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The Taiwan Problem: Two China or One China

ABSTRACT

The difficult history of Taiwan has preoccupied politicians and scholars for the better part of the last century and is unlikely to be unraveled in the near future. The main issue is the following: are there two separate Chinas or one and if so who has the right to represent China? Both the Taiwanese and Peking governments have consistently adhered the One China theory and both claim the right to represent the country. Many legal concepts were devised in support of either party, including that Taiwan had become *res nullius* after Japan's unconditional surrender, or a condominium of the Allied Powers. Several major theories are analysed in depth, based on the interpretation of public international law such as the Peace Treaty of San Francisco, the Treaty of Taipei and the Shimonoseki Peace Treaty. Parallels are drawn between the attempts to decide the legal status of Taiwan and akin attempts performed by some European territories such as bringing Alsace-Lorraine in the fold of France. The paper aims mainly at exploring various concepts of Taiwan's status according to international law. This investigation takes into account the international and the domestic situation.

Keywords: Taiwan status, Peace Treaty of San Francisco, Treaty of Taipei, Shimonoseki Peace Treaty



Teruji Suzuki

Problem Tajwanu: jedno czy dwa państwa chińskie

STRESZCZENIE

Trudna historia Tajwanu zajmowała polityków i badaczy przez większą część ubiegłego stulecia i jest mało prawdopodobne, aby można ją było rozwikłać w najbliższej przyszłości. Podstawowym problemem jest niemożność rozstrzygnięcia, czy istnieje jedno, czy dwa oddzielne państwa oraz kto ma prawo do reprezentowania Chin. Zarówno rząd tajwański, jak i Pekin, konsekwentnie popierają teorię jednych Chin i swoje prawo do ich wyłącznego reprezentowania. Powstało wiele teorii prawnych powoływanych przez każdą ze stron na poparcie swojego stanowiska, m.in. określające Tajwan jako *res nullius* po bezwarunkowej kapitulacji Japonii lub kondominium mocarstw sojusznicznych. Wiodące teorie interpretowane są w oparciu o akty prawa międzynarodowego publicznego, w tym traktat pokojowy z San Francisco, traktat z Tajpej i traktat pokojowy z Shimonoseki. Podejmowane są także próby określania statusu prawnego Tajwanu na zasadzie podobieństwa do statusu niektórych terytoriów europejskich, np. przyłączenia Alzacji i Lotaryngii do Francji. Celem artykułu jest przedstawienie na gruncie prawa międzynarodowego różnych koncepcji statusu Tajwanu, z uwzględnieniem jego sytuacji międzynarodowej i wewnętrznej.

Słowa kluczowe: status Tajwanu, traktat z San Francisco, traktat z Tajpej, traktat z Shimonoseki



1

INTRODUCTION

It the middle of the 20th century China emerged as a socialist state and, it was rapidly expanding towards the goals envisioned by the Communist Party of China. Besides, the sociopolitical system of the communist China was influenced by its indigenous cultures. However, a new government was established in 1949 and it administrated the mainland China. It was officially established in 1912 as the first republican government in China, though its effective control over the territory was very limited (expanded to a larger parts of China before 1949).¹ Since then, the dual status of China was internationally disputed focusing on legal and political issues.

The Taiwan problem is one of recognition of the government of People's Republic of China (Further PRC) while recognising the Taiwanese government as *de jure* government of China (two Chinas) versus accepting that China is one state and one government, so that the diplomatic representation should be limited to one China. The question of whether the government of China should be represented by Peking or Taipei is part of China's history and international relations in Asia during the Cold War. There is no doubt that what Taiwan occupies is a territory once annexed by Japan under the Peace Treaty of Shimonoseki of 1895, and then administrated by Japan for about a half century.

Some governments have continuously recognised Taiwan as a representative of China (nearly 20 countries, including Vatican) by establishing diplomatic relations and disregarding the existence of the government of the PRC. At the same time it is true that the Government of Republic of China (further RC) with its capital in Taipei could only administrate the territory of Taiwan and its neighbouring islands since 1949, when the Communist forces of China succeeded to control the mainland and declared that their government is a sole *de jure* government of China on October 1, 1949. Since then, Taiwan was actually separated from the Mainland. However, the government of Taiwan have insisted solemnly on the so called "One China policy" by rejecting the two China doctrine.² When Taiwan was actually detached

¹ "Taiwan" is a Chinese name officially used, but "Formosa" is also used in literature.

² Q. Wright, *The Chinese Recognition Problem*, "American Journal of International Law", July 1955, passim.

from Japan as a result of Japan's surrender of September 2, 1945, China as a member of the Allied Powers was represented by the Government of Chiang Kai-Shek. Thus the RC had become authorised to take over Taiwan as a territory restored from Japan (on the basis of the Potsdam Agreement of 1945).

After the Second World War the political situation in China was destabilized by domestic conflicts. As a result of the domestic war the mainland China was controlled by the Communist Forces led by Mao Tsu Tun, which declared *de jure* government of the PRC on Oct. 1, 1949. Soon after some socialist countries recognised that government instead of the government of the RC. Then, the political trend has been accelerated for the recognition of the PRC government. The government of the RC led by Chang Kai-Shek had *de facto* lost the administrative power and was expelled from the Mainland. After the transfer of the armed forces to Taiwan, however, it continued to declare itself as the only *de jure* government of China.³

When discussing the issue of Taiwan, one should take into consideration that the recognition of the new government of China took place under the Cold War. The Korean and the Vietnam Wars had placed Taiwan in the middle of the conflict between the East and the West. Taiwan was supported by Western countries, mainly by the USA refusing to recognise the new government in Peking which in turn had been recognized by socialist countries. The political climate change had first begun after the Vietnam War. President Nixon had visited China in 1972 to establish new relations with the Peking government which dramatically changed the background of the Taiwan problem. It was not, however, merely an issue of formal recognition. The Taiwanese are the same nationals as those in the mainland despite some cultural differences.

³ The Two Chinas doctrine was expressed in earlier time by: L.B. Pearson (Canadian Foreign Minister) in House of Commons, Jan. 27, 1955; A. Eden (British Prime Minister) in House of Commons, Feb. 3, 1955; S. Lloyd (British Foreign Minister) in House of Commons, Nov. 19, 1958; C. Bowles, *The Chinese Problem Reconsidered*, "Foreign Affairs", April 1960; The New York Times, editorial Dec. 30, 1961.

