of Taiwan's legal status needs to be discussed from the signing of "Treaty of Shimonoseki" (馬關條

約) between the Ching (清) Dynasty of China and Japan in 1895.

Specifically, Part II of this article covers "the ROC's statehood" issue by first discussing origins of statehood theories including Peace of Westphalian and Montevideo Conference. However, it is not unusual to hear that "the ROC has not been widely recognized as a State by the international community,"so this article further discusses recognition theories including declaratory and constitutive theories, and related political influences. This article then conducts a historical review of the ROC's foreign relations in a divided-nation situation.

Part III covers the "Taiwan's legal status" issue. For the assertion that the legal status of this island Taiwan is undetermined, it starts by discussing unequal treaties, in particular the Treaty of Shimonoseki. A longitudinal historical review is conducted to reveal the related facts. For the assertion that the ROC never claimed Taiwan being a State, this article conducts a legal analysis based on associated rules and facts.

And, despite of the political manipulation suffered, the ROC has striven to develop *sui generis* foreign relations. Part IV discovers that it includes: (1) relations by domestic laws and *de facto* embassies; (2) recognition and enforcement of foreign Judgments; (3) international organizations membership; and (4) international trade agreements. And there is a need to find out whether these implied recognition or *de facto* recognition in the divided-nation situation would provide breakthrough for us in view

of Westphalian concept.

This article even further asks, given this geopolitically absurd situation, what is the heading for ROC as steering in such a rough sea? Part V discusses that whether it should maintain the status quo, seek the independence, or pursue the reunification. An analysis will be conducted following by advocating a common roof framework as the solution. And Part VI is conclusion.

II. The ROC's Statehood

A. In the Matter of Statehood

(A). Peace of Westphalian and Montevideo Convention

From the western historians' perspective, the state concept was first established in 1648 when the Holy Roman emperor signed the Peace of Westphalian (Westphalian), wherein German princes were formally granted the power and capacity to enter into alliances. From the granting of such capacity as conferring sovereign upon them, the state concept was thereby derived (Chiang, 1999: 959, 962, 966).

Some scholars indicated that this western concept was not "introduced" to China until the late nineteenth century (Chung, 2009: 233, 235). In fact, this concept is not novel to China at that time at all. The Westphalian took place when emperor Shun-Ji (順治) of Ching Dynasty ruled China, a State already has more

than 1800 years of age since China's first unified dynasty, the Chin (秦) Dynasty established in 221 B.C.

The Westphalian concept had become the customary international law, featuring that the State is the most powerful form of political organization in the contemporary world, and state-based interaction is the basis of the contemporary world order (Chung, 2009: 234).

However, by limiting types of international personalities to State only, Westphalian concept is practically infeasible for the recognition issue in the divided-nation situation (Wei, 2000: 997, 1002). It is noted that the division of China, Korea, Vietnam, and Germany into communist and noncommunist political systems has been a major development since the end of the Second World War (WWII) (Wei, 2000: 998). And, divided nations was "a most unfortunate experience for the peoples of these nations." (Wei, 2000: 998) More importantly, "international law should not be used as an instrument to deprive the rights of the unfortunate individuals who happen to live in an unrecognized divided-nation, it should be recognized as a human rights issue." (Wei, 2000: 1007)

Indeed, the Westphalian's limitation to types of international personalities being State left rooms for political manipulation in divided-nation situations. On the other hand, it is a geopolitical absurdity when the ROC has developed *sui generis* foreign relations by being impliedly recognized among nations over the

course of time, irrespective of Westphalian sovereignty challenges. More details will be discussed in Section B of Part II and Part IV respectively.

Further, based on the Westphalian concept, the Montevideo criteria provided the basic framework for assessing whether an entity meets the key characteristics of a State. The Montevideo criteria established in the Montevideo Convention on the Rights and Duties of States (1933) would invariably be brought out as a checking list for identifying the existence of a country. Specifically, article I of the Montevideo Convention states that "the State as a person of international law should possess the following qualifications: (1) permanent population; (2) defined territory; (3) government; and (4) capacity to enter into relations with other States (Shaw, 2017: 157; Chiang, 1999: 970)."

Many counties follow the same definition, similar languages can be found in, e.g., §201 of the Restatement 3rd of the Foreign Relations Law (the Restatement) of the United States (US):

> Under international law, a State is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.[1]

And, when discussing the statehood of the ROC, it is

1. Restatement 3rd of the Foreign Relations Law of the U.S., § 201.

concluded that she satisfactorily meets the Montevideo criteria.

Indeed, the ROC, as being the first democracy country in Asia, was established in 1911. By succeeding from the Ching Dynasty, the then ROC had: (1) a population of more than 400 million; (2) a territory of more than 10 million square kilometers; (3) a government; and (4) the capacity to enter into relations with other States. Despite the loss of major territory and transit of her central government from mainland to Taiwan in 1949, the 2.3 million ROC nationals in this island, had remarkably achieved the economic strength, now she, within her effectively control jurisdiction, is the world's 22nd largest economy, where it offers a passport that has visa-free access to over 150 countries. It is clear the that the ROC does not fall away, and never ceases to be a country during the past one hundred plus years.

It is noted that a strict construction of the Montevideo criteria has been critiqued by jurists. In particular, the capacity to enter into foreign relations probably "[t]he most criticized of the four elements of the Montevideo formula (Saliba, 2018: 5)." For example, in his book Democratic Statehood and International Law, Jure Vidmar warns of placing too much emphasis on the capacity to enter into foreign relations as that is itself "a corollary of a sovereign and independent government." And James Crawford has called the capacity to enter into foreign relations "is, in effect, a consequence, rather than a condition of statehood." One may also argue that such capacity is not exclusive of States

and, therefore, not particularly useful to distinguishing States from other entities (Saliba, 2018: 5).

Accordingly, it is understood that we should cautiously apply the Montevideo criteria and not to over emphasize the fourth element thereof. However, in real practice it is not only this element been over emphasized, but statehood is determined by political influences of other countries.

