Indonesian Journal of International Law

Volume 21 | Number 2  
February 2024

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Exclusive Legal Personality of States in East Asia and the Legacy of Bandung

Pragmatism

Cover Page Footnote
This paper is based on the author's presentation at the 9th Biennial Conference of the Asian Society of International Law, Bandung, Indonesia in August 2023. The author is grateful to the participants who made comments on my presentation at the conference and the anonymous reviewers who helped me improve the manuscript. This research is supported by JSPS KAKENHI Grant Numbers 22K18516 and 21H04385.

This article is available in Indonesian Journal of International Law: https://scholarhub.ui.ac.id/ijil/vol21/iss2/6
EXCLUSIVE LEGAL PERSONALITY OF STATES
IN EAST ASIA AND THE LEGACY
OF BANDUNG PRAGMATISM

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Abstract

One of the significance of the Bandung Conference was the down-to-earth realism. The People's Republic of China (PRC) was among the major promoters of the conference, despite its mostly unrecognized status in the international community. The exclusive legal personality is the central tenet of the modern system of international law, where non-sovereign entities are strictly discriminated against sovereign ones. The introduction of international law in East Asia in the late-nineteenth century was particularly troublesome with the eventual denial of legal personality of semi-sovereign entities, such as the kingdom of Lew Chew, the Joseon dynasty, or the government of Tibet. East Asia today still sees the co-existence of mutually non-recognizing entities that are PRC and the Republic of China (ROC), as well as the Republic of Korea (ROK) and the Democratic People's Republic of Korea (DPRK). To deal with such a reality, we have established the practice of regional security dialogue where the DPRK has been included since 2000. We have the Asia-Pacific Economic Cooperation (APEC) forum, where both the PRC and ROC have been included in since 1991, leading to the inclusion of two Chinas in the WTO in 2001. The strict distinction between sovereign and non-sovereign entities is only a modern phenomenon, even in Western Europe, where the concept started to develop in the 17th century. The legacy of the Bandung Conference may be reappraised with its sense of pragmatism and be a starter for a postmodern and non-Western conceptualization and configuration of a community of international law.

Keywords: Bandung Conference, Exclusive Legal Personality of States, Modern System of International Law, Pragmatism, Sovereignty.

I. INTRODUCTION

The development of the modern theory of international law in Europe in the seventeenth and eighteenth centuries was very much motivated by the desire for the recognition of independence and sovereignty. When Hugo Grotius (1583-1645) was alive, the Dutch Republic was in the long process towards independence. The insurrections against Spanish rule in the late 1560s led to the creation of the Union of Utrecht in 1579, an alliance of seven provinces, which turned into the Dutch Republic, with the Act of Abjuration in 1581. The King of Spain concluded a ceasefire agreement with the rebellious provinces...
in 1609, to half-heartedly recognize the Dutch independence and treat them as
if they had sovereignty for twelve years of the ceasefire period. The ceasefire
period expired in 1621 and the hostilities resumed, continuing until the Peace
of Westphalia in 1648 as one of the theatres of the German Thirty-Year War.
In other words, for nearly eighty years, the legal status of the Netherlands was
uncertain. It was during such a time of legal uncertainty that Hugo Grotius
developed his theory of international law. According to his masterpiece, \textit{Libri
Tres de jure belli ac pacis} (Three Books on the Law of War and Peace), which
was published in 1625 during his exile in Paris, the Dutch Republic was an
independent nation and the King of France had legal responsibility to defend
this vulnerable nation against Spanish aggressors.

Another early writer of international law, Gottfried Leibniz (1646-1716),
developed a theory of two-layered sovereignty that allowed him to claim the
sovereignty of the Duchy of Braunschweig-Lüneburg in 1676-1677, under
the majesty (a higher kind of sovereignty, according to Leibniz) of the Holy
Roman Empire.\textsuperscript{1} His theory of double sovereignty provided some theoretical
support for his master to claim sovereign status in the Peace conference
of Nijmegen. By the time Gottfried Leibniz published his masterpiece of
international law, \textit{Codex Juris Gentium Diplomaticus} (Documentary Code of
the Law of Nations) in 1693, he abandoned the theory of dual sovereignty,
probably because his master acquired the status of imperial elector in the Holy
Roman Empire in 1692, with which he could enjoy the quasi-sovereign status
in foreign courts.\textsuperscript{2} International lawyers today may be disappointed by the
incoherence in Leibniz’ writings, but international law was not his primary
concern.

The most important book of international law in the eighteenth century,
in terms of dissemination and popularity, was \textit{Le Droit des Gens} (The Law
of Nations) of Emer de Vattel (1714-1767), who served the Duke of Saxony.
Vattel complained that the King of France should treat German principalities
as sovereign states.\textsuperscript{3} Furthermore, he also claimed the independence of his

\textsuperscript{1} For the theory of two-layered sovereignty (the theory of the majesty as a higher kind of sover-
eignty and the sovereignty in the strict sense), in addition the reference in footnote 2, see Patrick
Riley, “Three 17\textsuperscript{th} Century German Theorists of Federalism: Althusius, Hugo and Leibniz,”

\textsuperscript{2} Tetsuya Toyoda, “Hannoverian Court Councilor Gottfried Leibniz and His Concept of In-

\textsuperscript{3} “The king of France admits no ambassadors from the princes of Germany, as refusing to their
ministers the honours annexed to the first degree of representation; yet he receives ambassadors
from the princes of Italy.” See Emer de Vattel, \textit{The Law of Nations}, translated by Joseph Chitty
(Philadelphia: T & J. W. Johnson & Co. Publisher, 1883), Section 78.
home province. He was originally from the Principality of Neuchâtel, which was in personal union with the Kingdom of Prussia: i.e. the King of Prussia held the title of Prince of Neuchâtel. Vattel claimed the independence of the Principality of Neuchâtel despite its well established reign by the Prussian king. Vattel’s writings did not influence the political events at home, but it greatly inspired people from the rest of the world. He was typical of early writers of international law, who made legal arguments with political intentions.

