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The United States and the People's Republic of China established diplomatic relations on January 1, 1979, while official United States ties with Taiwan terminated on the same day. In this article, Professor Li examines two possible American rationales for continued unofficial ties with Taiwan and the possible legal consequences of adopting either rationale.

While I am delighted that the United States has normalized relations with the People's Republic of China (PRC), normalization has created many political and legal problems that will require resolution. Among them, the most significant is the international legal status of Taiwan. Since January 1, 1979, we know what Taiwan *is not*; it is not the *de jure* government of the state of China. Much less clear, however, is what exactly Taiwan *is*.

At the very least, we do know that Taiwan is still a party to United States treaties with the Republic of China (ROC) because those treaties did not automatically lapse upon withdrawal of recognition.[1] Furthermore, President Carter clarified the position of the United States in a December 30, 1978, memorandum:

> Existing international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and their agencies beginning January 1, 1979, in accordance with their terms.[2]

Despite this memorandum, however, the United States has not yet explained its legal rationale for preserving treaties and maintaining com-

* Shelton Professor of International Legal Studies, Stanford Law School. This article is based in part on testimony given before the Senate Committee on Foreign Relations, Feb. 5, 1979.

1 The Mutual Defense Treaty, 6 U.S.T. 433, T.I.A.S. No. 3178 (1954), for example, continues in effect for one more year.

2 Presidential Memorandum of December 30, 1978, Relations with the People on Taiwan, 44 Fed. Reg. 1075 (1979) [hereinafter cited as MEMORANDUM].

mercial, cultural, and other relations with Taiwan, an unrecognized entity.

SUCCESSOR GOVERNMENT OR DE FACTO ENTITY WITH INTERNATIONAL PERSONALITY?

In support of its position the United States may rely on either of two possible rationales. The first one utilizes the principle of government succession.[3] This approach involves the recognition that the United States has long had treaty and other relations with the government of the state of China. Prior to January 1, 1979, that state was represented by the ROC government. After January 1, 1979, the United States regards the People's Republic of China as the successor government to the ROC. As such, the PRC assumes the rights and obligations of its predecessor.[4]

Applying the above theory to the present situation, the PRC would succeed to the Mutual Defense Treaty and other agreements with the United States.[5] These treaties would remain in force because the PRC has agreed, in an implied manner, that they should continue to serve as the bases of American relations with the Chinese territory of Taiwan. In addition, since the PRC is the government of all of China including Taiwan, the United States can have no direct relations with the authorities on Taiwan, unless the PRC consents. Taiwan would have no capacity to conduct foreign affairs, except again insofar as the PRC consents, even if only in an implied manner.

An alternate rationale which the United States may use to support its position would require the United States to recognize Taiwan as a *de facto* entity with an international personality. Although the ROC is no longer regarded by the United States as a *de jure* government or state, it continues to control a population and territory while carrying out the

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[3] *See generally* D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW (1967).

[4] THE RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 94, Comment c (1965) [hereinafter cited as RESTATEMENT], states that "[w]hen a regime is recognized as the government of an existing state, rights and duties of the state as they exist at the time of change are not affected, for the state continues although the nature of its government may have changed drastically."

The successor government theory is well known. For example, in 1971, the PRC was recognized by the United Nations as the only legitimate representative of China, and took over the seat belonging to that state. G.A. Res. 2758, 26 U.N. GAOR, Supp. (No. 29) 2, U.N. Doc. A/8429 (1971).

[5] *See, e.g.*, Cohen, *Normalizing Relations with the People's Republic of China*, 64 A.B.A. J. 940 (1978); *Legal Implication of Recognition of the People's Republic of China*, Remarks by Jerome Cohen and others, PROCEEDINGS, 72d Annual Meeting of the American Society of International Law (1978).

usual functions of a government. Section 4 of the Restatement (Second) of Foreign Relations Law of the United States provides that:

> Except as otherwise indicated, "state" as used in the Restatement of this Subject means an entity that has a defined territory and population under the control of a government and that engages in foreign relations.[6]

Similarly, the Convention on Rights and Duties of States[7] states in article 1 that:

> The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.[8]

In other words, whether Taiwan is regarded as a "state" or juridical person in international law depends on whether it carries out the usual functions of a state, and not whether it is recognized *de jure* by other states.

If Taiwan is a *de facto* entity with international personality, it may carry out the full range of foreign relations, including entering into international agreements and sending and receiving official missions. With respect to pre-existing treaties and agreements, international law does not require that treaties entered into with a once recognized government, the terms of which are limited to the territory actually controlled by that government, must lapse after that government loses *de jure* recognition while still exerting *de facto* control.[9] In such an unprecedented situation, the United States could make a political decision to maintain these treaties on the ground that it may continue to deal with the authorities in actual control of Taiwan.

While the PRC clearly views the switch of recognition as a successor government situation, the U.S. position on the status of Taiwan is less obvious. In the Joint Communique of December 15, 1978,[10] the United States acknowledged the Chinese position that there is only one

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6 RESTATEMENT, *supra* note 4, at § 4.

7 49 Stat. 3097, T.S. No. 881 (1933).

8 *Id.*

9 For a more detailed explanation of this position, see Li & Lewis, *Resolving the China Dilemma: Advancing Normalization, Preserving Security*, 2 INT'L SECURITY 11 (1977); *Normalization of Relations with the People's Republic of China: Practical Implications: Hearings Before the Subcomm. on Asian and Pacific Affairs of the Comm. on International Relations*, 95th Cong., 1st Sess. 87 (1977) (statement of Victor H. Li).

10 14 WEEKLY COMP. OF PRES. DOC. 2266 (1978). The communique, Diplomatic Relations between the United States and the People's Republic of China, reads as follows:

> As of January 1, 1979, the United States of America recognizes the People's Republic of China as the sole legal government of China. On the same date, the People's Republic of China accords similar recognition to the United States of America. The United States thereby establishes diplomatic relations with the People's Republic of China.
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> On that same date, January 1, 1979, the United States of America will notify Taiwan that it is terminating diplomatic relations and that the Mutual Defense Treaty between the United States and the Republic of China is being terminated in accordance with the provisions of the

China and recognized the People's Republic of China as China's sole legal government. In nearly the same breath, the United States also stressed that it would continue to maintain cultural, commercial, and other unofficial relations with the people of Taiwan.[11] One possible interpretation of the communique is that the United States views the PRC as the successor government to the ROC. Because the language of the communique specifically included Taiwan as a part of the state of China, the United States would be compelled to acknowledge the legal right of the PRC to approve future U.S.-Taiwan relations. A second interpretation is that the U.S. acknowledgement of the Chinese position is not tantamount to an agreement with it.[12] Thus, to determine the status of Taiwan it is necessary to examine executive communications. In an official memorandum, the President stated:

> Whenever any law, regulation, or order of the United States refers to a foreign country, nation, state, government, or similar entity, departments and agencies shall construe those terms and apply those laws, regulations, or orders to include Taiwan.[13]

This statement may be read to support the view that the United States recognizes Taiwan as a *de facto* entity having the attributes of a state or government.

Since the United States has not yet committed itself to either rationale, I believe that the United States should reject the successor gov-

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Treaty. The United States also states that it will be withdrawing its remaining military personnel from Taiwan within four months.

In the future, the American people and the people of Taiwan will maintain commercial, cultural, and other relations without official government representation and without diplomatic relations.

The Administration will seek adjustments to our laws and regulations to permit the maintenance of commercial, cultural, and other non-governmental relationships in the new circumstances that will exist after normalization.

The United States is confident that the people of Taiwan face a peaceful and prosperous future. The United States continues to have an interest in the peaceful resolution of the Taiwan issue and expects that the Taiwan issue will be settled peacefully by the Chinese themselves.

