Conflict of Law Rules Between China and Taiwan and Their Significance

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CONFLICT OF LAW RULES BETWEEN CHINA AND TAIWAN AND THEIR SIGNIFICANCE

CHI CHUNG*

INTRODUCTION

The conflict of law rules between China and Taiwan is not a popular topic in law reviews in the United States. There has only been one article in 1989, one in 1990, one in 1992, and one in 1998. Part I of this article serves as an update on this topic.

* S.J.D. Candidate, Harvard Law School. I wish to thank Professor William P. Alford and Professor Richard D. Parker for years of teaching and guidance. I want to thank Pofang Tsai, Bruce Y. Hsueh, Hui-wen Chen, and Ming-sung Kuo for their helpful comments on earlier versions. I alone bear all responsibilities and welcome suggestions and criticisms.

1 The meaning of the two words China and Taiwan is a politically contested issue. In this paper, China and Taiwan are used as shorthand for the People's Republic of China and the Republic of China respectively. The problems between China and Taiwan are sometimes called the "cross-strait" problems, both because they are separated by the Taiwan Strait, and because the word "cross-strait" does not itself implicate the nation-state status. Translations of Chinese and Taiwanese materials are my own unless otherwise indicated.

2 See Wang Chih-wen, A Model for Solving Legal Problems Between Taiwan and the Mainland, 3 J. CHINESE L. 251 (1989). Chih-wen's article, while valuable, does not go
As authors sometimes do, I think the topic I am writing about deserves more attention than it has received so far. Part II of this article explains the significance of this topic from two interrelated perspectives. The first perspective is the social and historical context in which this article is situated. The second is the pivotal role of sovereignty in traditional jurisprudence. Taken together, the mere existence of conflict of law rules between today's China and Taiwan is very puzzling.

In order to address this puzzle, Part III of this article will highlight two important pieces of legal scholarship written by Huang Jin and Tung-Pi Chen, two professors of law. Though in different ways, they make the argument that China and Taiwan should have conflict of law rules between them regardless of whether China and Taiwan are two nation-states or together a single nation-state called China. This is an important argument, both because this is the primary legal foundation on which China and Taiwan build their current social and economic interdependence, and because this suggests a new understanding of sovereignty. Notably, sovereignty itself remains intact but becomes disconnected from other issues.

I. CONFLICT OF LAW RULES BETWEEN CHINA AND TAIWAN TODAY

The starting point of this article is a sketch of China's and Taiwan's conflict of law rules for the legal problems arising between them. I will focus on three basic topics in conflict of laws:

much further than the two works discussed in Part III of this article. Chih-wen's article discusses the fact that even though both China and Taiwan are currently politically separated, they each claim that their domestic laws apply to citizens on the other side of the strait.

3 See Tung-Pi Chen, Bridge Across the Formosa Strait: Private Law Relations Between Taiwan and Mainland China, 4 J. CHINESE L. 101 (1990), reprinted in FOREIGNERS IN CHINESE LAW (CHINESE LAW: SOCIAL, POLITICAL, HISTORICAL, AND ECONOMIC PERSPECTIVES) 245-69 (Tahirih V. Lee ed., 1997). This article will be discussed in more detail in Part III.

4 See Ada Koon Hang Tse, The Emerging Legal Framework for Regulating Economic Relations Between Taiwan and the Mainland, 6 J. CHINESE L. 137 (1992). Tse's article is valuable, but does not go much beyond the two works discussed in Part III of this article.

5 See Rong-Chwan Chen, A Boat on a Troubled Strait: The Interregional Private Law of the Republic of China on Taiwan, 16 WIS. INT'L L.J. 599 (1998). This article is also valuable, in that it analyzes the significance of Hong Kong's handover and its impact on the Taiwanese legal system, but it is not more encompassing than the two works discussed in Part III of this article.
CONFLICT OF LAW RULES—CHINA AND TAIWAN

jurisdiction, choice of law, and recognition and enforcement of judgments.6

A. China

i. Jurisdiction

Article Five of the Regulation on the Problems of Jurisdiction of Foreign-Related Civil and Commercial Litigation (guanyu shewai min shang shi anjian susong guanxia ruogan wenti de guiding), promulgated by China's Supreme People's Court, and valid since March 1, 2002, states that the Regulation on the Problems of Jurisdiction for Foreign-Related Civil and Commercial Litigation governs the jurisdictional issue of the civil and commercial litigation involving private parties of Hong Kong, Macau Special Administrative Regions, and the Taiwan area. China does not consider the Taiwan area "foreign," and therefore China does not classify the civil and commercial litigation involving Taiwanese people or corporations as "foreign-related." Nonetheless China needs to provide rules for the civil and commercial litigation involving people and corporations from Taiwan. The solution is a separate article—Article Five—because "Taiwan is not foreign," but the same rules apply to both Taiwan-related and foreign civil and commercial litigation.

Related to jurisdiction is the service of process on defendants, i.e., to notify defendants of the commencement of suits. Acting as the interface between the Chinese and Taiwanese governments are China's Association for Relations Across Taiwan Strait ("ARATS")7 and Taiwan's Strait Exchange Foundation ("SEF").8 Both of them were formed as private organizations or founda-

6 According to a leading casebook on conflict of laws:
The parties involved in multistate activity should keep in mind three major questions: (1) Where can or should litigation take place? (2) Which law will the court apply? and (3) Where can one enforce the resulting judgment? These three questions correspond to the three consecutive phases that comprise the process of judicial resolution of most multistate disputes, namely: (1) jurisdiction; (2) choice of law; and (3) recognition and enforcement of judgments.

7 The most authoritative information about ARATS can be found on the website for the Taiwan Affairs Office of the State Council of the People's Republic of China: http://www.gwytb.gov.cn (last visited Nov. 11, 2006).

tions with government funding. When a court in Taiwan needs to serve process on a defendant in China, the court in Taiwan sends to Taiwan's SEF both, (1) a letter asking for assistance, and (2) the process to be served. Taiwan's SEF then sends the process to be served as well as another letter written by SEF to China's ARATS. China's ARATS then sends a letter and the process to be served to an appropriate Chinese court. That Chinese court then serves that process on the defendant in China and the defendant is notified of the commencement of the suit. When a court in China needs to serve process on a defendant in Taiwan, the same process occurs, just in the opposite direction. This process suggests that even though process from a court is a public document "from a government," process sent through the ARATS-SEF channel, albeit "from a court" originally, becomes a private document "from a non-governmental source." After Taiwan's former President Lee Teng-hui announced in 1999 that the China/Taiwan relationship is a special state-to-state relationship, the negotiations between China's ARATS and Taiwan's SEF have never resumed. However, the SEF-ARATS channel continues to serve processes for courts. Between June 1991 and November 2005, a total of 34,705 processes were served between China and Taiwan.

ii. Choice of Law

Between 1949 and 1987, China and Taiwan had almost no interaction, whether in public or private sectors. The dawn of interaction in the private sector in 1987 led to a series of problems in the areas of contract, real property, succession, marriage, etc. For example, some people who got married first in China before 1949 later got married again in Taiwan after 1949, the year...
when China and Taiwan separated. There were also people who got married first in China before 1949, and, when their spouses were stuck in Taiwan after 1949, got married again in China. At first glance, these scenarios violated China’s and Taiwan’s prohibition against bigamy. Between 1949 and 1987 however, there was hardly any contact between China and Taiwan, which makes these scenarios distinguishable from the vices the prohibition against bigamy traditionally has been intended to prevent.\(^\text{12}\) In the immediate years after 1987, China and Taiwan had a dilemma. On the one hand, in order to uphold the integrity of law, China and Taiwan seemingly had to void all such instances of “bigamy.” On the other hand, there were so many instances of “bigamy” that the potential consequences of invalid marriages for unknowing spouses and children of the second marriage were grave. Similar dilemmas also arose in the areas of contract, real property, succession, and so on. Both China and Taiwan promulgated rules specific for such instances.

Except for those rules, China has not formally promulgated specific choice of law rules for its private law relationships with Taiwan. The lack of formal choice of law rules makes it appear that China does not have choice-of-law rules for its private law relationships with Taiwan. This appearance, however, might be misleading, given the existence of the five hundred seventy nine-page book, *The Taiwan-Related Trial Practice and Case Analyses*,\(^\text{13}\) published by the P.R.C. Publishing House for China’s People’s Court (renmin fayuan chuban she).