The worldwide development of the modern system of international law by the early twentieth century masked its practical defects, which were more visible during the seventeenth and eighteenth centuries in Europe. We can gain insights from early modern practice of international law to situate the context of legal anomalies of international law in the twentieth and twenty-first centuries. By the early twentieth century, the European theory of international law drastically changed international relations in East Asia, with the denial of the tribute relations around the Qing Dynasty and other centres of tribute relations. East Asian nations regained independence in the decades to follow the end of the Second World War, with scars of the forcible introduction of international law. In this paper, we will see the anomalous development of international law in East Asia in its historical context and as a normal outcome resulting from the fundamental defects of the modern system of international law, which is the sovereign state system. In other words, this paper aims to provide an account of the practical defects of the Westphalian system and highlight Bandung pragmatism with its limits.

II. POLITICS OF STATE RECOGNITION

In the system of modern international law, the principle of exclusive sovereignty prescribes that states have primary legal personality and that other legal personalities, such as international organizations and natural persons, are created by the wills of states, usually expressed in international agreements. The “principle of exclusive sovereignty” may be simply called “principle of sovereignty”, but we would like to add the adjective “exclusive” to emphasize the exclusive nature of sovereignty under international law: sovereignty excludes any other sovereignty over the same land. There can be no other sovereignty within a sovereign state than the one held by the sovereign state itself.

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Secondary international legal personalities are derivative legal personalities that have validity only in relation to those states who accepted them.\(^5\) There can be secondary international legal personalities within a sovereign state only if it is accepted by the latter, which is the case of recognized insurgents and belligerents.\(^6\)

This theoretical construction appears clear and simple at first sight, but may create a tremendous complexity in practice, because there is no clear rule to determine which entity is a state and which entity is not. When the Ottoman Sultan accepted Cornelius Haga as the first Dutch ambassador in 1612, the legal status of the Republic of Netherlands was unclear. According to the memoir of Cornelis Haga, the ambassadors of France, Venice, and England tried to convince the Turkish authorities that the provinces of the Netherlands were “not an independent state entity, but a rebel formation and therefore they should not be taken seriously by the Ottoman government, so their envoy (Cornelis Haga) should accordingly be sent back immediately.”\(^7\) Despite the resumption of hostilities between Spain and the Netherlands in 1621, Haga remained in Istanbul as the Dutch ambassador until 1639, even though the post was left vacant until 1668.\(^8\) There were no clear rules as to the recognition of sovereignty and it was up to every court to make its own judgment.

With the Peace of Westphalia, the Dutch Republic gained overall recognition of statehood in 1648, but the legal status of more than 300 constituent entities of the Holy Roman Empire remained very much unclear until the early nineteenth century. It was against such backgrounds of legal uncertainty that Leibniz argued that his master, the Duke of Braunschweig-Lüneburg who wished to be treated as a sovereign ruler, was powerful enough to participate in European politics and therefore should be treated as a sovereign under the law of nations, while weak princes such as the Prince of Monaco, should not be treated as a sovereign, even if he enjoyed independence.\(^9\)

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\(^{6}\) See, for example, Sasha Radin, “The current relevance of the recognition of belligerency,” in *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald*, Marielle Matthee, Brigit Toebes, and Marcel Brus, eds. (The Hague: Asser Press, 2013), 115.


\(^{8}\) Meanwhile, four officials (Henric Corps, Nicolas Ghisbrecht, Levinus Warmer, Joris Crook) were appointed as Chargé d’affaires (Łukasz Zweifel and Beata Langer, “Over Four Centuries of Relations between the Netherlands and Türkiye,” *Historia i Polityka* 42, (2022): 14.

\(^{9}\) Gottfried Leibniz (in pseudonym), Entretien de Philarette et d’Eugene sur la question du temps agitée à Nimwegue touchant le droit d’ambassade des electeurs et princes de l’Empire (1677);
on the other hand, argued that however small or militarily dependent, his home province, the Principality of Neuchâtel, should be recognized full sovereignty and the King of France should help the principality to expel Prussian rule. The seemingly scientific discourse of international law was closely related to the international political game of the time.

It was from the multilateralization of international legal relations that the modern system of international law gained force. From the Peace of Westphalia in 1648, the Peace of Nijmegen in 1678-79, the Peace of Utrecht in 1717, and the Peace of Aix-la-Chapelle in 1748 among others, the development of multilateral diplomacy gradually created a European club of mutually recognized sovereign states by the early nineteenth century. That club was finally established after the dissolution of the Holy Roman Empire in 1806 and after one of the protocols of the Final Act of the Congress of Vienna in 1815 established a uniform rule for the ranks of diplomatic agents. The modern system of international law meant the equality between sovereign states on the one hand and the distinction between sovereign states and non-sovereign entities.

