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I. INTRODUCTION

On January 24, 1992, the United States Court of Appeals for the Second Circuit decided in *New York Chinese TV Programs v. U.E. Enterprises*[1] that works authored by Taiwanese citizens merit copyright protection under the United States-Taiwan Treaty of Friendship, Commerce and Navigation.[2] The court further decided that enforcement of the FCN Treaty is not barred by the lack of diplomatic relations between the United States and Taiwan. This decision was based on the Taiwan Relations Act ("TRA"),[3] which mandates that:

> the continuation [of] . . . all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China (ROC) prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.[4]

The court probably correctly decided enforceability of the FCN Treaty under the TRA rules as domestic law of the United States.[5] Thus, the Second Circuit's decision based on the TRA is not impeach-

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1. New York Chinese TV Programs v. U.E. Enterprises, 954 F.2d 847 (2d Cir. 1992).

2. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, U.S.-China (R.O.C.), 63 Stat. 1299 [hereinafter FCN Treaty].

3. Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (codified at 22 U.S.C. §§ 3301-3316 (1979)) [hereinafter TRA].

4. *Id.* (codified at 22 U.S.C. § 3303(c)). *See also* 8 U.S.C. § 1152 (1979).

5. Although it is questionable whether Congress possesses the constitutional authority to cause the FCN Treaty to remain in force as an international obligation, Congress' apparent intent was to at least create consistent domestic rules.

able. One issue, however, remains unsettled: whether the FCN Treaty between the United States and the ROC is still valid under international law, given that (1) the United States de-recognized the ROC in 1979 pursuant to recognition of the government of the People's Republic of China ("PRC") as the legal government of China, and (2) acceptance that Taiwan is a part of China.[6] If the answer is affirmative, we need to ask whether the TRA, and a United States court's enforcement of the TRA, violate the international rights of the PRC.

II. FACTS

The FCN Treaty was signed on November 4, 1946, and became effective on November 30, 1948.[7] By signing the FCN Treaty, the United States recognized the Guomindang Government as the government of China. The government of the PRC regarded the FCN Treaty as void under the theory of inequality[8] because, at the time of its negotiation, "China's economic strength hardly matched that of the post-war United States . . . . Nationalist China lacked the capabilities to conduct even a fraction of the business in the United States compared to the United States' business conducted in China."[9]

On February 27, 1972, the PRC and the United States released the Shanghai Communique[10] regarding the normalization of relations between the two states. The normalization process, however, was inhibited by the United States' insistence that the Guomindang government of Taiwan was the legitimate government of China.[11] On

6. Joint Communique on Establishment of Diplomatic Relations, Jan. 1, 1979, U.S.-P.R.C., 79 DEP'T ST. BULL., Jan. 1979, at 25, *reprinted in* 18 I.L.M. 274 (1979) [hereinafter 1979 Comm.].

7. FCN Treaty, *supra* note 2.

8. Article 52 of the Vienna Convention recognizes a similar concept of coercion as a ground to invalidate a treaty. The doctrine of inequality probably covers a wider scope because it takes into consideration the comparative economic power of the parties and, therefore, gives rise to much argument as to its validity. However, the FCN Treaty may be terminated under the doctrine of *rebus sic stantibus* when there has been a fundamental change of circumstances. The fundamental change in the social system in China might render it impossible to enforce the Treaty in the whole of China.

9. Jay Goldstein, Comment, *Chinese & Western Treaty Practice: An Application to the Joint Declaration Between the People's Republic of China and Great Britain Concerning the Question of Hong Kong*, 1 AM. U. J. INT'L L. & POL'Y 167, 179 n.76 (1986) (citing HUNGDAH CHIU, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES 72 (1972)).

10. Joint Communique, Feb. 28, 1972, U.S.-P.R.C., 66 DEP'T ST. BULL. 1972, at 435, *reprinted in* 10 I.L.M. 443.

11. John E. Wolfinger, Comment, *United States-China Relations: Has President Reagan's Communique Revised International Obligations Towards Taiwan*, 14 CAL. W. INT'L L.J. 326, 326 n.5, 328 n.21 (1984).

December 15, 1978, the two governments jointly issued the Carter-Hua Communique[12] in which the United States recognized the PRC as the legal government of China. At the same time, the United States government de-recognized the ROC and terminated the Mutual Defense Treaty of 1954. It is noteworthy that the validity of other existing treaties between the United States and the ROC, including the FCN Treaty, were not questioned at that time by any party, especially by the government of the PRC. This position remains unchanged today, although the PRC government claims that it is not obligated to honor previous treaties signed by the ROC.[13]

In response to the action of the executive branch, Congress enacted the TRA, which mandates the continuation of all treaties and other international agreements between the United States and Taiwan in the absence of diplomatic relations or recognition of the ROC. On August 17, 1982, President Ronald Reagan issued another joint communique with the PRC[14] in which the United States reaffirmed that it "acknowledged the Chinese position that there is but one China and Taiwan is part of China."[15] Since then, the United States has established the standard for Sino-United States relations: "[T]he American people and people of Taiwan will maintain commercial, cultural, and other relations without official diplomatic relations."[16] This was the historical context in which the *New York Chinese* dispute arose.[17]

In 1982, the International Audio Visual Corporation ("IAVC"), a California corporation, contracted with Taiwanese television stations for the right to sell video cassette copies of certain "soap operas" ("Programs") in the United States. Shortly after signing this agreement, IAVC registered the Programs for copyright protection with the United States Copyright Office.[18]

In April 1988, IAVC granted by agreement the exclusive license to New York Chinese to distribute video cassette copies of the Programs in New York and New Jersey. The agreement also assigned to New York Chinese the right to sue to protect IAVC's copyright in the

12. 1979 Comm., *supra* note 6.

13. Goldstein, *supra* note 9, at 177.

14. Bureau of Public Affairs, U.S. Dep't of State, Currency Policy No. 413, U.S.-China Joint Comm. (Aug. 1982) [hereinafter 1982 Comm.].

