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# UNDERSTANDING THE SAN FRANCISCO PEACE TREATY'S DISPOSITION OF FORMOSA AND THE PESCADORES

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A correct statement of Taiwan's "international position" has eluded international scholars for over fifty years, and indeed has become something of a riddle. The number of papers on this subject in law journals and other magazines is almost too many to count. An article entitled "Is There A Question of Taiwan In International Law?" in the June 2000 edition of the Harvard Asia Quarterly was particularly well researched and informative, but still failed to offer an solution to the riddle.

The San Francisco Peace Treaty (SFPT) however, provides a deceptively clear statement on Taiwan's international position. Specifically, Article 2b states: "Japan renounces all right, title and claim to Formosa and the Pescadores." This statement is a crucial clue for solving the puzzle.

The problem of Taiwan arose in the mid-20<sup>th</sup> century, and indeed the SFPT came into force in 1952. This paper takes the unique approach of assembling a mass of historical data, court decisions, international conventions, treaties, and other legal references from the period of the early 1800s, to the late 1900s, and then organizing all this data together as a whole, in order to obtain workable models and analytical tools that can be used to examine the content of SFPT.

This paper's analysis has led necessarily to a conclusion that Taiwan's sovereignty lies not with itself or the People's Republic of China, but rather, United States administrative authority over the island is still active till the present day. In order to explain this conclusion, we must delve into the subject of territorial cession as the result of war.

Regarding the specifications of a territorial cession, most scholars consider the wording of Article 2b to present "only half of the story."<sup>1</sup> On the surface, it appears to be vague and unpecific. Yet, from this clause, we can derive all aspects of Taiwan's status, including diverse items such as the correct nomenclature for its WTO and WHO memberships, the citizenship of the local populace, income tax liability, the validity of its constitution under international law, and even the proper nomenclature for its teams to participate in the Olympics. Moreover, it can be determined whether Taiwan is a sovereign nation and should be admitted to the United Nations, whether it is the long lost province of some other nation, or whether it is fitting that the United States government review and revise the "One China Policy." Article 2b is powerful if the proper analytical tools are used to uncover its true meaning.

To this current day, most researchers and international legal experts read the SFPT using a "civilian mindset," and this is problematic. In order to fully understand the SFPT, it is necessary to understand the functions of military government and the laws of war.<sup>2</sup> (This will be fully discussed in the Question and Answer section of this paper.)

This paper will attempt to employ a "military mindset." The United States was heavily involved in all phases of the military operations against Japan in World War II. After the defeat of Japan, Article 2b of the SFPT designates a territorial cession of Taiwan.<sup>3</sup> However, no country was specified as the "receiving country." How should this be correctly interpreted? The situations of the territorial cessions after the Mexican American War and Spanish American War provide the crucial starting points

for analysis.

### *HISTORICAL CASES OF TERRITORIAL CESSION: CALIFORNIA, PUERTO RICO, AND CUBA:*

By the early to mid-1800s, international law came to recognize that the invasion of another country's territory was not immediately equivalent to "annexation," but only represented "military occupation." But what, exactly, is military occupation? In the opus, *Military Government and Martial Law*,<sup>4</sup> which was a standard reference for US military personnel for decades, the author William E. Birkhimer held that "The truth must be that a territory is militarily occupied when the invader dominates it to the exclusion of the former and regular government. The true test is exclusive possession."<sup>5</sup> According to current US Army regulations, "military occupation is a question of fact."<sup>6</sup> It presupposes a hostile invasion, resisted or un-resisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.<sup>7</sup>

Certainly in the United States, this concept was fully recognized very early in our country's history. The Supreme Court case of *United States v. Rice* (1819)<sup>8</sup> was an early precedent and determined that the populace of the occupied territory is subject to the doctrine of "temporary allegiance" and that foreign territory under military occupation must be held under a military government. In the case of the United States, this is the "United States Military Government" (USMG), and it serves as a form of administration which may be established and maintained for the government of enemy territory under military occupation. The USMG is a complete government with executive, judicial, and legislative functions. In the case of *Ex Parte Milligan* of the US Supreme Court in 1866,<sup>9</sup> which has become a standard reference for "military jurisdiction" under the US Constitution, the court held that military government is "to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents."<sup>10</sup> With regards to the definition of military government, current US Army Regulations state the following:

Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory. The necessity for such government arises from the failure or inability of the legitimate government to exercise its functions on account of the military occupation, or the undesirability of allowing it to do so.<sup>11</sup>

With this brief overview of military government and military occupation, it will be possible to compare the military history of California, Puerto Rico, Cuba, and Taiwan.

#### *Example 1: The California Cession*

**Background:** California originally belonged to Mexico. We can follow the transfer of sovereignty during and after the Mexican - American War as follows. Conflict between Mexican and American military forces was reported on April 25, 1846, and the US Congress declared war against Mexico on May 13.

**Occupying Power:** All military attacks against Mexican troops and Mexican facilities in California were done by US military forces. Hence, in military parlance, we say: the United States liberated California from Mexico. Thus, the United States was the (principal) occupying power.

From military history, we can use the date of January 13, 1847 as the beginning of a belligerent occupation of California, and hence the

activation of a military government over the entire territory. Article 5 of the Treaty of Guadalupe Hidalgo ceded California to the United States, and came into effect on July 4, 1848. Yet problems soon emerged in US courts: Did the coming into effect of the peace treaty mark the end of USMG in California? In *Cross v. Harrison* (1853)<sup>12</sup> the US Supreme Court answered in the negative. The judges found that "... holding that from the necessities of the case the military government established in California did not cease to exist with the treaty of peace, but continued as a government de facto until Congress should provide a territorial government."<sup>13</sup>

Civilian government finally supplanted the USMG on December 20, 1849. This historical transfer of sovereignty established the following pattern: First (A), a belligerent occupation under a military government; second (B), a peace treaty cession; and finally (C), the end of military government, with, in this case, California reaching its territorial status under the United States with a civil government in place of the military government in mid December 1849. This represents the final status after emerging from military occupation.