Back then, the question of sovereignty was not just a protocollary or ceremonial question. It was an important military question, as a sovereign state had the right to invite military assistance from other states. As eloquently argued by Vattel, if an entity is a sovereign state, be it small and weak, may have the legal authority to ask for foreign power to intervene. It was no accident that the Constitution of the United States of America in 1787 contained a provision to prohibit constituent states to “enter into any agreement or compact with another state, or with a foreign power, or engage in war.” The formation

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12 “A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.” See, Vattel, *The Law of Nations*, section 18. This statements is originally from Wolff, C., *Jus Gentium Methodo Scientifica Pertractatum*, 1764 (First published in 1749), Prolegomena, 16 nota, 6.
13 Cf. also Articles of Confederation (1777) Article VI: “No State, without the Consent of the united States, in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any King prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the united states, in congress assembled, or any of them, grant any
of the club of sovereign states had an effect to dissipate such ambiguities.

The club of international law was formally expanded to the Ottoman Empire in 1856, with the provision in the Treaty of Paris of 1856 that ended the Crimean War, accepting the Sultan “to participate in the advantages of public law and the European concert (à participer aux avantages du droit public et du concert européen),” while China was kept outside international law until the early twentieth century. Whether or not to accept new members was up to the arbitrary decision of the existing members.

III. LEGAL ANOMALIES IN EAST ASIA SINCE 1945 AND THE BANDUNG REALISM

In the early twentieth century, only three local powers retained their independence in East Asia: the Republic of China, the Kingdom of Thailand, and the Empire of Japan. The area of control by the Empire of Japan expanded to most of East Asia after the outbreak of the Second Sino-Japanese War in 1937 and made prelude to the political turmoil coming soon.

In August 1945, at the collapse of the Empire of Japan, the Soviet Union gained control over the northern part of the Korean peninsula, while the United States gained control over the southern part. The division of the peninsula was crystallized when the Republic of Korea was established on 15 August 1945 and the Democratic People’s Republic of Korea on 9 September in the same year. The People’s Republic of China was established on 1 October 1949, but the Republic of China retained its control over the island of Taiwan. The two divided states, which remain to date, were created then.

The Philippines was freed from United States rule on 4 July 1946, with the Treaty of Manila. In Myanmar, the British government recognized its independence on 4 January 1948, under the terms of the Burma Independence Act 1947. In Malaysia, the Federation of Malaya was first set up in 1948 as a British protectorate, before gaining independence on 31 August 1957. By virtue of the Malaysia Act 1963, enacted by the British parliament, the federation was merged with Singapore, North Borneo, and Sarawak to become Malaysia. Singapore gained independence from Malaysia on 9 August 1965.

title of nobility.”


Brunei Darussalam gained independence from British rule in 1984.

With the Geneva agreements on 21 July 1954, the French government ended its colonial rule in Cambodia, Laos, and Vietnam. Vietnam had two post-colonial governments, the Democratic Republic of Vietnam in the north and the State of Vietnam in the south, with a provisional military demarcation line running approximately along the 17th Parallel, and remained divided until the victory of the former in 1975.

In Indonesia, the nationalist forces declared independence on 17 August 1945, but it took more than four years to have its independence recognized with the Dutch resistance. Former Portuguese colony East Timor came under Indonesian rule in 1975, before gaining independence in 2002.\(^{16}\)

The Cold War, starting in East Asia in 1948 with the division of the Korean peninsula, was very prominent in East Asia. During the Cold War, North and South Korea mutually denied the legal existence of the other.\(^{17}\) They both joined the United Nations on 17 September 1991. Both of them still claim sovereignty over the entire peninsula, but as members of the United Nations, they do have de facto diplomatic relations today. On the other hand, as mentioned above, Vietnam was divided between the communist camp and the capitalist camp until 1975.

The other countries in East Asia were also divided between the two camps. In the communist camp, there was the People’s Republic of China, the Mongolian People’s Republic, the Democratic People’s Republic of Korea, the Democratic Republic of Vietnam, Burma (present-day Myanmar), and Indonesia (until 1965), to be later joined by the Lao People’s Democratic Republic and the Democratic Kampuchea (and then the People’s Republic of Kampuchea\(^{18}\)). In the capitalist camp, there was Japan, the Republic of Korea, the Republic of China, the Kingdom of Laos (until 1975), the Kingdom of Cambodia (until 1970), the Kingdom of Thailand, the Philippines, Malaysia,

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\(^{16}\) After the invasion in 1975, President Suharto was glad that “we are now at last welcoming back as brothers to the big family of the Indonesian nation the people of East Timor,” in his Independence Day speech (quoted by Kenichi Goto, “Multilayered postcolonial historical space: Indonesia, the Netherlands, Japan and East Timor,” Doctoral Degree Dissertation, Waseda University, 2005, 15. Indonesia, a former Dutch colony, being accused of colonialism against East Timor, shows another aspect of complexity of sovereignty issues in East Asia, which we would like to explore at another opportunity.