15. *Id.*

16. *Implementation of the Taiwan Relations Act: Issues and Concerns: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 133, 134 (1978) (statement of President Jimmy Carter to the Nation, Dec. 15, 1977).

17. *New York Chinese*, 954 F.2d 847.

18. *Id.* at 848.

Programs within New York and New Jersey.[19]

The present controversy arose out of defendants' attempts to sell the same Programs in the New York-New Jersey areas. Defendants videotaped the Programs when they were broadcasting in Taiwan and later surreptitiously shipped them into the United States for distribution to store-front video retail stores operated by defendants in the New York metropolitan area.[20]

New York Chinese eventually discovered that defendants' stores were renting out unauthorized videotapes of the Programs. It then filed suit against defendants because none of the stores obtained valid sub-licenses from New York Chinese for distribution.[21]

The district court concluded that defendants infringed the copyright in the Programs, and permanently enjoined defendants from copying, distributing, selling, renting or otherwise marketing any copies of the Programs. Plaintiff also obtained a judgment for statutory damages of $762,500.[22]

The parties later stipulated to reduce the damages, but defendants appealed the decision that they were liable for copyright infringement. The Second Circuit Court of Appeals found such copyright infringement in accordance with 17 U.S.C. § 104(b)(1). That statute confers protection on a national of any foreign nation that is a party to a copyright treaty to which the United States is also a party.[23] Therefore, the application of domestic law is based on the assumption that New York Chinese is a national of a contracting party. The applicable treaty, as understood by the court, is the FCN Treaty between the United States and ROC. The FCN Treaty guarantees

> the [reciprocal] privileges in regard to copyrights, patents, trademarks, trade names, and other literary, artistic and industrial property, upon compliance with the applicable laws and regulations, if any, respecting registration and other formalities which are or may hereafter be enforced by the duly constituted authorities.[24]

The court based the enforcement of the FCN Treaty on the TRA, which requires the continuation in force of all treaties and other international agreements between the United States and Tai-

19. *Id.*
20. *Id.*
21. *New York Chinese*, 954 F.2d at 849.
22. *Id.* at 849.
23. 17 U.S.C. § 104(b)(1) (1988).
24. FCN Treaty, *supra* note 2, art. IX, at 1309.

wan.[25] The major issue was whether a treaty with a territory which is now part of a de-recognized state is valid under international law.[26] This must be considered in light of the fact that the revolutionary government of the PRC has renounced the treaty because of the circumstances of its inception. At the same time, the "de-recognized" government has always abided by it.

III. THE PRAGMATIC CONSIDERATIONS OF THE COURT

The Second Circuit Court of Appeals reached its decision based on principles of domestic law. Nevertheless, the TRA is of questionable validity under international law. It was a curious oversight for the court not to question the validity of a treaty in light of international law before recognizing it as the supreme law of the land.

The court's approach finds its justification in pragmatic considerations. As the court points out in its decision, "we are mindful of the strong commercial ties between the United States and Taiwan. Indeed, Taiwan's trade with the United States has increased nearly fourfold since 1979."[27] In other words, the close commercial relationship between United States and Taiwan may influence the legal standard that determines entitlement to protection in United States courts under a treaty of which the validity is doubtful. This utilitarian approach is even more obvious when the court actually endorsed self-protectionism:

> Taiwan, moreover, has unfailingly relied upon the FCN Treaty to provide protection of its own copyright laws to works authored by American citizens. Taiwan would have little reason to honor the FCN Treaty if the United States were to turn its back on the Treaty. Thus, our holding encourages the United States to provide copyright protection to works authored by Taiwanese citizens, and insures that Americans will receive copyright protection of their works in Taiwan.[28]

In light of this public interest, the court held that the FCN Treaty was still in effect "by virtue of both Congress' enactment of the TRA and the Executive Branch's position that the FCN Treaty has remained in effect, and that the actions of both of these branches do

25. *New York Chinese*, 954 F.2d at 852.

26. *Id.* at 853.

27. *Id.* The court indicated that Taiwan imported over $11 billion of United States goods in 1990 and exported over $22 billion of its own goods to the United States. *Id.* n.6.

28. *Id.* at 853-54.

not violate the Constitution."[29] Therefore, the FCN Treaty was found to be a valid "treaty" for the purpose of section 104(b)(1) of the Copyright Act.[30]

Given the fact that treaties are expressly declared to be "supreme law of the land"[31] in the United States Constitution, it is curious that the court nowhere in its ten page opinion probed the validity of this treaty under international law. The term "treaty" in the Constitution means an agreement between the United States and a foreign state or other internationally recognized entity.[32]

IV. VALIDITY OF THE TRA AND THE FCN TREATY AS UNITED STATES DOMESTIC LAW

The first issue in this case was whether the TRA and the FCN Treaty are so integrated as to constitute a part of United States domestic law. If so, because these documents insure greater rather than fewer rights to aliens, international law is not concerned with this result; to the extent that these documents satisfy constitutional requirements, the TRA-FCN Treaty marriage is valid.

A. Separation of Powers with Respect to the FCN Treaty

Treaty obligations under international law, if any, may not be avoided by domestic law. However, a treaty will not be given effect as a rule for decision in a domestic court if the United States Constitution mandates that result. On the other hand, an agreement of questionable validity under international law may be given statutory effect domestically. The TRA is the basis for any domestic legal effect of the treaties with Taiwan. If the TRA is valid, the treaties with Taiwan may have legal effect in the United States regardless of their validity under international law.

Under the United States Constitution, a treaty made under the authority of the United States "shall be the supreme law of the land; and the judges in every State shall be bound thereby . . . ."[33] A treaty "stands on the same footing of supremacy as do the provisions of the

29. *New York Chinese*, 954 F.2d at 854.

30. *Id.*

31. U.S. CONST. art. VI, § 2.

32. International organizations, for example, can be parties to treaties. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 223 (1987) [hereinafter RESTATEMENT].