(B). Recognition Theories and Political Influences

It is not unusual to hear that “the ROC has not been widely recognized as a State by the international community (Ediger, 2018: 1668, 1671).” This leads to the question of whether satisfying these Montevideo criteria is all that is needed to be a State or recognition is itself a necessary component of statehood.

The constituent theory and the declaratory theory are two main legal theories of recognition. Relying on Hegel’s concept, the constitutive theory (Worster, 2009: 115, 120) holds that recognition completes statehood and is essential to the legal personality of a state. Consequently, the existence of statehood depends on recognition by foreign states (Hsieh, 2020: 693). In contrast, the declaratory theory contends that recognition only functions as a formal acknowledgement of statehood.

It is noted that the declaratory theory is the predominant one whereas the Montevideo adopt this theory (Chiang, 1999: 970). Indeed, the Montevideo Convention manifests this position by omitting recognition from the criteria of statehood and indicating

that "[t]he political existence of the State is independent of recognition by other states." (Hsieh, 2020: 693)

It is feasible to say the declaratory theory is a better one, because the constitutive theory at least has the disadvantage where a State was recognized by some but not other states, could one talk then of, for example, partial personality? On the contrary, the declaratory theory is more in accord with practical realities (Shaw, 2017: 330).

Although the declaratory theory is the predominant one, however, the ROC has been reversely given the test by the less-popular constitutive theory, where she would fail the test due to lack of the "recognition" element of it based on other countries' political choices, resulting in failure of the statehood.

In the absence of a central authority in international law to assess and accord legal personality, it is the States that have to perform this function on behalf of the international community and international law (Shaw, 2017: 333). And, the competing theories of State recognition and their failings actively demonstrate that recognition of a State does not have any normative content per se, but rather, that the rules of State recognition, although legal rules, are legal vehicles for political choices (Worster, 2009: 116).

For example, the Restatement is a platform to serve political choices to the US, wherein the §201, as mentioned earlier, adopts the declaratory theory, (Worster, 2009: 118) but §202

mandates that “a State is not required to accord formal recognition to any other State but is required to treat as a State an entity meeting the requirements of § 201,”except as otherwise provided.[2]

The §202 leaves a room for the US to decide whether to accord formal recognition to a State even that State has met the requirements of § 201, while also to decide, if needed, whether that State has met the requirements of § 201.

The threshold to the recognition of government is expected to be lower than to the recognition of state (Chiang, 1999: 968), because the former tends to minimize the fact that the precise capacity of the entity so recognized may be characterized in different ways. And again, political considerations have usually played a large role in the decision whether to grant recognition (Shaw, 2017: 337).

In more cases than not the decision whether to recognize, either State or government, will depend more upon political considerations than exclusively legal factors (Shaw, 2017: 329). It is mostly a political judgment, although it has been clothed in

2. Restatement 3rd of the Foreign Relations Law of the U.S., § 202.
   (1) A state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting the requirements of § 201, except as provided in Subsection (2).
   (2) A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.

legal terminology (Shaw, 2017).

B. The ROC's Foreign Relations in Divided-Nation Situation

In 1949, the ROC lost the civil war in mainland China and retreated to Taiwan, Penghu, Kinmen and Matsu. Despite the loss of major territory, the ROC continued to be recognized as the legitimate government of China by the US, many non-Communist states, and UN.

Meanwhile, the Chinese Communists established the PRC in 1949, and raised several unsuccessful operations attacking the ROC including amphibious landing and bombarding over the remoted Kinmen islands. Obviously, both ROC and PRC have coexisted since 1949, divided by the Taiwan Straits between them. However, the PRC claimed that the ROC had ceased to exist in 1949 (Chiang, 1999: 974; Chan, 2009: 455-492, §17).

The PRC's government has formulated a "One-China principle", whereby foreign countries may only conduct official diplomatic relations with the PRC on the condition that they surrender all official diplomatic relations with and formal recognition of the ROC. The PRC has successfully pressured many countries into withdrawing official recognition of the ROC (Hsiao, 2018).

In 1971, UN voted to replace the ROC with the PRC government in the representation of the China in the UN, despite the facts that the ROC was a founding member of the UN (Chan, 2009: 455-492, §23). Up through 1979, the US foreign policy

called for full recognition and support of the ROC. In 1979, the US derecognized the ROC and recognized the PRC as the government of China. [3] The theory held by US upon derecognition of government is based on that a State derecognizes a regime when it recognizes another regime as the government.[4]

As discussed earlier, according to the Montevideo criteria and the predominated declaratory theory, the ROC is a country. But, from the diplomatic history of ROC, we see the evolving of recognition and derecognition to this country, and the causes of it indeed being political influences mainly by the US and PRC (Ediger, 2018: 1671, 1682; Shaw, 2017: 329-360).

In addition to these political influences, the Westphalian conception itself has limitation wherein it cannot deal with the divided-nation situation because it restricts the international personality to be State only, as mentioned earlier in Section A of Part II. A review of the major treatises on international law or laws of nations reveals, under this traditional concept, that there are only three major categories of international personalities: states, belligerents, and insurgents (Wei, 2000: 1102). It is indeed out-of-date.

Further, the current principles of extending diplomatic recognition were developed from western European states before

3. Reporters' Note 3, Restatement 3rd of the Foreign Relations Law of the U.S., § 203.
4. Comment f, Restatement 3rd of the Foreign Relations Law of the U.S., § 203.

the nineteenth century. At that time and in that region, transition of a nation from unification to division, or vice versa, usually was rather rapid. As a result, the conventional international law simply failed to foresee the continuous existence of parallel political systems within the original State for an extended period, which happened in divided nations including China, Germany, and Korea after WWII (Wei, 2000: 1003).

On the other hand, ever since the first unified China was established by the Chin Dynasty in 221 B.C., there has been either a divided or unified situation in a rotated fashion repeatedly occurred throughout the Chinese history, either situation covers about a half of time during the prolonged history respectively. Typical divided-nation situation in Chinese history included: Yuan Dynasty and South Song (南宋), Ming Dynasty and North Yuan (北元), Ching Dynasty and South Ming (南明). The Chinese learned this quite well and much earlier that transition of a nation took quite a long time, and where there had never been serious attempts to permanently divide the nation. A review of the Chinese history would provide a clearer picture to illustrate divided-nation situation than does the Westphalian theory.