\(^{17}\) As far as the constitutional texts are concerned, South Korea still considers that “the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands” (Article 3 of the Constitution of the Republic of Korea) and North Korea that “The Democratic People’s Republic of Korea is an independent socialist State representing the interests of all the Korean people” (Article 1 of the Constitution of the Democratic People’s Republic of Korea).

\(^{18}\) The English name for Cambodia was Kampuchea from 1975 to 1989.
Singapore, and Indonesia (after 1965). The capitalist states of Southeast Asia, Malaysia, Indonesia, the Philippines, Thailand, and Singapore formed the Association of Southeast Asian Nations (ASEAN) in 1967 (Brunei Darussalam to join in 1984 upon its independence), to face the challenge of communism, before accepting Vietnam, Laos, Cambodia, and Myanmar in the 1990s. States from the two camps denied each other until 1971. Most importantly, the People’s Republic of China, the most populated nation in the world, remained unofficial for many states in the region and the rest of the world.

It is under such conditions of political division and mutual non-recognition that the Indonesian government showed its down-to-earth sense of pragmatism at the Bandung Conference in 1955.19 The PRC was among the major promoters of the conference, despite its mostly unrecognized status in the international community.20 That had extraordinary effects on international relations. For the Japanese government, for example, it became the first opportunity to have an official contact with the Beijing government, 17 years before the establishment of diplomatic relations. It was also noticeable that two Vietnams, the State of Vietnam (South) and the Democratic Republic of Vietnam (North), participated in the conference together despite mutual denial.21

IV. INDONESIAN FOREIGN POLICY IN THE 1960S AGAINST THE SOVEREIGN STATE SYSTEM

Regarding the pragmatic spirit in Indonesian diplomacy, it should be noted that the last years of the Sukarno presidency was marked by two more notable initiatives that went out of the traditional framework of international law: the

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20 An attendee even argued that “if the danger of the island to either party when in the hands of the other were frankly recognized and measures devised to eliminate such danger, ideology and even sovereignty would prove much less important.” See Charles P. Fitzgerald, “East Asia after Bandung,” Far Eastern Survey 24, no. 8 (1955): 115.
21 The list of participants included the Kingdom of Afghanistan, the Union of Burma, the Kingdom of Cambodia, the Dominion of Ceylon, the People’s Republic of China, Cyprus, the Republic of Egypt, the Ethiopian Empire, the Gold Coast, the Republic of India, the Republic of Indonesia, the Imperial State of Iran, the Kingdom of Iraq, Japan, the Hashemite Kingdom of Jordan, the Kingdom of Laos, the Lebanese Republic, Liberia, the Kingdom of Libya, the Kingdom of Nepal, the Dominion of Pakistan, the Republic of the Philippines, the Kingdom of Saudi Arabia, the Syrian Republic, Sudan, the Kingdom of Thailand, the Republic of Turkey, the State of Vietnam, the Democratic Republic of Vietnam, and the Mutawakkilite Kingdom of Yemen. Cyprus and Sudan were not independent yet, but were accepted to join the conference.
Games of New Emerging Forces (GANEFO) and the Conference of the New Emerging Forces (CONEFO).

The GANEFO was meant to compete with the Olympic Games, which were under the control of the West-dominated International Olympic Committee (IOC). The Indonesian government hosted the 4th Asian Games, the Asian version of the Olympic Games, in 1962. In protest against the non-recognition of the People’s Republic of China in the IOC, which lasted until 1979, the Indonesian government refused to invite the Republic of China to the 1962 Asian Games in Jakarta. The International Olympic Committee decided to exclude Indonesia from the Olympic Movement as the Indonesian government did not declare its will to respect the Olympic rules for the “separation of sports and politics.”

Although Indonesia was re-admitted to the IOC by the Summer Olympic Games in Tokyo in 1964, the tension rose to the point that the Indonesian government created its own version of the international Olympic games as GANEFO. The First GANEFO was held in Jakarta in November 1963, which gathered 51 states from all over the world. The Second GANEFO was held in Phnom Penh in November-December 1966, with participation mostly from Asian countries (thus the Asian GANEFO).

Even though the GANEFO did not eventually take over the Olympic Games, it showed the possibility of organizing universal sports events without Western leadership. Indonesian president Sukarno argued: “The International Olympic Games have proved to be openly an imperialistic tool… Now let’s frankly say, sports have something to do with politics. Indonesia proposes now to mix sports with politics, and let us now establish the Games of the New Emerging Forces, the GANEFO… against the Old Established Order.”

The success of the GANEFO encouraged President Sukarno to create a new international body on a much more political field. The CONEFO was meant to compete with the United Nations, which gave too much power to the old established forces such as the United States and the Soviet Union, to Indonesian eyes. The building for the Indonesian national parliament today was originally built to house the CONEFO, even though it never did. The

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establishment of the CONEFO was closely related to the Indonesian frustration against Malaysia, which culminated when the latter gained a non-permanent seat in the UN Security Council in January 1965. The division of the Bahasa-speaking world (Indonesia Raya or Melayu Raya) into two countries (three, to include Brunei Darussalam) was a result of the colonization by the British and Dutch powers under the dictates of the modern system of international law. In cooperation with the People’s Republic of China, the Democratic People’s Republic of Korea, and the Democratic Republic of Vietnam, President Sukarno withdrew the Indonesian membership from the United Nations and founded the CONEFO. The CONEFO turned out to be an ephemeral existence, since the rise to power of General Suharto in September 1966, making Indonesia return to the United Nations.