The United States believes that the establishment of diplomatic relations with the People's Republic will contribute to the welfare of the American people, to the stability of Asia where the United States has major security and economic interest, and to the peace of the entire world.

Id.

11 *Id.*

12 There is potentially serious linguistic discrepancy between the English and Chinese texts. The Chinese text use *ch'eng-jen* for "acknowledges." In this context, the Chinese term carries a strong connotation of acceptance or agreement. Moreover, the Shanghai Communique states: "The United States acknowledges that Chinese on both sides of the Strait agree that there is but one China and Taiwan is part of China. We do not challenge this position." The Chinese text uses a correct equivalent, *jen-shih*, for acknowledges. Reading the Chinese text of the two communiques together, the United States has increased the degree of its acquiescence in the Chinese position from *jen-shih* (acknowledges or takes note) to *ch'eng-jen* (recognizes or accepts).

13 MEMORANDUM, *supra* note 2.

ernment theory as unworkable and not in the best interest of America. One reason the United States has often given for normalization was to bring American policy into accord with reality. For the United States to treat Taiwan as though it were a subordinate unit of the PRC would be a departure from reality. Moreover, the need to obtain the PRC's consent before any agreement may be reached with Taiwan would constantly place the United States on the defensive. Although the PRC may give its implied consent for relations to continue for the present, serious difficulties would arise if the PRC later withdrew its consent in objection to some aspect of U.S.-Taiwan relations.

Application of the successor government theory would create problems in areas other than those involving official relations. For example, the ROC has deposited over $4 billion of its foreign exchange reserves in American banks. If the PRC is the successor government, it could assert that those funds belong to the "state of China" and should be handed over to the PRC. The transfer of such a vast sum would undercut any U.S. policy that seeks to ensure a peaceful and prosperous future for the people of Taiwan.

Recognizing Taiwan as a *de facto* entity with international responsibility would not violate the principle of one China. The *de facto* entity concept deals with present political realities and does not require or preclude eventual reunification. Indeed, Vice-Premier Teng's recent indication that Taiwan may retain its own political, military, and economic systems acknowledges the same realities.[14]

The United States may derive some short-term benefits from refusing to clarify the legal rationale for continued dealings with Taiwan. After all, explicitly calling Taiwan a *de facto* entity would aggravate the PRC, while adopting the successor government theory would place the ROC at a disadvantage. This policy of intentional ambiguity may be difficult to maintain for an indeterminate length of time. In the years to come, I suspect that the PRC will attempt to assert its position as the successor government. Each instance would set a precedent for the future.

One case soon likely to arise involves the ownership of the former ROC embassy at Twin Oaks.[15] The PRC may consider obtaining the state of China's diplomatic property as an important political and symbolic act. If the Executive or the courts transfer the property to the PRC as the successor government, then other ROC assets, such as the

14 N.Y. Times, Jan. 10, 1979, at A1, col. 6.

15 The ROC attempted to "sell" the property to a group of persons prior to January, reportedly for a token amount. This transaction would not appear to be legally effective.

several billion dollars in banks deposits, may be jeopardized. Allowing the PRC to succeed only to property acquired before the communist revolution in 1949 would resolve many difficulties. This, however, would not remove from the grasp of the PRC the half-billion dollar contribution made by the ROC to the International Monetary Fund in 1947.

The *de facto* entity concept is neither new nor unfamiliar. Prior to January 1, 1979, the United States dealt with the PRC on such a basis. Although we did not extend *de jure* recognition, official missions were exchanged, agreements were reached, and a considerable amount of trade was conducted. In fact, among the U.S. citizens permitted to visit the PRC were former Presidents Nixon and Ford. No one seriously questioned the capacity of the PRC to engage in such relations.

From an *international law perspective*, a *de facto* entity may clearly conduct foreign relations with countries which have not extended *de jure* recognition to it, pursuant to section 107 of the Restatement.[16] In recent years, the United States has entered into agreements regarding a wide variety of subjects with *de facto* entities such as the Democratic People's Republic of Vietnam, the German Democratic Republic, and the PRC.[17]

From a national law perspective, there are very few federal laws which require *de jure* governments to be treated differently from *de facto* governments. Terms such as "foreign country" or "foreign government" in U.S. statutes usually apply to both *de jure* and *de facto* recognized entities.[18] An examination of congressional enactments[19] would lead to three conclusions. First, Congress regards governments which are not recognized *de jure*, but which are firmly regarded, as having a definite existence and a certain degree of legitimate authority. Second, Congress contemplates and authorizes dealings with such enti-

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16 RESTATEMENT, *supra* note 4, § 107 (1965) provides:

> An entity not recognized as a state but meeting the requirements for recognition specified in § 100 (of controlling a territory and population and engaging in foreign affairs), or an entity recognized as a state whose regime is not recognized as its government, has the rights of a state under international law in relation to a non-recognizing state, although it can be precluded from exercising such a right if (a) the right is of such a nature that it can only be exercised by the government of a state, and (b) the non-recognizing state refuses to treat the purported exercise of the right as action taken by the government of the other state.

See also RESTATEMENT, *supra* note 4, § 108 (1965), which discusses the obligations of an unrecognized entity.

17 *See, e.g.*, Telecommunications Protocol, July 24, 1974, United States-German Democratic Republic, 27 U.S.T. 3287, T.I.A.S. No. 8362; Agreement on Exhibition of Archaeological Finds, Oct. 28, 1974, United States-People's Republic of China, 26 U.S.T. 2131, T.I.A.S. No. 8154.

18 For a detailed discussion of the confusing use of terms in this area, see LI, DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS 12-14 (1977). My testimony is based in part on this study.

19 *See* notes 20-21 *infra*.

ties. Third, the legislative approach has been to treat *de jure* and *de facto* recognized entities in a similar fashion unless there is a specific provision to the contrary.

For example, prior to January 1, 1979, a number of statutes applied to the PRC despite the lack of *de jure* recognition. In assigning higher rates of customs duties to products of "Communist countries," the statute draws within its scope only that part of China "which may be under Communist domination or control."[20] Congress obviously contemplated trade with the PRC albeit at a higher tariff. Other statutes which did not refer specifically to the PRC were still applied to the PRC. For example, Congress utilized 22 U.S.C. § 2452 to provide funds for cultural exchanges with the PRC. In addition, the Foreign Claims Settlement Commission is authorized to handle claims of American nationals included in claims settlement agreements signed after 1954 between the United States and a "foreign government."[21] Had an agreement been concluded concerning claims arising out of American properties expropriated in China and Chinese assets frozen in the United States prior to recognition, it would have been highly likely that the Commission would administer this agreement.

The subject matter of some statutes[22] clearly indicates that they should be applied as broadly as possible. For example, there should be control over the transfer of dangerous substances such as plant pests or narcotics whatever their foreign origin or destination.[23] In addition, the United States should be protected against certain harmful actions taken abroad whether or not they occur in *de jure* recognized countries, such as trademark infringement[24] or nationalization of American property without compensation.[25] Similarly, statutes that produce beneficial results for the United States or facilitate the operation of American activities abroad should be interpreted to apply to both *de jure* and *de facto* recognized entities.[26]

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20 19 U.S.C. § 1202(e) (1976).

21 22 U.S.C. § 1623(a) (1976).

22 *See* notes 23-26 *infra*.

23 7 U.S.C. § 150 (1976); 21 U.S.C. § 955 (1976). Other examples are pesticides, 7 U.S.C. § 1360(a)-(c) (1976), and uninspected nursery stock, 7 U.S.C. § 154 (1976).

24 15 U.S.C. § 1124 (1976).