2

THE LEGAL STATUS OF TAIWAN

2.1. Opinion A

There are three different views on Taiwan. The first maintains that until the Treaty of San Francisco of 1951, Taiwan had been legally part of Japan. It is further contended that the exercise of authority by the government of Chiang Kai-Shek over Taiwan was only provisional in nature. According to the explanation by G. Schwarzenberger, China has ceded Taiwan to Japan by the Peace Treaty of Shimonoseki of April 16, 1895. A communiqué issued at Cairo conference composed of President Roosevelt, Prime minister Churchill and Generalissimo Chiang Kai-Shek and held on December 1, 1943, referred to Taiwan as a territory Japan stole from China and it was not questioned as being contrary to international law. The understanding reached at the Cairo Conference of 1943 contained legal commitments of the parties to reunite Taiwan once again with China. The powers reaffirmed this intention in the Potsdam Declaration of July 26, 1945. For Japan it had become binding upon the Japanese acceptance of the Potsdam Proclamation of August 14, 1945. On October 25, 1945 as a result of an order issued on the basis of consultation and argument between the Allied Powers concerned, the Japanese forces in Taiwan surrendered to Generalissimo Chiang Kai-Shek and with the consent of the supreme Allied Command the administration was taken over by the government of the RC. In the Treaty of San Francisco 1951, Japan had renounced all rights, titles and claims to Taiwan and Pescadores.⁴ However, no Chinese representatives, neither the Taipei government nor the Peking Government, were invited to the conference. This meant that in relation to Japan, Taiwan ceased to be a Japanese territory and the other parties to the peace treaty had become the co-sovereigns of Taiwan. It resembled Germany's renunciation in favour of the Principal Allied and Associated Powers of all her rights and titles over overseas territories under the Treaty of Versailles of 1919, and that of Turkey after the Peace Treaty of Lausanne of 1923. As a result, until the powers other than Japan – parties to the Peace Treaty of San Francisco – decided otherwise, Gene-

⁴ Treaty Series, edited by the Japanese Ministry of Foreign Affairs, 1960, p. 53.

ralissimo Chiang Kai-Shek exercised only delegated authority in Taiwan on behalf of those parties. These states were to decide collectively to transfer their condominium over Taiwan to the United Nations.⁵

2.2. Opinion B

The second opinion holds that since Japan signed the Unconditional Surrender on September 2, 1945, Taiwan was detached from Japan and became a territory under the co-sovereignty of the Allied Powers, not part of China. K. Younger, a delegate of Great Britain in the Peace Conference with Japan in 1951, criticised Schwarzenberger's view and argued that: "I do not understand how it can be said that Generalissimo Chiang Kai-Shek is exercising delegated authority in Formosa (Taiwan) on behalf of those parties to the Peace Treaty of San Francisco who recognise his government. There is not a word in the peace treaty to support this and even if there were, I do not see how it could be binding either on the Soviet Union or upon any Chinese authority since China was not invited to San Francisco at all, and the Soviet Union was not a signatory. It was the purpose of the Japanese peace treaty to give legal form to the Japanese renunciation of all claims on certain territories, and I believe that the treaty effectively did this so far as the parties the treaty were concerned. The treaty, however, did not affect the right of any party other than Japanese to Formosa (Taiwan) and the Pescadores. Presumably therefore, Generalissimo Chiang Kai-Shek occupies Formosa (Taiwan) on behalf, not of the signatories of the San Francisco Treaty, but the Allied nations who fought jointly the war against Japan and who authorised him to accept the surrender of the Japanese troops in the Formosa (Taiwan) and to administer the islands pending a peace treaty. It is, therefore, incorrect to suggest that the states who signed the San Francisco Treaty are legally free agents to decide collectively on the future of these territories."⁶

2.3. Opinion C

The third thesis, on the other hand, persistently held by the governments of China (both Peking and Taipei) and sometimes officially supported by

⁵ G. Schwarzenberger, *The Times*, Feb. 2, 1955; *Title to territory, Response to Challenge*, "American Journal of International Law", Nr 51, 1957.

⁶ "The Times", Feb. 4, 1955; "Official Report of House of Commons", Vol. 478, July 26, 1950.

the Government of the United States, is that since Japan signed the surrender of September 2, 1945, Taiwan was naturally restored to China at Cairo in December, 1943, when President Roosevelt, Generalissimo Chiang Kai-Shek and Prime Minister Churchill declared that “all territories that Japan had stolen from the Chinese including Formosa (Taiwan) should be restored to the Republic of China” and it is, moreover, reaffirmed on July 26, 1945 at Potsdam that the terms of the Cairo Declaration should be carried out.⁷

According to the Minister of Foreign Affairs of the Republic of China (Taipei) Taiwan is historically a Chinese territory with inhabitants of mostly Chinese origins. The Taiwanese have never recognised Japanese control over Taiwan as legal. China, therefore, may possess it not as a new territory, but as a restored territory unjustly seized by Japan. Though no definite clauses provide for the cession of Taiwan from Japan to China (in the proclamations or the peace treaty), such a form is not necessary in this case. It resembles Alsace-Lorraine which was restored to France not by the Peace Treaty of Versailles, but by the ceasefire of October 2, 1918. Therefore, by the fact that Japan accepted the Potsdam Proclamation – by signing her surrender – Taiwan was in fact detached from Japan and retro-cessed to China. From that date the Government of the Republic of China administrated Taiwan as a Chinese territory, and no allied nation ever protested against it, but none the less the Allied Nations did accept the inclusion of Taiwan in the treaties which they signed previously with the Republic of China. Also, the Supreme Allied Commander in Tokyo (SCAP) admitted that the Government of China, in domestic legislation, treated the Taiwanese as Chinese nationals. He maintains, therefore, that from any point of view, it can be concluded that the Allied Powers and the other interested parties had actually recognised the sovereignty of China over Taiwan at the time.⁸

The attitude of the PRC is basically similar to that of Taipei. It is argued, however, that the Treaty of Shimonoseki, which was the legal basis for Japanese control over Taiwan, was abrogated by a proclamation of war with Japan on December 8, 1941. Since then, Taiwan legally ought to retro-cessed

⁷ K. Zemanek, *Die völkerrechtliche Stellung Formosa*, “Archiv des Völkerrechts”, 5 band 3 heft, 1955 pp. 309–310; M. Frankenstein, *Formosa son statut Juridique et sa situation*, “Revue Politique et Parlementaire”, Jan. 1952, p. 57; Wu Hsin-chuan, U. N. Security Council, 4th year Official Records, 527th, Session, p.6; D. Acheson (Secretary of the State), US Department of State Bulletin, Jan. 16, 1950.

⁸ Paget, R.T. (House of Commons), “The Times” (London), Feb. 4, 1955.

to China, although it is true that Taiwan was in fact under Japan's administration during war time.⁹

2.4. The Validity of Cession

First, the validity of cession should be questioned. China has ceded Taiwan to Japan as result of war, in the Peace Treaty of Shimonoseki on April 16 1895.¹⁰ It should be admitted that at the time war was a legal measure to solve disputes: that law permitted violence. Therefore, the defeated state should recognise the consequences of violence, even if its delegates signed the peace treaty under the overwhelming force of the enemy. Unlike national law, the general laws of nations did not invalidate transfers of promises obtained by intimidation; a dictated treaty obviously violated the principles of the so-called "civilised laws of contracts", and, as long as we regarded it as a contract, we were naturally tempted to look forward to a time when international law would be strong enough to deny its validity.¹¹ For this reason, it could be concluded that the validity of cession was unquestionable, at least, at that time. No Chinese arguments have ever questioned it.¹²

Could the validity of the cession still be contested? The statement of the Cairo Declaration emphasised the following sentence, "all the territories that Japan had stolen from Chinese should be restored to the Republic of China."¹³ This might be taken as a denial of the validity of cession of the Shimonoseki Treaty by the overwhelming forces of the Allied Powers. Then, if we pay attention to the fact that the post-war international law differs from its pre-war model for has developed more binding characteristics, it may be regarded as one of the sources for law seemingly confirmed by the covenant of the League of Nations.