In the political sense, the GANEFO and the CONEFO were part of Indonesia’s anti-U.S. policy and the policy of Konfrontasi (confrontation) against Malaysia, which could not stand the U.S. pressure for a long time. However, they proved that the seemingly universal and perpetual organizations like the IOC and the UN can be replaced or replicated by new organizations if there are unified international political wills. While the club of sovereign states was largely defined by the U.S. and other Western powers, the Indonesian initiatives with the Bandung Conference, the GANEFO, and the CONEFO may be considered, in retrospect, as a policy to undermine the established system of sovereign states.

However, the Indonesian initiative to overcome the established system of sovereign states had a clear limitation, which was derived from domestic politics. Even if the Indonesian government offered many non-sovereign entities to attend the Bandung conference, some conference attendees could not accept to see their rivals on the same table. North and South Vietnam could attend the conference together, but the People’s Republic of China could not accept the Republic of China, and neither North or South Korea could be included.

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26 Farabi Fakih, “Malaysia as an ‘Other’ in Indonesian popular discourse,” *Inter-Asia Cultural Studies* 18, no. 3 (2017): 381.


there. The question of the exclusive legal personality of states, denying the possibility of another sovereign government in the same country, is not only an international question but also, and probably rather, a question of domestic politics.

V. POLITICAL EVENTS IN 1971 AND THE EARLY 1990S

It is superfluous to get into details of the events leading to the general switching of recognition from the Republic of China to the People’s Republic of China in the 1970s. It should be mentioned here just the official declaration made in October 1971 by the UN General Assembly in its Resolution 2758 (XXVI):

The General Assembly,

- Recalling the principles of the Charter of the United Nations,

- Considering the restoration of the lawful rights of the People’s Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter,

- Recognizing that the representatives of the Government of the People’s Republic of China are the only lawful representatives of China to the United Nations and that the People’s Republic of China is one of the five permanent members of the Security Council,

Decides to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.

Prior to the General Assembly resolution, Henry Kissinger visited Beijing on 9-11 July 1971 and President Nixon announced on 15 July his visit to Beijing in February in the following year. The *volte-face* of U.S. diplomacy in 1971 was an important turning point in the twentieth century.\(^29\) Before the U.S. switched the diplomatic relationship from the Republic of China to the

People’s Republic of China in January 1979, the Japanese government did so in 1972. The Malaysian government did the same in 1974, followed by the Philippine government and the Thai government in 1974. In East Asia, the Republic of Korea was the last government to maintain its diplomatic relationship with the Republic of China, which ended in 1992.

The Taiwanese government maintained diplomatic relations with remote countries in Africa and Latin America often with economic leverage until the early twenty-first century, but as far as the East Asian nations are concerned, the Republic of China (Taiwan) lost its recognition mostly in the 1970s. Despite the complete loss of diplomatic presence with the Republic of Korea’s switching diplomatic relationship to the People’s Republic of China in 1992, there was a new evolution rather favorable for Taiwan’s international presence: admission to APEC in 1991 and to the WTO in 2002.

At the third ministerial conference held in Seoul on 12-14 November 1991, “Ministers welcomed the participation in APEC of the People’s Republic of China, Hong Kong and Chinese Taipei and reaffirmed that the participation of these three important economies would greatly contribute to the process of economic cooperation in the region.” Their participation in APEC was closely related to their respective applications to the GATT membership. The People’s Republic of China officially formulated in June 1989 its claim to resume Chinese membership and the Republic of China submitted its application for accession to the GATT in January 1990. They were admitted to the World Trade Organization in November 2001 by the difference of only one day.

Even though the WTO is an international organization set up under international law, it accepts not only recognized sovereign states but also “territories” or “economies” as full members. The importance of the WTO cannot be exaggerated. Unlike the International Court of Justice whose jurisdiction is limited by the principle of acceptance, the Dispute Settlement Mechanism of the WTO enjoys the compulsory jurisdiction (at least it used to have one) on trade disputes. In many cases, in the WTO dispute settlement procedures, we have seen Chinese representatives and Taiwanese

32 “The terms “country” or “countries” as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.” (Explanatory note 1, added to the Marrakesh Agreement Establishing the World Trade Organization, https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)
representatives sitting together in the panel or the appellate body proceedings. Most recently, the Chinese Taipei joined the procedure as a third party on 27 January 2023, in case DS611 on Enforcement of Intellectual Property Rights, where the European Union formulated its complaint against the People’s Republic of China. Even though there are no cases directly confronting the Republic of China and the People’s Republic of China as the complainant (plaintiff) and respondent (defendant), there are numerous cases where they participated in the same cases as a third-party participant.

Another development of legal flexibility in East Asia is the ASEAN Regional Forum (ARF), which was inaugurated in July 1994. The Democratic People’s Republic of Korea was admitted in 2000. Similar to the 1955 Bandung conference, where two Vietnams and non-sovereign entities like Cyprus and Sudan were accepted, the ARF accepted the two Koreas in its meetings. It is regrettable that the Republic of China (Taiwan) is not included in the ASEAN Regional Forum and that the Democratic People’s Republic of Korea (North Korea) is not included in the WTO, but it should be noted positively that these important institutions do not limit the membership to fully recognized sovereign states.