25 22 U.S.C. § 2850 (1976). Other examples are 15 U.S.C. § 72 (1976) (dumping); 22 U.S.C. § 1978 (1976) (violation of various fishing rules); 19 U.S.C. § 1338 (1976) (discriminatory duties, fees, and other commercial regulations); and 46 U.S.C. § 141 (1976) (discriminatory treatment of American shipping).

26 For example, these include issuance of subpoenas to persons in foreign countries, 28 U.S.C. § 1783 (1976); setting of sugar import quotas, 7 U.S.C. § 1116 (1970) (expired Dec. 31, 1974); restrictions on export of tobacco seed, 7 U.S.C. § 516 (1976); establishing methods for calculating cost of production for foreign goods, 19 U.S.C. § 1336(e)(2) (1976); establishing rules for re-

One problem may arise, however, with respect to congressional enactments which call for a degree of acknowledgement by the United States of the authority and competence of a foreign government. This may conflict with an Executive policy not to extend *de jure* recognition. Many of these laws concern minor routine matters and often involve private rights, such as authorizations to accept a foreign governmental agency's certification of tonnage measurements of vessels.[27] These groups of statutes do not appear to protect sensitive political interests which would be substantially affected by the lack of *de jure* recognition.

Other statutes which affect American governmental activities have greater political, economic, and strategic significance. Several laws authorize various government-related agencies to enter into agreements with foreign governments and representatives on matters such as textile quotas, commercial satellite links,[28] and nuclear material supplies.[29] Other laws having significant import include the registration of prospectuses and securities issued by a foreign government,[30] acceptance of letters rogatory and requests for assistance from foreign courts,[31] service of process in a foreign country,[32] and the training of foreign military personnel.[33] In addition, some statutes requiring reciprocal treatment have important political implications. These include granting privileges to representatives of a foreign government in transit[34] and providing routine port and airport services for foreign military ves-

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funding of taxes for export goods, 7 U.S.C. § 617 (1976); and compensation for employees injured in American military bases in foreign countries, 42 U.S.C. § 1651 (1976). In addition, some statutes deal with matters fairly universal in nature, such as smuggling, 19 U.S.C. §§ 1703, 1704 (1976), and transportation of counterfeited foreign money, 49 U.S.C. § 781(b)(3) (1976).

27 46 U.S.C. § 81 (1976). Other examples are 21 U.S.C. § 143 (1976) (certificate of milk inspection); 7 U.S.C. §§ 473, 1561 (1976) (certificate of seed control); and 12 U.S.C. § 358 (1976) and 31 U.S.C. § 473 (1976) (authorizing the Federal Reserve Bank and the Treasury to set up depositories abroad).

28 47 U.S.C. § 721 (1976).

29 42 U.S.C. § 2074(a) (1976). Other examples are 42 U.S.C. §§ 1862, 1870 (1976) (setting up scientific exchanges); 7 U.S.C. § 57(a) (1976) (system of cotton classification); and 19 U.S.C. § 1351(a)(1) (1976) (promotion of trade).

30 15 U.S.C. § 77(g), (j) (1976).

31 28 U.S.C. §§ 1781, 1782 (1976).

32 FED. R. CIV. P. 4(i).

33 10 U.S.C. § 7046 (1976). Other examples are 46 U.S.C. § 764 (1976) (allowing suit in admiralty in the United States courts on rights of action granted by the laws of a foreign state for a wrongful death on the high seas); Rule 6, *Rules of the Supreme Court* (allowing attorneys "qualified to practice in the courts of any foreign state" to be specially admitted to the bar in the United States); 10 U.S.C. § 4681 (1976) (authorization to sell war surplus materials abroad); and 10 U.S.C. § 2675 (1976) (authorization to lease military bases from foreign governments).

34 8 U.S.C. §§ 1101(a)(15)(A), 1182(d)(8) (1976).

35 10 U.S.C. § 7227 (1976). Other examples are 8 U.S.C. § 1201(c) (1976) (determining the length of time for which non-immigrant visas remain valid); 47 U.S.C. § 305(d) (1976) (allowing

sels.[35] If these statutes are applied equally to *de jure* and *de facto* recognized entities, the extent of U.S. dealings with a *de facto* recognized entity may contravene the Executive policy not to extend *de jure* recognition. Most of these statutes, however, concern relations that the United States would be unlikely to have with states or governments not *de jure* recognized. Even where a statute affects an on-going relation, the intent of the Executive in not extending *de jure* recognition must be ascertained to determine whether application of the statute would contravene the Executive policy.

Perhaps the most serious drawback that U.S. laws may impose on *de facto* recognition of Taiwan is the possible denial of economic and military aid to that entity. A number of important statutory schemes involving economic and military aid apply only to "friendly countries." These programs include military sales and assistance,[36] the Overseas Private Investment Corporation,[37] and sale of American agricultural surplus on credit terms or for foreign currency by the Commodity Credit Corporation,[38] loans to small farmers of predominantly rural countries,[39] and expenditures of funds received pursuant to the Agricultural Trade Development and Assistance Act of 1954.[40] Although "friendly" is not defined in these statutes, the withdrawal of the *de jure* recognition could be interpreted as a loss of friendship.

In addition, several statutes impose sanctions upon countries with which the United States has severed diplomatic relations. The Foreign Assistance Act, which affects both economic and military aid, includes the blanket provisions in section 2370(t):

> No assistance shall be furnished under this chapter *or any other Act*, and no sales shall be made under the Agricultural Trade Development Act of 1954, in or to any country which has severed or hereafter severs diplomatic relations with the United States or with which the United States has

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foreign embassies and delegations to operate radio stations); 46 U.S.C. § 785 (1976) (permitting aliens to sue in admiralty); 28 U.S.C. § 2502 (1976) (permitting aliens to sue the United States in certain cases); and 26 U.S.C. § 883 (1976) (establishing a system for excluding from gross income certain foreign earnings of aircrafts and ships).

36 22 U.S.C. §§ 2311, 2751 (1976).

37 22 U.S.C. § 2191 (1976).

38 7 U.S.C. § 1701 (1976). Up until the mid-1960's, Taiwan has received considerable economic aid under this and related programs. Such aid has since ceased.

39 22 U.S.C. § 2175 (1976).

40 22 U.S.C. § 1922 (1976). Other examples are 22 U.S.C. § 2102 (1976) (health research and training); 22 U.S.C. § 2219 (1976) (family planning); 50 U.S.C. App. 1878(e) (1976) (loan of military vessels); 10 U.S.C. § 7227 (1976), 31 U.S.C. § 529(j) (1976) (routine disbursement of funds and services to military forces of a friendly country); and 39 U.S.C. § 407 (1976) (postal agreements).

severed or hereafter severs diplomatic relations.[41] (emphasis added).

Finally, several statutes place restrictions on dealings with "Communist countries." If Taiwan is considered a part of a Communist country after the withdrawal of recognition, then the Export-Import Bank,[42] the generalized system of preferences,[43] and tariff rates[44] may be affected.

Judicially developed rules impose few serious disabilities on *de facto* entities. Such states are entitled to claim sovereign immunity to the same extent as *de jure* recognized states. In *Wulfsohn v. Russian Socialist Federated Soviet Republic*,[45] the Soviet Union was "an existing government, sovereign within its own territories,"[46] but unrecognized by the United States. Immunity was granted on the ground that a foreign sovereign, even if unrecognized, could not be sued in an American court without its consent.[47] The Foreign Sovereign Immunities Act of 1976[48] makes no explicit mention of unrecognized entities, but instead refers generally to "foreign states." The absence of a specific provision implies that preexisting rules established by case law remain valid.