#### *Example 2: The Puerto Rico Cession*

Let us use the same structured framework to examine the transfer of sovereignty of Puerto Rico from Spain to the United States after the Spanish American War.<sup>14</sup>

**Background:** Conflict between Spanish and American troops on broke out on February 15, 1898, and the US Congress declared war against Spain on April 22.

**Occupying Power:** All military attacks against Spanish troops and Spanish facilities in Puerto Rico were done by US military forces. Hence, in military parlance we say that the United States liberated Puerto Rico from Spain. The United States is the (principal) occupying power.

The US Congress passed the Foraker Act and it came into effect on May 1, 1900, providing a civil government for Puerto Rico. This supplanted the United States Military Government in Puerto Rico.

**Example 3: The Cuba Cession**

As a further example, let us consider the disposition of Cuba’s sovereignty after the Spanish American War.

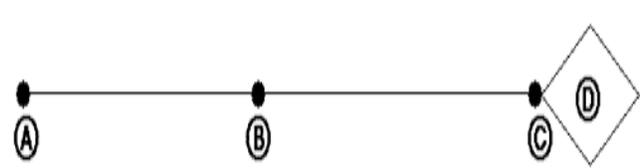
**Occupying Power:** All military attacks against Spanish troops and Spanish facilities in Cuba were done by US military forces. Hence, we say that the United States liberated Cuba from Spain. The United States is the (principal) occupying power.

The civil government for the Republic of Cuba began operations on May 20, 1902. This supplanted the United States Military Government in Cuba.

A chart may be drawn as follows. This Chart has three points A, B, C, and an area labeled D.

**BASIC ANALYSIS OF THE ABCD CHART**

Point A represents “cession by conquest.”<sup>15</sup> In other words, historically speaking, most countries traditionally recognized that overrunning another country’s territory with military forces was directly equivalent to “annexation.” This notion changed rather dramatically after the end of the Napoleonic period, during that age’s development of international law, and was redefined as



“military occupation,” with the added stricture that “occupation does not transfer sovereignty.”<sup>16</sup>

In the early 20<sup>th</sup> century, a more firmly established customary norm of international law was instituted. The norm binds all nations, and is more clearly codified in the Hague Conventions of 1907. Hence, the refined understanding of Point A is that it marks the beginning of a period of belligerent occupation of the entire territory. Moreover, military government is in effect.

Point B represents “cession by treaty.” In the post Napoleonic era, “cession by conquest” must be confirmed with a “cession by treaty” in order to be considered valid. The transfer of the sovereignty of the territory is clearly specified in the peace treaty. On this aspect, the US Supreme Court stated: “One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather

than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party.”<sup>17</sup>

Point C marks the end of military government, which must be supplanted by some other legal arrangement for the governing of the territory.

Area D marks the onset of a “final status” after going through the period of military occupation, alternatively called final status under the law of occupation.

After this preliminary survey of the stages of military occupation in dealing with a territorial cession, a more in-depth examination is still needed, because we have not dealt with a number of important international legal issues for the occupied territory. These include its precise legal position during each stage, the allegiance of the local populace and basic human rights, as well as the true nature of “interim status” and “final status.”

**ADVANCED ANALYSIS OF THE ABCD CHART**

Point A to Point B marks the period of “belligerent occupation.” Based on the decision in *Fleming v. Page* (1850), and subsequent cases of the US Supreme Court<sup>18</sup>, the territory’s international position is an independent customs territory under USMG.

Point B to Point C marks the period of “friendly occupation,” or what in today’s terminology we would call the “civil affairs administration of a military government.”

US Army regulations state: “It is immaterial whether the government over an enemy’s territory consists in a military or civil or mixed administration. Its character is the same and the source of its authority the same. It is a government imposed by force, and the legality of its acts is determined by the law of war.”<sup>19</sup> Based on the *Insular Cases* of the US Supreme Court, the territory’s international position is unincorporated territory under USMG.

Point A to Point C is called the “interim status” under the law of occupation. The conquering power has a right to displace the preexisting authority, and to assume to such extent as may be deemed proper the exercise by itself of all the powers and functions of government.<sup>20</sup> The sovereignty of the area is said to be “fettered.”

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>21</sup>

From Point A up until Point C, according to the doctrine of “temporary allegiance” under the law of occupation, the local populace gives allegiance to the occupying power. However, the occupying power cannot institute military conscription policies over the local populace. The Geneva Conventions state:

*Taiwan appears to fulfill the Montevideo criteria for statehood, however since the United States derecognized the Republic of China as the “juridical person of China” in 1979, Taiwan has increasingly been treated as the orphan of the international community. In reality, the Montevideo criteria are inadequate to delineate Taiwan’s true position under international law.*

“The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted. In no case shall requisition of labor lead to a mobilization of workers in an organization of a military or semi-military character.”<sup>22</sup> The Conventions further state that, “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.”<sup>23</sup>

The Conventions also state:

“The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligation under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”<sup>24</sup>

Area D is the “final status.” In a general way, the rule may be stated that final status is achieved when the occupying power’s military government has “relinquished the occupied territory to the lawful government of the area.” The sovereignty of the area only then becomes unfettered.

Note: Charts for comparative examples of (1) territorial cessions during peacetime, and (2) military occupation where there is no transfer of sovereignty, would be different.

### COMPARATIVE DATES

A comparative examination of Puerto Rico, Cuba, and Taiwan may be drawn from the data in the following table.

Relevant Dates			
ABCD Chart items	Puerto Rico	Cuba	Taiwan
Point A	August 12, 1898	July 17, 1898	Oct. 25, 1945
Point B	April 11, 1899	April 11, 1899	April 28, 1952
Point C	May 1, 1900	May 20, 1902	-----
Area D	unincorporated territory of USA	Republic of Cuba	-----

### QUESTION AND ANSWER ON TAIWAN’S STATUS

As the reader may notice in the table below, Point C and Area D for Taiwan are left blank. As the author suggested at the beginning of this paper, a full statement of the current international position of Taiwan can be directly derived from the SFPT if one employs a “military mindset.” Let us proceed through the following series of questions and answers in order to illuminate this.