34 China joined the procedure as a third party in DSS588 initiated by the Chinese Taipei in 2019 against India on Tariff Treatment on Certain Goods in the Information and Communications Technology Sector”, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds588_e.htm; in DS482 initiated by the Chinese Taipei in 2014 against Canada on Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS482_e.htm; in DS490 initiated by the Chinese Taipei in 2015 against Indonesia on Safeguard on Certain Iron or Steel Products, https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS490_e.htm; in DSS377 initiated by the Chinese Taipei in 2008 against the European Communities and its Member States on Tariff Treatment of Certain Information Technology Products. There were more cases which were initiated by China and joined by the Chinese Taipei as a third party.
35 The ARF did not solve the Korean problem nor did it prevent the Scarborough incident and other skirmishes in the region, but it did contribute to maintaining “habits of dialogue and consultation on political and security issues” (“ASEAN Regional Forum,” ASEAN Regional Forum, https://aseanregionalforum.asean.org/about-arf/). The current members are Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, China, Democratic People’s Republic of Korea, European Union, India, Indonesia, Japan, Lao PDR, Malaysia, Mongolia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Russia, Singapore, Sri Lanka, Thailand, Timor-Leste, United States, and Viet Nam.
VI. DIMINISHING RECOGNITION FOR THE REPUBLIC OF CHINA (TAIWAN)

As of November 2023, there are 12 foreign embassies in Taipei: the Republic of the Marshall Islands, the Republic of Palau, Tuvalu, the Kingdom of Eswatini, The Holy See, Belize, the Republic of Guatemala, the Republic of Haiti, the Republic of Paraguay,36 the Federation of Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines. Of these states, 11 are UN member states (the only non-UN member being the Holy See).37 Additionally, the largely unrecognized Republic of Somaliland opened its representative office in Taipei in September 2020. Somaliland is the largest, in terms of area, unrecognized state in the world, while Taiwan is the largest of the kind in terms of population and economy.38

Meanwhile, the Republic of China lost its diplomatic relationship with the Dominican Republic and with Burkina Faso both in May 2018,39 with the Republic of El Salvador in August 2018,40 with Solomon Islands both in September 2019,41 with the Republic of Nicaragua in December 2021,42 with

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38 Other non-recognized (partially recognized) entities include Abkhazia, Northern Cyprus, Sahrawi Arab Democratic Republic (SADR), South Ossetia, Transnistria, Kosovo, Palestine, Cook Islands, and Niue.
the Republic of Honduras in March 2023,\textsuperscript{43} with Nauru in January 2024.\textsuperscript{44} The election to the presidency of Tsai Ing-wen from the pro-independence Democratic Progressive Party (DPP) strengthened the People’s Republic of China’s efforts for Taiwan’s diplomatic marginalization.\textsuperscript{45}

However, despite the legally ambiguous status, the Taiwanese government has concluded visa arrangements with many countries around the world. According to “The Henley Passport Index: Q1 2023 Global Ranking”, based on the data collected from the International Air Transport Association (IATA), the Taiwanese passport gives a visa-free entry to as many as 146 travel destinations, while the Chinese passport to only 81 travel destinations.\textsuperscript{46} Taiwan has also concluded numerous agreements for investment protection and other types of economic partnership,\textsuperscript{47} especially with the European states.\textsuperscript{48}

The problem of Taiwan’s observer participation in the World Health Assembly is well known. From 2009 to 2016, Taiwan’s health ministers

\textsuperscript{43}“The Republic of China (Taiwan) has terminated diplomatic relations with the Republic of Honduras with immediate effect to uphold national dignity”, Ministry of Foreign Affairs of The Republic of China, 26 March 2023, https://en.mofa.gov.tw/News_Content.aspx?n=1328&s=99968.
\textsuperscript{46}Henley and Partners, The Henley Passport Index: Q1 2023 Global Ranking. [available at <https://cdn.henleyglobal.com/storage/app/media/HPI/HENLEY_PASSPORT_INDEX_2023_Q1_INFOGRAPHIC_GLOBAL_RANKING_230119_2.pdf>].
\textsuperscript{47}The list includes the economic partnership with Singapore in 2013, the agreement with Indonesia for the promotion and protection of investments in 1990, the agreement with the Philippines for the promotion and protection of investments in 2017, the agreement with Malaysia for the promotion and protection of investments in 1993, the agreement with Vietnam for the promotion and protection of investments in 2019, the agreement with Thailand for the promotion and protection of investments in 1996, the agreement with Japan in 2011 for the Liberalization, Promotion and Protection of Investment, and the agreement with New Zealand for economic cooperation in 2013 (InvesTaiwan, https://investtaiwan.nat.gov.tw/showPage?lang=cht&search=G_Agreement01).
were invited to attend it every year, but not from 2017 onwards. When the pandemic started in December 2019, the World Health Organization’s delay in response may be arguably attributed to its lack of proper cooperation with the Taiwanese health authorities. Furthermore, the absence of the Republic of China in the Universal Postal Union (UPU) forces all packages to Taiwan to make a detour to a third country, currently Japan (all mails to Taiwan used to go through Hong Kong). These problems are caused by the fact that the international organizations, such as the World Health Organization and the Universal Postal Union, are classical international organizations constituted solely by sovereign states. For non-intergovernmental international organizations like the Internet Corporation for Assigned Names and Numbers (ICANN) that was established under Californian law and governs the address system in the Internet, there are no problems with the legal status of the Republic of China and other unrecognized states.