The act of state doctrine provides that: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[49] In *M. Salimoff & Co. v. Standard Oil Co. of New York*,[50] the court applied this doctrine to acts of the Soviet government, which was unrecognized but in actual control.[51]

The "constitutional underpinning" for the act of state doctrine is the separation of powers. The judiciary is reluctant to interfere with the conduct of foreign affairs by the Executive.[52] Courts should be es-

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41 *See also* 7 U.S.C. § 1703(j) (1976) (sale of agricultural supplies); 16 U.S.C. § 1052(b)(5) (1976) (encourage use of the National Aquarium by nationals of states with which the United States maintains diplomatic relations).

42 12 U.S.C. § 635(b)(2) (1976).

43 19 U.S.C. § 2462 (1976).

44 19 U.S.C. § 1202(e) (1976). *See also* the Foreign Assistance Act, 22 U.S.C. § 2370(b), (f) (1976) (for purposes of § (f), the PRC is specifically listed as a "Communist country"); 7 U.S.C. § 1703(d) (1976) (purchase of surplus agricultural products).

45 234 N.Y. 372, 138 N.E. 24 (1923).

46 *Id.* at 375-76, 138 N.E. at 25-26.

47 *Id.* at 376, 138 N.E. at 26.

48 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-1611 (1976).

49 Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

50 262 N.Y. 220, 186 N.E. 679 (1933) (refusal to examine the validity of a law confiscating property located in the Soviet Union).

51 262 N.Y. at 226-27, 186 N.E. at 682.

52 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

pecially wary of making politically delicate pronouncements about the possible invalidity of actions taken by *de facto* entities. The act of state doctrine should be applied leaving such determinations to the Executive.

The only disability imposed by United States courts on a *de facto*[53] entity is that such a state may not have standing to bring a suit in an American court. In *Russian Socialist Federated Soviet Republic v. Cibrario*,[54] the court held that allowing an unrecognized government to sue would undermine the Executive decision not to extend *de jure* recognition.[55] Since then, however, United States courts have substantially eroded this position. A Soviet-owned corporation organized under the laws of New York was allowed to bring suit in *Amtorg Trading Corp. v. United States*.[56] In *Upright v. Mercury Business Machines*,[57] an American assignee of a corporation controlled by the unrecognized German Democratic Republic was permitted to sue. More recently, in *Federal Republic of Germany v. Elicofon*,[58] the court did not allow the Weimar Art Collection, an East German museum which was an arm of the East German government, to bring suit. However, the court added in a footnote:

> It is unclear whether this reasoning supports a rule invariably denying standing to unrecognized governments. There may be special circumstances in which action by the President can be interpreted as creating an exception to the rule. For example, it may be argued that the act of the Executive in permitting American nationals to engage in commercial relations with unrecognized governments or their instrumentalities of standing to litigate claims arising out of those transactions in United States courts.[59]

These cases indicate that judicial doctrine may be evolving to a position where unrecognized entities have standing to sue, at least in cases involving economic and cultural relations.

The formulation "*de facto* entity with international personality" is awkward, both semantically and substantively. But since both the PRC and the ROC agree on the principle of one China, it is hardly appropriate for the United States to propose any other position if it is to maintain economic, cultural, and military ties with Taiwan. Moreover, in

53 First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

54 235 N.Y. 255, 139 N.E. 259 (1923).

55 *Id.* at 263, 139 N.E. at 262.

56 71 F.2d 524 (C.C.P.A. 1934).

57 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

58 358 F. Supp. 747 (E.D.N.Y. 1970), *aff'd*, 478 F.2d 231 (2d Cir. 1973).

59 358 F. Supp. at 752 n.4.

the course of helping to build a new society on Taiwan, the United States has incurred obligations to give that society an opportunity to survive and grow.[60] The use of the *de facto* entity approach by the United States would provide the best means to assist Taiwan in making the transition from a state representing all of China to an entity with some new and still undefined status. What that new status should be must be decided by all of the people on Taiwan. I believe that few responsible people in Taiwan, despite the slogans and political speeches, think that they will recover the mainland from the Communists or that they rule anything more than the territory of Taiwan. Taiwan must consider the offers being tendered by the PRC. If it wishes to continue the fiction of being all of China, then it has ample notice that it must stand alone and face the consequences. If it wishes to reunify with the PRC or adopt some other status, then Taiwan must begin the process now.

[60] For an example of the current congressional sentiment concerning Taiwan, see the following appendix which provides the text of the proposed Taiwan Relations Act as reported out of the joint conference committee.

APPENDIX

Conference Report on H.R. 2479*

Mr. ZABLOCKI submitted the following conference report and statement on the bill (H.R. 2479) to help maintain peace, security, and stability in the Western Pacific and to promote continued extensive, close, and friendly relations between the people of the United States and the people on Taiwan:

CONFERENCE REPORT (H. REPT. NO. 96-71)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2479) to help maintain peace, security, and stability in the Western Pacific and to promote continued extensive, close, and friendly relations between the people of the United States and the people on Taiwan, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Taiwan Relations Act".

FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) The President having terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, the Congress finds that the enactment of this Act is necessary—

(1) to help maintain peace, security, and stability in the Western Pacific; and

(2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.

(b) It is the policy of the United States—

(1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;

(2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern;

(3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;

* 125 CONG. REC. H1,668 (daily ed. March 26, 1979) (Taiwan Relations Act as reported out of conference).

(4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or eargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;

(5) to provide Taiwan with arms of a defensive character; and

(6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.

(c) Nothing contained in this Act shall contravene the interest of the United States in human rights especially with respect to the human rights of all the approximately 18 million inhabitants of Taiwan. The preservation and enhancement of the human rights of all the people on Taiwan are hereby reaffirmed as objectives of the United States.

IMPLEMENTATION OF UNITED STATES POLICY WITH REGARD TO TAIWAN

SEC. 3. (a) In furtherance of the policy set forth in section 2 of this Act, the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.

(b) The President and the Congress shall determine the nature and quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law. Such determination of Taiwan's defense needs shall include review by United States military authorities in connection with recommendations to the President and the Congress.

(c) The President is directed to inform the Congress promptly of any threat to the security or the social or economic system of the people on Taiwan and any danger to the interests of the United States arising therefrom. The President and the Congress shall determine, in accordance with constitutional processes, appropriate action by the United States in response to any such danger.

APPLICATION OF LAWS; INTERNATIONAL AGREEMENTS

SEC. 4. (a) The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

(b) The application of subsection (a) of this section shall include, but shall not be limited to, the following:

(1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

(2) Whenever authorized by or pursuant to the laws of the United States to conduct or carry out programs, transactions, or other relations with respect to foreign countries, nations, states, governments, or similar entities, the President or any agency of the United States Government is authorized to conduct and carry out, in accordance with section 6 of this Act, such programs, transactions, and other relations with respect to Taiwan (including, but not limited to, the performance of services for the United States through contracts with commercial entities on Taiwan), in accordance with the applicable laws of the United States.

(3)(A) The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.

(B) For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan.

(4) Whenever the application of the laws of the United States depends upon the law that is or was applicable on Taiwan or compliance therewith, the law applied by the people on Taiwan shall be considered the applicable law for that purpose.

(5) Nothing in this Act, nor the facts of the President's action in extending diplomatic recognition to the People's Republic of China, the absence of diplomatic relations between the people on Taiwan and the United States, or the lack of recognition by the United States, and attendant circumstances thereto, shall be construed in any administrative or judicial proceeding as a basis for any United States Government agency, commission, or department to make a finding of fact or determination of law, under the Atomic Energy Act of 1954 and the Nuclear Non-Proliferation Act of 1978, to deny an export license application or to revoke an existing export license for nuclear exports to Taiwan.