When Japan seized Manchuria in violation of the League Covenant the twelve member states of the Council other than China and Japan addressed a note to Japanese government on January 16, 1932 calling attention to

⁹ Mei Ju-ago, *People's Daily* (Ren Min Nibao) Jan. 31, 1955.

¹⁰ "Revue generale de droit international public", (ii) 1895, pp. 475–463.

¹¹ J.L. Brierly, *The Law of Nations*, 4th edition, 1949, p. 230.

¹² *The Important Documents concerning the Question of Taiwan*, "Foreign Language Press", Peking no. 22, 1955.

¹³ "Department of State Bulletin", No. 13, No. XX, 13, 137, 1945.

Article 10.¹⁴ In this article, the members of the League undertook to respect and preserve territorial integrity and existing political independence of all Members of the League.¹⁵ As to the legal consequences of the covenant-breaking, the twelve states decided that no infringement of territorial integrity brought about in disregard of this Article could be recognised as valid and effective by members of the League of Nations.¹⁶ Manchuria was recognised only by six states, including Japan (later the number increased but there were still less than 20 states until 1945). Most of the states did observe the resolution of the League. The General Assembly of the League adopted a negative position on March 11, 1932.¹⁷ The attitude of the government of the United States was one of non-recognition.¹⁸

At this stage, international law really made a step towards by prohibiting war through government action. A step further was taken in the Anti-war Treaty concluded in 1933 between members of the Union of American Republics. The parties to that treaty renounced cession forced upon defeated states or acquisitions by conquest.¹⁹ Along with it, the theory of international law has concentrated its effort on avoiding uncertainty in terminology concerning the terms “treaty” and “international agreement”. Whether the result is positive or not, the more clearly they are analysed, the more broadly they are interpreted.²⁰

¹⁴ “American Journal of International Law”, 26, 1932, p. 342; H. Lauterpacht, *Oppenheim’s International Law*, 8th edition, 1955, p. 143.

¹⁵ Documents on International Affairs, the League of Nations, 1932.

¹⁶ Documents, op. cit. 1932 (the communication of Feb. 16, 1932 of the president of the Council to the Japanese representative).

¹⁷ The adopted Resolution: “It is incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pacts of Paris.” Documents, op. cit. 1932, p. 284.

¹⁸ H.L. Stimson (Secretary of State) informed both Japan and China on Jan. 7, 1932 that the United States cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments or agents thereof which may impair the treaty rights of the United States. “American Journal of International Law”, 26, 1932, p. 342.

¹⁹ H. Lauterpacht, *Oppenheim’s International Law*, 8th edition 1955, p. 144; “Documents”, 1933, op. cit., p. 476. As the result of these, the Bogota Charter of the Organization of American States of April 30, 1948 provides that “No territorial acquisition or special advantages obtains either by force or by other means of coercion shall be recognized”, “American Journal of International Law”, 46, 1952, supplement, p. 28.

²⁰ M. Lachs maintains that „nie ulega wątpliwości wypadków brak jednolitości jest wynikiem niedostatecznej troski o formę umowy, *Umowy wielostronne*, Warszawa 1958, pp. 26–27. Niemniej jest faktem, że wszelkie dotychczasowe próby zmierzające do ustalenia powszechnie obowiązującej nomenklatury – zawiodły. Stąd też, jesteśmy świadkami (ale i ofiarami) panującej w tej dziedzinie anarchii.”; Brierly,

For instance, Brierly, Lauterpacht and Lachs admit that every agreement and every treaty in keeping up with the requirements of international law is an international agreement irrespective of its name and form; the name is less important than the legal substance, provided it is accepted by other parties concerned.²¹ On this basis, therefore, one can consider that the statement of Cairo and the Potsdam Agreement which reaffirmed that Cairo Declaration, provide a new form of a binding international understanding. More precisely, the declarations contained two characteristics; one was the factual 'enforcement' endorsed by the military powers and the other was 'the legality of the enforcement' in the states concerned. Thus Japan was absolutely forced to carry out "the terms of the Cairo Declaration" not only by the overwhelming force of Allied Powers, but also the binding character of those principles in the terms of surrender. Lauterpacht also maintains the following: "even a statement in the form of reports of conferences signed by the heads of the states may be regarded as legally binding upon the states in question."²² Therefore, we may regard international laws as capable of change.²³ Then it can hardly be accepted that the statement of the Cairo Declaration could mean merely a retrospective moral condemnation of an international transaction legally unenforceable on the parties.²⁴ Legal status created by coercion does not, as a rule, vitiate a treaty of peace, which does not mean that in other cases no notice is taken of the fact that a government acts under compulsion.²⁵ For these reasons one can conclude that Cairo and the Potsdam proclamations should be taken as legal instruments, capable of enforcement, binding upon all the parties concerned. Therefore, the validity of the cession by the Peace Treaty of Shimonoseki may be re-considered by them.²⁶ As far as this conclusion is concerned, some of the assertions from Chinese side should be reasonable.²⁷

U.N. International Law Commission A/CN. 4/23, Lauterpacht, A/CN. 4/63, op. cit., A. Klafkowski, *Umowa Poczdamaska*, 1960, pp. 78–91.

²¹ H. Lauterpacht, *Oppenheims International Law*, 8th ed., op. cit., p. 873; D.P. Myers, *The name and scope of treaties*, "American Journal of International Law", vol. 51, No. 3, 1957.

²² H. Lauterpacht, op. cit. p. 873.

²³ M. Lachs, *International Law Today*, "Polish Perspectives", vol. 5, passim.

²⁴ G. Schwarzenberger, *Letter to the Editor*, "The Times", February 1955, p. 6.

²⁵ H. Lauterpacht, op. cit., p. 892.

²⁶ *Ibidem*, p. 934.

²⁷ Chau En Lai's speech delivered on August 24, 1950, "Yearbook of the United Nations", 1950, pp. 289–294.

2.5. When sovereignty over Taiwan was taken over from Japan, to whom belonged and how?

Apart from the validity of the assertion that the unilateral abrogation of the Treaty of Shimonoseki by the Declaration of War had restored Chinese sovereignty over Taiwan, the above question will be later attended to when discussing the surrender to the Peace Treaty of San Francisco on September 8, 1951.