In this book, on pages twenty-five and twenty-six, Qi Shu-jie, Zhu Zhen-niu, and Chen Gao-run, a scholar and two judges, note that Taiwan’s law has not been given legitimacy by China’s People’s Court, and China’s Supreme People’s Court has not made any interpretation of this issue.\(^\text{14}\) They argue that some disputes in Taiwan-related economic relationships are difficult to be adju-

\(^{12}\) The point I want to convey in this sentence is: The prohibition against bigamy envisions a husband and a wife living together with no more spouses. In those “bigamy” scenarios in China and in Taiwan, however, what happened were just a husband and a wife living together with no additional spouses.

\(^{13}\) *THE TAIWAN-RELATED TRIAL PRACTICE AND CASE ANALYSES* (Zhu Zhenniu et al eds., 2001).

dicated correctly and effectively if Taiwan's relevant laws are not applied, citing the differences between China's and Taiwan's partnership law, and urge China's legislature or Supreme People's Court to respond as soon as possible.

On pages twenty-nine and thirty, however, Ho Pei-Ming, a Chinese judge, disagrees with the idea that Chinese judges should not apply Taiwan's law. He notes that an anonymous partnership is not provided for in the Chinese law but explicitly provided for in Taiwanese law, and argues that the anonymous partnership agreements made by investors from Taiwan based on their knowledge of Taiwan's law should be valid and protected by China's law, because of, as explained on page twenty-nine, the importance of "realistically" (shi shi qiu shi) ascertaining the litigation status (susong diwei or standing) of such anonymous partners.

On page fifty-two, Wu Hai-Yan and Xu Jun-jiang, two P.R.C. judges of the Xiamen Maritime Court (Xiamen haishi fayuan), assert that, because of China's one-China principle, Taiwan's law does not apply when the Xiamen Maritime Court adjudicates Taiwan-related cases. However, in Wu and Xu's next sentence, Wu and Xu say that the Xiamen Maritime Court recognizes (renke) the factual effects (shishi xiaoli) of Taiwan's law, and the example they use is that, the corporations formed according to Taiwan's law should be considered as legal persons. This approach of "Taiwan's law as facts," according to these two judges, is consistent with the spirit of China's Regulation on the Problems of Jurisdiction of Foreign-Related Civil and Commercial Litigation (zuigao renmin fayuan guanyu renmin fa yuarenke Taiwan diqu youguan fayuan minshi panjue de guiding), promulgated by China's Supreme People's Court and described earlier. Moreover, according to Wu and Xu, when the parties agree to apply Taiwan's law, if China's law does not regulate that specific problem, Taiwan's law on that problem is applicable as a local custom (difang guanli).

15 See He Pei-Ming, The Basic Situation and Several Legal Problems of Taiwan-Related Economic Trials (she tai jingji shenpan jiben qingkuang ji jige falu wenti), in THE TAIWAN-RELATED TRIAL PRACTICE AND CASE ANALYSES, supra note 13, at 28.

16 See Wu Hai-yan & Xu Jun-jiang, To Seriously Adjudicate Maritime Disputes Related to Taiwan With the Purpose of Facilitating Healthy Development of Cross-Strait Shipping (renzhen shenli she tai haishi anjian cujin liangye hangyuan jianbang fazhan), in THE TAIWAN-RELATED TRIAL PRACTICE AND CASE ANALYSES, supra note 13, at 48.
iii. Recognition and Enforcement of Judgments

In contrast, China has a clear rule recognizing and enforcing civil judgments rendered by Taiwan’s courts. China’s Supreme People’s Court promulgated the Regulation on the People’s Courts’ Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area, valid since May 26, 1998. Its Article Two says that parties of civil judgments of the relevant courts in the Taiwan area may apply for recognition in the People’s Courts provided that the parties’ (1) domicile, or (2) place of usual residence, or (3) place where the property enforced against is located, is in China.

B. Taiwan

Taiwan’s statute Law on the Relationship between the People in the Taiwan Area and the People in the Mainland Area (Taiwan diqu yu dalu diqu renmin guanxi tiaoli)\(^1\) governs the conflict of laws between China and Taiwan in Taiwan’s courts. Based in large part on this statute, below I will briefly introduce Taiwan’s conflict-of-law rules.

i. Jurisdiction

According to Lee Hou-Jen, a Taiwanese judge specializing in Taiwan’s conflict-of-law rules, the jurisdiction issue in civil matters between the mainland area and the Taiwan area should be determined according to the “reason of law” (fali) of the jurisdiction issue in foreign-related civil matters.\(^1\)

Such a vague statement warrants a more detailed explanation. In his treatise devoted to Taiwan’s conflict-of-law rules for China,

17 Taiwan’s Law on the Relationship Between the People in the Taiwan Area and the People in the Mainland Area became valid on July 31, 1991. The translation of the name of this statute from mandarin Chinese into English yields varying titles, such as The Statute Governing Relations Between People of the Areas of Taiwan and Mainland China, another being the Act Governing Relations Between Peoples of the Taiwan Area and the Mainland China, and lastly the Law on the Relationship Between the People in the Taiwan Area and the People in the Mainland Area. Irrespective of any differences in translation the Chinese text prevails. However, for clarity’s sake the text of this article will refer to the statute using the last of the translations listed above: Law on the Relationship Between the People in the Taiwan Area and the People in the Mainland Area.

from page 127 until the last three lines of page 141, Lee discusses how Taiwan’s law addresses the jurisdiction issue in foreign-related civil matters, without mentioning “the mainland area” (i.e., China) at all. Beginning at almost the end of page 141, Lee asks whether the concept (guannian) of jurisdiction discussed in his earlier pages can be applied to the relationship between the mainland area and the Taiwan area. Lee says the concept of jurisdiction discussed in his earlier pages allocates judicial affairs among nation-states, which is different from the relationship between the mainland area (i.e., China) and the Taiwan area, two areas within a single nation-state. However, Lee argues that the China/Taiwan context is similar to that between two nation-states because there has been no possibility for civil courts of the two areas (i.e., China and Taiwan) to transfer their cases to each other’s courts. As a result, the concept of jurisdiction in Taiwan’s private international law can be applied to the relationship between the mainland area and the Taiwan area. In other words, although Taiwan’s Law on the Relationship Between the People in the Taiwan Area and the People in the Mainland Area has no provision explicitly governing the jurisdiction issue, Lee asserts his own opinion that the jurisdiction issue in civil matters should be determined on the basis of the “reason of law” (fali) of the jurisdiction issue in foreign-related civil matters. What, after all, is the “reason of law” of the jurisdiction issue in foreign-related civil matters? It means the civil courts of the Taiwan area have jurisdiction if those courts have jurisdiction according to Taiwan’s civil procedure law, with the exceptions of honoring forum selection clauses and of the doctrine of forum non conveniens.

Then, how many Chinese people are plaintiffs or defendants in Taiwan’s civil courts? In 2004, in Taiwan’s district courts, 95 Chinese people were plaintiffs and 2,938 were defendants. From

19 See id. at 141 (“The problem is whether the concept of jurisdiction in earlier pages can be applied between the mainland area and the Taiwan area.”).
20 See BLACK’S LAW DICTIONARY 681 (8th ed. 2004) (defining “forum selection clause” as a “contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them.”).
21 See id. at 680 (providing that the term “forum non conveniens” shall be defined as “[t]he doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.”).
January to October in 2005, in Taiwan's district courts, 93 Chinese people were plaintiffs and 2,952 were defendants.

ii. Choice of Law

Taiwan's choice-of-law rules for cases between China and Taiwan are set out between Article 41 and Article 73 of Taiwan's Law on the Relationship Between the People in the Taiwan Area and the People in the Mainland Area. Ada Koon Hang Tse translates those articles into English in the Fall 1992 issue of the Journal of Chinese Law. Those articles are also translated into English by Taiwan's government, published on the website of Taiwan's Mainland Affairs Council.

iii. Recognition and Enforcement of Judgments

Article 74 of Taiwan's Law on the Relationship between the People in the Taiwan Area and the People in the Mainland Area governs recognition and enforcement of judgments and arbitral awards. It has three paragraphs. The first paragraph provides that “[t]o the extent that an irrevocable civil ruling or judgment, or arbitral award rendered in the Mainland Area is not contrary to the public order or good morals of the Taiwan Area, an application may be filed with a court for a ruling to recognize it.” The second paragraph provides that “[w]here any ruling or judgment, or award recognized by a court’s ruling as referred to in the preceding paragraph requires performance, it may serve as a writ of execution.”