Q1: When did Japanese troops in Taiwan surrender or come under the complete authority of the hostile army?

A1: The representatives of Chiang Kai-shek (CKS) accepted the surrender of Japanese troops on October 25, 1945, raised the Republic of China (ROC) flag, and immediately announced this event as “Taiwan Retrocession Day”. However, according to the dictates of international law, this so-called retrocession on October 25, 1945 is impossible. The Annex to the Hague Convention, No. IV (1907) states that, “Territory is considered occupied when

it is actually placed under the authority of the hostile army.” This is a basic principle of the law of war,<sup>25</sup> and its subset the law of occupation.<sup>26</sup> (These are “jus cogens” and considered binding on all nations.<sup>27</sup>)

It is a matter of historical record that during WWII, all military attacks against Formosa and the Pescadores, and indeed against the four main Japanese islands were conducted by US military forces. In fact, US military personnel were already in Taiwan in early September 1945, well before the arrival of CKS’ representatives. Military occupation does not transfer sovereignty, and hence is not equivalent to annexation. Despite the intentions expressed in the Cairo Declaration, Potsdam Proclamation, and Japanese surrender documents, under the law of war the United States military troops would have been fully justified in accepting the surrender of Japanese troops on September 26, 1945, and raising the US flag.<sup>28</sup> Indeed if this correct procedure had been followed, the ROC flag would fly under the US flag.

Q2: If not the Republic of China, who then is the principal occupying power?

A2: The SFPT confirms the United States as the principal occupying power in Article 23. United States Military Government administrative authority in Taiwan began on October 25, 1945, with the surrender of Japanese troops. In General Order No. 1 of September 2, 1945, General Douglas MacArthur specified the handling of the surrender formalities of Japanese troops and the military occupation for over twenty areas under Japanese control. The commanders and troops receiving directions and following his orders were acting as agents<sup>29</sup> for the United States Military Government and cannot claim any special benefits resulting from their actions in this regard. Chiang Kai-shek's troops were also acting as agents for USMG in handling the surrender ceremonies on Taiwan and undertaking the military occupation of the island.

Q3: When did the Peace Treaty come into effect?

A3: The SFPT was signed on September 8, 1951. It was ratified by the US Senate and came into effect on April 28, 1952.

Q4: Who did the SFPT specify as the receiving country?

A4: No country was specified as the "receiving country" for the Taiwan cession.

Consequently, over fifty years later, Taiwan's current position on the ABCD Chart is still lying somewhere between points B and C as an "unincorporated territory under the United States Military Government."

Under the US system of government, the final status for a region is to be constitutionally "permanent," i.e. to join the Union as a state, because no state can then secede from the Union.<sup>30</sup> "Outside" the Union or District of Columbia, it is federally different. Without any civil government legislation by Congress, a territory is still subject to military government (including civil affairs administration) until a resolution of the interim status is reached. All ceded territories are constitutionally subject to the doctrine of unincorporation,<sup>31</sup> whether as an insular possession, trust territory, or self-governing dominion. The Constitution certainly does follow the flag, under the doctrine of unincorporated territory.<sup>32</sup>

Q5: Why do most people interpret the SFPT to say that the status of Taiwan is undetermined?

A5: Before World War II, the lawful government of Formosa and the Pescadores was Japan. As outlined above, military occupation of these areas began on October 25, 1945. According to the law of occupation, the goal for the final disposition of occupied territory will be to relinquish it to "the lawful government of the area". However, at the time the SFPT was written, there was no consensus in the international community regarding the determination of the "lawful government" of Formosa and the Pescadores.

To clarify this further, upon the coming into effect of the peace treaty, an authorized civil government for Taiwan, to whom the principal occupying power could relinquish the territory, did not yet exist. More importantly, no country was authorized to pass relevant legislation to establish a civil gov-

ernment for Taiwan. Hence, Taiwan remains under military government until the USMG is legally supplanted.

Q6: Has Taiwan's final political status ever been precisely determined?

A6: Although the final political status of Taiwan is still undetermined, the "interim status" was fully defined as of April 28, 1952, as an "unincorporated cession under a USMG civil affairs administration", with administrative authority delegated to the Chinese Nationalists, who were formerly co-belligerents<sup>33</sup> with the United States in the WWII China Theatre of operations, and who had fled to Taiwan in late 1949, after the founding of the PRC on the first of October.<sup>34</sup>

#### THE SIGNIFICANCE OF THE SHANGHAI COMMUNIQUÉ

On February 28, 1972, the PRC and the USA signed the "Shanghai Communiqué," firmly establishing the PRC as the "sole legal government of China." The importance of the wording in the communiqué is illustrated in

the following key paragraphs:

There are essential differences between China and the United States in their social systems and foreign policies. However, the two sides agreed that countries, regardless of their social systems, should conduct their relations on the principles of respect for the sovereignty and territorial integrity of all states, non-aggression against other states, non-interference in the internal affairs of other states, equality and mutual benefit, and peaceful coexistence. International disputes should be settled on this basis, without resorting to the use or threat of force. The United States and the People's Republic of China are prepared to apply these principles to their mutual relations.

The Chinese side reaffirmed its position: the Taiwan question is the crucial question obstructing the normalization of relations between China and the United States; the Government of the People's Republic of China is the sole legal government of China.

The United States declared: The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.

In other words, in February 1972, the viewpoint of the US government (in its position as principal occupying power) regarding Taiwan's final political status changed from "undetermined" to "a part of China," and Taiwan was placed on a flight-path for eventual unification with the PRC. However the timetable for this was not specified, and was left up to negotiations between the Taiwanese and the PRC authorities.