In addition, some scholars failed to acknowledge the difference upon the recognition of government in divided-nation situation. For example, Samuel Pufendorf, in his book "The Law of Nature and Nations" deduced a principle, wherein "each State

has one and only one government" (Chiang, 1999: 967-968). However, under this principle, the ROC government would not be recognized due to the divided-nation situation surrounding by foreign countries' political manipulation and the PRC's "One-China principle".

As Hungdah Chiu pointed out that recognizing a divided State as the sole representative of the nation was not consistent with the fact that the divided State has no effective control over its rival state. It is inequitable that the choice of recognition was based on political pressure (Chiu, 1981: 46; Low, 2015: 267).

Given that the rights of 2.3 million people in Taiwan had been patently ignored and deprived for decades due to infeasible international law, compounded by political influences (Wei, 2000: 1007), the traditional international law regarding the situation of divided nations shall be rejuvenated.

III. Taiwan's Legal Status

A. Unequal Treaty and Dilemma It Caused

Pacta sunt servanda, the long-held principle in the international law arena, codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT), stipulates that"every treaty in force is binding upon the parties to it and must be performed by them in good faith" (Li, 2016: 465, 481).

But the view began to change regarding the validity of

unequal treaties imposed on countries including China during mid-nineteenth century (De Jonge, 2014: 130). By the 1950s and 1960s, many scholars expressed the view that "unequal treaties are not legally binding" (De Jonge, 2014: 127). In fact, VCLT also stipulates that a treaty shall be nullified if entered into by force or the threat of force (Shen, 2000: 1110).[5]

Even in the twenty-first century, unequal treaties are still existed, including the environmental law and international trade areas (De Jonge, 2014: 126), and can be identified from the perspectives of substantive inequality (Li, 201: 471; De Jonge, 2014: 133), or procedural inequality (Li, 2016: 475; De Jonge, 2014: 135).

During mid-nineteenth, several treaties were signed by Ching Government concluded at gunpoint, and typically included provisions on "extraterritoriality, nonreciprocal tariff and most-favored nation privileges, territorial cessions and leases, the stationing of foreign military units", and many other humiliating restrictions upon sovereignty (De Jonge, 2014: 130). These are unequal treaties as they fall within Stuart Malawer's categories: "treaties containing formally unequal terms concluded following the threat or use of economic or military force" (De Jonge, 2014: 128).

Specifically, after being defeated in the first Sino-Japanese war in 1894, the Ching Government, under extreme duress, was

5. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

forced to sign the Treaty of Shimonoseki in 1895 wherein Taiwan was ceded to Japan. Considering afore mentioned, the Treaty of Shimonoseki is an unequal treaty, and shall be nullified and is void and invalid *ab initio*.

The ROC requested the abrogating of unequal treaties on several occasions. During the WWII, the ROC, in its Declaration of War against Japan, proclaimed to abrogate all treaties, conventions, agreements, and contracts regarding relations between China and Japan, including the Treaty of Shimonoseki (Lorca, 2010:475; Shaw, 2017: 712, 714) which rendered Taiwan been ceded to Japan (Shaw, 2017: 369).

In 1943, the Cairo Declaration had expressly indicated:“all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China.” The term “stolen” indicates that Taiwan is not *terra nullius*, and prove that the nature of these treaties, including the Treaty of Shimonoseki, are unequal.

International law is based on the concept of the State, which lies upon the foundation of sovereignty, and sovereignty is founded upon the fact of territory (Shaw, 2017: 361-409; Chiang, 1999: 986), or territorial sovereignty (Shaw, 2017: 363; Chiang, 1999: 964). So, the assertion “Taiwan sovereignty being undetermined” would completely negate ROC’s sovereignty in Taiwan, compounded by the foreign manipulation, it further incubates the pro-secessionist Democratic Progressive Party

(DPP) to claim self-determination for seeking Taiwan independence.

B. Assertion of “Taiwan Sovereignty Being Undetermined” (臺灣地位未定論)

The logic of “Taiwan sovereignty being undetermined” is based on manipulations by foreign powers. First, totally disregard the existence unequal treaty and its invalidity. Second, utilizing piecemeal approach to render procedural inequality upon the returning of Taiwan back to the ROC.

In the Declaration of War against Japan, the ROC proclaimed that China's resumption of sovereignty over Taiwan, Penghu and four northeastern provinces, emphasizing that China would recover these territories. After winning the war, the Chinese government reinstated its administrative authority in Taiwan Province, thereby formally resuming sovereignty of China over the territory (Shen, 2000:1109).

The US asserted that Taiwan’s legal status is still undetermined because Japan had never returned it back to China. However, when discussing Taiwan’s legal status, it cannot be done by a piecemeal approach (Chiang, 1999: 966; Shen, 2000:1126). This article longitudinally reviews through several historical events related to Taiwan’s legal status and illustrates as follows:

On July 26, 1945, the Potsdam Declaration was signed between the Allies, and it stated that Japan must accept the Cairo Declaration. On September 2, 1945, Japanese Instrument of Surrender was signed between Japan’s representatives and

the Allies, officially the end of the war. It had stated Japan's acceptance of the conditions outlined in the Potsdam Declaration, linking it to the initial Cairo Declaration.

Some argued that Japan did not sign Cairo Declaration, nor Potsdam Declaration, because not being a party. The matter that Japan had not signed these two declarations does not affect the legal effect, because the Japan's signing of the Japanese Instrument of Surrender had concluded the process.

Most US Department of State officials thought that Taiwan would be returned to China pursuant to the Cairo Declaration at a postwar settlement (Chiang, 1999: 991). So came the 1951 Treaty of San Francisco (Treaty of Peace with Japan). It is noted that nothing in the Treaty of Peace with Japan suggests any intention for it to replace the Cairo Declaration and the Potsdam Proclamation (Shen, 2000: 1115).