The last paragraph provides that “[t]he preceding two paragraphs shall not apply until the time when for any irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area, an application may be filed with a court of the Mainland Area for a ruling to recognize it, or it may serve as a writ of execution in the Mainland Area.”

22 The Statute Governing Relations Between People of the Areas of Taiwan and Mainland China, 6 J. CHINESE L. 179 (1992).
23 The Taiwan Mainland Affairs Council's website can be found at http://www.mac.gov.tw (last visited on March 21, 2007).
25 Id.
26 Id.
74 passed, on July 31, 1992, unconditionally gave effect to China's civil judgments, but Taiwan added this reciprocity requirement on May 14, 1997. As introduced earlier in this article, China's Supreme People's Court on January 15, 1998 announced *The Provisions on the People's Courts Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan Province* (zuigao renmin fayuan guanyu renmin fayuan renke Taiwan diqu youguan fayuan minshi panjue de guiding), valid since May 26, 1998, to recognize and enforce the civil judgments rendered by Taiwan's courts. Taiwan's High Court (Taiwan gaodeng fayuan), on July 28, 1998, issued an official announcement that China's *The Provisions on the People's Courts Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan Province* fulfilled Taiwan's requirement for reciprocity.\(^{27}\)

According to the data provided by Taiwan's Mainland Affairs Council\(^{28}\) to Professor Rong-Chwan Chen,\(^{29}\) forty-four judgments rendered by Chinese courts ordering divorce were recognized by Taiwanese courts between 1998 and 2001. According to Rong-Chwan Chen, there were three cases in which the Chinese court-administered mediation records were not recognized by Taiwanese courts; they were not recognized because Taiwan's *Law on the Relationship Between the People in the Taiwan Area and the People in the Mainland Area* recognizes only “judgments rendered by Chinese courts”\(^{30}\) but not “Chinese court-administered mediation records.”\(^{31}\) Chen also cites a case in which a Taiwanese court did not recognize the judgment rendered by a Chinese court, because the party failed to pay the court fees required by that Taiwanese court in accordance with Taiwan's law.


\(^{28}\) The Mainland Affairs Council is a ministry-level office in the Taiwan government.


\(^{30}\) Id. at 291-92.

\(^{31}\) Id. at 291-92.
II. THEIR SIGNIFICANCE

Part I leads to this question: Why should anyone, with the exception of the practitioners in this area, care about those conflict of law rules between China and Taiwan? In other words, what is their significance?

I argue that the mere existence of such conflict of law rules between China and Taiwan challenges profoundly how sovereignty has been understood. According to Richard C. Bush, a prominent diplomat of the United States, “The sovereignty issue is at the core of the cross-Strait [i.e. China/Taiwan] dispute; unless it is resolved, the dispute will never be resolved. . . . Such a fundamental split cannot be papered over.” Part II discusses the importance of sovereignty from two different perspectives, the social and historical context and the pivotal role of sovereignty in traditional jurisprudence.

A. The Historical and Social Context

From this perspective, sovereignty is important both because it is the historical reason of the China/Taiwan dispute and because most people today still regard it as the crux of the China/Taiwan dispute.

Decades ago, the conflict between China and Taiwan was about the authority to rule and represent internationally the combined territory of China and Taiwan. At that time, Chinese and Taiwanese governments viewed each other as a rebel with whom no negotiations on an equal footing could be held, because they did not want to legitimize the rule of each other. Later, with the advent of Taiwan's democratization in the 1990s, the Taiwanese government increasingly demands to negotiate with the Chinese government on an equal footing. However, what China wants to
avoid is exactly a sovereign statehood for Taiwan, and China repeatedly and firmly rejected any proposal of government-to-government talks with Taiwan. Therefore, since 1949 up to date, China and Taiwan have not been able to figure out in what standing they should deal with each other, whether state-to-state, special state-to-state, center-to-province, center-to-Special Administrative Region (SAR), two warring governments striving for legitimacy, two parts of one single divided state aiming for future unification, etc. In addition, while no actual hostilities broke out after the 1950s, China and Taiwan continue to prepare themselves for the coming armed conflict between them.


The quote below poignantly demonstrates China's reluctance to have government-to-government talks with Taiwan:

As a general practice, even in a forum where both Beijing's and Taipei's representatives are present, Chinese officials have been unwilling to make contact with Taiwan officials, let alone hold formal talks on any subject. Beijing is wary that such formal contacts or talks may contribute to creating an impression that Taiwan is on par with China and may be used by Taiwan to boost its image or even expand its diplomatic space. China's diplomatic representatives are very cautious in dealing with their Taiwanese counterparts on the occasion when both are present. From the Chinese perspective, Taipei's relentless campaigns to expand its diplomatic space are independence-driven and thus China must ready itself to block such efforts. Beijing views Taipei's use of the WTO framework to regulate cross-strait economic relations as a pro-independence strategy and therefore insists that contacts between the two sides are internal matters not to be conducted under WTO auspices. The Chinese government was advised to prevent the island from using the WTO as a forum for contacts.

Id. at 99-100 (footnotes omitted).

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Id. at 99-100 (footnotes omitted).


The United States has an interest in peace within the Asia Pacific area, evidenced by the Taiwan Relations Act of 1979. Some analysts see Taiwan as one of the difficult, if not the most difficult, issues from which a Sino-American War is likely. See, e.g., Edward Friedman, *Reflecting Mirrors across the Taiwan Straits: American Perspectives on a China Threat, in THE CHINA THREAT: PERCEPTIONS, MYTHS AND REALITY* 65 (Herbert Yee & Ian Storey eds., Routledge 2002).
To be sure, there is substantial economic or societal interaction between China and Taiwan, and there are optimists who see promises for future peace and prosperity from current interdependence. Here are some basic facts: Since 2003, China has become Taiwan's largest export destination, while Taiwan has become China's fifth largest source of foreign direct investment. Indeed, “[a] total of $60 billion from Taiwan is invested on the mainland. Perhaps half a million ROC nationals reside in China, and Taiwanese make 3 million visits to the mainland every year.” Given these facts, optimists think the current social and economic interdependence between China and Taiwan will, over time, pacify their troubled relationship. On the other hand, pessimists are skeptical that nationalist passions could be tamed by the current level of interdependence, and caution that Taiwan’s economic dependency on China might endanger its security should there be a future conflict between the two.

Both optimists and pessimists see a mismatch between political conflict on the one hand, and economic and social interdependence on the other, and ponder which would prevail in the end. It is striking, however, that both optimists and pessimists, while taking note of all sorts of legal issues about sovereignty,
pay virtually no attention to vast and growing literature. I will quickly identify some important works in this literature. In Professor Dominique T.C. Wang’s 250-page book, *Analysis of Contemporary Cross-Strait Legal Problems*, sovereignty is discussed in only ten pages. Another book by the same author, *Analysis of the Law and Practice of Investing in the Market of Mainland China*, has 560 pages but no space for the China/Taiwan sovereignty dispute. In Professor Rong-Chwan Chen’s 457-page book *The Status Quo and Practice of the Cross-Strait Conflict of Laws*, sovereignty is discussed in only six pages. In the 579-page book *The Taiwan-Related Trial Practice and Case Analyses* published by China’s court, sovereignty is discussed only briefly. Also, in the 449-page book *Cross-Strait Civil Relations*

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Statute and Trial Practice by Lee Hou-Jen, a judge in Taiwan, sovereignty is discussed only in passing.\(^\text{45}\)

This neglect cannot be explained by the historical and social context alone. This neglect has to do with the pivotal role of sovereignty in traditional jurisprudence.

B. The Pivotal Role of Sovereignty in Traditional Jurisprudence

What I call as traditional jurisprudence dominates the Chinese and Taiwanese policymaking prior to 1987, the dawn of the China/Taiwan interdependence. Besides, to a large extent, traditional jurisprudence is still relevant for today's world, given the frequency the word "sovereignty" appears on legal and policy documents, mass media and academic journals.