The Shanghai Communiqué can be viewed as a civil

*Taiwan entered the World Trade Organization (WTO) as an independent customs territory. The concept of independent customs territory arises from belligerent occupation.*

affairs agreement under the law of occupation and establishes the PRC as the legal government of Formosa and the Pescadores. A civil affairs agreement such as this is effective because a decision of the US President in this regard is not reviewable by the Congressional or the Judicial Branch. The Shanghai Communiqué laid to rest a number of outstanding issues regarding Taiwan's international status, yet a number of questions still persist. Thus, we need to return to the Q&A begun earlier.

Q7: What proof or disproof can be offered to show that the military government of the principal occupying power has not been legally supplanted?

A7: The consideration that the US Department of State does not regard Taiwan as sovereign nation is adequate proof to show that the sovereignty of "Formosa and the Pescadores" has never been transferred to the Republic of China or the Taiwan governing authorities, and that the United States administrative authority over Taiwan is still currently active.

Indeed, from 1952 to the end of 2004, in relation to all agreements, laws, declarations, etc., in respect to Taiwan, we do not find any record of the end of USMG in Taiwan, or its supplanting by another legal arrangement. This is in stark contrast to the situation of California, Puerto Rico, and Cuba wherein the USMG authority was officially supplanted by formal legislation.

"Military government continues until legally supplanted," is the rule as stated in Military Government and Martial Law, by William E. Birkhimer, 3rd edition, 1914.<sup>35</sup>

Q8: What is the principle covering the final disposition of Japanese property in "Formosa and the Pescadores"?

A8: In the Shanghai Communiqué, the lawful government of Taiwan has been specified as the PRC. The US Commander in Chief's authority to make this determination arises from his plenary authority over foreign affairs in general, and from SFPT Article 4b in particular: "Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3."

As stated previously, under the law of occupation, the goal for the final disposition of occupied territory will be to relinquish it to "the lawful government of the area." Acting in the position of principal occupying power, the United States has determined the lawful government of Formosa and the Pescadores to be the PRC, and has concluded a civil affairs agreement to specify this. However, no firm timetable for implementation has been agreed upon.

Q9: What rights do the Taiwanese have under this arrangement at the present time?

A9: For a clarification of the status of Taiwanese persons under US immigration law during this period of interim status, please see the accompanying chart "US Insular Law Considerations on the Origin and Classification of Aliens."

## MILITARY OCCUPATION – FURTHER CLARIFICATIONS

Military occupation results in the occupying power having the authority to exercise the rights of sovereignty, and is considered an "intermediate period" or a time of "interim status". On the ABCD Chart, this is Point A to Point C. Military occupation does not transfer sovereignty, but the sovereignty of the occupied territory is held by the principal occupying power in the form of a fiduciary obligation (often called a "fiduciary relationship").<sup>36</sup>

After the Spanish-American War of 1898, Spain ceded Cuba, but did not "give" it to any other country. This situation is very similar to the handling of Taiwan in the SFPT: "cession by conquest" followed by a "cession by treaty," yet no receiving country was specified, and the United States was confirmed as the (principal) occupying power. In 1901 the Supreme Court decided two cases which discussed the situation of Cuba, *Neely v. Henkel* and *Downes v. Bidwell*.<sup>37</sup> The resulting decisions clarified the nature of the fiduciary relationship of the United States over Cuba. The Court held that:

It is true that as between Spain and the United States — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

A similar analysis was offered in Birkhimer's Military Government and Martial Law. See Chapter VI "Effect of Occupation on Local Administration", Section 63 "Instance Occupation of Cuba"<sup>38</sup>. Birkhimer writes:

The position of the United States military authorities in Cuba, before the Spanish authorities abandoned the island in 1899, was one of military occupation, pure and simple; after that event, it was military occupation of a particular kind — namely, wherein the dominant military power exercised authority over the island as trustee for a Cuban nation not yet in existence, but the creation of which was promised and which was to have the assistance of the United States in establishing itself.

This is a very similar situation to Taiwan, since the sovereignty of Taiwan has not yet been transferred to the ROC or the Taiwan governing authorities, and technically speaking the "Taiwan nation" does not yet fully exist under international law. The true situation of Taiwan is further clarified in the accompanying chart "Analysis of the Location of Taiwan's Sovereignty."

## TAIWAN'S CURRENT STATUS

Taiwan is currently being held by a military administration (under USMG) and has not been transferred to a civilian administration (civil government) in the technical sense. This is the reason why during the last fifty years, the ROC au-

thorities have lawfully exercised “the colonial powers of local military governors of a self-governing dominion under SFPT interim status.”<sup>39</sup> A definition may be provided as follows:

“Self-governing Dominion” is a self-governing area under the benign sovereignty of another country; although not a trust territory or mandate territory, but, in many respects, treated similarly in international law as being a (sub-sovereign) foreign state equivalent.<sup>40, 41, 42</sup> Technically, the United States administration of this “quasi-trusteeship” sub-sovereign foreign state equivalent is still subject to military regulations.

US military regulations say that “[t]erritory subject to civil affairs administration is not considered to be occupied.”<sup>43</sup> The occupational authority over the Taiwan cession is not de-jure occupation of belligerents under the laws of war. The SFPT continuity of the laws of occupation is maintained on the sole basis of the civil affairs administration for an indefinite period. It is not de-jure occupation but it is still operating in an exactly similar fashion until someone makes the political decision otherwise. This implementation of customary insular law practices after treaty cession highlights the true significance of United States Military Government for “foreign territory,” which is not incorporated into the US Constitution and the Bill of Rights. Insular law and civil affairs regulations operate under the US Military Government for this SFPT cession, thus resulting in a de-facto continuation of the law of occupation. It looks like occupation and still also operates similar to an occupation, but the US military regulations tell us that it is technically not an occupation. It is an “occupation” within the insular law and FM 27-10. This “Field Manual” was written for the US constitutional form of government, which includes Senate ratified peace treaties. It contains the laws of war as recognized by the United States.<sup>44</sup>

Under the laws of war and military regulations, this is the current status until someone changes it — either finalization of political status, action by the Commander in Chief, or action by the US Congress. The courts cannot touch *the political question*, but executive actions can be judicially reviewed for failure to safeguard any constitutionally mandated civil rights protections.<sup>45</sup> This is the constitutional system of the checks and balances facilitated for an “unincorporated territory” as de-jurely created by a peace treaty such as the SFPT. In the post WWII period, the SFPT is the highest ranking document of international law regarding the status of Taiwan. Concurrently, as a Senate-ratified treaty, the SFPT’s weight under US law is equivalent to the Constitution.<sup>46</sup> Its specifications are binding on all US government departments.