49 One should remember that Margaret Chan of Hong Kong, China, took the leadership in the World Health Organization from 2006 to 2017 and created a false sense that the PRC and the ROC will work together in that organization. For example, in the opening address at China’s General Practice Conference in 2015, she applauded the cross-strait cooperation: “China is fortunate to have the General Practice Branch of the Chinese Medical Association, devoted to developing the curriculum, standards and performance evaluation mechanisms for the discipline. The Chinese Medical Association is also developing a professional network platform. This platform will not only play a role in mainland China, but also in other regions. Dr. Meng-Chih Lee has successfully promoted the development of General Practice in Taiwan and I will continue to follow his work with great interest.” (Margaret Chan, “Opening speech at China’s General Practice Conference,” Family Medicine and Community Health 3, no. 4 (2015), 75-77, at 76).


52 Mails to Abkhazia and South Ossetia go through the Russian Federation, mails to Northern Cyprus through Turkey, mails to Sahrawi Arab Democratic Republic (Western Sahara) through Algeria, mails to Transnistria through Moldova. Interestingly, mails to Kosovo are routed through Serbia despite the political tensions between the two governments.


VII. CONCLUSION

After the bloody struggles in early modern times, the present national borders in Europe were accepted as accidental products of history. There is no compelling reason why Belgium must be one country with its Dutch and French speakers. Scotland just happens to be part of the United Kingdom. The province of Alsace is now part of the French territory, even though the local language is a variant of the German language. Romania and Moldova are separated only by history. In consolidating national borders from the continuous and amorphous distribution of political powers and ethnic groups from the early modern times into the modern nation-state system as we have today, international law played a significant role with the strict distinction between sovereign and non-sovereign entities. We still have military conflicts in a few parts in Europe over territorial disputes, including the ones in Ukraine or Georgia, but the most murderous confrontation between the French and Germans belongs to the past with the process of economic integration under the banner of the European Union.

The modern system of international law developed in Europe with its stereotype of nation-state, according to which each nation should make one state. Stereotypes are only stereotypes and, in reality, there are no perfect nation-states. States tend to include different nations and nations tend to be divided into different states. However, even though the nation-state system started in Europe or perhaps because it started first in Europe, it has been marginalized first in Europe through the process of European integration, with occasional backslides such as Brexit, but mostly as a constant move towards the marginalization of international law within Europe. As some may claim, the protection of the rights of people as individuals may be more important than the protection of the rights of people as ethnic groups.55

The national boundaries are no less arbitrary in East Asia than in Europe. The introduction of international law in East Asia in the late-nineteenth century

55 Such a view was presented, for example, by Jan Klabbers, “The right to be taken seriously: Self-determination in international law,” Human Rights Quarterly (2006): 186-206. The UN Human Rights Committee has been keen to emphasize the importance of individual rights over collective rights at least since it declared: “In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.” (UN Human Rights Committee (HRC), CCPR General Comment No. 12, Article 1 (Right to Self-determination), The Right to Self-determination of Peoples, 13 March 1984, accessed 22 January 2024. [available at: https://www.refworld.org/docid/453883f822.html])
was particularly troublesome with the denial of the legal personality of semi-sovereign entities, such as the kingdom of Lew Chew, the Joseon dynasty, the government of Tibet, and other relatively weak political entities. After the colonial division of the region by the European powers (plus later the Empire of Japan), East Asian nations were divided by ideological confrontation during the Cold War. As an effort to overcome the ideological conflict, the legacy of the Bandung Conference may be reappraised with its sense of pragmatism and be a starter for a postmodern and non-Western conceptualization and configuration of a community of international law.\textsuperscript{56}

East Asia today still endures the co-existence of mutually non-recognizing entities, such as the PRC and the Republic of China (ROC), as well as the Republic of Korea (ROK) and the Democratic People’s Republic of Korea (DPRK). It is strange and unfortunate that a peculiar system of international law, which is only a modern phenomenon even in Western Europe where the concept started to develop in the seventeenth century, is affecting the life and peace of the region in the twenty-first century. The Europeans have more or less overcome the negative heritage of international law with the creation of the European Economic Community, which later developed into the European Community, then becoming the European Union. To deal with the politically divisive reality in East Asia, the practice of regional security dialogue was established where the Democratic People’s Republic of Korea (North Korea) is included since 2000. We have the Asia-Pacific Economic Cooperation (APEC) forum where both PRC and ROC have been included since 1991, leading to the inclusion of two Chinas in the WTO in 2001.\textsuperscript{57}

Domestic politics in the PRC and ROC or the ROK and DPRK will not allow the governments to recognize mutual sovereignty or allow third parties to recognize both governments, but the pragmatic approach taken at the Bandung Conference, The Third APEC ministerial conference, and the acceptance of two Chinas in the WTO in 2001 may avoid unsolvable issues of state sovereignty. Claiming independence and sovereignty would be important in the contexts like decolonization, such as the Dutch Republic against the King of Spain in