33. U.S. CONST. art. VI, cl. 2.

Constitution and laws of the United States."[34] Therefore, if the FCN Treaty satisfies the constitutional requirement, it is enforceable by the courts as a supreme law of the land, and is a basis for protection of the plaintiff in this case.

The Constitution specifies that the President "shall have power, by and with the advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . . ."[35] In addition, "the President, as the 'sole organ of the federal government in the field of international relations,' retains the exclusive power to negotiate international treaties . . . ."[36] However, "the content of that power is uncertain due to cognate powers vested in Congress: for example, regulation of foreign commerce, declaration of war and support of armies."[37]

It is within the executive power to conclude the FCN Treaty with the approval of the Senate, as a function of the foreign relations power.[38] This constitutional requirement was satisfied in 1948, when it was ratified by the Senate.[39]

In 1949, when the ROC government left mainland China, the force of the FCN Treaty was in question because the territory governed by the Treaty in fact changed. The Treaty's parties made no amendment to reflect this material change. Arguably, the United States obtained a different agreement with this material change of circumstance. A new deal would require the amendment to be approved by the Senate as a new treaty. Since there was no amendment, the FCN Treaty arguably terminated at the time when the applicable treaty territory changed from the whole of China to Taiwan. Under international law, the United States is not required to, but may, abide by this treaty; the doctrine of *rebus sic stantibus*[40] excuses any obligation.

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34. Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

35. U.S. CONST. art. II, § 2, cl. 2.

36. David A. Gottenborg, Note, *Treaty Termination and the Separation of Powers: The Constitutional Controversy Continues in* Goldwater v. Carter, *100 S. Ct. 533 (1979) (Mem.)*, 9 DENV. J. INT'L L. & POL'Y 239, 259 (1980) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

37. Cynthia J. Hill, Note, *Unilateral Presidential Treaty Termination Power by Default: An Analysis of* Goldwater v. Carter, 15 TEX. INT'L L.J. 317, 361 (1980).

38. A counter argument that the Treaty relating to the regulation of foreign commerce is within the exclusive power of Congress is not persuasive because the manifest intention of the founders mandates that the treaty power be shared between the President and the Senate.

39. U.S. DEP'T OF STATE, TREATIES IN FORCE 274 (1991) [hereinafter TREATIES IN FORCE].

40. *See supra* note 6.

Another argument against the FCN Treaty is based on government-recognition rules of international law. The PRC government renounced this particular treaty signed by the ROC. Under international law, United States' recognition of the PRC in 1978 automatically operates retroactively to 1949 when the PRC government came into being.[41] That is to say, the United States accepted the PRC's 1949 renunciation by the 1978 Recognition Communique. Thereafter, the FCN Treaty lost its validity and has never regained it. Congress, therefore, was operating in a vacuum when it enacted the TRA, which sought to prolong the life of the FCN Treaty.

However, a counter-argument would be that the PRC, by its acquiescence,[42] revived this particular treaty between Taiwan and the United States. If so, it is valid under United States law, like any other treaty.

B. Congress' Power in the Enactment of the TRA

In addition to the difficult problem presented by the change of treaty territories without Senate approval, there is the question of whether the TRA is a domestic legal document complete in itself or an attempted implementation of the FCN Treaty. The defendants in *New York Chinese* claimed that the TRA, by substituting Taiwan for the ROC, unconstitutionally amended the FCN Treaty.[43]

The TRA arose from congressional efforts to limit the President's power in foreign affairs. It was a response to the 1979 Recognition Communique which called the validity of the United States-ROC treaties into question, and purports to revive the treaties between the United States and Taiwan. It thus presents problems of separation of powers between the executive and the legislative branches.

If the TRA is an attempted amendment of the FCN Treaty or a new treaty with Taiwan, it must have been negotiated by the President, and is subject to the two-thirds concurring vote from the Senate. If it is simply a statute, as it is related to foreign commerce, its regulation is within the powers of the Congress. The issue then is whether the TRA is simply a federal statute that refers for its content to the

41. Haile Selassie v. Cable and Wireless, Ltd. (No. 2), [1939] 3 ALL E.R. 384 (C.A. 1938). *See* J. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 909 (3d ed. 1988).

42. *See infra* Part V.

43. *New York Chinese*, 954 F.2d at 853.

FCN Treaty. If so, whether or not the treaty is valid, the legal status of the TRA is not affected.

One possible argument is that, although the TRA takes the form of a statute, it is a new treaty or an amendment of the FCN Treaty. It changes the name of "ROC" to "Taiwan," and mandates "the continuation in force of all treaties and other international agreements . . . entered into by the United States and the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law."[44] Because there was a meeting of minds between Taiwan and the United States, the TRA takes the form of a treaty and is subject to the treaty eligibility requirements of Taiwan and to United States' constitutional law.[45] As a treaty, the TRA cannot pass the constitutional hurdle because it has never been submitted to the Senate for approval.[46]

This argument was explicitly rejected by the court when it said that "a change in the name of the party to a treaty is not an 'amendment' to that treaty."[47] In reaching this conclusion, the court invoked *Arnbjornsdottir-Mendler v. United States*.[48]

The issue in *Arnbjornsdottir-Mendler* was whether the treaty between the United States and Denmark continued to apply to Iceland after the latter's separation from Denmark as an independent state.[49] The court held that an "amendment" to a treaty means the change of the obligations of the parties to a treaty, not the mere change in names of the parties.[50] Accordingly, merely changing the name of the same treaty territory did not affect the applicability of the treaty to Iceland.[51]

What distinguishes *New York Chinese* from *Arnbjornsdottir-Mendler* is the fact that Iceland became independent with Denmark's consent.[52] It was a re-arrangement of the territory and its attached treaty

44. TRA, *supra* note 3, § 3303(c).

45. *See infra* Part V.