Scholars explain the pivotal role of sovereignty in different ways.\(^\text{46}\) First of all, sovereignty is essential in defining what is "international." Sovereign

\(^{45}\) Lee Hou-Jen, Cross-Strait Civil Relations Statute and Trial Practice 142-43 (1994).

\(^{46}\) See, e.g., Christoph Schreuer, The Waning of the Sovereign State: Towards a New Paradigm for International Law?, 4 EUR. J. INT'L L. 447, 448 (1993). The author states:

The sovereign State as the prototype of international actor has become the universal standard. Contemporary international law presupposes this structure of co-equal sovereign States. The international community's constitutive set-up is dominated by it. The classical sources of international law depend on the interaction of States in the form of treaties and customary law. Diplomatic relations are conducted between States. Official arenas, like international organizations and international courts, are largely reserved to States. The protection of individual rights still depends mostly on diplomatic protection through State representatives. Central concepts of international law, like sovereignty, territorial integrity, non-intervention, self-defense or permanent sovereignty over natural resources all rely on the exclusive or dominant role of the State.


This traditional conceptual framework is elsewhere termed "methodological nationalism":

Methodological nationalism considers nation-states as the basic unit of all politics. It assumes that humankind is naturally distributed among a limited number of nations, which organize themselves internally as nation-states and delimit themselves externally from other nation-states. In addition, it assumes that the external delimitation and the subsequent competition between nation-states are the most fundamental concepts of political organization. . . . Methodological nationalism sees national self-determination as ontologically given and as the most important cleavage in the political sphere. This double premise pre-determines empirical observations, as can be seen for example in the case of aggregate statistics, which are almost exclusively categorized in national terms. It locates and restricts the political sphere to the national level. (footnote omitted)

Michael Zürn, From Interdependence to Globalization, in HANDBOOK OF INTERNATIONAL RELATIONS 235, 248 (Walter Carlsnaes et al. eds., 2002) (citing both Ulrich Beck, Translegale Herrschaft (2000), and Anthony D. Smith, Nationalism in the Twentieth Century (1979)).
eignty, the standing upon which entities in the international plane interact, demarcates the domestic plane from the international plane. “International law is a body of rules and principles governing relations between sovereign States.” Besides, because sovereignty is the line demarcating the two spheres, there is no grey area and no other word to describe the non-existent grey area.

Moreover, only after ascertaining whether there is any existing law can anyone ascertain whether that law is followed or should be changed. As a result, conceptually, the first step to deal with any legal problem is to ascertain whether there is any existing international or domestic law on point. If there is no existing domestic or international law on that issue, the next step is to ascertain whether the particular problem requires national or international responses. If a national response is needed, then a national legal process is followed to produce a statute from the legislature, an administrative order from the executive, or a verdict from the judiciary. If an international response is needed, then the representatives of sovereign states meet to facilitate concerted action, whether in the form of unilateral but harmonized national responses or multilateral treaties. As a conse-


49 It is true that some scholars take note of alternatives such as trusteeships and associated statehood, but such options have, so far, generally been considered “alternatives” to the more common statehood.

50 It should be noted that the theory I am describing differs from the popular view represented in the following quote:

Two world views collide: the traditional view of the world consisting of sharply distinguished compartments (the national States) and a view of an interdependent world society with common values and with problems that can only be solved through common efforts and with respect for universal, hence supranational, legal rules.


Kooijmans set up a contrast between, on the one hand, a world consisting of sharply distinguished compartments, and, on the other hand, a world society of common values and common efforts to solve common problems. According to the theory I am describing in this paragraph, however, this contrast is much less stark than how Kooijmans put it. According to the theory I am describing, the common efforts are, and should be, the cooperation among nation-states, because the question of whether the values and problems are common is considered equivalent to the question of whether nation-states have common values and common problems. This is because nation-states are the only actors on the international plane, according to that theory.

quence, to determine which process to follow when confronting a legal problem, almost inevitably requires China, Taiwan, and other international organizations or private groups to take a position on Taiwan’s legal status in international law. For example, should the governments in the world perceive and/or treat Taiwan as a province of China or as a sovereign state? Does international law govern the relations between China and Taiwan? Or, should China’s domestic law apply to the relations between China and Taiwan because Taiwan is or should become a part of China? Examples abound.


Two examples are handy. The first is how the United Nations responded to the earthquake in Taiwan in 1999:

When a strong earthquake struck the central island of Taiwan in 1999, while people lay buried under the rubble, [Kofi] Annan said that the United Nations had to wait for the approval of the People’s Republic of China (“P.R.C.”) before sending a disaster assessment team to what he called “the Taiwan Province of China.”


The second is the “panda problem” between China and Taiwan. When China wanted to send a pair of pandas to Taiwan in 2005, Taiwan wanted to follow the procedure provided in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The proposal to follow the CITES was rejected by China because China did not want to give Taiwan the appearance of a sovereign state, to which the international law is applicable. Should the Convention on International Trade in Endangered Species (CITES) apply? It seems that there are only two answers available. China does not want CITES to apply, but the proponents of Taiwanese independence do want CITES to apply. The New York Times reported on the event:

Taiwanese authorities expressed misgivings about accepting two pandas that China offered the island at the end of a visit to the mainland by Lien Chan, the chairman of the opposition Nationalist Party. Agriculture officials have called
In other words, whether China and Taiwan are, or should be, united as a nation-state or separated as two nation-states determines how China and Taiwan should handle all, not simply some, of the cross-border legal problems between them. These two questions are related as two steps in a single process of logical reasoning and there is only a single body of law governing these two questions.55

Pundits know that the first step of the two-step process—determining whether China and Taiwan are or should be united as a nation-state or separated as two nation-states—is both explosive and impractical, both right now and in the foreseeable future. China denounces the “international” choice and threatens to use force if necessary. On the other hand, depending on which political party wins the presidential election, Taiwan either (1) disagrees with China’s contention that China’s Beijing government can represent Taiwan internationally,66 or (2) increasingly denounces the “national” choice.57 The disagreement between China and Taiwan is deep.

Then, how is it possible to establish any of those conflict of law rules between China and Taiwan, as set out in Part I of this article? This difficult question, a descriptive question of legal history, profoundly challenges the pivotal role of sovereignty in traditional jurisprudence.

In order to answer this descriptive question, I choose to focus on the conflict of law rules in this article, because this area of law is where I can find most sophisticated legal arguments. Part III will discuss two much-cited academic works in support of conflict of law rules between China and Taiwan.

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55 It is the aim of this paper to explain how the two steps of a single process of logical reasoning gradually become two different bodies of law unrelated to each other.

56 Here I refer to the position held by the Democratic Progress Party and the Taiwanese Independence Movement, that Taiwan should be a nation-state or sovereign state alongside, but not part of, of China. For the Taiwanese Independence Movement, see, for example, MEI-LING T. WANG, THE DUST THAT NEVER SETTLES: THE TAIWAN INDEPENDENCE CAMPAIGN AND U.S.-CHINA RELATIONS (U. Press Am. 1999).
III. THEORIES FOR CONFLICT OF LAW RULES BETWEEN CHINA AND TAIWAN

A. Huang Jin

Professor Huang Jin is a professor of law at Wuhan University, China. His 261-page treatise, *Research on the Inter-regional Conflict of Laws*, published in 1991, is a book cited by many scholars in China pioneering the study of “inter-regional conflict of laws.”

Nomenclature is at the core of this issue. According to Lea Brilmayer and Jack Goldsmith, “conflict of laws” and “private international law” are two phrases commonly and properly used interchangeably as labels for the same single topic. According to another leading casebook, however, “the term Conflict of Laws, which was coined in Europe in the middle ages, has prevailed in the United States and a few other common jurisdictions. . . . Ironically, the term Private International Law, which was coined in the United States, has prevailed in Europe and the rest of the world.” In other words, “private international law” is how that discipline was traditionally understood in China and Taiwan, but the word “international” in the traditional label, “private international law,” as set out in Part II, implicates the sovereignty dispute between China and Taiwan. Then, what should be done to justify the conflict of law rules between China and Taiwan?