## TAIWAN’S NEXT MOVE

According to the Insular Cases of the Supreme Court, “fundamental constitutional rights” apply in all insular areas.<sup>47</sup> For the local population, these fundamental rights include the life, liberty, property, and due process of the Fifth Amendment. For the territory, these fundamental rights include the Article 1, Section 8, guarantee that Congress will provide for the common defense.<sup>48</sup> Congress implemented this clause in 1789 by establishing the War Department, which

was reorganized in 1949 as the Department of Defense.

For the defense of Taiwan, the policies of the United States, as outlined in the Taiwan Relations Act, include —

- 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;

- to provide Taiwan with arms of a defensive character; and

- 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.

Notably, no insular area of the United States maintains its own “Ministry of Defense.” Technically, all sales of military hardware to Taiwan should be stopped immediately. Under this interpretation of the SFPT, Taiwan’s defensive needs should be handled directly by the US Department of Defense, headquartered at the Pentagon.

## CONCLUSION

Should Taiwan spend US \$18 billion on new arms purchases? Or should that money be invested in local infrastructure improvements? The answers to such questions depend on a clear recognition of Taiwan’s current international position. Importantly, the statement at the beginning of this paper that “United States administrative authority over Taiwan is still currently active,” is not a goal, but a description of present legal reality. In addition, the author maintains that Taiwan’s interim status position does not result in the creation or recognition of “One China, One Taiwan”, “Two Chinas,” or a “Taiwan Republic.” The interim status designation is fully compatible with President Truman’s Statement of June 27, 1950, the San Francisco Peace Treaty, the Taiwan Relations Act, the “One-China Policy,” the “Six Assurances” (July 14, 1982), the “Cross-Straits Consensus of 1992,” the “Three No’s Policy” (June 30, 1998), and the three USA-PRC joint communiqués. As such, this statement does not amount to a change of US policy, but rather a new recognition of all pre-existing US policy. In other words, it is completely compatible with the Taiwan Relations Act, which is a domestic law of the United States.

## ENDNOTES

1. By contrast, the “receiving countries” for the territorial cessions in the 1947 “Treaty of Peace with Italy” were fully specified. The treaty’s provisions included the cession of the Adriatic islands, Istria south of river Mirna and what is now western Slovenia to Yugoslavia; the cession of the Dodecanese islands to Greece; and minor revisions of the border with France. In addition, the independence of Albania was fully recognized.

2. The laws of war as spoken of in this paper are the “customary laws of warfare in the post-Napoleonic era.” A detailed discussion of the origins of the laws of war, which include the laws of occupation, would be a separate essay, and is not

included in this paper.

3. In this paper, the terms “Formosa and the Pescadores” and “Taiwan” are used interchangeably.

4. Military Government and Martial Law, by William E. Birkhimer, third edition, revised (1914), Kansas City, Missouri, Franklin Hudson Publishing Co., *internet*: <http://familyguardian.betterthanyours.com/Publications/MilitaryGovAndMartialLaw/MilitaryGovernmentAndMartialLaws.pdf>

5. Birkhimer, *op. cit.*, p. 33.

6. References to US Army regulations in this paper have been taken from Field Manual No. 27-10, *The Law of Land Warfare*, Revised (1976), Department of the Army, Washington, D.C., *internet*: <http://www.globalsecurity.org/military/library/policy/army/fm/27-10/>

7. FM 27-10, *op. cit.*, paragraph 355.

8. *United States v. Rice*, 17 U.S. 246, 254 (1819).

9. *Ex Parte Milligan*, 71 U.S. 2 (1866)

10. Belligerents are the “parties” to the hostilities of war.

11. FM 27-10, *op. cit.*, paragraph 362.

12. *Cross v. Harrison*, 57 U.S. 164 (1853)

13. *Cross v. Harrison* (1853), as quoted in *DeLima v. Bidwell*, 182 U.S. 1, (1901).

14. “Porto Rico” was the official spelling until it was changed by the US Congress to “Puerto Rico” in 1932.

15. “The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest.” See *Johnson v. M’Intosh*, (1823), as quoted in *Downes v. Bidwell*, 182 U.S. 244 (1901).

16. “Formerly adverse military occupation vested in the conqueror a right to all property found there and transferred to him the sovereignty of the subjugated territory. He appropriated the former without stint, nor did he hesitate the press the inhabitants into the ranks of his army. That was the rule from earliest times down through the Napoleonic period.” Birkhimer, *op. cit.*, p. 2.

17. *DeLima v. Bidwell*, 182 U.S. 1 (1901).

18. *Fleming v. Page*, 50 U.S. 603 (1850). Other decisions of note are *Neely v. Henkel*, 180 U.S. 109 (1901) and *Downes v. Bidwell*, 182 U.S. 244 (1901), as well as the cases cited therein.

19. FM 27-10, *op. cit.*, para. 368.

20. Birkhimer, *op. cit.*, p. 74.

21. Annex to Hague Convention No. IV, 18 October 1907, embodying the Regulations Respecting the Laws and Customs of War on Land, Article 43.

22. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 51. Hereinafter “GC”.