46. The joint resolution of both houses of the Congress that approved the Interim Strategic Arms Limitation Agreement, plus the President's signature, are argued to be the equivalent to the normal treaty procedure. However, the two houses have not passed the TRA and there has been no independent resolution to create such effect. *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 205, 98th Cong., 2d Sess. 92-93 (1984).

47. *New York Chinese*, 954 F.2d at 854.

48. 721 F.2d 679 (9th Cir. 1983).

49. *Id.*

50. *New York Chinese*, 954 F.2d at 854.

51. *Arnbjornsdottir-Mendler*, 721 F.2d at 682.

52. *Id.* at 681.

obligations. Therefore, the treaty covers the same territory in that case, whereas the treaty territory in *New York Chinese* is dramatically reduced with regard to the FCN Treaty. In the present case, not only does the name of the same treaty territory change but both the United States and the PRC agreed that the FCN Treaty did not apply to mainland China. This change of the relevant treaty territory from the whole of China to a much smaller territory of Taiwan is clearly a material change in the obligations of the parties.[53] Therefore, unless it passes the constitutional hurdle of Senate consent under its treaty powers, the TRA should fail as an unconstitutional attempt to change the obligations in the FCN Treaty.

Another constitutional issue is whether Congress has constitutional authority to deal with such a problem by statute. Under the doctrine of separation of powers, the executive branch is responsible for certain aspects of foreign relations. Negotiation of treaty relations between the United States and Taiwan are of that nature. The executive branch must initiate and negotiate any treaty, including treaty amendments.[54] Congress has no constitutional role in treaty negotiation except for the Senate's power to consent to ratification. Therefore, if the TRA is an attempted treaty amendment, it has not conformed to the constitutional process; the FCN Treaty may not legitimately derive its power from the TRA.

The TRA, however, appears to be a congressional response to changes in executive policies related to Sino-United States issues. It can be argued that the TRA derives its content from the FCN Treaty, that it is a legislative act to regulate international commerce, and that it is thus valid under the Constitution.[55] Legislation directly affecting United States-Taiwan trade relations is a legitimate exercise of Con-

53. Although the relevant territory of all treaties concluded by the ROC has been confined to Taiwan after the PRC government took over the mainland China in 1949, the parties did not change the name of ROC as the treaty party until 1978. Treaties in Force does not indicate the restriction on the geographic coverage until 1980. TREATIES IN FORCE, *supra* note 39, at 274.

54. The United States Constitution expressly authorizes the President to make treaties. U.S. CONST. art. II, § 2. As the sole organ of the United States in its international relations, the President himself has authority to represent the United States in negotiating or concluding international agreements. *See* RESTATEMENT, *supra* note 32, § 311 cmt. b.

55. The court never touched the issues regarding the validity of the FCN Treaty; it treated the TRA as a domestic statute which requires the court to enforce the FCN Treaty. It may be that the court viewed the TRA not as a treaty amendment or a new treaty, but as a statute the contents of which are defined by the FCN Treaty. The validity of the treaty under the domestic law, on this argument, does not arise.

gress' power to regulate foreign commerce.[56] However, if the TRA was enacted to dictate the terms of relations between Taiwan and the United States and to affect the interests of the PRC,[57] it would not be valid. Even assuming the TRA had been enacted substantially for regulation of commerce and would therefore be valid under the commerce power, it does not rely on the FCN Treaty for statutory standards. It instead purports to revive the TRA itself. Therefore, the TRA only has effect if it successfully recreated the treaty in a new form. The copyright in the present case would be protected only if both documents were constitutionally valid.

C. Constitutionality Requirement and Later-in-Time Rule

There are two additional domestic rules governing this area. One is that a rule of international law or a provision of a United States international agreement will not be given legal effect in the United States if it is inconsistent with the United States Constitution. However, this should not be an issue in this case because of the decision in *Goldwater v. Carter*.[58] In *Goldwater*, the United States Supreme Court held that the legitimacy of the three communiques was a political question and, therefore, beyond the power of judicial review.[59] In one sense, that holding was a judicial recognition of the treaty power of the executive branch in the context of recognition of governments. If that is the case, by enacting the TRA, Congress may have impermissibly interfered with the independent exercise of the executive power in foreign relations.[60]

The other applicable domestic rule is the later-in-time rule. Under that rule, where a conflict between an international agreement

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56. U.S. CONST. art. I, § 8, cl. 3.

57. The policy of the United States for the enactment of the TRA is laid out in § 3301(b):

> (4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the West Pacific area and of grave concern to the United States . . .;
>
> . . .
>
> (6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people of Taiwan.

28 U.S.C. § 3301(b). It is difficult to justify these policy expressions as regulation of international trade.

58. 444 U.S. 996 (1979).

59. *Id.*

60. The United States Supreme Court has restrained itself from interfering with the obligations of the executive branch. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Because the executive branch is the sole organ responsible for international relations under the Constitution, Congress should not be able to thwart that responsibility.

and federal legislation exists, the one entered into force later supersedes the earlier.[61] Accordingly, in case of conflict the 1982 Communique should supersede the 1979 TRA. The *New York Chinese* court observed that there would be a real conflict between the 1982 Communique and the TRA if the TRA did give *de facto* recognition to Taiwan as a nation.[62] Under the 1982 Communique, the United States "acknowledged the Chinese position that there is but one China and Taiwan is part of China."[63] If there is any possible validity of the TRA, it is inconsistent on this point. The courts are bound to follow the more recent expression of United States policy, namely, the communiques. Further, if the TRA had been later in time, its attempts to re-shape international relations with the PRC without recourse to the treaty making powers of the United States would likely render it invalid. If invalid on that ground, it would not, of course, displace the 1982 Communique. Moreover, under international law, neither branch of the United States government should recognize Taiwan as a nation contrary to that Communique which is an international agreement. Doing so would constitute a breach of an international agreement, making the United States liable in international law even though the action is legitimate under domestic law.