(6) For purposes of the Immigration and Nationality Act, Taiwan may be treated in the manner specified in the first sentence of section 202(b) of that Act.

(7) 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.

(8) No requirement, whether expressed or implied, under the laws of the United States with respect to maintenance of diplomatic relations or recognition shall be applicable with respect to Taiwan.

(c) For all purposes, including actions in any court in the United States, the Congress approve the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

(d) Nothing in this Act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization.

OVERSEAS PRIVATE INVESTMENT CORPORATION

SEC. 5. (a) During the three-year period beginning on the date of enactment of this Act, the $1,000 per capita income restriction in clause (2) of the second undesignated paragraph of section 231 of the Foreign Assistance Act of 1961 shall not restrict the activities of the Overseas Private Investment Corporation in determining whether to provide any insurance, reinsurance, loans, or guaranties with respect to investment projects on Taiwan.

(b) Except as provided in subsection (a) of this section, in issuing insurance, reinsurance, loans, or guaranties with respect to investment projects on Taiwan, the Overseas Private Insurance Corporation shall apply the same criteria as those applicable in other parts of the world.

THE AMERICAN INSTITUTE IN TAIWAN

SEC. 6. (a) Programs, transactions, and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through—

(1) The American Institute in Taiwan, a nonprofit corporation incorporated under the laws of the District of Columbia, or

(2) such comparable successor nongovernmental entity as the President may designate, (hereafter in this Act referred to as the "Institute").

(b) Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute.

(c) To the extent that any law, rule, regulation, or ordinance of the District of Columbia, or of any State or political subdivision thereof in which the Institute is incorporated or doing business, impedes or otherwise interferes with the performance of the functions of the Institute pursuant to this Act, such law, rule, regulation, or ordinance shall be deemed to be preempted by this Act.

SERVICES BY THE INSTITUTE TO UNITED STATES CITIZENS ON TAIWAN

SEC. 7. (a) The Institute may authorize any of its employees on Taiwan—

(1) to administer to or take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to perform within the United States;

(2) to act as provisional conservator of the personal estates of deceased United States citizens; and

(3) to assist and protect the interests of United States persons by performing other acts such as are authorized to be performed outside the United States for consular purposes by such laws of the United States as the President may specify.

(b) Acts performed by authorized employees of the Institute under this section shall be valid, and of like force and effect within the United States, as if performed by any other person authorized under the laws of the United States to perform such acts.

TAX EXEMPT STATUS OF THE INSTITUTE

SEC. 8. (a) The Institute, its property, and its income are exempt from all taxation now or hereafter imposed by the United States (except to the extent that section 11(a)(3) of this Act requires the imposition of taxes imposed under chapter 21 of the Internal Revenue Code of 1954, relating to the Federal Insurance Contributions Act) or by any State or local taxing authority of the United States.

(b) For purposes of the Internal Revenue Code of 1954, the Institute shall be

treated as an organization described in sections 170(b)(1)(A), 170(c), 2055(a), 2106(a)(2)(A), 2522, and 2522(b).

FURNISHING PROPERTY AND SERVICES TO AND OBTAINING SERVICES FROM THE INSTITUTE

SEC. 9. (a) Any agency of the United States Government is authorized to sell, loan, or lease property (including interests therein) to, and to perform administrative and technical support functions and services for the operations of, the Institute upon such terms and conditions as the President may direct. Reimbursements to agencies under this subsection shall be credited to the current applicable appropriation of the agency concerned.

(b) Any agency of the United States Government is authorized to acquire and accept services from the Institute upon such terms and conditions as the President may direct. Whenever the President determines it to be in furtherance of the purposes of this Act, the procurement of services by such agencies from the Institute may be effected without regard to such laws of the United States normally applicable to the acquisition of services by such agencies as the President may specify by Executive order.

(c) Any agency of the United States Government making funds available to the Institute in accordance with this Act shall make arrangements with the Institute for the Comptroller General of the United States to have access to the books and records of the Institute and the opportunity to audit the operations of the Institute.

TAIWAN INSTRUMENTALITY

SEC. 10. (a) Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to render or provide to or to receive or accept from Taiwan, any performance, communication, assurance, undertaking, or other action, such action shall, in the manner and to the extent directed by the President, be rendered or provided to, or received or accepted from, an instrumentality established by Taiwan which the President determines has the necessary authority under the laws applied by the people on Taiwan to provides assurances and take other actions on behalf of Taiwan in accordance with this Act.

(b) The President is requested to extend to the instrumentality established by Taiwan the same number of offices and complement of personnel as were previously operated in the United States by the governing authorities on Taiwan recognized as the Republic of China prior to January 1, 1979.

(c) Upon the granting by Taiwan of comparable privileges and immunities with respect to the Institute and its appropriate personnel, the President is authorized to extend with respect to the Taiwan instrumentality and its appropriate personnel, such privileges and immunities (subject to appropriate conditions and obligations) as may be necessary for the effective performance of their functions.

SEPARATION OF GOVERNMENT PERSONNEL FOR EMPLOYMENT WITH THE INSTITUTE

SEC. 11. (a) (1) Under such terms and conditions as the President may direct, any agency of the United States Government may separate from Government service for a specified period any officer or employee of that agency who accepts employment with the Institute.

(2) An officer or employee separated by an agency under paragraph (1) of this subsection for employment with the Institute shall be entitled upon termination of such employment to reemployment or reinstatement with such agency (or a successor agency) in an appropriate position with the attendant rights, privileges, and benefits which the officer or employee would have had or acquired had he or she not been so separated, subject to such time period and other conditions as the President may prescribe.

(3) An officer or employee entitled to reemployment or reinstatement rights under paragraph (2) of this subsection shall, while continuously employed by the Institute with no break in continuity of service, continue to participate in any benefit program in which such officer or employee was participating prior to employment by the Institute, including programs for compensation for job-related death, injury, or illness; programs for health and life insurance, programs for annual, sick, and other statutory leave; and programs for retirement under any system established by the laws of the United States; except that employment with the Institute shall be the basis for participation in such programs only to the extent that employee deductions and employer contributions, as required, in payment for such participatcn for the period of employment with the Institute, are currently deposited in the program's or system's fund or depository. Death or retirement of any such officer or employee during approved service with the Institute and prior to reemployment or reinstatement shall be considered a death in or retirement from Government service for purposes of any employee or survivor benefits acquired by reason of service with an agency of the United States Government.

(4) Any officer or employee of an agency of the United States Government who entered into service with the Institute on approved leave of absence without pay prior to the enactment of this Act shall receive the benefits of this section for the period of such service.

(b) Any agency of the United States Government employing alien personnel on Taiwan may transfer such personnel, with accrued allowances, benefits, and rights, to the Institute without a break in service for purposes of retirement and other benefits, including continued participation in any system established by the laws of the United States for the retirement of employees in which the alien was participating prior to the transfer to the Institute, except that employment with the Institute shall be creditable for retirement purposes only to the extent that employee deductions and employer contributions, as required, in payment for such participation for the period of employment with the Institute, are currently deposited in the system's fund or depository.

(c) Employees of the Institute shall not be employees of the United States and, in representing the Institute, shall be exempt from section 207 of title 18, United States Code.

(d)(1) For purposes of sections 911 and 913 of the Internal Revenue Code of 1954, amounts paid by the Institute to its employees shall not be treated as earned income. Amounts received by employees of the Institute shall not be included in gross income, and shall be exempt from taxation, to the extent that they are equivalent to amounts received by civilian officers and employees of the Government of the United States as allowances and benefits which are exempt from taxation under section 912 of such Code.

(2) Except to the extent required by subsection (a)(3) of this section, service performed in the employ of the Institute shall not constitute employment for purposes of chapter 21 of such Code and title II of the Social Security Act.