23. GC, Article 64.

24. GC, also Article 64.

25. In this paper, the terms “law of war” and “laws of war” are used interchangeably.

26. In this paper, the terms “law of occupation” and “laws of occupation” are used interchangeably.

27. The term “*jus cogens*” is Latin for “compelling law.” It

## FINAL REMARKS ON THE INTERPRETATION OF TREATIES

(A.) The Treaty of Peace between the ROC and Japan of 1952 stipulates in Article 4 that “all treaties, conventions and agreements concluded before December 9, 1941, between Japan and China have become null and void as a consequence of the war”. Japan acknowledged that the treaties, agreements and so on between Japan and China as indicated in the Article above mentioned were including all of those concluded between Japan and the Qing Dynasty.<sup>49</sup>

However, clauses regarding territorial cession, reparation provisions, etc. are not affected by a war or by subsequent cancellation of a treaty. This is because once the obligations of territorial cession, reparation provision, etc. have been fulfilled, the relevant clauses in the treaty itself are no longer active. In other words, the cancellation of a treaty only affects those provisions which have not yet been fulfilled in their entirety. Thus the specifications of the 1895 Treaty of Shimonoseki which ceded Taiwan to Japan are in no way subject to “retroactive cancellation.”<sup>50</sup>

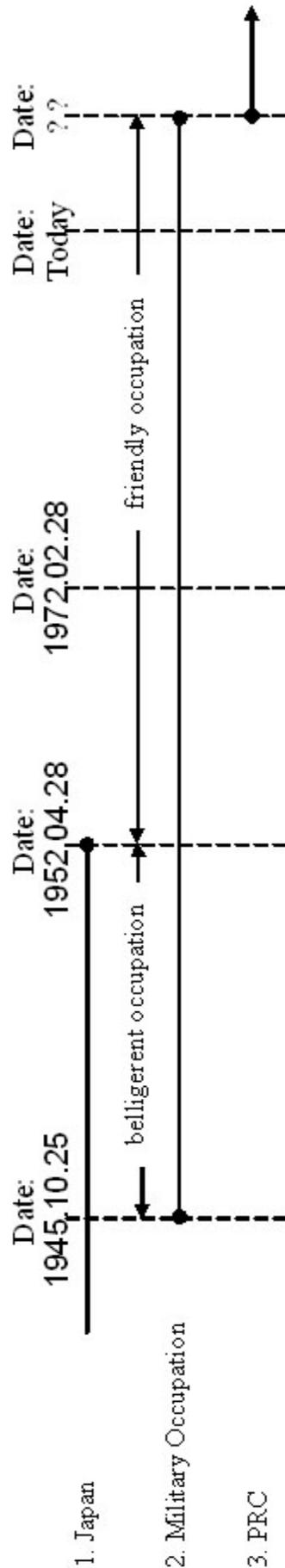
Furthermore, upon the coming into force of the 1895 Treaty, all previous claims of China regarding the ownership of Taiwan and the Pescadores, whether due to history, culture, language, race, geography, geology, etc. became null and void.

(B.) The SFPT recognizes the independence of Korea. The benefits which China received from the SFPT are specifically outlined in Article 21. The Sino-Japanese Peace Treaty is a subsidiary treaty under the SFPT, as authorized by Article 26. Hence, China is very much affected by the SFPT. The often heard reasoning of some Chinese scholars toward the SFPT of “We didn’t sign it, so we are not affected by it” is illogical when viewed in this light.

(C.) In the SFPT, Japan ceded Taiwan, however no “receiving country” for the cession was specified. Article 2 of the Sino-Japanese peace treaty, effective August 5, 1952, merely quoted this SFPT provision. However, some scholars still maintain that the Sino-Japanese peace treaty, between Japan and the ROC, must be interpreted as transferring the sovereignty of Taiwan to the ROC, since one party “ceded,” so of course the other party “received.” However, this analysis is erroneous because Japan was not holding the sovereignty of Taiwan after April 28, 1952.

(D.) Curiously, it is often heard from Chinese or Taiwanese researchers that “The Chinese were in Taiwan when the treaty came into effect, so of course Taiwan belongs to us,” or “Since no receiving country was specified in the SFPT, of course the sovereignty of Taiwan is distributed among the local Taiwanese populace” or “Since no receiving country was specified in the SFPT, of course the sovereignty of Taiwan reverts to China.”<sup>51</sup> However, after lengthy research, the author has been unable to find any precedents in the post-Napoleonic world which would give credence to any contentions that sovereignty can be transferred according to such rationale.

# Analysis of the Location of Taiwan's Sovereignty



## Explanatory Notes:

1. In 1895, Taiwan was ceded to Japan in the Treaty of Shimonoseki. After the treaty came into effect, Taiwan's sovereignty was held by Japan, and this was "ownership."
2. After WWII, the United States was the principal occupying power of the Pacific area and nearby environs. In General Order No. 1 of September 2, 1945, the other troops receiving orders and following the directions of General MacArthur were acting as agents for the principal occupying power, and cannot claim any special rights of their own. According to the law of occupation, "Territory is considered occupied when it is actually placed under the authority of the hostile army." Hence, the acceptance of the surrender of Japanese troops by the representatives of KCS on October 25, 1945, marks the beginning of the belligerent occupation of Taiwan, and military occupation is an interim status condition. Military occupation does not transfer sovereignty, and there was no transfer of sovereignty on this date. Taiwan's status became that of an independent customs territory under USMG.
3. Upon the coming into effect of the peace treaty on April 28, 1952, Japan ceded Taiwan, but no receiving country was specified. Taiwan's status became that of unincorporated territory under USMG. The period of time from the coming into effect of the peace treaty until the end of military government of the principal occupying power is called "friendly occupation" or more properly "the civil affairs administration of a military government." Hence, Taiwan currently remains under the administrative authority of USMG, until such time as the Taiwan territory can be relinquished to the "lawful government of the area." USMG is acting as trustee to hold Taiwan's sovereignty.
4. In the Shanghai Communiqué of February 28, 1972, the USA and the PRC agreed on the "One China Policy," stating that the PRC is the sole legitimate government of China. No firm timetable for the annexation (or "unification") of Taiwan by the PRC was established however, and the details were left to be negotiated by the officials of Taiwan and the PRC. Currently, Taiwan is in a period of interim status, and the USA does not support "Taiwan independence" nor Taiwan's participation in any international organizations for which statehood is a requirement. When the Taiwan governing authorities and the PRC officials finally come to the negotiating table, it is expected that they will reach an agreement for Taiwan to be integrated into the PRC under the "one country, two systems" model. After this agreement takes effect, USMG in Taiwan will be legally supplanted.