V. VALIDITY OF THE FCN TREATY AND THE TRA UNDER INTERNATIONAL LAW

Through the FCN Treaty and the TRA, the United States attempted to assume — albeit unconstitutionally — the international obligation to protect Taiwanese copyrights in the United States. Therefore, whether or not the FCN Treaty and the TRA are valid under United States domestic law, the plaintiff may have recourse against the United States if these documents create an international obligation.

Under the FCN Treaty,

> [t]he nationals, corporations and associations of either High Contracting Party shall be accorded within the territory of the other High Contracting Party effective protection in the exclusive use of inventions, trademarks and trade names, upon compliance with the applicable laws and regulations, if any, respecting registration and

61. Whitney v. Robertson, 124 U.S. 190 (1888); Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). In both cases, the Court gave effect to a statute that was contrary to an earlier conflicting treaty.

62. *New York Chinese*, 954 F.2d at 853.

63. 1982 Comm., *supra* note 14.

> other formalities which are or may hereafter be enforced by the duly constituted authorities; unauthorized manufacture, use or sale of such inventions, or imitation or falsification of such trademarks and trade names, shall be prohibited, and effective remedy therefor shall be provided by civil action.[64]

If the FCN Treaty remained valid under international law, plaintiff's copyright should be protected by the United States copyright law. If the United States failed to provide protection equal to that enjoyed by a United States citizen due to some obstacles in its domestic regime, the United States would be liable for the injury incurred by the plaintiff.[65]

The FCN Treaty and the TRA are documents that purport to create rights in persons like the plaintiff. In the FCN Treaty, the United States government recognized and expressed its willingness to develop a diplomatic relationship with the ROC government. For this purpose,

> [t]he Government of each High Contracting Party shall have the right to send to the Government of the other High Contracting Party duly accredited diplomatic representatives, who shall be received and, upon the basis of reciprocity, shall enjoy in the territories of such other High Contracting Party the rights, privileges, exemptions and immunities accorded under generally recognized principles of international law.[66]

The issue then is whether the FCN Treaty lapsed upon the United States' subsequent refusal to recognize the ROC.

A. The Legal Consequence of Recognition and De-recognition

Under international law, recognition is a legal-political act projecting both legal and political consequences. The recognizing state assumes an obligation to respect the other government's sovereignty in the administration of its territory. *De facto* recognition of a rival government within the territory of the other, while maintaining diplomatic relations with both governments, violates international law.[67]

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64. FCN Treaty, *supra* note 2, art. IX.

65. Of course, if the right arises solely under international law (there being no statute creating a cause of action against the United States in the United States courts), only another state can pursue the claim on behalf of the plaintiff.

66. FCN Treaty, *supra* note 2, art. I, para. 2.

67. *See* Bank of China v. Wells Fargo Bank & Union Trust Co., 104 F. Supp. 59 (N.D. Cal. 1952). The district court in that case refused to recognize both governments simultaneously. After the United States recognized the PRC in 1979, the PRC government consistently demanded that the U.S. not give *de facto* recognition to Taiwan, and that the relation should

The Taiwan issue is complicated. The general rule, however, is the same. After recognition of the PRC, no official or branch of government may recognize Taiwan as a "nation" under any circumstances without causing a breach of the international legal obligation assumed by the United States. In *New York Chinese*, the Second Circuit violated this rule by its *de facto* recognition of Taiwan as a nation.[68] The court based its rationale on the "constitutive theory," that is, "[a]n entity's status as a nation . . . does not depend on whether it receives diplomatic recognition from other nations."[69] If it exhibits the basic elements of a nation, which are (1) a defined territory, (2) a permanent population, (3) a government and (4) the ability to engage in relations with other nations, then any country can recognize it as a *de facto* nation.[70]

In its relations with the mainland, Taiwan has acceded to the PRC's suggestion that it participate in various international bodies as "China, Taiwan." The United States, by recognizing that "there is but one China and Taiwan is part of China,"[71] has restricted itself by treaty obligation[72] to go no further.

The United States' *de facto* recognition practice developed from its subtle relations with the Soviet Union in the 1920s and 1930s. As distinguished from the present case, in those cases the United States courts simply recognized internal effect of the law and decrees of the Soviet Union within Soviet territory.[73] The courts, however, have

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be unofficial. *Id.* Compare this position to that of the court and lawyers in *Bank of China*, who insisted on a *de facto* recognition of Taiwan. *See also New York Chinese*, 954 F.2d at 853 ("[T]he United States' de-recognition of Taiwan did not change Taiwan's status as a nation."); David J. Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L.J. 930, 945-51 (1978).

68. *New York Chinese*, 954 F.2d at 853.

69. *Id.*

70. *Id.*

71. 1982 Comm., *supra* note 14.

72. Yet the Executive Branch of the United States government, in Hearings on Separation of Powers Questions Raised by the Communique Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, maintained the position that the 1982 Communique "is not an international agreement and thus imposes no obligations on either party under international law." *President Reagan's Communique: Hearings on the Separation of Powers Questions Raised by the Communique Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, (hearings not in publication at this date) (statement of Davis R. Robinson, Legal Advisor, Dep't of State, Sept. 27, 1982), *quoted in* Wolfinger, *supra* note 11, at 332. The Communique, jointly issued by the United States and the PRC, of course engages international obligations. Whether it is a "treaty" in the constitutional sense, requiring Senate confirmation, is a separate problem. Denmark v. Norway, 1933 P.C.I.J. (ser. A/B) No. 53.

73. Russian Socialist Federated Soviet Republic v. Cibrario, 139 N.E. 259 (1923); Salimoff & Co. v. Standard Oil Co., 186 N.E. 679 (1933).

consistently declared that only a recognized government may be a plaintiff in United States courts.[74] It can thus be inferred that recognition and de-recognition bear on the qualification of an entity to appear before United States courts. Furthermore, the Soviet regime, through revolution, effectively took control and administered the whole territory of the previous Russia, substituting for the previous government. The ROC, on the other hand, is a replaced regime, though it exercises effective control over a part of the territory. International law has recognized the former as a form of governmental succession.[75] It is an entirely different matter to give *de facto* recognition to part of the territory of a state which the United States has a treaty obligation not to recognize.