REPORTING REQUIREMENTS

SEC. 12. (a) The Secretary of State shall transmit to the Congress the text of any agreement to which the Institute is a party. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United Stetes shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President,

(b) For purposes of subsection (a), the term "agreement" includes—

(1) any agreement entered into between the Institute and the governing authorities on Taiwan or the instrumentality established by Taiwan; and

(2) any agreement entered into between the Institute and an agency of the United States Government.

(c) Agreements and transactions made or to be made by or through the Institute shall be subject to the same congressional notification, review, and approval requirements and procedures as if such agreements and transactions were made by or through the agency of the United States Government on behalf of which the Institute is acting.

(d) During the two-year period beginning on the effective date of this Act, the Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, every six months, a report describing and reviewing economic relations between the United States and Taiwan, noting any interference with normal commercial relations.

RULES AND REGULATIONS

SEC. 13. The President is authorized to prescribe such rules and regulations as he may deem appropriate to carry out the purposes of this Act. During the three-year period beginning on the effective date of this Act, such rules and regulations shall be transmitted promptly to the Speaker of the House of Representatives and to the Committee on Foreign Relations of the Senate. Such action shall not, however, relieve the Institute of the responsibilities placed upon it by this Act.

CONGRESSIONAL OVERSIGHT

SEC. 14. (a) The Committee on Foreign Affairs of the House of Representatives, the Committee on Foreign Relations of the Senate, and other appropriate committees of the Congress shall monitor—

(1) the implementation of the provisions of this Act;

(2) the operation and procedures of the Institute;

(3) the legal and technical aspects of the continuing relationship between the United States and Taiwan; and

(4) the implementation of the policies of the United States concerning security and cooperation in East Asia.

(b) Such committees shall report, as appropriate, to their respective Houses on the results of their monitoring.

DEFINITIONS

SEC. 15. For purposes of this Act—

(1) the term "laws of the United States" includes any statute, rule, regulation, ordinance, order, or judicial rule of decision of the United States or any political subdivision thereof; and

(2) the term "Taiwan" includes, as the context may require, the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities (including political subdivisions, agencies, and instrumentalities thereof).

AUTHORIZATION OF APPROPRIATIONS

SEC. 16. In addition to funds otherwise available to carry out the provisions of this Act, there are authorized to be appropriated to the Secretary of State for the fiscal year 1980 such funds as may be necessary to carry out such provisions. Such funds are authorized to remain available until expended.

SEVERABILITY OF PROVISIONS

SEC. 17. If any provisions of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

SEC. 18. This Act shall be effective as of January 1, 1979.

And the Senate agree to the same.

That the House recede from its disagreement to the amendment of the Senate to the title of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment to the title of the bill insert the following: "An Act to help maintain peace, security, and stability in the Western Pacific and to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan, and for other purposes."

And the Senate agree to the same.

CLEMENT J. ZABLOCKI,
DANTE B. FASCELL,
LESTER L. WOLFF,
DANIEL A. MICA,
TONY P. HALL,
WM. BROOMFIELD,
EDWARD DERWINSKI,
PAUL FINDLEY,
Managers on the Part of the House.

FRANK CHURCH,
CLAIBORNE PELL,
JOHN GLENN,
RICHARD (DICK) STONE,
JACOB K. JAVITS,
CHARLES H. PERCY,
JESSE HELMS,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R.

2479) to help maintain peace, security, and stability in the Western Pacific and to promote continued extensive, close, and friendly relations between the people of the United States and the people on Taiwan, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

TITLE

The House bill had as its title, "An Act To help maintain peace, security, and stability in the Western Pacific and to promote continued extensive, close, and friendly relations between the people of the United States and the people on Taiwan.".

The Senate amended the title so as to read: "An Act to promote the foreign policy of the United States by authorizing the maintenance of commercial, cultural, and other relations with the people on Taiwan on an unofficial basis, and for other purposes.".

The conference substitute is titled as follows: "An Act to help maintain peace, security, and stability in the Western Pacific and to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan, and for other purposes.".

SHORT TITLE

The House bill cited the act as the "United States-Taiwan Relations Act".

The Senate amendment cited the act as the "Taiwan Enabling Act".

The conference substitute cites the act as the "Taiwan Relations Act".

FINDINGS AND DECLARATION OF POLICY

The House bill had a seven-point declaration of principles governing United States policy with regard to Taiwan. These principles included the following: The United States desires to preserve and promote friendly relations between the people of the United States and the people on Taiwan, as well as with the people on the China mainland and all other peoples of the Western Pacific area; peace and stability in the area are in the political, security, and economic interest of the United States, and are matters of international concern and must be maintained; continued extensive, close and friendly commercial, cultural, and other relations must be assured; the future of Taiwan must be determined through peaceful means without prejudice to the well-being of the people on Taiwan; any armed attack against Taiwan or use of force, boycott, or embargo to prevent Taiwan from engaging in trade with other nations would be a threat to the peace and stability of the Western Pacific area and of grave concern to the United States; in interpreting the word "boycott" in this act, Taiwan shall be considered a "friendly" country under the anti-boycott provisions of the Export Adminis-

tration Act of 1969; and the United States will maintain its capacity to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people of Taiwan. The House bill also contained a statement that nothing in the act shall contravene the President's stated policies and positive interest in human rights, especially with respect to the 18 million inhabitants of Taiwan, and reaffirming the U.S. commitment to the preservation of human rights of the people on Taiwan.

The Senate amendment contained a four-part declaration providing that it is United States policy to maintain extensive, close and friendly relations with the people on Taiwan; to make clear that the United States' decision to establish diplomatic relations with the People's Republic of China rests on the expectation that any resolution of the Taiwan issue will be by peaceful means; to consider any effort to resolve this issue by other than peaceful means, including boycotts or embargoes, as a threat to the peace and security of the Western Pacific area and of grave concern to the United States; and to provide the people on Taiwan with arms of a defensive character. The Senate amendment also provided that the American Institute in Taiwan shall take all appropriate steps to strengthen and expand the ties between the people of the United States and all the people on Taiwan and to promote full human rights for all the people on Taiwan, and to provide adequate personnel and facilities to accomplish these purposes.

The conference substitute begins with a Congressional finding drawn from provisions in the House bill and the Senate amendment. It states that, because the President has terminated governmental relations between the United States and the governing authorities on Taiwan, formerly recognized as the Republic of China, this Act is necessary (1) to help maintain peace, security, and stability in the Western Pacific, and (2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.

The conference substitute then sets forth a six-point statement of United States policy. It states this policy to be (1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area; (2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern; (3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means; (4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States; (5) to provide Taiwan with arms of a defensive character; and (6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.

The conference substitute further states that nothing in this act shall contravene the United States interest in the human rights of Taiwan's approximately 18 million inhabitants. The preservation and enhancement of the human rights of the Taiwan people are reaffirmed as United States objectives.

The House provision interpreting the word "boycott" in this act was not retained in this section of the conference substitute because it is included, in substance, in sec-

tion 4 which is described in "Application of Laws; International Agreements" below. Section 4(a) of the conference substitute provides for continued application of United States laws with respect to Taiwan as they did before January 1, 1979. Section 4(b)(1) specifically provides that U.S. laws referring or relating to a foreign country shall apply with respect to Taiwan, and section 4(b)(8) makes clear that Taiwan will be treated as a "friendly" country for purposes of United States laws. The antiboycott provisions of the Export Administration Act, for example, are made applicable with respect to Taiwan by these sections.