Through the arrangement of the US, neither the ROC nor PRC be invited to the San Francisco Peace Conference (Chan, 2009: 455-492, §13). Afterward, under the pressure from the US (Chan, 2009: 455-492, §14), Japan concluded with the ROC as "the sole legal government of China" and signed the 1952 "Treaty of Peace between ROC and Japan" (Treaty of Taipei) with the ROC government. In Article 2 of the Treaty of Taipei, both parties agreed that"Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands," which reiterated Japan's

renunciation in the Treaty of Peace with Japan of its title to and rights over Taiwan (Chan, 2009: 464).

Taiwan had been a part of Chinese territory before Japan stole it from China under the unequal and invalid Treaty of Shimonoseki. When Japan renounced its claim to Taiwan upon its defeat in WWII, it was only natural for China to resume sovereignty regardless of whether Japan or any peace treaty identified the ROC as the recipient (Shen, 2000: 1115).

It is noted that, under the Treaty of Taipei, Japan "recognized that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war" (Chan, 2009: 455-492, §15; Shen, 2000:1111, 1117).[6]

This latter undertaking, together with ROC's own abrogation of all unequal treaties with Japan, is legally significant because even, assuming *arguendo* that the Treaty of Shimonoseki became effective, or in the absence of the Cairo/Potsdam instruments, the ROC would be the sole country entitled to recover Taiwan (Shen, 2000:1117).

The UN Charter prohibits armed conflicts in the conduct of international relations; yet at the same time, it prescribes that the domestic affairs of a State may not be interfered with by the UN (Chan, 2009: 455-492, §48). To reserve a viable vehicle to intervene further possible conflict raised in the Taiwan Strait, the

6. Art. 4, Treaty of Peace, Apr. 28, 1952, ROC-Japan, 138 U.N.T.S. 3.

US tentatively leave Taiwan in a non-State status may best serve the need.

In 1959, when the US still fully recognized the ROC, the US State Department's official position maintained that the provisional capital of the ROC has been at Taipei, Taiwan since December 1949; that the Government of the ROC exercises authority over the island; that the sovereignty of Formosa has not been transferred to China; and that Formosa is not a part of China as a country, at least not as yet, and not until and unless appropriate treaties are hereafter entered into. Formosa may be said to be a territory or an area occupied and administered by the Government of the ROC, but is not officially recognized as being a part of the ROC (Chiang, 2017: 229).

C. Assertion of "Never Claiming Taiwan Being a State"

It is derived from international custom that a political entity, which meets the Montevideo criteria, does not become a State until it declares that it is a state (Chiang, 1999: 971). The declaratory theory also provides a general principle that, an entity is a State from the time of the declaration (Chiang, 1999: 973). The US holds the view that an entity is not a State if it does not claim to be a State as well (Chiang, 1999: 972, 973).

The US Restatement stands on the ground that, after the WWII Japan renounced claims to Taiwan. Both the regime

governing Taiwan and the regime governing the mainland of China have claimed Taiwan as part of China, and other states have either confirmed or acquiesced in that claim. The ROC continued to claim Taiwan was part of China (and that they were the government of China), even after the regime in Beijing was generally recognized as the government of China.[7] As of 1986, since the authorities on Taiwan do not claim that Taiwan is a State of which they are the government, the issue of its statehood has not arisen.[8] If Taiwan should claim statehood, it would in effect be purporting to secede from China (Shaw, 2017: 183-184).[9]

It is noted that, in 1684, the Ching Dynasty officially included Taiwan as part of China. Taiwan is not *terra nullius*. Thereafter, the ROC succeeded the Ching Dynasty, along with the territory thereof (Shen, 2000:1107). As above-mentioned, China had become a State for such a long time, the ROC, successor of the Ching Dynasty, thereby is a state. And, the ROC never ceased to be a country, she is not merely an authority of the island Taiwan. In addition, after the WWII, the legal status of Taiwan is not uncertain, the sovereignty of Taiwan had been transferred to ROC. Even in 1991, the ROC conducted the amending of her

7. Restatement 3rd of the Foreign Relations Law of the U.S., § 201. (referring to § 203, Comment f and Reporters' Note 3).
8. Comment f, Restatement 3rd of the Foreign Relations Law of the U.S., § 201 (referring to Reporters' Note 8, and § 203, Comment f).
9. Reporters' Note 8, Restatement 3rd of the Foreign Relations Law of the U.S., § 201.

Constitution, wherein Taiwan is still part of her territory, and therefore there is no reason to claim Taiwan being a state.

Thus, the assertion of "never claiming Taiwan being a state", when applying in the ROC regarding territory Taiwan, is based on an erroneous conclusion that ROC is lacking statehood, and Taiwan is *terra nullius*. It is a false proposition based on the above mentioned (Li, 2019).

IV. *Sui Generis* Foreign Relations

Given that the diplomatic pressure from the PRC, there are fourteen countries recognizing the ROC. On the other hand, irrespective of Westphalian sovereignty challenges, the ROC has developed *sui generis* foreign relations and impliedly recognized among nations in various areas over the course of time. Notably, despite of the derecognition, there ae substantial and *de facto* relationship maintains between the ROC and US (Krasner, 2001: 17).

A. Relations by Domestic Laws and *De Facto* Embassies

The US's recognition of the PRC as the sole legal government of China in 1979 entailed the derecognition of the ROC. In the same year, the Sino-American Mutual Defense Treaty signed by both states in 1954 was unilaterally terminated by the then US President Jimmy Carter.

Nevertheless, the application of the treaty between the US and ROC was transformed into the US domestic law (Shaw, 2017: 346; Chiang, 1999: 977). Among them, the Taiwan Relations Act (TRA) authorizes *de facto* diplomatic relations with the ROC by giving special powers to the American Institute in Taiwan (AIT) to the level that it is the *de facto* embassy. The act provides for the

ROC to be treated under US laws the same as "foreign countries, nations, states, governments, or similar entities", thus treating the ROC as a sub-sovereign foreign state equivalent. It is a recognition *sui generis*, because it has the same effect as of "recognition of government" (Wu, 2011), by defining the officially substantial but non-diplomatic relations between the people of the US and the people of Taiwan.