There is a possible legal justification for a plaintiff's judgment in *New York Chinese*.[76] The validity of the FCN Treaty might be based on the PRC's acquiescence in treating Taiwan as a local authority authorized by the central government to participate in limited international relations. This approach is closer to reality. A historically close relationship between the United States and Taiwan had developed to such a stage that the PRC government was willing to take it into account in the normalization negotiations.[77] Since the existing commercial and cultural relations between Taiwan and the United States are beneficial to all and to the detriment of none, the PRC government did not wish to disturb them.[78] On the contrary, it conditioned the normalization of Sino-American relations only on the termination of one treaty, which was aimed at Mainland China as an enemy.[79] By acquiescence in the limited applicability of all but one existing treaty[80] between Taiwan and the United States, the PRC adopted a realistic approach.[81]

B. The Party Requirement in the Law of Treaties

The Restatement defines international agreement as "an agree-

74. *Salimoff & Co.*, 186 N.E. 679; *Russian Socialist Federated Soviet Republic*, 139 N.E. 259.

75. SWEENEY ET AL., *supra* note 41, at 923.

76. *New York Chinese*, 954 F.2d at 847.

77. SWEENEY ET AL., *supra* note 41, at 923.

78. *Id.*

79. *Id.*

80. Mutual Defence Treaty, Dec. 2, 1954, U.S.-R.O.C., 6 U.S.T. 433.

81. Most of these treaties refer specifically to Taiwan as the relevant treaty territory. The TRA also replaces the name "Republic of China" in all treaties with the name "Taiwan." Yet the legal validity of such replacement under international law is doubtful.

ment between two or more states or international organizations that is intended to be legally binding and is governed by international law."[82] The word "party" is defined as "a state or international organization that has consented to be bound by the international agreement and for which the agreement is in force."[83]

Taiwan is arguably not even a state after the United States refused to recognize it. It does not have the requisite international personality to be party to an international agreement. Yet, as the American Law Institute put it, the formulation of legal rules in a Restatement is "in no sense an official document of the United States,"[84] and "in a number of particulars the formulations in this Restatement are at variance with positions that have been taken by the United States government."[85]

Traditionally, states have been the basic personalities in international relations. Nevertheless, there are numerous circumstances in which non-state entities are capable of participating in international relations, including entering into treaties. Examples can be found in the previously existing Soviet Union, which conferred upon Ukraine and Byelo-Russia the authority to become parties to the Charter of the United Nations as separate entities. Similarly, the Palestine Liberation Organization as a non-state entity has been invited by the United Nations to join the mission observers and to participate in international relations to a certain extent. According to the United States Constitution, a state may enter into an "Agreement or Compact . . . with a foreign power" with the consent of Congress.[86] A more recent example is the Joint Declaration of the United Kingdom and PRC on the Question of Hong Kong, in which the Hong Kong Special Administrative Region will enjoy a high degree of autonomy to "maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organizations."[87]

Consequently, the party requirement in the law of treaties is no longer as stringent as it once was. A political subdivision of a state

82. RESTATEMENT, *supra* note 32, at § 301(1).

83. *Id.* § 301(2).

84. *Id.* at Foreword.

85. *Id.*

86. U.S. CONST. art. I, § 10, cl. 3.

87. People's Republic of China-United Kingdom: Agreement on the Future of Hong Kong, Joint Declaration, art. 3, para. 10, 23 I.L.M. 1377 (1984) [hereinafter Agreement on the Future of Hong Kong].

may enter into an agreement with another state, provided the nature of the agreement is not repugnant to the sovereignty of the central government and it is explicitly or implicitly authorized by that government.

The next issue, then, is whether the Central Government of the PRC has authorized its Taiwan subdivision to enter into the FCN Treaty. The answer is far from clear.

Under traditional international law, a treaty does not lapse as a consequence of the succession of governments in a party. However, the diplomatic and treaty relations between one state and a subdivision of another that is de-recognized would normally be terminated upon the *de jure* recognition of the competing government.

Since the FCN Treaty was concluded by the ROC government in 1946, before the PRC government took control of mainland China, there could have been no pre-authorization of the Treaty. The result of a revolution, the PRC was established as a new government different in nature from the ROC government. Soon after its establishment, the PRC declared the ROC's 1946 FCN Treaty void from its inception.[88]

Since this particular treaty has been renounced by the PRC under treaty succession theory, it certainly lapsed as between the United States and China. Furthermore, it should have lapsed[89] as to all parts of China, including Taiwan. United States' de-recognition of the ROC government would seem to reinforce that conclusion. Though logical, this conclusion fails to take into account the pragmatic approach that the United States government takes on the Taiwan issue and the "understanding" of this approach by the PRC government.[90] In order not to disturb the trading relations between Taiwan and the United States, the PRC government acquiesced in all treaties remaining in force between the United States and Taiwan, with one exception. This acquiescence, together with the explicit permission in the 1979 Communique that the American people and the people of Taiwan "maintain commercial, cultural and other relations

88. Goldstein, *supra* note 9, at 179.

89. That is contrary to the fact. The treaties entered into between the ROC and the United States are only applicable to Taiwan, not to mainland China. Furthermore, international law would not recognize such a conclusion absent consent of the PRC. TREATIES IN FORCE, *supra* note 39, at 274.

90. This pragmatic approach is fully reflected by the court's decision in this case. *New York Chinese*, 954 F.2d at 854.

without official relations,"[91] constitutes the PRC's consent with respect to the United States-Taiwan treaty practices. This consent has created a special treaty rule governing United States-Taiwan relations.