## U.S. Insular Law Considerations on the Origin and Classification of "Aliens"

	Area/Region	Insular Area of USA?	Examples	Native Population?	Sovereignty Held By?	Present or Historical Classification as "Alien" under US law	Alternative Nomenclature	Relevant Dates when Entitled to Carry "Non-citizen Passport" Issued under US Administrative Authority
1	Foreign Country	No	France, Poland, Greece, Morocco, Tanzania, etc.	Yes	Each respective country	Alien (Type I)	XXX	XXX (Note 1)
2A	Domestic Territory (Domestic Country) (Note 2)	Yes	Puerto Rico (1899→present)	Yes	USA	Alien (Type II)	island citizen of the Puerto Rico cession	April 11, 1899→March 2, 1917 (Note 2)
			Guam (1899→present)	Yes	USA	Alien (Type II)	island citizen of the Guam cession	April 11, 1899→August 1, 1950 (Note 2)
2B	Domestic Territory	Yes	Midway Island (1867→present)	No	USA	N/A	XXX	XXX
			Wake Island (1897→present)	No	USA	N/A	XXX	XXX
3	Foreign Territory under the temporary dominion of the USA (Note 3)	Yes	Cuba (April 11, 1899→May 20, 1902)	Yes	USA	Alien (Type III)	island citizen of the Cuba cession	April 11, 1899→May 20, 1902
			Taiwan (April 28, 1952→present)	Yes	USA	Alien (Type III)	island citizen of the Taiwan cession	April 28, 1952→present
							TRA alien	January 1, 1979→present (Note 4)
4	Foreign Territory leased by the USA	No	Guantanamo Bay, Cuba (Feb. 1903→present)	No	Cuba	N/A	XXX	XXX

This chart extrapolates the concept of having "eligibility" to carry some type of US passport back to earlier eras, even though most persons did not carry passports before the 1950's. The special circumstances of (1) trust territories, or (2) Indian reservations in the fifty states may overlap with insular law to some extent, but are not considered.

[Note 1]: A person who is a dual citizen of his/her home country and the USA would of course be qualified to carry a US passport. [Note 2]: The terminology of "domestic country" and "island citizen" comes from the ruling in *Gonzales v. Williams*, 192 U.S. 1 (1904). Some years later, the people of Puerto Rico were collectively naturalized in March 1917, and the people of Guam were collectively naturalized in August 1950. [Note 3]: Cuba and Taiwan were both "limbo cessions" with the USA as principal occupying power and qualify as insular areas. Foreign Territory held by US military forces under belligerent occupation (without any territorial cession) may be said to be under the administrative control of the USA, but is not insular and hence is not considered here. US Insular Law applies to Taiwan and Cuba because they are "inside" the principle of *cession by conquest* which was confirmed by *cession by treaty*. In *DeLima v. Bidwell* 182 U.S. 1 (1901), it was held that "Cuba is under the dominion of the United States." [Note 4]: The Taiwan Relations Act came into effect in early 1979. N/A is used to indicate "Not Applicable."

## THE TAIWAN STATUS: A FULL LISTING OF CONCLUSIONS

### *International Law Determination: unincorporated territory under USMG*

Name: Taiwan Cession.

Organized Territory?: No.<sup>52</sup>

Nationality of Populace: Island Citizens of the Taiwan Cession.<sup>53</sup>

Insular Area of US? Yes.<sup>54</sup> Status: Interim Status

Violation of One China Policy: No.<sup>55</sup>

Allegiance of Island Citizens During Interim Status: USA.

Flag of the Interim Status: Flag of the USA, and Flag of Taiwan.<sup>56</sup>

National Anthem of the Interim Status: “Star Spangled Banner” or “God Bless America,” in addition to the local Taiwanese anthem.<sup>57</sup>

Voting rights in US Federal elections: No.

Appellation for Olympic Teams: Taiwan.

Flag for Olympic Teams: Flag of Taiwan.<sup>56</sup>

Membership in WTO: independent customs territory.

Membership in WHO: associate member under USA.

Membership in United Nations: No.

Cession Day: April 28.

Language: Chinese, Taiwanese, local aboriginal dialects, etc.

Romanization (orthography): Hanyu Pinyin.

Weights & Measures: Metric System.

Constitution: US Constitution (“fundamental rights”), and Taiwan is entitled to draft its own Constitution

Income Tax Liability: to Taiwan governing authorities (no USA federal income tax liability).<sup>58</sup>

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indicates a law which may not be violated by any country.

28. The provisions of the Cairo Declaration, Potsdam Proclamation, and Japanese surrender documents should certainly be taken into account when drafting the post war peace treaty, however they do not constitute any sort of legal justification for the ROC to claim the “annexation” of Taiwan in the Fall of 1945.

29. The law of agency is the body of legal rules and norms concerned with any “principal” – “agent” relationship; in which one person (or group) has legal authority to act for another. Such relationships arise from explicit appointment, written or oral, or by implication. The law of agency is based on the Latin maxim “Qui facit per alium, facit per se,” which means “he who acts through another is deemed in law to do it himself.” Hugo Grotius spoke of agency in his treatise *On the Law of War and Peace* (1625). Under the law of war, an agency relationship between the military troops of one country and another country is common and accepted international practice.

30. On December 20, 1860, South Carolina became the first state to secede from the Union. Article 1, Section 10 of the US Constitution stipulates: “No state shall, without the consent of Congress, enter into any agreement or compact with any other state or with a foreign power.” Section 10 further clarifies: “No state shall enter into any treaty, alliance, or confederation.” Secession from the Union and entering into an alliance with other US states or foreign countries violates these sections of the US Constitution.