IMPLEMENTATION OF UNITED STATES POLICY WITH REGARD TO TAIWAN

The House bill provided that in furtherance of the principles set forth in the policy declaration, the United States will make available to Taiwan conventional defense articles and services of modern technology in such quantity as can be effectively utilized for Taiwan's defense. It required the President to inform the Congress promptly of threats to the peace and stability of the Western Pacific area and of any danger to U.S. interests arising from any threat to Taiwan's security. Appropriate U.S. action in response to any such danger was to be determined by the President and the Congress in accordance with constitutional processes. Furthermore, the President was required to ensure that determinations on defense articles and services for Taiwan would be made without regard to the views of the People's Republic of China. Such determinations of Taiwan's defense needs were to include review by U.S. military authorities for forwarding with their recommendations to the President and to the Congress.

The Senate amendment provided that in order to achieve the policy objectives, the United States would maintain its capacity to resist force or other forms of coercion which would jeopardize the security, of the social or economic system, of the people on Taiwan. It stated that the United States will assist the people on Taiwan to maintain a sufficient self-defense capability through the provision of arms of a defensive character. The President was directed to inform the Congress promptly of any threat to the security or the social or economic system of Taiwan and of any danger to U.S. interests arising therefrom; and U.S. action to meet any such danger was to be in accordance with Constitutional processes and procedures established by law.

The conference substitute provides that in furtherance of the policy set forth, the United States will make available to Taiwan such defense articles and services in such quantities as are needed to enable Taiwan to maintain a sufficient self-defense capability. The President and the Congress are to decide the nature and quantity of these arms and services solely according to their judgment of Taiwan's needs, and in accordance with the procedures established by law. Such determinations shall include review by U.S. military authorities in connection with recommendations to the President and the Congress. The President is directed to inform the Congress promptly of any threat to the security or the social or economic system of the people on Taiwan and any danger therefrom to the interests of the United States. Appropriate action by the United States in response to any such danger is to be determined by the President and the Congress in accordance with constitutional processes.

ARMS SUPPLY REPORTS

The Senate amendment required the President to transmit to Congress annually a report on the status of certain arms sales to Taiwan which are considered eligible for approval. The amendment also required notification to Congress 30 days prior to issu-

ance to the People's Republic of China of any license to export items on the United States Munitions List.

The House bill did not contain comparable provisions.

The conference substitute is the same as the House position. The committee of conference adopted the House position after determining that adequate information on these subjects would be made available to the Congress under existing law, and that the Congress would be informed in advance of any change in the present United States policy of not approving arms exports to the People's Republic of China.

APPLICATION OF LAWS; INTERNATIONAL AGREEMENTS

The House bill provided that no U.S. legal requirement with respect to diplomatic relations or recognition of a government shall apply with respect to Taiwan. It also stated that the absence of diplomatic relations and recognition shall not affect application of United States laws with respect to Taiwan, and that United States laws shall apply with respect to Taiwan as they did before January 1, 1979. In addition to these broad provisions, the House bill provided further that Taiwan may be granted a separate immigration quota under the Immigration and Nationality Act, that interests in tangible or intangible property acquired by the Republic of China prior to January 1, 1979, shall not be affected by U.S. recognition of the People's Republic of China, and that all treaties and other international agreements which were in force between the United States and the Republic of China on December 31, 1978, including multilateral conventions to which both were parties, shall continue in force unless terminated in accordance with their terms or otherwise in accordance with United States laws.

The Senate amendment addressed a number of legal issues more specifically. It provided (in section 102) that no requirement for diplomatic relations or for recognition by the United States as a condition of eligibility for participation in programs, transactions, or other relations under United States law shall apply to Taiwan. It stated (in section 101(a)) that whenever any United States law refers to a foreign country, it shall apply with respect to Taiwan. It also contained provisions concerning the rights and obligations of natural and juridical persons (section 102(b)), access to U.S. courts by the Taiwan instrumentality (section 103), authority for the Executive branch to conduct programs with respect to Taiwan (section 105), the choice-of-law questions (section 109), and consideration of nuclear export applications (section 116). It further provided that recognition of the People's Republic of China shall not affect the ownership of properties held by the people on Taiwan before or after December 31, 1978 (section 110(a)). It stated that Congress approves the continuation in force of all treaties and other international agreements in force between the United States and the Republic of China prior to January 1, 1979, unless terminated in accordance with law (section 104), and that nothing in this act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization (section 115).

The conference substitute combines both the general House provisions and the more specific Senate provisions without weakening or narrowing the applicability of any of the provisions adopted. The House provisions applying United States laws to Taiwan are to be construed as all-inclusive, as intended in the House bill. The Senate provisions are to be construed as fully applicable to the matters to which they are directed; and at the same time, their inclusion in the conference substitute is not to be interpreted either as exhaustive or as excluding the applicability of general provisions

to matters not specifically addressed. The conference substitute emphasizes this in stating that the application of subsection (a) of section 4 "shall include, but shall not be limited to," the items addressed in section 4(b).

The conference substitute further provides that the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, between the United States and Taiwan which were in force prior to January 1, 1979, unless terminated in accordance with law; and nothing in this Act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from any international financial institution or other international organization.

With regard to the issue of conditioning the right to sue and be sued on reciprocity, the Committee of Conference noted that Article VI(4) of the Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of China (TIAS 1871, 63 Stat. 1289) guarantees freedom of access to the courts in each country by the nationals, corporations and associations of the other party, and that this Treaty continues in force. Therefore, no specific provision on this issue in the bill was considered necessary.

OVERSEAS PRIVATE INVESTMENT CORPORATION

The Senate amendment provided that the $1,000 per capita income restriction applicable to the Overseas Private Investment Corporation in regard to its determining whether to provide any insurance, reinsurance, loans or guaranties for a project, shall not apply, with respect to investment projects in Taiwan. The Senate amendment required that in all other respects, OPIC apply the same criteria in evaluating investment projects on Taiwan as it applies in other parts of the world. The President was required to report to the Congress within five years concerning the desirability of continuing this provision in light of economic conditions on Taiwan at the time of the report.

The House bill contained no comparable provision.

The conference substitute is the same as the Senate provision, except that a 3-year limit was placed on the waiver of the per capita income criteria, and the Presidential reporting requirement is not included. The Committee of Conference, in adopting the Senate provision as amended, intended to provide for continuing OPIC activity on Taiwan at about the previous level, but did not intend a substantially expanded level of such activity.

THE AMERICAN INSTITUTE IN TAIWAN

The House bill provided that dealings of the United States Government with Taiwan shall be conducted through such nongovernmental entity as the President, after consultation with Taiwan, may designate. The House bill further provided that to the extent the President may specify, U.S. laws which apply to U.S. Government agencies shall apply to the designated entity as if it were a U.S. Government agency.

The Senate amendment provided that programs, transactions, and other relations conducted by the United States Government with respect to the people on Taiwan shall be conducted through the American Institute in Taiwan, a nonprofit corporation incorporated under the laws of the District of Columbia. The Senate amendment expressly authorized the Institute to enter into, perform, and enforce agreements and arrangements with Taiwan on behalf of the United States Government.

The Senate amendment stated that the Institute shall not be an agency or instru-

mentality of the United States. Rather, it provided that State law would be preempted to the extent that it interferes with the Institute in carrying out its functions, that the Institute shall be exempt from Federal and State taxes (although this does not relieve the Institute of the obligation to collect the withholding tax imposed on the wages paid its employees) and that the Comptroller General shall be able to audit the Institute.

The conference substitute provides that U.S. Government programs, transactions, and other relations with respect to Taiwan shall be conducted through the American Institute in Taiwan, or such comparable successor nongovernmental entity as the President may designate. The conference substitute includes the Senate provision expressly granting authority for the Institute to enter into, perform, and enforce agreements and other transactions with respect to Taiwan.