Based on the foregoing reasoning, the FCN Treaty may be deemed valid because of the conduct of the PRC government. The PRC government, upon the normalization of Sino-American relations, did not have any objection to the FCN treaty being restored as between Taiwan and the United States. The PRC government may consider the enforcement of the Treaty between Taiwan and the United States to be beneficial to maintain cultural, commercial and other unofficial relations. The issue of treaty succession is simply deferred to the time of reunification of Taiwan with mainland China. In other words, this acquiescence can be construed as the Central Government's delegation of limited treaty power to the Taiwanese authorities with respect to treaties applicable to the localities.

This interpretation of the PRC government's intent seems to be supported by the PRC treaty practice evidenced by the Joint Declaration on the Question of Hong Kong. The only distinction between the two cases is that the authorization of treaty power from the Central Government to Hong Kong is explicit in the Joint Declaration, whereas the treaty power of Taiwan was accepted retrospectively. This difference should not affect the validity of the treaties.

As communications and business relations between mainland China and Taiwan develop, treaties concluded by Taiwan to which the PRC is not a party may well be accepted by the Central Government for implementation only in Taiwan, much as was true with Hong Kong.[92] If so, the question of whether Taiwan has treaty power under international law will be moot.

C. Effect of the Three Joint Communiques

Pacta sunt servanda is an ancient rule of international law. The issue is whether the three Joint Communiques constitute international agreements. The United States executive, in hearings on separation of powers questions raised by the communiques, testified before the Sub-

91. 1979 Comm., *supra* note 6.

92. The PRC government provided that "[i]nternational agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in Hong Kong Special Administrative Region." Agreement on the Future of Hong Kong, *supra* note 87, at 1377.

committee on Separation of Powers of the Senate Judiciary Committee that the 1982 Communique "is not an international agreement and thus imposes no obligations on either party under international law."[93]

This position is less than persuasive even to American lawyers.[94] Since the Permanent Court of International Justice found in the case concerning the legal status of Eastern Greenland that the government of Norway is bound by the commitment made by its Foreign Minister, "a statement by the President of the United States should have an equal or greater status than one made by a foreign minister."[95]

The three Communiques certainly are international agreements as defined in the Restatement, that is, "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law."[96] In *Weinberger v. Rossi*,[97] the Court held that the Communiques, as executive agreements, had status under United States law. Since the three joint communiques between the United States and China were understood as one of the prerequisites to the normalization of Sino-American relations, the United States government must have intended to be bound. The fact that the United States complied validates this conclusion.

"A joint communique is a new form of international agreement. It is partly unilateral declarations of the parties and partly a record of the parties' consensus regarding their rights and obligations."[98] "Regardless of the position of United States municipal law, under international law, the joint communiques are international agreements, binding on the parties. International obligations bind the state, not particular branches, institutions, or members of its government."[99] No matter what kind of legal system a country adopts, it is a single unit in the international legal system. The government cannot claim domestic law, even its Constitution, as a justification for its violation of international law.[100] International liability follows as a consequence of the breach.[101] United States courts may refuse to give effect

93. Wolfinger, *supra* note 11, at 327 n.15.
94. *Id.* at 332-33.
95. *Id.*
96. RESTATEMENT, *supra* note 32, § 301(1).
97. 456 U.S. 25 (1982).
98. Chen Tiqiang, *Some Legal Problems in Sino-U.S. Relations*, 22 COLUM. J. TRANSNAT'L L. 41, 56 (1983).
99. *Id.* at 45.
100. RESTATEMENT, *supra* note 32, § 115(b).
101. *Id.*

to an international agreement based on domestic law.[102] Nevertheless, "[t]hat a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."[103]

Since the United States would otherwise be in violation of its international legal obligations, the United States should precisely observe the three Communiques. The three branches of the United States government should speak with a single voice, recognizing the PRC as the sole legitimate government of the state of China. There should be no *de facto* recognition of the ROC. The judicial branch should not recognize it as such, as it appears to have in this case. Any such conduct, even by the judiciary, is illegal action by the United States under international law.

VI. Private Rights Under An International Agreement

If a plaintiff can prove that international law protects the right vested in it, it may directly invoke the treaty in the United States courts. The next issue is whether the treaty provision enacts a pre-existing rule of customary international law which might have granted a plaintiff rights to United States copyright protection, or whether the treaty is one of a self-executing nature. In case of a non-self-executing treaty, the issue is whether the legislature has made it law by statutory implementation. If the treaty is either self-executing or is enforceable because of an implementing statute, a party may invoke the treaty in its interest.

It is generally agreed that, notwithstanding the long history of business transactions across borders, there is no customary international law governing the rights and duties of states to permit entry of foreign goods.[104] International human rights law and international economic law have not developed to such a stage that individuals' economic rights are directly protected. Consequently, even though a plaintiff may have a cause of action under the United States copyright law in United States domestic courts, that right is not protectable under customary international law.

A treaty between the state of the alien's nationality and the receiving state may grant this copyright protection. Under the FCN

102. *Id.* § 115(b) cmt. a.
103. *Id.*
104. Sweeney et al., *supra* note 41, at 1132.

Treaty, the Taiwanese copyright in this case is valid, and the United States has assumed the responsibility to protect it within its territory. If the treaty is self-executing, it operates just like a statute, and the owner automatically enjoys statutory protection equal to that enjoyed by a United States person.

According to the Restatement, "[p]rovisions in treaties of friendship, commerce, and navigation, or other agreements conferring rights on foreign nationals, especially in matters ordinarily governed by State law, have been given effect without any implementing legislation, their self-executing character assumed without discussion."[105]

In *Asakura v. Seattle*,[106] the plaintiff successfully relied on a national treatment provision in the Treaty of Friendship, Commerce and Navigation between the United States and Japan ("Japanese FCN Treaty") for protection of his right to trade in the United States. The Court found that the Japanese FCN Treaty "[operates] of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."[107]

Although the Court did not use the term "self-executing," it is clear that the Japanese FCN Treaty was of that nature in that case. Similarly, the FCN Treaty in the present case is related to national treatment on copyright, which is similar to *Asakura*. Therefore, this provision should also be enforceable by the court "without the aid of any legislation," and the plaintiffs would be protected by the United States copyright law.