2.5.1. 1945 to 1951

On the day, October 25, 1945 the Japanese forces in Taiwan surrendered to the Republic of China and since then, the Japanese government ceased to be an administrative authority in Taiwan. However, might it be considered that since Japan surrendered on September 2, 1945, the territorial terms of the Potsdam Proclamation should have been realised and the legal procedure by which Taiwan shall be restored to China" should have been completed? According to the official statement of the British Ministry of Foreign Affairs relating to a case 'Civil Air Transport Inc. v. Chenailt and Others of 1950,²⁸ in 1943, Taiwan was part the Japanese Empire.²⁹ This meant that the final determination was to be a matter of a peace treaty. Article 8 of the Potsdam Proclamation provides that "the terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." Accordingly, it may be assumed that, though such principles regarding Japan were defined in the Proclamation, the final determination concerning the territories should be a matter of future conventions determined by the Allied Powers. That is to say, that even though the terms should be provisionally carried out in accordance with the Potsdam Proclamation, the decision on Taiwan including retro-cession or any other form of transfer of sovereignty could not be completed, at least not only on the basis that the Proclamation was accepted by Japan. Thus, there is, as argued by the British Government, something left uncertain in the strict sense of the word which might support the authors who maintain that "the legal status of Taiwan is doubtful."³⁰

²⁸ L.C. Green, *The Recognition of Communist China*, "International Law Quarterly", Vol. 3, 1950, pp. 418–422.

²⁹ *Ibidem*, pp. 418–422

³⁰ A. Eden, Feb. 4, 1955 "Official Report of House of Commons", vol. 536, Col, 159 (Hansard).

However, that the Japanese government would definitely renounce sovereign rights in Taiwan was clear and in fact renunciation was carried out. In addition, the fact that the government of the RC had the intention to administer it as its own territory could be deducted by these following practises:

- 1) the local administrative order on September 20, 1945 defines Taiwan as “province of the Republic of China;”³¹
- 2) the government of the RC arranges the surrender of the Japanese forces in Taiwan on October 25, 1945³²;
- 3) the special regulations treating the nationality of the Taiwanese abroad issued on June 22, 1945. According to them, all Taiwanese abroad may restore retroactively Chinese nationality from the day when the Japanese forces in Taiwan surrendered to the government of the Republic of China.³³ In relation to these regulations, the government of the RC has never been questioned by the Allied Powers. Therefore, it may be possible to consider that the Chinese government executed them in accordance with the promises made by the Allied Powers in Cairo and Potsdam, while the Allied Powers would also, although not explicitly, recognise them. This can be called, *de facto* occupation by the government of the RC. According to Wright, the claims of *de facto* occupation were admitted but “perhaps subject to ultimate validation by the Allied Powers, with whom Japan concluded the treaty.”³⁴ However, if the *de facto* occupation could be settled in this stage, that should mean also be *de jure* for the Allied Powers recognised it by implication. For these reasons, it could be considered that the legal process by which Japan, which at that time ceased to be the actual administrative authority in Taiwan and legally renounced sovereign rights, was fully formed in this period of the time. It could not be questioned only because there were no treaty concerning the matter.

³¹ K. Irie, Study on the Peace Treaty of San Francisco, Tokyo, 1951.

³² Ibidem.

³³ Ibidem.

³⁴ Q. Wright, *The Chinese Recognition Problems*, “American Journal of International Law”, July 1955, p. 332.

2.5.2. 1951 – after the Peace Treaty of San Francisco on September 8, 1951

According to the Article 2 (b) of the treaty, “Japan renounces all right, title and claim to Formosa (Taiwan) and the Pescadores”.³⁵ It, therefore, would be right, as explained by K. Younger, as far as the Japanese were concerned, to think that the treaty legalized the renunciation of Taiwan, similar to the case of Alsace-Lorraine, which was legally restored to France by the Treaty of Versailles, not by the ceasefire.³⁶ The government of the Republic of China, which was not invited to the Conference of San Francisco, signed later a peace treaty separately with Japan on April 28, 1952 in Taipei.³⁷ In the territorial terms determined by the Peace Treaty of San Francisco the following were recognised without further amendment:

It is recognised that under Article 2 of the treaty of peace with Japan signed at the city of San Francisco in the United States on September 8, 1951, Japan has renounced all rights, title and claim to Taiwan and Penghu (the Pescadores).³⁸ Therefore, at this time, Japanese sovereignty over Taiwan was detached from the Japanese by the treaties which were at least binding upon the parties who signed the treaties.

On the other hand, there were no words in the Peace Treaty of San Francisco affecting the right of the Allied Powers or parties other than Japan; some of the delegates pointed this out in the Conference of San Francisco.³⁹ However, some parties which later signed treaties with the government of the Republic of China declared that Taiwan was part of China. In the Peace Treaty of Taipei, Taiwan was treated as follows: For the purpose of the present Treaty, nationals of the republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan and Penghu (the Pescadores) and their descendants who are of Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan and Penghu (the Pescadores)

³⁵ “Treaty Series”, ed. by Japanese Ministry of Foreign Affairs, 1961, p. 53.

³⁶ Minister of Foreign Affairs, (Republic of China), cited by M. Frankenstein, *op. cit.* pp. 57–58.

³⁷ “Treaty Series”, *op. cit.* pp. 55–57.

³⁸ *Ibidem.*

³⁹ J.F. Dulles, Delegate of the U.S. at the Conference in San Francisco, “The wise course was to protect now so far as Japan is concerned, leaving the future to resolve doubts by invoking international covenants other than this treaty”, from the annual report of Japanese Branch of International Law Association, 1954/40.

– Article 10.⁴⁰ Moreover, the Exchange Notes between both parties (the governments of the RC and Japan) stated that: The terms of the present treaty shall in respect of the Republic of China, be applicable to all the territories which are now, or which may hereafter be, under the control of its government.⁴¹ On December 2, 1954 the government of the Republic of China signed with the United States the Mutual Defence Treaty. According to the treaty, the territory of the RC was defined as follows: For the purpose of the Article 2 and 5: the term ‘territorial’ and ‘territories’ shall mean in respect of the Republic of China, Taiwan and Pescadores – Article 6.⁴²

Thus, in these treaties, whether their character was politically one-sided or not, the term “Formosa” or “Taiwan” was defined as a part of China, precisely, a part of the Republic of China, and its inhabitants also were deemed to have Chinese nationality. However, in October 1949 when these treaties were elaborated, the government of PRC had been recognised as only *de jure* government of China by some states (Soviet Union and some socialist countries). Therefore the governments of Peking and Taipei could both claim to represent China.⁴³ For this reason, neither the Government of the RC, nor the government of PRC were invited to the Conference of San Francisco for making peace with Japan. The Soviet Union, which took part in the Conference, did not sign the treaty at all. It may be asserted that as far as the parties who signed these treaties are concerned, the treaties are naturally binding upon them all, but it is also said that the one-sided character of these treaties could cast doubt on their validity *sensu stricto* and in fact prevent from unanimous settling for peace with Japan.⁴⁴ It is, therefore, concluded with some reservations that in 1951 Taiwan was detached from Japan and even defined as a part of China by these treaties.

2.5.3. It is valid to assert that the Shimonoseki Peace Treaty was abrogated by the Declaration of war on December 8, 1941?

The Chinese contended, especially the PRC, that the unilateral abrogation of the Treaty of Shimonoseki by the Japan’s Declaration of War of Decem-

⁴⁰ “Treaty Series”, op. cit. pp. 53–55.