This matter of justification can be perceived as two questions. The first question is whether China and Taiwan are two nation-states or one single nation-state. The second question is whether China and Taiwan should have conflict of law rules for their bilateral relationship. If sovereignty is as important as described

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60 Symeonides, *supra* note 6, at 6. It should be noted that the authors think the two labels “conflict of laws” and “private international law” carry different connotations. However, the authors also think the two labels describe the same subject matter, as Brilmayer and Goldsmith do. In contrast, as explained in more detail later, Huang thinks there are two different subject matters, though the two subject matters are twins.
in Part II, then the answer to the second question should depend on the answer to the first question.

How does Huang answer these questions? Huang unambiguously thinks that China and Taiwan are one single nation-state, but at the same time argues that China and Taiwan should have conflict of law rules for their bilateral relationship. Huang’s position on the first question has never been controversial in China, but his position on the second question has been controversial. This is because even if Deng Xiao-Ping’s one-country-two-systems formula gives Huang’s position political support, theoretical support in the legal academia is lacking. Rather, it is Huang that has to provide theoretical support to Deng Xiao-Ping’s one-country-two-systems formula, an unconventional idea at that time in China, both inside and outside the legal academia. Huang succeeded, and today China and Taiwan have conflict of law rules to govern their bilateral relationship, which was unconventional or unthinkable in China at the time Huang wrote his book. Therefore, considering his book should be a good starting point for our inquiry.

Professor Huang begins his book with an extended discussion of the phrase Fa-Yu (legal area). According to him, Fa-Yu is roughly equivalent to “territorium legis” in Latin, “Rechtsgebiet” in German, and “legal unit,” “legal region” and “territorial legal unit” in English. With the exception of “legal unit,” he says, these expressions are conceptually narrower than the phrase Fa-Yu that he understands. He defines Fa-Yu as the specific scope in which a unique legal system applies. Further, he identifies two characteristics: (1) Fa-Yu has a unique legal system; (2) Fa-Yu is of a specific scope, which might be (1) spatial, (2) with respect to its members, or (3) temporal. If the specific scope is spatial, then the Fa-Yu is Shu-Di-Shin-Fa-Yu, i.e., a specific spatial area with a unique legal system. He mentions several examples

61 Huang Jin cites Professors Han De-Pei and Lee Shuan-Yuan’s article. See HUANG JIN, supra note 58. Here I refer to the lack of theoretical support in traditional jurisprudence, as described in Part II.

62 Later in the book, between pages 37 and 43, Huang lists five common characteristics of the Shu-Di-Shin-Fa-Yu (spatial Fa-Yu) within a single nation-state (Guo-Jia): (1) The legal systems of the Fa-Yu’s within that nation-state have to be different. (2) The Fa-Yu’s have to be connected to specific areas, or territorial. (3) The Fa-Yu’s should be equal in status, or there will be no conflict of laws because the superior law would prevail. (4) The legal systems of Shu-Di-Shin-Fa-Yu’s lack sovereignty-ness (Ju-Quan-Shin). Huang does not cite any other scholar for his point. He defines sovereignty-ness as the connectedness between the legal system of a unitary state and the nation-state sovereignty (Guo-Jia-Ju-
of Shu-Di-Shin-Fa-Yu: the member states of the Organization of American States, the Soviet Republics, the Republics of the former Yugoslavia, and the United Kingdom's England, Scotland, and Northern Ireland. The existence of Fa-Yu, Huang writes, implies that there are many differences among the legal systems but it does not mean these differences are "conflicts." From the perspective of the conflict of civil and commercial laws, three more conditions must be met before a conflict of laws arises: (1) People and members of the different Fa-Yu's interact and build legal relationships, (2) each Fa-Yu recognizes outsiders' civil legal status within that Fa-Yu, (3) each Fa-Yu recognizes the effects of the legal system of other Fa-Yu's outside those Fa-Yu's. In the contemporary world, Huang observes, people and members of the different Fa-Yu's interact more frequently than the old days, and even those countries that were in long-time seclusion have to face this reality and open their doors to outsiders. In addition, Huang continues, each Fa-Yu, in order to facilitate and promote interaction between their own people or members and the people or members of other Fa-Yu's, have to recognize outsiders' civil legal status within that Fa-Yu under certain conditions. Huang then turns to the third and last condition that each Fa-Yu recognizes the effects of the legal system of other Fa-Yu's. Huang asserts that there is a latent conflict of laws among the public or mandatory law of each Fa-Yu, that each Fa-Yu traditionally has a latent rule that the law of the forum governs the problems of public or mandatory law, and that the latent rule in the tradition of each Fa-Yu denies the effects of the legal system of other Fa-Yu's outside those Fa-Yu's, thereby eliminating this kind of conflict of laws.  

So far two intriguing points should be noted. First, Huang does not use sovereignty or jurisdiction as the basic unit of Quan). According to this definition, Huang states that Shu-Di-Shin-Fa-Yu's are under nation-state sovereignty, that they are components of a single nation-state, they are not themselves sovereigns, and that therefore the legal system of Shu-Di-Shin-Fa-Yu's lack sovereignty-ness. He also states that the lack of sovereignty-ness leads to the limits the legislations of central governments can impose on each Shu-Di-Shin-Fa-Yu, and to the conclusion that the conflict of laws among Shu-Di-Shin-Fa-Yu's within a single nation-state is inter-regional conflict of laws, instead of international conflict of laws. (5) Each Shu-Di-Shin-Fa-Yu is under the sovereignty of its nation-state, and therefore inevitably subject to the limits imposed by the treaties signed and legislations made by the central government.

63 See HUANG JIN, supra note 58, at 37-43.
analysis, which is unconventional and therefore difficult. This difficulty makes it necessary for Huang to explain the concept of Fa-Yu in a highly abstract fashion, comparing similar phrases in several languages, which turns out to be an advantage—an academic, as opposed to a political, tone. Second, Huang is somewhat ambivalent about whether to limit himself to civil and commercial laws. At one point Huang writes that “from the perspective of the conflict of civil and commercial laws, three more conditions must be met before a conflict of law arises” and discusses “outsiders’ civil legal status” only, but later he asserts that “there is a latent conflict of laws among the public or mandatory law of each Fa-Yu.” To be sure, Huang does not attempt to deal with the conflict of public or mandatory laws, but this argument, that conflict of laws is a phenomenon in both the area of civil or commercial law and the area of public or mandatory law, makes more persuasive his claim that conflict of laws is a reality that must be faced at the time he writes.

Then, Huang asserts that Fa-Yu is specific to its scope, which might be (1) spatial, (2) with respect to its members, or (3) temporal, and that accordingly there are three kinds of conflict of laws: (1) spatial, (2) with respect to the members of that Fa-Yu, and (3) temporal. Huang defines his subject of study as concerning only the spatial conflict of laws, also known as Shu-Di-Shin-Fa-Yu. Huang then divides the spatial conflict of laws into three kinds, among different regional international organizations, among different nation-states (guojia), and among the different nation and state. Huang observes that, in common law countries such as the United Kingdom and the United States, the law of the conflict of laws, albeit with slight differences, solves both international and inter-regional conflict of laws. And as a result, scholars in countries such as the United Kingdom and the United States study the law of the conflict of laws without differentiating between international and inter-regional private law. Under this circumstance, they do not “like” to use “law district” to describe the Fa-Yu’s within a nation-state, they more often use “country” or “state” to describe Fa-Yu. In order to support his claim, Huang cites the statutes of the United Kingdom in DICEY AND MORRIS ON THE CONFLICT OF LAWS (9th ed., 1973) and the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

See HUANG JIN, supra note 58, at 1. Also, Huang uses phrases like “[in the contemporary world], “the old days”, “have to face the reality,” to frame in a less political way the policy question whether to allow cross-border interaction. See id. at 3.
CONFLICT OF LAW RULES—CHINA AND TAIWAN

regions within a single nation-state. Huang states that, under usual or ordinary circumstances, a nation-state is an independent Shu-Di-Shin-Fa-Yu, but there are several Shu-Di-Shin-Fa-Yu's with different legal systems in some nation-states, for various historical, practical, and external or internal reasons. Huang then distinguishes the spatial conflict of laws among different nation-states (guojia) from the spatial conflict of laws among the different regions within a single nation-state. According to Huang, the spatial conflict of laws among different nation-states is the subject matter for private international law, also known as international conflict of laws, while the spatial conflict of laws among the different regions within a single nation-state is the subject matter of inter-regional conflict of laws, also known as private inter-regional law. After distinguishing three kinds of the spatial conflict of laws, Huang chooses as his subject of study inter-regional conflict of laws, also known as private inter-regional law. 70