\textsuperscript{56} This question is somewhat related to the old controversy between the constitutive theory and the declaratory theory of state recognition. According to constitutive theory, the state recognition is a constitutive element of statehood and therefore a state does not exist as a state without being recognized by other states. According to declaratory theory, the state recognition is only declaratory and therefore a state exists as a state whether or not recognized by other states. Such theoretical elaborations seem only to make international law irrelevant to international reality and do not make much contribution to Taiwan’s participation in international trade negotiations and dispute settlements in the World Trade Organization’s framework.

the seventeenth century and for Indonesia against the Dutch Republic in the twentieth century, but not necessarily in the historical context we have today. For Indonesia, creating a unified sovereign state together with Malaysia could have been a solution, but it was much wiser to keep the colonial boundaries as they were and try to develop collaborative relations across the arbitrary borders and create common prosperity. Likewise, the Economic Cooperation Framework Agreement (ECFA), agreed in 2010, is much more beneficial than attempts for political unity between the two Chinas. The People’s Republic of China today is one of, if not the most, important countries in the global community. The Republic of China today is the largest unrecognized state in the world with a population comparable to that of Australia and a gross domestic product larger than that of Thailand. If necessary, we should develop a new concept of international law to better represent the political reality in East Asia, which would accept the overlap of sovereignties or the coexistence of mutually exclusive sovereignties. Even with the current practice of international law, there are some nuances between non-recognition and full recognition, with which we can imagine another version of international law with the concept of sovereignty more as a gradually nuanced concept.

The pragmatic spirit of the Bandung Conference, as the author sees it, is that we should work for the interest of people as human beings, not for the interest of the state, which claims identity with the people under its control. Likewise, the preamble of the 2010 ECFA put forward the “principles of equality, reciprocity and progressiveness and with a view to strengthening cross-Straits trade and economic relations.” One nation does not need to mean one state. One state does not need to mean one nation. What matters is the interests of people living there.

In recent years, the Chinese government is stiffening its position on the Taiwan question. Various domestic factors may have made it necessary for them to do so and it is no use criticizing them. We should think about the peace in East Asia in a more pragmatic way. We do not hope to see a military solution like the one that ended the division of Vietnam. We cannot expect to see two Chinas recognizing each other de facto in the United Nations, as do two Koreas, since Taiwan’s accession to the United Nations would be unlikely as long as the People’s Republic of China has the veto power in the Security

Council. In the context of domestic politics, it is a constitutional obligation of the government to pursue reunification.\(^{61}\) The international legal concept of sovereignty affects the domestic constitutional rules and limits the margin of maneuver for diplomacy, creating a threat to the lives of people. If our skewed concept of international law is putting a hurdle to peace and prosperity in East Asia,\(^{62}\) we should progressively change the conceptual framework rather than the political and social reality.\(^{63}\)

If we cannot do so, we should perhaps think about abandoning intergovernmental international organizations and turning them into nongovernmental international organizations so that we no longer need to be embarrassed by the question of exclusive legal personality of states in East Asia. In addition to the ICANN mentioned above, some important international organizations, such as the International Union for Conservation of Nature (IUCN) or the International Olympic Committee, are established under Swiss law and do not find legal obstacles to accepting Taiwan as a full member.\(^{64}\)

If people in the twentieth century crafted the classical theory of international law to protect the values they considered important, we should craft another theory of international law to protect the values we consider important in the twenty-first century. Instead of fighting over the membership, we should work together in a looser and more functional framework, while keeping, if necessary, the exclusive club of international law as it is.

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\(^{61}\) The 1982 Constitution of the People’s Republic of China provides that “Taiwan is part of the sacred territory of the People’s Republic of China. It is the sacred duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.” (preambular paragraph 9, https://www.gov.cn/guoqing/2018-03/22/content_5276318.htm)

\(^{62}\) Tsu-Sung Hsieh may be right in pointing out that “the current types of international personalities limited to be States by Westphalian theory, is practically infeasible for the recognition issue in the divided-nation situation, especially in the situation of the ROC case” and that “[a] review of Chinese history would provide a clearer picture to illustrate the divided-nation situation than does the Westphalian theory.” See Tsu-Sung Hsieh, “The Republic of China’s Statehood and Taiwan’s Legal Status: With Advocating a Common Roof Framework,” *Soochow Journal of Political Science* 39, no. 2 (2021): 103.

\(^{63}\) In this sense, the author agrees with Steve Allen who claimed that “the international community must support a fundamental revision of the traditional notions of statehood and sovereignty, in the interests of a sustainable international order and the advancement of international human rights.” See Steve Allen, “Statehood, self-determination and the ‘Taiwan Question’,” *Asian Yearbook of International Law* 9 (2000): 219.

\(^{64}\) It should also be noted with regret that the International Committee of the Red Cross (ICRC), which is also an organization set up under Swiss law, does not recognize the Red Cross Society of the Republic of China as its member.
ACKNOWLEDGMENT

This paper was first read at the 9th Biennial Conference of the Asian Society of International Law held at Bandung, Indonesia on 7-10 August 2023 on the common themed of “Reconstructing the Bandung Spirit for Asia to Lead in the New Era of International Law”. The author would like to thank the conference participants who provided insightful comments and questions, and the anonymous reviewer(s) and editors who helped the author so much to improve the manuscript, although all remaining errors and defects belong to the author.
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