⁴¹ Ibidem.

⁴² Ibidem.

⁴³ Q. Wright, op. cit., p. 332.

⁴⁴ A. Klafkowski, op. cit., pp. 490–500.

ber 8, 1941 could legally restore Chinese sovereignty over Taiwan.⁴⁵ Traditionally, this is probably due to the ancient practices of *diffidatio*, as defined by Phillimore, whereby upon the outbreak of a war it was customary for each belligerent party to proclaim solemnly that all treaties existing between them have ceased to exist.⁴⁶ However, there developed many exceptions,⁴⁷ though some assert that the effect of the outbreak of war upon the validity of a treaty is yet far from being settled.⁴⁸ Since then it is generally admitted that the effect of war may not be the same upon all kind of treaties and, therefore, we should deal with them, depending upon the nature of the treaty.⁴⁹ It is, in fact, true, as Brierly observes, that belligerents have a tendency to leave the fate of their pre-war treaties to depend on the operation of legal principles, but at the same time, in order to avoid uncertainty, the parties selectively revive some of their pre-war treatise allowing other to lapse.⁵⁰ Therefore, it is asserted that the Declaration of War December 8, 1941 was not able to abrogate the Peace Treaty.

2.5.4. Is Taiwan under a condominium of the Allied Powers?

The intention of the parties to carry out a condominium is either expressed or implied from some understandings and agreements.⁵¹ In the case of Taiwan, however, any such intentions were neither explicitly stated nor implied by the Allied Powers, not even by the parties of the Treaty of San Francisco. It cannot be accepted that without the intention of the parties, such the transfer of sovereignty could be valid under international law. From this point of view, Zemanek who admits neither retro-cession (*Wiedereinverleibung*) nor condominium, maintains that it is a case of original acquisition by occupation, in which may be applied a theory of prior occupation.⁵² This means that Taiwan became ownerless, *res nullius* through renunciation by

⁴⁵ Mei Ju-ao, *People's Daily*, (Ren Min Ni abo) Jan. 31, 1955.

⁴⁶ Sir R. Phillimore, *Commentaries Upon International Law*, iii, p.dxxx (1879–1888).

⁴⁷ L. McNair, "It is believed that in the vast majority of cases, in not in all, either of these tests would give the same result, for the nature of the treaty is clearly the best evidence of the intention of the parties", "The Law of Treaty", 1961, p. 698.

⁴⁸ H. Lauterpacht, *op. cit.*, p. 551.

⁴⁹ L. McNair, *op. cit.*, p. 697.

⁵⁰ Similar conclusion in: *Research in International Law of Treaties*, Supplement of American Journal of International Law, Vol. 29, Oct. 1955.

⁵¹ H. Lauterpacht, *op. cit.*, p. 453.

⁵² K. Zemanek, *op. cit.*, p. 315

Japan – so it may be acquired by the government of the Republic of China by its prior occupation. A reference to renunciation would be reasonable because it simply means that Japan loses her rights and titles to Taiwan, but does not include the further settlement of them. Thus, the idea of a condominium over Taiwan by the Allied Powers as a whole or the parties of the San Francisco Peace Treaty, does not seem to provide a persuasive argument.⁵³

2.5.5. What is the legal nature of the occupation of Taiwan by the Government of the Republic of China?

Even Zemanek who insists that a prior occupation theory is applicable to Taiwan, is still suspicious about the fact that the actual administration is carried out by the government of the RC.⁵⁴ Because it might be considered that Taiwan actually belonged to China, which had lost effective control over the territory. However, if it is assumed that the occupation and the actual administration of Taiwan by the government of the RC was valid enough to justify acquisition before the government was replaced by the new government, then, it should be considered that all the practices carried out by the former government passed on to the new government: that is to say, the government of PRC, when it is recognised as only a *de jure* government of China, would be legally entitled to Taiwan.⁵⁵

2.5.6. Formation of two China doctrine in practice

In the wake of the Chinese Revolution, the government of PRC was established on October 1, 1949. According to the official statement issued the same day by the Foreign Minister Chou En-Lai “the new government was the sole *de jure* government represented by the whole people of China”. In response to this statement, the Government of U.S.R.R. recognised it on October 2, 1949. The day when the government of United Kingdom recognised it as only a *de jure* government of China was January 5-6, 1950.⁵⁶

On the other hand, the government of the RC decided to transfer its capital city from Kanton in the mainland to Taipei in Taiwan on December 8, 1949. Therefore, as far as its effective control was concerned the government of

⁵³ G. Schwarzenberger, *op. cit.*, p. 6.

⁵⁴ K. Zemanek, *op. cit.* p. 453.

⁵⁵ Q. Wright, A., *op. cit.*, *passim*.

⁵⁶ L.C. Green, *op. cit.*, pp. 418–422.

the RC should be regarded powerless. The fact that the power at least in the mainland of China was really transferred from the government of Generalissimo Chiang Kai-Shek to the new government can be deduced from diplomatic practices of the period from October 1, 1949 until the end of 1950, at least before the Peace Treaty of San Francisco on September 8, 1951. Taking those facts into consideration, it is contended that the *de facto* occupation and administration of Taiwan by the government of the RC has been carried out since the day of the surrender of the Japanese forces in Taiwan and “a prior occupation” (though the status of *res nullius* of Taiwan was questionable) had been completed before the government of PRC was generally recognised as a sole *de jure* government. The practices implemented by the government of the Republic of China should be taken as those on behalf of the Chinese; that is to say, when the new government obtained effective control over the entire Chinese territory and was generally recognised *de jure*, Taiwan should legally belong to the *de jure* government, even if it was actually administrated by the former power. The legal process to validate the *de facto* occupation could be judged from practices until 1951, precisely, during the period that the administration by the government of the RC was effective in China. With regard to this argument, the question when the new government was recognised would, as above quoted, necessitate further discussion. However, as far as to whether the acquisition was actually completed by the government of the RC or by the local power the answer is clear. Thus, it can be concluded that Taiwan which was transferred to Japan by the Peace Treaty of Shimonoseki of 1895, has actually belonged to China through the *de facto* occupation and administration by the government of the RC, which was based on the promise expressed by the Allied Powers in Cairo and Potsdam. The Japanese renunciation of Taiwan was implemented in accordance with principles declared in the Proclamations, although they were not definite as a form. This is a case resembling those of Korea and the Pacific Islands, which before the Peace Treaty of San Francisco in 1951 were actually detached from Japan, whose independence and trusteeship under the United Nations (under the actual administration of the USA) were generally recognised by the Allies powers.