In addition, there are numerous *de facto* embassies, the Taipei Economic and Cultural Office (TECO), around the world. The issuing of a consular exequatur, the accepted authorization permitting the performance of consular functions, to a representative of an unrecognized State will usually amount to a recognition of that state, though not in all cases. For example, a British consul has operated in Taiwan, but the UK does not recognize the ROC government (Shaw, 2017: 343).

B. Recognition and Enforcement of Foreign Judgments

There are privileges permitted to a foreign State before the municipal courts that would not otherwise be allowed to other institutions or persons (Chiang, 1999: 978; Chung, 2008: 559, 565; Shaw, 2017: 329; Wei, 2000: 1005). The withdrawal of recognition by the US rendered the ROC a non-State entity and resulted in refusal of foreign judgment recognition and enforcement according to §481 of the Restatement:

> (1) Except as provided in § 482, a final judgment of a court of a foreign State granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.
> (2) A judgment entitled to recognition under Subsection (1) may be enforced by any party or its successors or assigns against any other party, its successors or assigns, in accordance with the procedure for enforcement of judgments applicable where enforcement is sought.[10]

However, the TRA provides the accommodation. Pursuant to this Act, the US has continued extensive, nondiplomatic relations with the ROC.[11]

> The capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition.[12]

10. §481, Restatement 3rd of the Foreign Relations Law of the U.S.
11. Reporters' Note 3 of § 203, Restatement 3rd of the Foreign Relations Law of the U.S.
12. Taiwan Relations Act, §4(b)7.

In addition to the US, concerning the practices of Italy and Russia, each stated that their courts could give effect to acts of unrecognized entities related to ministerial or private law matters. Moreover, an Australian statute provides for the recognition of foreign judgments from certain jurisdictions, without reference to whether those jurisdictions are recognized (Saliba, 2018: 22, 24).

The ROC, as many other countries, has adopted the reciprocal principle to equally deal with the recognition and enforcement issue of foreign judgments. Hence, without evidence showing to the contrary which causes violation of ROC law,[13] the ROC recognizes and enforces foreign judgments, including judgments from countries like US, Canada, UK, Japan, Singapore, Australia, New Zealand, and Malaysia.

Denying ROC nationals access to international courts will deprive its 23 million nationals of their individual human rights. It is frequently argued that, by granting individual access to certain international courts and tribunals, such as the European Court of Human Rights or treaty-based human rights committees, international law has gradually departed from the embedded Westphalian concept of sovereign States (Hsieh, 2007:811).

C. International Organizations Membership

Samuel Pufendorf yet deduced another principle that only a

13. Ref. §402, Civil Procedure of ROC.

State may be a full member of the international society (Chiang, 1999: 967). Proponents of the traditional state-based perspective provide that the UN, the most influential international organization, admits only sovereign states as members (Chung, 2009:234).

But the state-based perspective should not be over emphasis. For example, the World Trade Organization (WTO) has different policy to reflect the modern-day political situation (Chung, 2009:274-277). The ROC's participation in the world trade system began in the late 1940s. The ROC was one of the original signatories of the General Agreement on Tariffs and Trade (GATT), but the ROC withdrew in March 1950 in part because it could no longer fulfill trade commitments of mainland China. In 1965, ROC applied for and received GATT observer status. Then in 1971, the GATT took away ROC's observer status after the PRC was given China's seat in the UN, and ROC's representatives were expelled. This was one instance of the practice of the GATT to follow U.N. decisions on high political matters.

In contrast to other international organizations, the WTO does not require its members to be states. This constitutional feature has allowed ROC to join the WTO alongside the PRC. As a result, the WTO is now the only major international organization in which ROC can participate as a full member (Charnovitz, 2006: 400). In the WTO, the ROC is called the "Separate Customs

Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)" (Charnovitz, 2006: 410; Chiang, 1999: 982).

In addition, the ROC is a member of the Asian Development Bank, the Asia-Pacific Economic Cooperation (APEC) Forum, the Pacific Economic Cooperation Council, and some other 55 international organizations.

D. International Trade Agreements

The ROC is a nation which has developed her industry and international trade towards immense economic growth, she holds a trade surplus while its foreign reserves are the world's fifth largest. As of 2020, the ROC has concluded more than 30 free trade agreement (FTA) and investment protection agreements (Hsieh, 2020: 708).

The EU and its member states follow their respective one-China principle that recognize the PRC as the sole legitimate government of China and maintain non-diplomatic relations with the ROC. However, there are vibrant trade ties between the ROC and EU. The ROC is currently the EU's sixth largest trading partner in Asia and bilateral trade in goods amounts to €51.9 billion. As the largest investor in ROC, the EU accounts for 30 per cent of ROC's foreign investment stock (Hsieh, 2020: 690).

The EU has explicitly recognized ROC as "a separate customs territory" and as "an economic and commercial entity". As of 2020, ROC has signed double taxation agreements with 13 EU states and concluded investment facilitation agreements and memoranda of understanding (MoU) with eight EU countries at national and regional levels (Hsieh, 2020).

Central to the EU's approach to ROC, recognition of states and governments are legally different. Nevertheless, the legal principle of recognition is not absolute. Based on the EU practice,

the space of nonrecognition may enable some flexibility and latitude for engaging unrecognized entities. The EU's strategies for interacting with unrecognized entities demonstrate the unique policy that balances non-recognition and engagement. Although none of the 28 EU member states recognize ROC, the EU's relations with the ROC under the one-China principle can be understood as an example (Hsieh, 2020: 694).

V. Dead Reckoning or Course Change

After reviewing the ROC's statehood, sovereignty, and *sui generis* foreign relations issues, it subsequently comes to a question: what is the future of the ROC? Or where is the heading for the ROC?

The situation of the ROC, like a ship sailing in a rough sea, shall she keep dead reckoning or make a course change? Debates in this regard are mostly surrounding three options: maintaining the status quo, seeking the independence, or pursuing the reunification. This article tackles with these debates and moves forward advocating a common roof framework as the solution.

A. Maintaining the Status Quo

Maintaining the status quo means that, neither seeking of independence nor pursuing reunification with mainland China but

maintaining the status.