In some recent cases, courts have found that treaties are more likely to be non-self-executing when they involve subjects that Congress has regulated extensively. For example, in *Robertson v. General Electric Co.*,[108] a treaty regarding patents on industrial property was held not self-executing because:

> Congress alone was given by the Constitution the power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries treaty provisions relating to patent rights must be deemed dependent upon legislation in aid thereof.[109]

It can be argued that the Congress has chosen to regulate copyrights

105. RESTATEMENT, *supra* note 32, § 111 cmt. 5.
106. 265 U.S. 332 (1924).
107. *Id.* at 341.
108. 32 F.2d 495 (4th Cir. 1929), *cert. denied*, 280 U.S. 571 (1929).
109. *Id.* at 500.

in the way specified in the TRA and the FCN Treaty. Since the issue involved in the present case is governed not only by the treaty, but also by the TRA, separation of powers is not an issue here.

Other courts emphasize intent as the self-execution test. In *Sei Fuji v. California,*[110] the plaintiff relied on Articles 55 and 56 of the United Nations Charter for protection of his right to own land in the United States as an alien. The court held that the Charter provisions relied on by the plaintiff were not intended to supersede existing domestic legislation and, therefore, were not self-executing. The court did mention that no treaty between the United States and Japan conferred upon the plaintiff the right to own land. A different result could be argued if the right in *Sei Fuji* had been covered in a specific provision of the FCN Treaty, as in *Asakura.*

In the present case, even if the plaintiff is not protected by customary international law or by the treaty, it may be able to establish, on common law estoppel theory, that its right is protected by the United States copyright law. Under common law, if one party has created a reasonable expectation on the part of another, in reliance upon which the other changes position, this party is estopped from denying the existence of that obligation.

The FCN Treaty, its continuance in force mandated by the TRA, is actually listed in *Treaties In Force,*[111] which evidences it as an active treaty between the United States and Taiwan.[112] Even if the FCN Treaty is invalid under international law and United States domestic law, the Treaty may have created a reasonable reliance on the part of the Taiwanese businesses that the Treaty will protect them. In reliance on such treaty protection, the Taiwanese businesses may have changed their position by not obtaining the otherwise available copyright protection as other foreign businesses did under United States law. Under such circumstances, the United States arguably should be estopped from changing the law and applying it retroactively, consequently denying its treaty obligation to protect the Taiwanese copyright. If this is a sound argument, plaintiff may claim a private right for copyright protection under the estoppel doctrine.

Although the common law estoppel doctrine is a domestic legal concept, it may apply to the present case by virtue of Article 38 of the Statute of the International Court of Justice, which specifies one of

110. 217 P.2d 481 (D. Cal. 1950), *aff'd on other grounds,* 242 P.2d 617 (1952).
111. TREATIES IN FORCE, *supra* note 39.
112. *Id.*

the sources of international law as "the general principles of law recognized by civilized nations."[113] The plaintiff, however, has the burden to prove that this is a well recognized principle in major legal systems. However, since the dispute in the present case occurred between two private persons, the estoppel doctrine may not be applicable as against defendants in this case. The common law estoppel doctrine operates to estop a party who induces detrimental reliance of another party from denying the implied promise. Here, it was the United States government, not the defendants, who had created the plaintiff's expectation. The defendants should not be estopped by the act of the United States. The plaintiff may have a cause of action against the United States, but this should not affect the rights of the defendants.

This estoppel argument may put the court in a difficult position. On the one hand, if it fails to protect plaintiff's right arising from reasonable reliance on the FCN Treaty and the TRA, it may put the United States in default of an international obligation. On the other hand, since defendants did not create the plaintiff's expectation, they should not be estopped by the act of the government.

However, a government is the representative of its people in international relations. Thus, the obligations the United States government assumes here are exchanged for Taiwanese protection of the United States copyright. Therefore, the defendants who contract through their "agent"—the United States government—should be bound by the contract and the estoppel theory. Furthermore, if the treaty and the TRA are valid under United States law, this argument will be unnecessary because these two documents simply operate as domestic law in a United States court.

If the conduct of the United States misled Taiwan into believing that these rights would be protected, the estoppel could run in favor of Taiwan, allowing enforcement of its rights. In fact, the customary rule of international law, by general principle, protects these rights.

VII. CONCLUSION

The court in the *New York Chinese* case ignored both the constitutional and international legal requirements, deciding the case merely on pragmatic considerations. This might be expedient, but is unprincipled. The most harmful aspect of this decision to Sino-Amer-

113. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW SELECTED DOCUMENTS (1991).

ican relations is the *de facto* recognition of Taiwan as a "nation." This is not only contrary to the international obligations assumed by the United States through the three communiques with the PRC but is also inconsistent with the separation of powers doctrine in that it conflicts with the Continental domain of the executive in foreign relations. Furthermore, it violates the policy that the three branches should speak with a unified voice in international relations.[114]

The same protection in the FCN Treaty may be available to the Taiwanese, based on domestic law or the doctrine of estoppel. If the United States, by its conduct, misled Taiwan into believing that these rights would be protected, the estoppel theory would compel that these rights be enforced.[115] Since this concept is a United States domestic law that confers greater rights on aliens, both the PRC and the ROC should be happy with the result that Chinese copyright is protected. This resolution should also avoid international legal problems or problems with Sino-American relations.

In light of this alternative way to protect the Taiwanese intellectual property, the court's seemingly expedient solution through recognition of Taiwan as a state may not be the best one.

The Taiwan issue has been a shadow upon Sino-American relations. As the economic and the political cooperation between Taiwan and mainland China develops, this issue will be solved by the Chinese among themselves some day. Thereafter, the United States courts will be relieved of the conundrum.

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114. Goldwater v. Carter, 444 U.S. 996 (1979).

115. There may also be a customary rule of international law by general principle under Article 38 of the International Court of Justice Statute. *See* CARTER & TRIMBLE, *supra* note 113.