2.5.7. Comparison with the other cases like Korea

In the case of Korea, which was promised her independence by the Allied Powers in Cairo, it took the form of a treaty recognised by the Peace Treaty of San Francisco in 1951 (Art. 2-b). However, neither the government of

People's Republic of Korea nor the government of the Republic of Korea, had never been invited to the San Francisco conference. Despite it these two governments had been already recognised by other powers pending the peace treaty of San Francisco. Even such an international organisation as the UN recognised their independence and authority. According to a decision of the Security Council, based on Resolutions of the General Assembly issued on December 12, 1948 and October 21, 1949, the governments were defined as "the Republic of Korea" on the one hand, and "the Authorities of North Korea on another."⁵⁷ In the case of the Pacific Islands, formerly under mandate of the League to Japan, Japan accepted in the Peace Treaty of San Francisco the action by the United Nations Security Council of April 2, 1947, pending peace treaty of 1951, which extended the trusteeship system to them. In these cases, a peace treaty merely recognized the prior settlement. Therefore, in the case of Taiwan it is considered that the Japanese renunciation in the peace treaty of 1951 meant merely a recognition, by treaty, of the settled facts that Japan actually renounced all rights and titles in Taiwan pending a treaty. At the same time, the occupation and administration over Taiwan by the government of the RC was not questioned by any of the Allied Powers or the parties of the Peace Treaty of San Francisco. Therefore, Taiwan which was detached from Japan by the surrender of Sep. 2, 1945 was *de facto* and *de jure* restored to China through the occupation and administration by the Government of the RC as promised by the Proclamations in Cairo and Potsdam.

Taking into consideration at least the question of when the new government should be presumed to gain "effective control" in China, the answer is clear. The government of the PRC was recognised as only *de jure* government of China in the period of time from October 1, 1949 to 1951 – pending the Peace Treaty of San Francisco on September 8, 1951 by sixteen members of the United Nations and eleven non-members.⁵⁸ Although at the beginning the recognition of the new Peking government was limited to a few friendly countries like the Soviet Union, the UK was the first country from the West to recognise the new government in 1943. Then the political tension was relaxed and more and more countries tended to recognise the new

⁵⁷ K. Irie, *op. cit.*, pp. 61–62; G.I. Tunkin, *Sovietskoe Opredelenie agresii v OON*, "Sov. Gos. i Prawo", No. 2–3, 1953, p. 96; H. Kelsen, *The Law of the United Nations*, 1951, p. 929; "The Yearbook of the United Nations", *op. cit.* 1948–49, pp. 287–294, 1950, pp. 221–224.

⁵⁸ Q. Wright lists the governments recognizing Peking as a UN member, see *op. cit.*, p. 332.

government of PRC instead of the government of RC. Such political change was petrified when the UN General Assembly adopted a decision on the representation of China shifting dramatically from the government of RC to the government of the PRC in 1971.

On this basis one can conclude that the Chinese possession of Taiwan had been settled by the government of the RC on the behalf of China at least before its political power was transferred. Accordingly, the new government is, based on principles of succession, entitled to all rights and titles over Taiwan, because both governments insisted on the one China doctrine and did not admit a separated status of Taiwan. Due to the fact that it is still administered by the government of RC, further settlement may be considered as an internal affair of China negotiable between the government of PRC and the government of RC.⁵⁹

Some writers argue, on the contrary, that it is assumed that the acquisition was completed by the government of Generalissimo Chiang Kai-Shek in the second stage, immediately after the Revolution, therefore Taiwan may constitute a new state. Wright, relating to the Mutual Defence Treaty between the United States and the Republic of China, maintains that “the significance of this treaty is, however, controversial. It is said that the accompanying note indicates that the term “Republic of China” is an euphemism, and the treaty in fact recognised that Taiwan and the Pescadores constitute a new state separated from China”.⁶⁰ Nevertheless, the validity of this assertion may be questioned at least on two points. Firstly, it disregarded the fact that pending this treaty with the United States, Taiwan was not *res nulls*, but a part of the living world orbit subjected to the rules of international law; that is to say, the first occupation and then administration were carried out in accordance with the principles decided by the Allied Powers, and even the status was recognised by them by implication. It is more reasonable to consider that occupation was carried out from the beginning with the intention to administrate Taiwan. Secondly, the government of the RC is, according to the one China doctrine, a local one controlling only the islands of

⁵⁹ United Kingdom Treaty Series, No. 28/956: see, “International & Comparative Law Quarterly”, No. 6, 1957: On the International Sugar Agreement Britain, Czechoslovakia, Poland and Soviet Union declared that “the representatives could not regard signing of the agreement by a Nationalist representative as a valid signature on behalf of China.”

⁶⁰ Q. Wright, *op. cit.*, p. 333.

Taiwan and the Pescadores.⁶¹ This political fiction may be changed in future depending on domestic political situation in Taiwan.

3

THE TAIWAN PROBLEM SINCE THE 1970S

3.1. Recognition of the Peking government by the USA

Although the government of PRC was recognised by the Soviet Union and some other socialist countries soon after the declaration, most of the western countries, except the UK, were reluctant to see a new government of China. More, they were inclined to refuse to recognise it until the 1970s due to the Cold War tensions. However, Richard Nixon's visit to China on Feb. 21, 1972 had dramatically changed the political climate. As a result of negotiations with the Chinese partners, mainly with the prime minister Chou En Lai in Peking both sides had principally agreed to establish a formal diplomatic relations by accepting one China doctrine, while the Taiwan problem had not been concluded definitely at the time.⁶² Although it took some time to adopt a formal position of the US towards the Taiwan problem, both governments concluded an agreement on Jan. 1, 1979 by which the government of the USA recognised the government of the PRC by abolishing diplomatic relations with the RC. While the replacement of the Chinese representation from Taipei by Peking in the United Nations had been already approved by the General Assembly in 1971, the US government's recognition of the Peking government was politically essential for the East-West relations. Many countries of the West followed the US. Subsequently Japan, which established relations with Republic of China by the Peace Treaty of Taipei

⁶¹ D. Acheson, Department of State Bulletin, Jan. 16, 1950: "The islands of Formosa (Taiwan) was turned over to Chinese in accordance with the Declarations made and with the conditions of the surrender. The Chinese have administrated Formosa for four years. Neither the United States nor any other all ever questioned that authority and that occupation. When Formosa was made a province of China nobody raised any lawyer's doubts about that. That was regarded as in accordance with the commitments. Now, in the opinion of some, the situation is changed."

⁶² W. Burr (ed.), *The Kissinger Transcripts: The Top Secret Talks with Beijing and Moscow*, New Press, 1999; E. Goh, *Constructing the US Rapprochement with China 1961–1974*, Cambridge University Press, New York, 2005; M. Fukuda, *Chuugokugaiko to Taiwan*, "Foreign Policy of the Chinese Government and Taiwan", Keio University Press, Tokyo, 2013, passim.

on 29 April 1952, recognised the government of PRC on Sept.29 1972 replacing the Republic of China. On the same day the government of RC broke off the relations with Japan.⁶³

However, the Taiwan problem was not merely a question of choice of one government over another. There were complicated political and social relations, which the US government could not separate from a single treaty of recognition. Therefore, a compromise was adopted on Taiwan within the frame work of one China doctrine. Simultaneously, the US Congress enacted the Taiwan Relations Act of 1979 on January 1,1979. According to the congressional records, some representatives strongly demanded to defend interests of the Taipei government and vital interests of the USA in Taiwan. Under the law of 1979, as far as the US government and its citizens were concerned, nothing changed compared with the time before the recognition. The American Institute in Taiwan “was actually to function as an embassy for the USA.⁶⁴ The government in Taipei also admitted “special offices to maintain *de facto* relations called “Taipei representative office’, for example, in Japan and the USA, while those governments substantially adopted the one China doctrine.⁶⁵

3.2. The “Cross Strait Relations”

During the Cold War the tensions between two governments of China continued, and both governments insisted on the one China doctrine claiming the title to represent China. Besides, the governments had no opportunity to see each other due to the political and military tension of the East West conflicts (Korean War and Vietnam War). Taiwan was militarily supported by the US forces with the security alliance (the Mutual Security Treaty of 1954.) On the other hand the government of PRC was supported by the socialist countries. However, since the 1970s the situation has improved. Both governments were inspired by the change of climate in Asia and admitted *de facto* relations in trade, economic cooperation and exchange of cultural missions.