In fact, the status in Taiwan is not always the same because that the associated policies had been evolving. After long-time administration by the Kuomintang (KMT), the DPP took power in 2000 for the first time. And, the sea change was taken place when former President Chen “cease to apply” the “Guidelines for National Unification” (國統綱領), which indicated the more aggressive reunification was frustrated. Since then, people started to see policies shifting between pro-unification and pro-independence.

In addition, there are limitations of maneuverability to this option, because, as discussed earlier, statehood and sovereignty issues will not go away. Without being recognized as a State, the most important international legal person in the international community, the ROC would not be able to enjoy the right and bear the responsibility thereof (Shaw, 2017: 156).

Although the ROC has strived to achieve *sui generis* foreign relations in the international community and is impliedly recognized among nations over the course of time, irrespective of Westphalian sovereignty challenges. However, these implied recognition in the divided-nation situation still subject to numerous restrictions and challenges, so it is not a solution to current situation.

B. Seeking the Independence

Conducted by the pro-secessionist DPP, the independence movement is a political movement to seek formal international recognition of Taiwan as an independent, sovereign nation and in opposition to Chinese reunification.

(A). De-Sinicization (去中國化)

Aiming at against the "Cultural Revolution" conducted in mainland China which intended to destroy the Chinese culture, the KMT-led government promoted a "re-sinicization" covering various Chinese culture events, including calligraphy, traditional painting, folk art, and opera.

However, the DPP managed to direct to the opposite direction by promoting "de-sinicization". De-sinicization occurred most rapidly between 1992 and 2005, wherein it directed the rewriting of high school history textbooks to abolish the "remnants of greater Chinese consciousness". This textbook de-sinicization included the separation of Taiwanese history and Chinese history into separate volumes, a ban on the term mainland China, and the portrayal of Chinese immigration to Taiwan during the Ching Dynasty as "colonization".

Some foreign advocates in favor of de-sinicization call people in Taiwan who support reunification as "mainlanders" (Allen, 2004: 191-219; Attix, 1995:357; Lewis, 2019: 502; Rigger, 2013), a term intentionally distinguishing the Han people arriving in Taiwan after 1949 as "mainlanders" from the same before 1949

as “Taiwanese”. In fact, 96.34% of population in Taiwan are all Han people, it is paradoxical to divide them by arrival time.

And there has been a strong tie existed between mainland China and Taiwan, which had rooted in the minds of so-called “Taiwanese”. This was evidenced in books written by Japanese writers during Japanese occupation in Taiwan.[14] One another Japanese writer further expressed confuse about that the US was called “allied” despite of the bombing of Taiwan during WWII.[15] The “de-sinicization” directed by the DPP merely to emphasize this point.

(B). Self-Determination

The assertion“Taiwan sovereignty being undetermined” raised by the US incubates the pro-secessionist DPP to claim self-determination for seeking Taiwan independence. But this undertaking is not promising (Shaw, 2017: 387).

For territories that were formerly occupied by WWII-defeated States, Chapter XII of the UN Charter establishes an international trusteeship system (Shaw, 2017: 176-178; Chan, 2009: 455-492, §28). Since the entry into force of the UN Charter in 1945,

14. For example, Haruo Sato’s (佐藤春夫) Colonial Journey (植民地の旅) (1920) ;Kaneko Kitamura’s (北村兼子) New Taiwan March (新台湾行進曲) (1930) (indicating that Taiwan has a strong Chinese culture); Yayoi No kami’s (野上彌生子) Taiwan (台湾) (1935); After 40 years of Japanese rule over Taiwan, Lin Xiantong's (林獻堂) second son, Lin Yulong (林猶龍), says his hometown is Fujian, China).

15. Ryotaro Shiba’s (司馬遼太郎) Taiyuan Noriyuki (台灣紀行) (1995) (The stone monument of the Xintiangong Temple (行天宮) is engraved with the words “allied air strikes” (盟軍空襲)).

Taiwan has never been considered as falling under Chapter XI or XII. Accordingly, the legal situation pertaining to Taiwan is distinguishable from those to East Timor and the Palestinian Territory (Chan, 2009: 455-492, §29).

In addition, the most authoritative criteria for a people to be recognized as possessing the right to self-determination can be found in Principle IV of UN General Assembly Resolution 1541(XV), which states that a territory entitled to the right to self-determination is "a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it." Héctor Gros Espiell, has reaffirmed that "[t]he right of peoples to self-determination, as it emerges from the UN, exists for peoples under colonial and alien domination, that is to say, who are not living under the legal form of a State (UN, 2018: §90)."

Thus, it is not tenable to consider the inhabitants in Taiwan a distinct people possessing the right to self-determination under international law, as they share ethnic, religious, linguistic and cultural affinity with their contemporaries on mainland China (Chan, 2009: 455-492, §35).

In addition, the recognition has always been an obstacle to the ROC. More than likely, it will be the same to the new entity if established via the self-determination. And the PRC opposes Taiwanese independence since it declares that Taiwan and mainland China comprise two portions of a single country's

territory, because it has formulated a “One-China principle”, and Taiwan is an inalienable part of China (Chan, 2009: 455-492, §13). Declaring independence by any means will definitely solicit a war.

Although the Article 51 of the UN Charter indicates that the right of self-defense is an inherent right irrespective of membership of the UN. However, as within the international order, States continue to be the primary actors and subjects, the right of self-defense is inherent only and exclusively in an entity that is a State (Chan, 2009: 455-492, §48) .

In a post-Westphalian conception, international law has moved beyond to embrace subjects such as terrorist groups, individuals, and international organizations (Ediger, 2018: 1672). Some suggest that as a self-governing territorial entity with a defined people, Taiwan can hold rights even without full recognition as a state (Chan, 2009: 455-492). However, this post-Westphalian conception is not squarely fit into the ROC’s situation, nor having any legal binding effect to rebut the unthinkable Article 51 of the UN Charter. A risk of war shall be of concern if overtly declaring independence by any means.

In fact, the DPP is adopting a more-talk-than-act attitude in this option. And Crawford denied Taiwan as an independent country in his book as Taiwan has never explicitly claimed independence (Li, 2019: 1).