In the last paragraph Huang introduces the idea of private inter-regional law into the China/Taiwan context. At the beginning of his explanation, Huang provides his own definition of Fa-Yu, and then squares his idea of Fa-Yu with the traditional sovereignty norm, producing three kinds of spatial conflicts of laws. Huang concedes that “under usual or ordinary circumstances, a nation-state is an independent Shu-Di-Shin-Fa-Yu”, but he shortly adds that “there are several Shu-Di-Shin-Fa-Yu's with different legal systems in some nation-states, for various historical or practical, and external or internal reasons”. 71 To be sure, in Chapter Two, Huang lists ten “various historical or practical, and external or internal reasons”, 72 but I presume that it is not his concern. Nor is his goal to explain the usual or ordinary circumstances under which a nation-state is an independent Shu-Di-Shin-Fa-Yu. Rather, he accepts the bright-line traditional sovereignty norm as exogenously given, while at the same time, arguing that conflict of laws is a subject matter with little, or no, regard to the traditional sovereignty norm. According to him, there are three kinds of spatial conflicts of laws encompassing all the

70 See id. at 4.
71 See id.
72 See id. at 15-24.
logically possible matches between Fa-Yu and nation-state. He carefully and unambiguously distinguishes private international law from private inter-regional law based on the premise that conflict of laws exists not only between nation-states, but also within a single nation-state. This premise is intriguing for a subtle but important reason. Huang asserts it in the neutral tone of "there are", describing it and at the same time asserting the existence of something. Conflict of law rules are not a concrete thing, and therefore the existence of conflict of law rules for the interstate legal disputes in the United States, for example, itself does not logically lead to the descriptive existence or desirability of conflict of law rules for the legal disputes in another nation-state, such as China.

It should be noted that I am not taking issue with Huang's conclusion that conflict of laws is a subject matter with little or no regard to the traditional sovereignty norm. In fact, Huang's conclusion indeed has support from well-regarded scholars. For example, a leading casebook on conflict of laws so defines its subject of study:

The law of Conflict of Laws is that branch of the law that aspires to provide solutions to international or interstate legal disputes between persons or entities other than countries or states as such. A dispute is considered international or interstate if one or more of its constituent elements are connected with more than one country or state. These elements may be the events that give rise to the dispute, the location of its object, or the nationality, citizenship, domicile, residence, or other affiliation of the parties. Thus a contract dispute between citizens of different countries, or domiciliaries or residents of different states, or a property dispute between residents of one state regarding assets situated in another state, or a tort resulting from conduct occurring in one state and

The three logically possible matches between Fa-Yu and nation-state are: First, that the conflict of laws arise between two Fa-Yu's within a nation-state, or secondly, the conflict of laws arise between two Fa-Yu's which are simultaneously two nation-states, or thirdly, the conflict of laws arise between two Fa-Yu's, at least one of which encompasses two or more nation-states. See id. at 4.

Here I am not concerned with whether China has always been, is, or should be, a nation-state. Here I am simply stating the prevailing view in China that China is a nation-state.
causing injury in another state are all examples of disputes that fall within the scope of this subject.\textsuperscript{75}

In the footnote after the word "state" quoted above, a further definition for that word is provided:

Hereafter the word 'state' is used to denote any country or a territorial subdivision of a country, such as a state or province that has its own system of private law. Thus, the United States, a state of the United States, a Canadian province, or France are 'states' within the meaning of this definition. Cases involving the laws of more than one state are referred to hereafter as 'multistate' cases.\textsuperscript{76}

In my view, this casebook supports Huang's argument that conflict of laws is a subject matter with little or no regard for the traditional sovereignty norm. Against the deeply entrenched traditional sovereignty norm in China, however, Huang cannot afford to do what Symeon C. Symeonides, Wendy Collins Perdue, and Arthur T. Von Mehren do in that casebook—to treat "international" and "interstate" as interchangeable using the word "or," and then adding "any country or any territorial subdivision" in a footnote.\textsuperscript{77} Huang has to do a lot of work to accomplish what scholars elsewhere may deem easy to deal with.

Huang's argument that conflict of laws has little regard to sovereignty has significant consequences. As noted earlier, according to traditional jurisprudence basically two questions are involved. The first question is whether China and Taiwan are, and/or should be, two nation-states or one single nation-state. The second question is whether China and Taiwan should have conflict of law rules for their bilateral relationship. Although Huang's overall direction in 1991 was to adapt private international law to circumstances under China's one-China principle, Huang accomplished more: Conflict of laws is a subject matter with little or no regard to the traditional sovereignty norm, which matches Tung-Pi Chen's theory discussed in the next section. This was a major accomplishment because it provided necessary stability in the conflict of law rules throughout the ups and downs in the overall China/Taiwan relationship.

\textsuperscript{75} SYMEONIDES, supra note 6, at 1. To be sure, this is used as "a tentative definition" by the authors, but I think this tentative definition satisfies my immediate purpose.

\textsuperscript{76} Id.

\textsuperscript{77} Id.
It is not difficult to see that Huang's overall goal in 1991 was to adapt private international law to circumstances under China's one-China principle. Although inter-regional conflict of laws starts to appear in Huang's book on page four, the remainder of Huang's 261-page book is not exclusively devoted to inter-regional conflict of laws. Indeed, on page five of Huang's book, he both discusses inter-regional conflict of laws in other countries and compares inter-regional conflict of laws with other areas of law. Additionally on page five, however, Huang observes that, throughout the history of conflict of laws, private international law and inter-regional private law are similar to twins, which, according to him, means that the development of any one of the two is closely connected to the development of the other.78

This twin relationship is so close that Huang defines private inter-regional law by reference to the definition of private international law. On page five, Huang begins to define the subject matter of inter-regional conflict of laws by considering the subject matter of private international law in common law jurisdictions, civil law jurisdictions, the Soviet Union and other Eastern European countries. On page six, Huang admits that both (1) jurisdiction and (2) recognition and enforcement of judgments made by other Fa-Yu's are closely connected to inter-regional private law. However, Huang asserts that the rules about jurisdiction, recognition and enforcement of judgments made by other Fa-Yu's are procedural law, and since procedural law is in the area of public law, and therefore it is, strictly speaking, not part of inter-regional private law.79

To be sure, defining private inter-regional law by private international law risks making private inter-regional law appear unduly dependent on private international law, and what Huang does immediately is to turn this relationship of dependency on its head. On page seven Huang asserts that the "theory of private international law" before the eighteenth century was principally a theory of inter-regional conflict of laws. Huang cites, among other people, Bartolus of Sassoferrato (1313-1357) from Italy, and Ulricus Huber (1624-1694) from the Netherlands, as the prime examples of the "inter-regional" origin of private international law.

78 See HUANG JIN, supra note 58, at 5.
79 In so doing, Huang successfully downplays governments' role in so-called private law. See id. at 6.
law. Huang cites Albert A. Ehrenzweig, a professor of law at University of California, Berkeley, who said that, throughout the history of private international law, international conflicts and inter-regional conflicts have always been intertwined. Hence Huang draws the inference that studying inter-regional conflict of laws is beneficial for "us scholars of private international law" to understand more deeply the historical development of private international law and the development of the theory of private international law.

After stating the importance of private inter-regional law, Huang continues on page nine to page eleven to assert that foreign scholars pay more attention to inter-regional private law than to private international law, by citing scholars in Russia, the United States, Australia, Canada, Italy, Switzerland, Germany, Yugoslavia, and Austria. On pages eleven and twelve Huang laments that Chinese scholars have long lagged behind foreign scholars in the study of private international law, which, combined with the fact that there has never been any inter-regional conflict of laws problems in China, leads to the sparse attention paid to the sister subject of private international law—inter-regional private law.