Normal diplomatic relations between the government of the PRC and the USA established (*de facto* in 1972) had been followed by a relaxed climate

⁶³ Joint Communique of the Government of Japan and the Government of the People`s Republic of China signed on September 29, 1972.

⁶⁴ Taiwan Relation Act of 1979, Public Law 96–8, 96th Congress (US); R.S. Ross, *Negotiating Cooperation: The United States and China 1969–1989*, Stanford University Press, 1995.

⁶⁵ *Ibidem*.

created by the governments of Peking and Taipei. It was indeed a time to reach a solution of the Taiwan problems. The attitude of the Government of Taipei towards Peking indicated a slight change at the time of death of president Chiang, the last of the Chiang family in 1988. His successor was the first Taiwanese political leader Lee (李登輝), a deputy chairman of the Nationalist Party and also a mayor of Taipei City. Lee was inclined to turn around the situation for he understood that the political system established by Chiang Kai-Shek was the old mainland Chinese system not adjusted to the conditions prevailing in Taiwan.⁶⁶ The Taiwanese were aware that the one China doctrine was unrealistic. However, all political decisions in Taiwan were monopolised by the ruling Nationalist Party, the only political party since 1949. Taiwan was administrated under a dictator type political system since the beginning. People could not express even slightly critical views on the government, particularly on the two China doctrine. The first Taiwanese president Lee, who was elected on May 1990, provided several radical changes in both domestic and foreign policies. As for the relations with the mainland he proposed to cease war by abolishing the martial law imposed in 1947 and abolished on July 15, 1987). He allowed people to travel abroad, which meant that most of the soldiers coming with the Chiang Kai-Shek to Taiwan (mainland Chinese) could visit their families, which benefited nearly half million of old soldiers during the 1988 – 1989.⁶⁷

In such a climate, in the politics both the government of the RC and that of PRC had agreed to establish a special governmental agency – the Mainland Affairs Council of the Republic of China in Taiwan operational from 1991. A similar agency was organised in 1992 in the PRC. Then, both sides declared that the *de facto* relations between two China should be called, “cross-strait relations” and should be carried out not through the ministries of foreign affairs but these special agencies.⁶⁸

⁶⁶ M. Yanagimoto, *Taiwan Kakumei* (Taiwan Revolution), Shueisha, Tokyo, 2000.

⁶⁷ *Ibidem*.

⁶⁸ M. Fukuda, *op. cit.*, p. 347.

3.3. The political power shift in Taiwan from Mainlander to Taiwanese

To understand the domestic political situation in Taiwan we have to bear in mind a very complicated relations between the mainland China and Taiwan. First, the Taiwanese have slightly different language and culture from the mainland Chinese expelled or moved to Taiwan together with Chiang Kai-Shek who declared that his government is the same as it was in the mainland. This statement made the mainlanders to entertain the idea that their status was temporary and that one day they might regain power over the mainland.⁶⁹ Accordingly, Taiwan was not viewed as an independent state but a province of the RC, which continued to administrate both Mainland China and Taiwan. Therefore, Chiang Kai-Shek considered that all political and social positions should be monopolised by mainlanders. Although the Taiwanese changed citizenship from Japanese to Chinese the Chiang Kai-Shek government had never allowed the Taiwanese to have political rights, including parliamentary voting rights.⁷⁰ In addition, there were cultural conflicts caused by the shock of Chiang Kai-Shek forces landing in Taiwan. They were different from the previous Japanese forces: they looked so miserable that the local people had not expected much collaboration.⁷¹ Despite it, the RC government had disregarded the realities and applied a harsh policy towards the Taiwanese, including the martial law, enacted to restrict anti-governmental activities and to enforce the unequal treatment for Taiwanese in respect of political rights. The government was monopolised by mainland Chinese whose status was secured by the constitution of 1946. The constitution was enacted by the Chiang Kai-Shek government during the mainland period, which Taiwanese did not know about. Thus the government of Chiang Kai-Shek had not envisioned Taiwan as an independent state. How to administrate Taiwan was largely depended on their military strategy against the Communist forces in the mainland, always aggressively looking for a chance to invade Taiwan.

On the other hand, Taiwanese who were liberated from Japanese administration in 1945 felt completely free to build their own nation without any

⁶⁹ M. Yanagimoto, *op. cit.*, p. 108.

⁷⁰ M. Yanagimoto, *op. cit.*, p. 99.

⁷¹ M. Yanagimoto, *op. cit.*, p. 124.

prejudices, so at the beginning the government and the forces from the mainland were welcomed by Taiwanese. Naturally there were some political groups who wanted to unify Taiwan and the associated territories, by contacting with groups active in Hong Kong and some overseas Chinese, but the movement was active for only a short period of the time just after the war.

The government of Chiang Kai-Shek applied a harsh policy to control the people by using secret police and military forces. Naturally, those who expected equal treatment with the mainland Chinese and democracy protested. The gap between the expectation of the people and reality kept stirring up socio-political conflicts during the Chiang Kai-Shek administration. Taiwanese had often expressed opposing opinions through their underground movements and critical views expressed in organised ways or individually. The results were tragic. The case of the 2-2-28 incident of 1947, when leading intellectuals and politicians were assassinated, jailed or purged was very symbolic. It was reported that nearly 200,000–300,000 disappeared in operations of secret police during the 1947–1950s.⁷² The government and the Taiwanese societies together had rehabilitated them and compensations had been paid. It took half a century to realise oppressive policies were wrong.⁷³ Until the annexation by Japan in 1895, Taiwan was a formally part of the Chinese Empire (the Qing dynasty's administration). It was not firmly integrated with the mainland China because of a different ethnic culture and language.

During Japan's administration from 1895 to 1945 Taiwan was intensively industrialised and the Taiwanese were forced to attend Japanese schools and then, as a result, 90% of the people were more or less educated in Japanese culture.⁷⁴ Accordingly, Taiwan was well developed, in particular in agriculture and the people were accustomed to work systematically. When Chiang Kai-Shek and his government landed in Taiwan in 1945, they considered it as their colony. Chiang Kai-Shek administrated Taiwan as a part of China by maintaining administrative order as it was in the Mainland

⁷² Ibidem, p. 70.

⁷³ Ibidem, p. 70.