C. Pursuing the Reunification

(A). " That Which Is Long Divided Must Reunify"

The cross-strait reunification is the potential unification of territory currently governed by the PRC and the ROC under one political entity.

During the administration of late President Chiang Kai-Shek, the overall policy was to reunite with the mainland China. The means of reunification include military action. The subsequent Presidents, including late President Chiang Jing-guo, were gradually abandoned the military-action style plan but still claimed the reunification as the goal for ROC. And the "Guidelines for National Unification" illustrated the intent and plan thereof.

"That which is long divided must reunify, and that which is long unified must divide" (分久必合，合久必分) is a statement deriving from the novel of the "Romance of Three Kingdoms". This famous book had described the trend of reunification of China over the course of long history where there had never been serious attempts to permanently divide the nation. This statement is adopted by the KMT which seeks to retain the somewhat ambiguous status quo of the ROC and gradually reunify with mainland China at some point.

To the benefit to people on both sides of Taiwan Straits, it is not necessary to possess a hostile attitude to each other. Scholars had suggested it could be a chance for these two

governments to consider cooperation in many events (Beckman, 2013: 162-163). For example, based on the “1992 Consensus” (九二共識), both sides had reached the Economic Cooperation Framework Agreement (ECFA) (Hsieh, 2011: 121).

The “1992 Consensus” is a formula that supposedly encapsulated an agreement allegedly reached by the proxies of the ROC and PRC governments in 1992 (Chung, 2009: 240; Chen and Cohen, 2019: 7). The term means that both sides recognize there is only one “China”: both mainland China and Taiwan belong to the same China, but both sides agree to interpret the meaning of that one China according to their own definition (Chung, 2009: 240).

The ROC's KMT's position is that there is one, undivided sovereignty of China, and that the ROC is the sole legitimate representative of that sovereignty. The DPP’s position is that it recognizes the PRC as a country after martial law in ROC was lifted and therefore there is now one country on each side, and each is a sovereign nation (Chung, 2009). The PRC's position is that there is one, undivided sovereignty of China, and that the PRC is the sole legitimate representative of that sovereignty.

Insofar, the term one “China”does not have a common meaning fully consented by both sides of Taiwan Strait. Although it is by design that both sides agree to do so, a uniform interpretation is needed for further breakthrough.

(B). A Common Roof Framework

This article introduces a "common roof framework" (framework) to be the solution for cross-strait reunification. In fact, the term "roof" is not unprecedent, wherein the "China under the big roof" theory was advocated by Nian Huang (2013), and the "dachtheorie" (roof theory) was advocated during the East/West Germany reunification. In addition, Wei Yung provided similar theory but with different name "multi-system nation" or "Chinese intra-national commonwealth" (Wei, 2000: 997), while Zhen Hai-Lin proposed a "three-category system" as well (Zhen, 2000).

The framework shares ideas with these theories, emphasizing the equal autonomies and jurisdiction being respected, and outlines as follows.

First, the ROC and PRC connect under the common roof to form an abstract "China". As mentioned earlier, the term one "China" in the 1992 Consensus does not have a common meaning yet. Here the framework adopts the definition according to "The Policy Paper on Cross-Strait Relations" wherein one "China" is a "historical, geographic, and cultural Chinese nation." (Taiwan Mainland Affairs Council, Republic of China, 1994)

Secondly, the ROC and PRC cannot see each other as foreign states. Specifically, as Wei suggests that the two Chinese political entities are that of inter-system relations within one nation, which is to be regulated by agreements signed by both sides (Wei, 2000: 1001).

Thirdly, the ROC and PRC mutually recognize each other.

There are precedents in the two Germanys and Koreas cases. For example, before their reunification, both German states agreed to grant mutual recognition, according to Article 6 of the Basic Treaty (CVCE, 2016).

Fourthly, the ROC and PRC cannot prevent each other from being recognized by other third countries or admitted as member of international organizations. There are precedents in the two Germanys and Koreas cases as well. For example, both German states agreed to“respect each other’s independence and autonomy in their internal and external affairs,” according to Article 6 of the Basic Treaty (Low, 2015: 273; Mattox and Vaughan Jr. 2018). Based on the Communiqué of 1972, the two Korean states were simultaneously into the UN in September 1992 (Armstrong, 2005: 2-3). Insofar, the two Korean states are recognized by major countries of the world (Wei, 2000: 1009).

The framework has similarities with the stage-one East/West Germany reunification, but with a difference as shown in the first point. That is, the roof in Germany model is based on an actual Reich (realm), while the roof in this framework is based on an abstract China as explained earlier, so we can avoid the non-uniformity as in the“1992 Consensus”.

Further, the framework is different from Wei’s system where he suggested a loose linkage among commonwealth members due to the observation of Germany reunification where the heavy burden suffered by the West Germany government. But this

article suggests that this framework is not designed as merge-style like the stage-two of East/West Germany reunification, nor a loosely linked framework like the British Commonwealth would effectively form a meaningfully common roof in China.

Instead, this framework adds Zhen's "three-category system" into the context. Zhen maintains that mainland provinces, Hongkong and Macau, and Taiwan would individually enjoy different rights and obligations under the great China umbrella (Zhen, 2000). This article agrees with Zhen's system in this regard because it would allow a common roof being pragmatically formed with least alteration to be made.

More importantly, unlike in feudal era, it is beneficial to the contemporary China to encompass different political systems when confronts with the varieties of the modern world. As Huang pointed out, that Taiwan is important because she is not only a geographically interface between the mainland and the Pacific Ocean, but also a strategically bridge between the eastern and western world (Huang, 2013: 69-74).

The framework would resolve the problems – statehood, recognition, unequal treaties, sovereignty in Taiwan, and intervention of foreign powers. And it would bring the peace to the Taiwan Strait because risk of war will be eliminated.

As of 2020, over 40% of the export of the ROC is conducted to mainland China (including Hongkong), it shows, *inter alia*, that

a linked society has substantially established across the Strait. If the conventional zero-sum thinking is given up, there will be a room of cautioned optimism for a successful development. As the first step toward the common roof, this article suggests that both the ROC and PRC shall conduct the mutual recognition to each other.