The conference substitute is the same as the Senate amendment with regard to preemption, to treatment of the Institute under tax laws, and to auditing.

SERVICES BY THE INSTITUTE TO U.S. CITIZENS

The House bill provided that the designated entity may authorize its employees in Taiwan to assist and protect the interests of U.S. persons by performing acts authorized by U.S. laws to be performed outside the United States for consular purposes.

The Senate amendment authorized similar services by the employees of the Institute but did not use the word "consular."

The conference substitute is similar to the House provision, except that it refers to acts "such as are" authorized to be performed for consular purposes.

U.S. AGENCY DEALING WITH THE INSTITUTE

The House bill provided that Federal agencies may acquire and accept services from the designated entity without regard to the laws and regulations normally applicable to the acquisition of services by such agencies.

The Senate amendment authorized any Federal agencies to acquire and accept services from the Institute, but that waiver of procurement laws must be by Executive order.

The conference substitute is similar to the Senate provision.

TAIWAN INSTRUMENTALITY

Dealings with Taiwan

The House bill provided that dealings of Taiwan with the U.S. Government shall be conducted through such instrumentality established by Taiwan as the President and Taiwan agree is the instrumentality appropriate for such dealings and which has the necessary authority under Taiwan laws to provide assurances and take other action on behalf of Taiwan.

The Senate amendment authorized the President to provide to or receive any performance, communication, assurance, undertaking, or other action from Taiwan for purposes of U.S. law through an instrumentality established by Taiwan.

The conference substitute combined the House and Senate provisions.

Location of facilities

The House bill directed the President to make every effort to reach agreement with

Taiwan to assure that the Taiwan instrumentality could use facilities at or near the locations of the Taiwan consular establishments which existed in the United States on December 31, 1978.

The Senate amendment authorized the President to extend to the Taiwan instrumentality, on a reciprocal basis, the same number of offices and personnel a previously operated in the United States before January 1, 1979.

The conference substitute requests the President to extend to the Taiwan instrumentality the option of maintaining the same number of offices and personnel in the United States as existed before January 1, 1979.

Privileges and immunities

The house bill provided for the granting on a reciprocal basis, of such privileges and immunities for the Taiwan entity in the United States and its personnel as are necessary to carry out their functions.

The Senate amendment also provided for privileges and immunities for the Taiwan instrumentality on a reciprocal basis, such privileges and immunities to be "comparable to those provided to missions of foreign countries."

The conference substitute is similar to the House provision.

REPORTING REQUIREMENTS

The Senate amendment required the Secretary of State to transmit to Congress the text of any agreement (as defined) to which the Institute is a party, and provided that agreements and transactions made by or through the Institute shall be subject to the same Congressional notification, review, and approval processes as are applied to the U.S. Government agencies on behalf of which the Institute is acting.

The Senate amendment also provided that for a 2-year period beginning with the effective date of this act, the Secretary of State shall transmit to the Congress every 6 months a report on economic relations between the United States and Taiwan, noting any interference with normal commercial relations.

The House bill did not have such comparable provisions.

The conference substitute is the same as the Senate provisions.

RULES AND REGULATIONS

The House bill authorized the President to prescribe regulations to carry out the purposes of this act.

The Senate amendment authorized the President to prescribe rules and regulations to carry out the purposes of this act, such rules and regulations to be transmitted promptly to the Congress.

The conference substitute is the same as the Senate provision, with an amendment limiting the transmission requirement to a 3-year period starting with the effective date of this act.

CONGRESSIONAL OVERSIGHT

The House bill provided that the Committee on Foreign Affairs of the House and the Committee on Foreign Relations of the Senate shall monitor the implementation of this act, the operation and procedures of the designated entity, the legal and technical

aspects of the continuing relationship between the United States and Taiwan, and the implementation of the policies of the United States concerning security and cooperation in East Asia, and that such Committees shall report, as appropriate, to their respective Houses on the results of their monitoring.

The Senate amendment provided for a Joint Commission on Security and Cooperation in East Asia, composed of six Members of the House and six Members of the Senate, to perform the same monitoring tasks over a period of 3 years, with an appropriations authorization of $550,000 a year, and which would make semi-annual reports to the two committees and to the President.

The conference substitute is the same as the House provision, with an amendment including "other appropriate committees of the Congress", along with the Foreign Affairs and Foreign Relations Committees, as those charged with the monitoring responsibility. The committee of conference intends that reports resulting from such monitoring would be handled in accordance with the rules applicable in each House.

DEFINITIONS

(*1*) *Laws of the United States*

The House bill used the term "laws of the United States" throughout the bill and defined the term as including any statute, rule, regulation, ordinance, order, or judicial rule of decision of the United States or any political subdivision thereof.

The Senate amendment contained varying references to U.S. law, and contained no express definition.

The conference substitute is the same as the House provision.

(*2*) *Taiwan/People on Taiwan*

The House bill defined "Taiwan" to include, as the context may require, the islands of Taiwan and the Pescadores, the inhabitants of those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the authorities exercising governmental control on those islands (including agencies and instrumentalities thereof).

The Senate amendment contained three definitional provisions of the term "people on Taiwan" for purposes of different sections of the Senate amendment. The generally applicable definition defined "people on Taiwan" to include the governing authority on Taiwan, recognized by the United States prior to January 1, 1979, as the Republic of China; its agencies, instrumentalities, and political subdivisions; and the people governed by it or organizations and other entities formed under the law applied on Taiwan in the islands of Taiwan and the Pescadores.

The conference substitute defines "Taiwan", rather than "people on Taiwan", and states that the term "Taiwan" includes, as the context may require, the island of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities, including subdivisions, agencies, and instrumentalities.

AUTHORIZATION OF APPROPRIATIONS

The House bill provided that no Federal agency may make any funds available to the designated entity unless the Congress has expressly authorized and appropriated those funds to be made available to the designated entity.

The Senate amendment authorized to be appropriated to the Secretary of State for fiscal year 1980 such funds as may be necessary to carry out the provisions of this act, to remain available until expended. The Senate amendment further authorized the Secretary of State to provide funds to the Institute for four categories of expenses directly related to the provisions of this act.

The conference substitute is the same as the Senate provision authorizing appropriations to the Secretary of State for fiscal year 1980 to carry out the provisions of this act. The action of the committee of conference in expressly authorizing appropriations for fiscal year 1980 is not to be construed as opposition to funding for the implementation of this act in fiscal year 1979 or in the years subsequent to fiscal year 1980. To the contrary, the committee of conference intends that funding for the implementation of this act such as for the Institute shall be provided in fiscal year 1979, and in subsequent years, from the amounts regularly authorized and appropriated to the State Department. The Senate provision further authorizing the Secretary of State to provide funds to the Institute for four categories of expenses was not included in the conference substitute because the Committee of Conference was satisfied that the Secretary of State already had this authority.

SEVERABILITY OF PROVISIONS

The Senate amendment provided that if any provision of this act or application thereof is held invalid, the remainder of the act and the application of such provision to any other person or circumstance shall not be affected thereby.

The House bill did not have a comparable provision.

The conference substitute is the same as the Senate provision.

CLEMENT J. ZABLOCKI,
DANTE B. FASCELL,
LESTER L. WOLFF,
DANIEL A. MICA,
TONY P. HALL,
WM. BROOMFIELD,
EDWARD DERWINSKI,
PAUL FINDLEY,

Managers on the Part of the House.

FRANK CHURCH,
CLAIBORNE PELL,
JOHN GLENN,
RICHARD (DICK) STONE,
JACOB K. JAVITS,
CHARLES H. PERCY,
JESSE HELMS,

Managers on the Part of the Senate.