⁷⁴ Tay-Sheng Wang wrote that "It is not difficult for an observer to discover that Taiwan has a remarkably modern legal system far different from that of traditional and contemporary China. Legal modernization on Taiwan in fact has proceeded for a hundred years beginning from advent of Japanese rule in 1895. We cannot understand all of the factors that have shaped today's Taiwan if we continue to use the traditional China-centered viewpoint". *Legal Reform in Taiwan under Japanese Colonial Rule 1895–1945: The Reception of Western Law*, University of Washington Press, 1999, preface.

and reserving the privileges for themselves. In addition, there was a gap of cultural consciousness.⁷⁵ Most Taiwanese were prepared to modern ways of life during a half-century Japanese administration, but the soldiers from the mainland had no such experiences. Most of them were forced to take part in the Chiang Kai-Shek's army, summoned by the authorities in the mainland (about 1500,000 in 1949). They hoped to return home after half-century stay in Taiwan. Consequently they were not interested in Taiwan affairs.

The Taiwanese were usually treated as a second category of the nationals. The "Nationalist Party", mostly composed of the people from the mainland, was a monistic power. In addition, all representatives were secured permanent seats without election. Thus, the government of Chiang Kai-Shek had intentionally maintained policies in the interest of the mainland Chinese because it felt it most important to devise a strategy against the communist forces in the mainland. However, the mainland Chinese in Taiwan, typically old soldiers, had gradually faded away for natural causes and retired from the political scene.⁷⁶

3.4. President Lee's democratisation in Taiwan

Chiang Ching Kuo (蔣經國), the son of Chiang Kai-Shek, came to power in 1978,⁷⁷ and then, he gradually relaxed harsh policy towards the Taiwanese by accepting Taiwanese politicians as executives in the Nationalist Party. Lee was the first Taiwanese leader nominated as a deputy chairman of the party and nominated a mayor of Taipei in 1978. After the death of President Chiang Ching Kuo in 1988 he advanced further to the top tiers of the party and then, became Taiwanese president of the RC (later elected in a free and general election of 1992).

⁷⁵ Ibidem, p. 12.

⁷⁶ Under Chiang Kai-Shek system the National Assembly consisted of 129 non-elective representatives, who were permanent Mainland Chinese. They constituted nearly 60% of the total members in the National Assembly until the end of 1991.

⁷⁷ Chiang Ching Kuo (1910–1988), the successor to late President Chiang Kai-Shek, studied at the Communist Party School in Moscow from the age of 16 and was trained later at the communist party organs. He was recommended to Moscow by his father, Chiang Kai-Shek. He was married to a Belarusian lady with five children. During his time of Moscow he had contacts with many Chinese communists and attended at the same party school. His father asked him to return to China in 1937 after staying in Soviet Union over 12 years. It was a symbol of good relations between Chiang Kai-Shek and Stalin during the War.

During his administration since 1991 to 2000 President Lee provided several important changes in the legal and political system. First, his proposal to amend the Constitution of 1946 was accepted. Articles which stipulated the privileged status of mainland Chinese were repealed. Further, President Lee abolished the permanent, non-elective mainland Chinese representatives. The system had finally ceased to exist by the forced retirement of all representatives at the end of 1991.⁷⁸ Besides, he assured to provide a broad range of human rights including the freedom of speech, by liquidating secret police system and censorship of press. Then, he had introduced political pluralism by admitting multiparty system. Accordingly, the Democratic Progressive Party, which was organised in 1986 which had begun a political campaign for nationwide general elections. President Lee was, a chairman of the Nationalist Party, was indirectly to express the two China theory “ declared by the General Meeting of the Democratic Progressive Party”, and then he had often cooperated with this party`s policy for Independent Taiwan.⁷⁹ The concept of two Chinas, “the cross strait relations”, has already functioned *de facto* in international relations. Taiwan was fully independent with sovereignty limited to the territories of Taiwan due to the Amendment of Constitution in 1991, and it recognised the government of the PRC, which could effectively administrate the mainland China, so , we don`t need to develop further diplomatic relations with the government of the Republic of China“. ⁸⁰ Thus, the Taiwanese problem has reached almost the final stage of its evolution. However, the government of the PRC has not yet given up their idea to unify Taiwan with China as it was the case of Hong Kong.

After President Lee`s retirement in 2000, new leaders of Taiwan, Chen and later, Ma were successively elected presidents and have both maintained the same policy line. However, it seems that the situation is flexible depending on the political climates in Taiwan and its relations with mainland China.

⁷⁸ The first general and free election for the General Assembly in Taiwan was held on Dec. 12, 1992. The total 161 seats for the highest national legislative organ were elected for the first time without. Only 6 seats were reserved for the representatives of overseas Chinese. M. Yanagimoto, op. cit., p. 108.

⁷⁹ During the Lee administration the Nationalist Party was always a ruling party, but the Democratic Progressive Party was growing as a second influential party. However, president Lee was flexible enough to cooperate with this party in a coalition. Even after his retirement in 2000 Lee was an influential figure both in the Nationalist Party and the Democratic Progressive Party. M. Yanagimoto , op. cit., p. 110.

⁸⁰ On July 1999, An Interview, “Deutsche Welle”; Yanagimoto, op. cit., p. 110.

BIBLIOGRAPHY

- Bowles C., *The Chinese Problem Reconsidered*, "Foreign Affairs", April 1960.
- Brierly J.L., *The Law of Nations*, 4th edition, 1949.
- Burr, W. (ed.), *The Kissinger Transcripts: The Top Secret Talks with Beijing and Moscow*, New Press, 1999.
- Frankenstein M., *Formosa son statut Juridique et sa situation*, "Revue Politique et Parlementaire", Jan. 1952, p. 57.
- Fukuda M., *Chuugokugaiko to Taiwan*, "Foreign Policy of the Chinese Government and Taiwan", Keio University.
- Goh E., *Constructing the US Rapprochement with China 1961–1974*, Cambridge University Press, New York, 2005.
- Green L.C., *The Recognition of Communist China*, "International Law Quarterly", Vol. 3, 1950, pp. 418–422.
- Kelsen H., *The Law of the United Nations*, 1951, p. 929; "The Yearbook of the United Nations".
- Klafkowski A., *Umowa Poczdamaska*, 1960, pp. 78–91.
- Lauterpacht H., *Oppenheim`s International Law*, 8th edition 1955, p. 144; "Documents", 1933.
- Lachs M., *Umowy wielostronne*, Warszawa 1958, pp. 26–27.
- Schwarzenberger G., "The Times", Feb. 2, 1955; *Title to territory, Response to Challenge*, "American Journal of International Law", No. 51, 1957.
- Tunkin G.I., *Sovietskoe Opredelenie agressii v OON*, "Sov. Gos. i Prawo", No. 2–3, 1953, p. 96.
- Wright Q., *The Chinese Recognition Problem*, "American Journal of International Law", July 1955, passim.
- Zemanek K., *Die völkerrechtliche Stellung Formosa*, "Archiv des Völkerrechts", 5 band 3 heft, 1955, pp. 309–310.