VI. Conclusion

This article finds that there are two kinds of problems underlying issues of the ROC's statehood and sovereignty. First, prominent legal theories are trumped by political influences, mainly from the US and PRC. Second, the current legal theories are practically infeasible for dealing with the divided-nation situations, particularly in the ROC case.

For the first kind of problems, the implications of associated legal basis, in the name of international law are questionable. For example, as to the statehood issue, the ROC satisfactorily meets the Montevideo criteria and the requirement of the predominant declaratory theory. However, the ROC has been reversely given the test by the less-popular constitutive theory, where she fails the test due to lack of the "recognition" element of it, resulting in failure of the statehood. So, it is not unusual to hear that "the ROC has not been widely recognized as a State by the international community." Considering afore mentioned, the

statehood is determined by others'recognition.

From the diplomatic history of ROC, we saw the evolving of recognition and derecognition to this country, and the causes of it indeed being political influences mainly conducted by the US and PRC. Specifically, in 1979, the US derecognized the ROC and recognized the PRC as the government of China. And the PRC's government formulated a "One-China principle", whereby many foreign countries surrender all official diplomatic relations with and formal recognition of the ROC.

The assertion "Taiwan sovereignty being undetermined" would completely negate ROC's sovereignty in Taiwan, and further incubates the pro-secessionist DPP to claim self-determination for seeking Taiwan independence.

The VCLT stipulates that a treaty shall be nullified if entered into by force or the threat of force. The Shimonoseki Treaty, which is an unequal treaty between China and Japan, and shall be invalid *ab initio*. And Taiwan shall maintain to be part of China.

It is noted that, the Treaty of Taipei together with ROC's own abrogation of all unequal treaties with Japan are legally significant because even, assuming *arguendo* that the Treaty of Shimonoseki became effective, or in the absence of the Cairo/Potsdam instruments, the ROC would be the sole country entitled to recover Taiwan.

Thus, the assertion of "never claiming Taiwan being a state"

is based on an erroneous conclusion that ROC is lacking statehood, and Taiwan is *terra nullius*. It is a false proposition because that the ROC never ceased to be a country, and the sovereignty of Taiwan had been transferred to ROC, and therefore there is no reason to claim Taiwan being a state.

For the second problem, the current types of international personalities limited to be State by Westphalian theory, is practically infeasible for the recognition issue in the divided-nation situation, especially in the situation of the ROC case.

In view of the Chinese history, there has been either a divided or unified situation in a rotated fashion repeatedly occurred throughout the Chinese history, either situation covers about a half of time during the prolonged history respectively, transition of a nation took quite a long time, and there had never been serious attempts to permanently divide the nation.

There is never a unified country covering the whole Europe in history, so the Westphalian theory simply does not have these associated attributes. A review of the Chinese history would provide a clearer picture to illustrate divided-nation situation than does the Westphalian theory.

The ROC has established *sui generis* foreign relations and impliedly recognized among nations over the course of time, irrespective of Westphalian sovereignty challenges, including: (1) relations by domestic laws and *de facto* embassies; (2)

recognition and enforcement of foreign Judgments; (3) international organizations membership; and (4). international trade agreements. However, these implied recognition in the divided-nation situation still subject to numerous restrictions and challenges.

Maintaining the status quo, would not be effective either for now or in the long run, while the seeking to be independent would end up with a devastating result. This article suggests a "common roof" framework to be the solution for cross-strait reunification.

According to this framework, ROC and PRC connect under the common roof to form an abstract "China", which is a "historical, geographic, and cultural Chinese nation". And both cannot see each other as foreign states. A special relationship governed by agreements between ROC and PRC. Further, ROC and PRC mutually recognize each other, and cannot prevent each other to be recognized by other third countries or admitted as member of international organizations.

A "three-category system" will be integrated within this framework wherein mainland provinces, Hongkong and Macau, and Taiwan would individually enjoy different rights and obligations.

The framework would resolve the problems – statehood, recognition, unequal treaties, sovereignty in Taiwan, and intervention of foreign powers. And it would bring the peace to the Taiwan Strait because risk of war will be eliminated.

If the zero-sum thinking embedded in feudal era is given up, there will be a room of cautioned optimism for a successful development. As the first step toward the common roof, this article suggests that both the ROC and PRC shall conduct the mutual recognition to each other.

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中華民國的國家屬性與臺灣的法律地位：兼論大屋頂框架

謝祖松

以《蒙特維多國家權利義務公約》檢視，中華民國是符合的國家屬性要件的；再以通說的「宣示說」檢視，中華民國存在的客觀事實，不需要他人的承認。所以中華民國是一個國家應無疑義。

但是，因為多數國家不承認我國，所以實際上我國是被少數說「承認說」來檢視。而「承認說」的內涵是政治因素而非法理，所以中華民國是否是一個國家，並非取決於自我，而是取決於他國及對岸之政治因素。

這些政治因素的影響可見於多處，例如：1979 年美國與我國之斷交，及對岸「一中原則」的運作。此外，美國基於其國家利益，對臺灣的法律地位也多有操作，例如：不平等之「馬關條約」之漠視，及倡議「臺灣地位未定論」等。

西方法理模式固然遭受政治因素衝擊，但其本身亦多有可議之處，例如：《西發里亞和約》模式過於強調以國家為國際人格標準，無法適用於二戰後分裂國家中未被承認國之情況等。反觀中華悠久歷史中的分合狀態，可從中瞭解分裂情況乃屬常態，應給予包容空間，並認知“分久必合”亦是勢之所趨。

二戰後分裂國家人民之遭遇乃人權悲劇，鑒於他國及對岸政治因素的影響及法理模式本身多有可議之處，本文倡議「大屋頂框架」為解決之道。兩岸華人在相同歷史、地理、文化為基底的大屋頂下，取得一致的共識，不假外求，共同弭平兩岸分治問題。並建議兩岸政府首應互相承認，作為實踐該框架的第一步，則可

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關鍵詞：國家屬性、不平等條約、九二共識、大屋頂框架