31. See concurring opinion of Justices White, Shiras, and McKenna in *Downes v. Bidwell*, 182 U.S. 244 (1901).

32. By contrast, Berlin was not unincorporated territory, and not insular. Berlin was occupied without any treaty cession, thus as administrative authority based on “cession by conquest” it was very legal but was purely temporary in terms of US holding sovereignty during a period of belligerent occupation. The “hostile” nature of occupation was officially concluded in 1950, but the Berlin Zone was still excluded from the creation of a West Germany in the 1955 Bonn Accords. The US Supreme Court’s Insular Cases do not apply to West Berlin.

33. Allies are also called “co-belligerents.”

34. In regard to the disposition of Taiwan after WWII, the provisions of the Cairo Declaration, Potsdam Proclamation, and Japanese surrender documents offer statements of intent, but have no “stand alone” legal validity. Importantly, such intentions were certainly formulated upon the ROC maintaining its “legal position” as the de-facto and de-jure government of China. When the ROC went into exile on Taiwan in late 1949, its legal position changed dramatically.

35. Birkhimer, op. cit., p. 26.

36. A fiduciary relationship is a relationship of trust and confidence, as between trustee and beneficiary. In Chinese, fiduciary relationship is “xin tuo guan xi.”

37. *Neely v. Henkel*, 180 U.S. 109 (1901) and *Downes v. Bidwell*, 182 U.S. 244 (1901).

38. Birkhimer, op. cit., p. 44.

39. The author is indebted to his research assistant, Jeffrey Geer, of Las Vegas, Nevada, for providing extensive commentary and analysis of the complications of military government, military occupation, insular law, and civil affairs

administration as they relate to peace treaty cessions under the laws of war.

40. It is notable that for the purposes of the Rules of Chargeability, under the US Immigration and Naturalization Act, Taiwan is not considered as an “outlying possession.”

41. The formulation of the Montevideo Convention, Article 1, is inadequate to deal with complicated situations of territorial cessions, military occupation, or governments in exile. As an example, for the Taiwan governing authorities, their “defined territory” was originally “obtained” via military occupation, and there has been no valid transfer of title.

42. The United States does not recognize that Taiwan is a “state” in the international sense, and under the Taiwan Relations Act, Taiwan is treated as a sub-sovereign foreign state equivalent.

43. FM 27-10, op. cit., para. 354.

44. See the mention of FM 27-10 in *Application of Yamashita*, 327 U.S. 1 (1946).

45. e.g. “fundamental rights” and “civis romanus sum” under United States Military Government.

46. Article VI of the US Constitution specifies: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”

47. The current status of Taiwan is “after” the peace treaty cession and the Supreme Court’s Insular Cases do apply.

48. “In sum, it can fairly be said that the Insular Cases stand for essentially two propositions: (1) for territories incorporated into the United States, the Constitution applies ex proprio vigore, and (2) for unincorporated territories, only ‘fundamental’ constitutional rights apply.” See *King v. Morton*, US Court of Appeals, D.C. Circuit, (1975).

49. Although scholars of Chinese history claim that China was first united under the Qin Dynasty, it is important to note that the maps of early dynasties such as the Qin (221 - 207 BC), the Han (206 BC - 220 AD), the Three Kingdoms (220 – 280), etc. do not include Taiwan. Taiwan does not appear on Chinese maps until the latter years of the Qing Dynasty (1644 – 1911), and then it was ceded to Japan in 1895.

50. The 1895 Treaty was ratified by the Qing Emperor. Under international law, territorial cession in a peace treaty is considered a valid method for transferring the title of an area.

51. The author has lived in Taiwan for nearly thirty years, and has seen these types of mutually contradictory rationale reported in the local Taiwanese media for decades.

52. Organized territory is that which has a Constitution drafted under the approval of the supreme sovereign. In the history of the United States, an organized territory is a territory for which the United States Congress has approved a Constitution (also referred to as an “organic act” or “organic law.”) The “Republic of China” Constitution currently in use in Taiwan was drafted in 1947 in Nanjing, China, by the KMT government. Later, it was brought over from Mainland China by the KMT officials during the Chinese Civil War period of the late 1940’s. As such, this Constitution, which is often called the “Nanjing Constitution,” is not the true organic law of the Taiwan cession.

53. This is a customary law nationality arising from common-

law *jus soli* for natural-born subjects, based on the US Supreme Court’s Insular Cases (beginning 1901). This is differentiated from *jus soli* based on the 14th Amendment to the US Constitution (promulgated in July 1868). An alternative nomenclature would be “TRA aliens.” Importantly, according to the Nationality Law currently in effect in Taiwan, and indeed according to established Taiwanese, Chinese, and Japanese laws and customs, for US citizens or foreigners who give birth in the Taiwan cession, their children do not (and will not) automatically obtain Taiwan “island citizen” nationality.

54. For “US Insular Law Considerations on the Origin and Classification of ‘Aliens’,” see the accompanying chart.

55. The recognition that Taiwan is unincorporated territory under USMG is a statement of Taiwan’s current interim status under international law. While this interim status condition under SFPT persists there is no “Taiwan Republic,” nor any “One China, One Taiwan,” nor “Two Chinas,” nor “a divided Chinese nation.”

56. To this author’s knowledge, the flag of Taiwan does not yet exist.

57. To this author’s knowledge, the local Taiwanese anthem does not yet exist.

58. Reference is made to the November 1997 report of the United States’ General Accounting Office “US Insular Areas — Application of the US Constitution”, page 37, which states: “The Congress has authority to impose income taxes on the worldwide income of US citizens and corporations, including income from the insular areas. However, federal individual and corporate income taxes as such are not currently imposed in the insular areas.” For Taiwan, this interpretation complies with Taiwan’s status as an independent customs territory.