On pages twelve and thirteen, Huang adds "China's reality needs and waits for deeper research on inter-regional private law." He cites the one-country-two-system formula, and the outlook that Hong Kong and Macau would be governed according to that formula beginning in 1997 and 1999. Although Huang is uncertain when Taiwan would follow in the footsteps of Hong Kong and Macau, he optimistically thinks it is just a matter of time. As a result, Huang, writing in 1991, predicted that China would increasingly become a country with several Fa-Yu's beginning in 1997. Huang cites Professor Han De-Pei and Professor

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80 Albert A. Ehrenzweig, Interstate and International Conflicts Law: A Plea for Segrega-
tion, 41 MINN. L. REV. 717, 717 (1957) (stating that American courts and writers assumed similar principles governing international and interstate transactions).
81 HUANG JIN, supra note 58, at 8.
83 HUANG JIN, supra note 58, at 11-12.
84 Id. at 12-13.
Lee Shuan-Yuan's 1983 article,\(^{85}\) which called for more research on the conflict of laws due to the forecasted need to resolve the conflict of laws arising among the different regions within China after 1997.

Huang's Chapter Two discusses "Multiple Fa-Yu's Countries." Huang cites ten reasons for the emergence of countries with multiple Fa-Yu's throughout history. On page twenty-two, Huang discusses the "unification of divided countries" as one of such reasons, and puts the "future unification between mainland China and Taiwan" as one of the examples, along with the divided Germany and Korea after the Second World War. Huang then purports to offer the taxonomy of "Multiple-Jurisdiction (Fa-Yu) Countries" according to the ten reasons for their emergence, after describing taxonomies offered by scholars such as Edoardo Vitta,\(^{86}\) Ronald Harry Graveson,\(^{87}\) István Szászy,\(^{88}\) and Otto Kahn-Freund.\(^{89}\)

It is useful to go on to consider Huang's whole book, but I should stop here and leave the rest to future research. In sum, we can draw two conclusions.

First, through the efforts pioneered by Huang, the concept of "private inter-regional law" (qu ji si fa) was introduced to China and Taiwan. Besides, Huang successfully establishes in the China/Taiwan context the irrelevance between the conflict of law rules and traditional sovereignty norm, even though Huang himself unambiguously thinks that China and Taiwan are two parts of a single nation-state, i.e., China.

Second, Huang draws on foreign examples and foreign scholarly work in order to help him establish that irrelevance. He gains an important advantage in his purportedly academic endeavor pushing the front of human knowledge. In so doing, he avoids criticizing China's and Taiwan's decades long policies, but

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\(^{85}\) Id. Huang cites an article written in Chinese: Han De-pei & Li Shuang-yuan, The Research on Conflict of Laws Should be Emphasized (yinggaizhongshidui chongtufa de yanjiu), J. WUHAN (wuhan daxue xuebao), No. 6, p. 59 (1983).

\(^{86}\) Vitta, supra note 82.


\(^{88}\) ISTVÁN SZÁSZY, CONFLICT OF LAWS IN THE WESTERN, SOCIALIST AND DEVELOPING COUNTRIES (A.W. Sijthoff-Leiden 1974).

\(^{89}\) OTTO KAHN-FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW (Sijthoff 1976).
no doubt he supports China's new policy toward Taiwan with his latest academic research in the area of private inter-regional law.

B. Tung-Pi Chen

Another important work on the relationship between sovereignty and private international law is Bridge Across the Formosa Strait: Private Law Relations Between Taiwan and the Mainland China, a law review article published in 1990 by Professor Tung-Pi Chen, a professor of law at Queen's University, Canada, purporting to explain "a legal framework for private relations." As set out earlier, according to traditional jurisprudence, basically there are two questions: The first question is whether China and Taiwan are two nation-states or one single nation-state. The second question is whether China and Taiwan should have conflict of law rules for their bilateral relationship. As also discussed earlier, although Huang unambiguously thinks that China and Taiwan are one single nation-state, he argues that China and Taiwan should have conflict of law rules for their bilateral relationship. In contrast, Chen devises a different research question. In the section titled as "a general theory," Chen defines his question as "how the rival regimes can justify and build a legal framework for private relationships between their people in an environment of non-recognition and of official hostility." In other words, the question whether China and Taiwan are two nation-states or one single nation-state, according to Chen, should have no bearing on the question whether China and Taiwan should have conflict of law rules for their bilateral relationship. The following pages try to describe how Chen arrives at his conclusion.

Chen begins with the view of the orthodox international law scholarship that both an unrecognized government and its acts are null. However, Chen also finds a modern alternative accord-

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90 Chen, supra note 3.
91 Id. at 106.
92 Id. at 106.
93 Id. at 106.
94 Id. at 106. Chen introduces his idea in this paragraph:
Orthodox international law scholarship holds that 'no judicial existence can be attributed to an unrecognized government. . . . [B]oth [an] unrecognized government and its acts are a nullity.' By the strictest application of this theory,
ing to which recognition of foreign law in private international law is "largely independent of recognition of foreign governments in public international law." Chen builds an orthodox/modern contrast, but purports to be only finding, rather than building, such an orthodox/modern contrast. This is a smart strategy. On the one hand, the orthodox/modern contrast does not deny legitimacy to the traditional jurisprudence in which sovereignty is pivotal. In fact, Chen calls traditional jurisprudence "orthodox." On the other hand, the modern label implies his point of view that the needs of the late 1980s do not fit the orthodoxy.

Then, Chen lists five reasons why the modern alternative, in his view, should prevail over orthodox international law scholarship. Each of the five reasons should be described and discussed.

Chen's first reason is that the modern alternative promotes fairness by acknowledging reality. However, the emphasis on reality, and thereby fairness, might be a misplaced attack on the

an unrecognized government, its agents, and its legal creations have no legal status, capacity, or diplomatic immunity, and the judgments of its courts are unenforceable in the country that does not recognize the government.

(qoting H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 145-47 (1947)).

Chen cites A. ANTON, PRIVATE INTERNATIONAL LAW 82-85 (1967), for the paragraph cited below:

There is a modern alternative to the orthodox view. According to the newer theory, recognition of foreign law in private international law is largely independent of recognition of foreign governments in public international law. Public recognition is an executive act, influenced by moral approval of foreign governments and constrained by the vagaries of international politics. Recognition in private international law, whether through a judicial, administrative, or legislative act, is influenced by considerations of fairness to the parties and by a desire to facilitate private relations. Since the fundamental aims of public and private recognition are different, they can operate independently. Thus, the modern theory holds that the capacity, laws, and immunity of a firmly established but unrecognized foreign government can be given full legal effect in the domestic jurisdiction, provided of course that such recognition is not contrary to the public policy of the forum.

Chen, supra note 3, at 107 (footnotes omitted).

Chen's entire argument on this issue is quoted in full here:

The overwhelming weight of legal scholarship over the last quarter century supports the latter theory. By acknowledging reality, the theory promotes fairness to the parties. The orthodox view presumes that the judicial, administrative, and executive branches must all speak with one voice on matters of recognition. But the executive itself will often hold an implicit policy of split recognition: it may allow or even encourage private relations with de facto foreign governments while international political realities prevent it from extending official recognition. In such a situation, the 'one voice' argument in fact supports the modern view. The courts will conflict with the executive unless they recognize the latter's dual policy. In any case, dangers of inconsistency on matters of recognition are minimized by looking to the public policy of the jurisdiction.

Id. at 107-08 (footnote omitted).
orthodox view. Sir Lauterpacht, the exponent of the orthodox view Chen describes, of course took note of the divergence between judicial existence and actual existence, or he would not have written “no judicial existence can be attributed to an unrecognized government. . . . [B]oth [an] unrecognized government and its acts are nullity.”97 The real question Sir Lauterpacht and the traditional theory addressed is: which one of the two—judicial existence and actual existence—should be the standard by which governments judge the validity of the acts of the governments whose legitimacy they do not recognize? Choosing actual existence, instead of judicial existence, might promote fairness to the parties by “acknowledging reality”, but then judicial existence loses its importance as a concept. In other words, Chen fundamentally doubts the value of judicial existence as a concept.98

Chen’s second reason is that, even if the court and the executive need to speak with only one voice for foreign affairs, as the orthodox international law scholarship posits, the court should nonetheless adopt the modern alternative when the executive begins to hold “an implicit policy of split recognition,” because the executive’s implicit policy of split recognition, coupled with the need for the court and the executive to speak with only one voice, should make the court follow, rather than overrule, the executive’s implicit policy of split recognition.99

In my view, Chen here invented two legal doctrines. First of all, if I am not mistaken, the possibility of such “an implicit policy of split recognition”100 as a viable option is Chen’s own invention, itself breaking from the orthodox international law scholarship Chen describes. If recognition can possibly be “split,” then sovereignty is no longer an either-or, all-or-nothing matter, which turns the orthodox international law scholarship upside down. Just as it does not make much sense to compare an apple with an ox, it does not make much sense to compare the orthodoxy with a modern alternative of a fundamentally different nature. Secondly, even if recognition can be split, Chen seems to jump to the conclusion that the court should follow, rather than

97 Id. at 106.
98 Id. at 108 (supposing that “[t]he courts will conflict with the executive unless they recognize the latter’s dual policy.”).
99 Id.
100 Id.
question, the executive’s “implicit” judgment whether and when to hold a policy of split recognition, which is again Chen’s own invention running against orthodox international law scholarship. As a whole, Chen invented two doctrines to turn the speak-with-one-voice argument back against the orthodox international law scholarship.

Chen’s third reason is that the doctrine of necessity, based on the 1970 Namibia case by the International Court of Justice, distinguishes ministerial tasks from political acts, and argues that the ministerial tasks done by unrecognized governments should be valid. It should be noted, however, that Chen’s third reason moves from the original question—whether acts of unrecognized governments should be nullities—to a more general but only remotely relevant, question—whether it is desirable to harm the interests of the innocent inhabitants by denying legal effects to illegal and invalid government acts. The question Chen asks here—whether illegal and invalid government acts should harm the interests of the innocent inhabitants—is relevant only because of the consequences, i.e., declared nullities. However, consequence-oriented thinking is closer to policy analysis as opposed to legal analysis, if legal analysis should include only legal doctrines, syllogisms, and the like, as Chen purports to do in his article.

101 Id. at 107. Chen’s argument is here quoted in its entirety:

Furthermore, the modern theory is solidly grounded in the well-known doctrine of necessity in private international law. This doctrine was first described in the 17th century by Hugo Grotius, the father of international law. The doctrine of necessity now holds that acts done by an unlawful regime to preserve order and good government should be obeyed by citizens and should be enforced by the courts. It forms the theoretical foundation of international practice and has been approved by the International Court of Justice (ICJ) in a 1970 Namibia case. In that case, the ICJ ruled: “[W]hile official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.”

Chen's fourth reason is that *common sense* also supports the modern view rather than the orthodox view:

Finally, if the conflict of laws rules in one country disregard the doctrine of necessity and do not recognize the effect of laws and measures of unrecognized governments, the result would be a *legal vacuum*: legally sanctioned transactions would not exist; companies legally established by the laws of unrecognized governments would be considered non-existent and could not sue or be sued in the non-recognizing jurisdiction; marriages established under the laws of unrecognized governments would be void; children born under these marriages would be illegitimate; and court judgments on divorce, succession, and commercial affairs would be nullities. *Common sense*, as well as *personal and commercial needs*, requires an approach which avoids these unhappy consequences.\textsuperscript{103}

The danger of "a legal vacuum", however, might be exaggerated. Chen starts with the goal of seeking to promote and sustain economic and social interdependence between China and Taiwan, and, as a result, Chen surely needs the modern approach, as he calls it. This is because otherwise the economic and social interdependence cannot be sustained, not to mention promoted. However, in the orthodox international law scholarship, the goal to sustain and promote economic and social interdependence between China and Taiwan does not exist. In the years when the orthodox international law scholarship was dominant between China and Taiwan, there were fewer conflict of law cases and the "personal and commercial needs" were less intensive as compared with today's situation. In other words, Chen prefers the modern view to orthodox international law scholarship for a policy reason— to promote and sustain economic and social interdependence between China and Taiwan. As a result, this preference, itself a policy choice, cannot be adequately put in legal terms.

\textsuperscript{103} Chen, *supra* note 3, at 108-09 (emphasis added). In his footnote Chen states that an explanation of the theory of a legal vacuum can be found in Lord Wilberforce's opinion in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd.*, 1 A.C. 853, 963 (H.L. 1967).
Chen’s fifth reason is that “International practice varies, but the trend is toward adoption of the newer, more pragmatic view.”104 “Where judicial practice is mixed, legislatures have frequently stepped in to ensure the application of the modern approach.”105 Viewed in retrospect, however, if there were such trend of international practice, the co-existence of conflict and interdependence and of the two bodies of law, as discussed in Part II of this article, should not be puzzling at all. Besides, Chen cites only one book for what he labeled as “the modern approach”—Private International Law, written by Alexander Elder Anton and published in 1967. However, the title of that book, in its entirety, is Private International Law: A Treatise from the Standpoint of Scots Law, which was a big surprise for me when I retrieved that book from the library shelf. This is because the omission of the Scottish origin in the citation helps paint the image of a widespread trend. Given the fact that Professor Anton “attempts to deal in a systematic way with the Scottish rules of private international law,” 106 one must ask: What is the relevance and weight a Scottish standpoint of law can provide for the China/Taiwan context? However, if Chen’s article is a search for a legal basis for a policy already favored or decided, then every law or treatise fitting the policy already favored or decided, even from the Standpoint of Scots law, is of help.

“[I]nevitably,”107 Chen concludes that:

The weight of legal theory, as well as judicial, administrative, and legislative practices worldwide, indicate that there are solid theoretical bases and precedents for establishing normal private law relationships between Taiwan and the PRC. The two governments need not reach an agreement on public recognition in order to allow full private relations, and the establishment of such relations need not lead to any public international law consequences. Further, the fact that each government officially views the other as a rival—rather than merely as an unrecognized regime—

104 Chen, supra note 3, at 109.
105 Id. at 110.
107 Tung-Pi Chen's word. Chen, supra note 3, at 117.
provides no serious barriers to the establishment of private relations.\textsuperscript{108}

In short, Chen's goal, stated by him as an inevitable conclusion of a purely academic exercise, is to establish the irrelevance between, on the one hand, the question whether China and Taiwan are, and/or should be, two nation-states or one single nation-state, and, on the other hand, the question whether China and Taiwan should have conflict of law rules for their bilateral relationship.

After concluding the legal analysis, Chen touches upon policy reasons:

Finally, the overlap between the PRC's 'one country, two systems' reunification proposal and Taiwan's 'one country, two governments' concept provides a strong policy basis upon which private law relations can be built. As discussed earlier, while the governments continue to disagree over the issue of international representation, both seem willing to recognize the de facto authority of the other over private matters within their respective territories. Even without full agreement on the reunification proposals, authorities on both sides can use the common ground as a starting point for legislative initiatives facilitating private relationships.\textsuperscript{109}

At first glance, policy analysis comes into play only at this point, after all the legal analyses. However, as has been made clear, Tung-Pi Chen puts great emphasis on Chinese and Taiwanese policies to promote and sustain the social and economic interdependence between China and Taiwan.

CONCLUSION

In Part I, I provided a sketch of the conflict of law rules that exist between China and Taiwan today. In Part II, I described the importance of sovereignty from two perspectives—the social and historical background of the China/Taiwan relationship, and the traditional jurisprudence. In Part III, I introduced to readers the works done by Professor Huang Jin and Professor Tung-Pi

\textsuperscript{108} Id. at 112 (emphasis added).
\textsuperscript{109} Id. at 112.
Chen supportive of the conflict of law rules between China and Taiwan. Though in different ways, Huang and Chen made predominant the argument that China and Taiwan should have conflict of law rules between them regardless of their sovereignty dispute. This argument is the primary legal foundation on which China and Taiwan build their current social and economic interdependence. Today's legal and policy documents, and mass media are replete with the vocabulary Huang Jin and Tung-Pi Chen pioneered. Their argument, in my view, suggests a new understanding of sovereignty; that sovereignty itself remains intact but becomes disconnected from other issues.

The aim of this article is simply to provocatively call for more research on this topic. The research to date is still thin and I will wait for more research before I can judge whether the conflict of law rules are desirable, and by what standard.