

When Westphalia Goes to (Greater) China: Territory, Sovereignty and Legal Narratives Across the Strait

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Structured Abstract

Article Type: Research Paper

Purpose—The present study aims to reconceptualize the underlying tenets of Westphalian links between sovereignty and territoriality, showing how an “exported” Eurocentric doctrine actually functions in a distinct legal environment—post-imperial China—and the manner in which a protracted political-ontological dispute can or cannot make use of established Western-based legal mechanisms.

Approach—By focusing on the cross-strait dilemma of overlapping claims to sovereignty upon a “greater” China—advanced both by the People’s Republic of China and the Republic of China (Taiwan)—we aim to show how volatile (and fragile) the functionality of Westphalia actually is. In this regard, we first concentrate upon the “genealogy” of Westphalia itself, as well as on the competing narrative of Sinocentric regional order, setting the scene for an unavoidable clash of paradigms. Afterwards, it is shown how the allegedly victorious vision of Westphalia was rewritten (and conceptually undermined) when applied to the cross-strait divergence.

Findings—By following a genealogical path of Westphalia and of the intra-Sinic dispute, the present enquiry shows that a Eurocentric concept (such as sovereignty) is ill-suited to address challenges that occur in such different legal-political frameworks. Moreover, it can be discerned that even though Westphalia could have been of some (albeit limited) use when European and non-European actors collided, it

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Journal of Territorial and Maritime Studies / Volume 5, Number 1 / Winter/Spring 2018 / pp. 23–41 /
ISSN 2288-6834 (Print) / © 2017 Yonsei University

is unable to deliver a path forward for polities that were both part of a common non-Westphalian system.

Originality—When taken apart, neither the analysis of Westphalia, nor of the Sinocentric paradigm structurally reconfigure the shape of the present debates. However, it is a leap forward to join them together into a larger narrative about cross-cultural collisions, showing how even a *neutralized* Westphalia is dysfunctional in polities with a distinct (and strong) political tradition.

Keywords: China, sinocentrism, sovereignty, Taiwan, Westphalia

Diffusing Westphalia: Narratives of Sovereignty

As all stories of international law, the story of Taiwan-China sovereignty goes back—at least conceptually—to 1648. All the roads seem to lead to Westphalia.¹ But do they really go down that path? Should they actually trace narratives of state legitimation to that particular point in time and space? At first glance, modern scholars of international relations (and law) have successfully struggled to void Westphalia of any essentialist singularities, transforming it into a universal—and supposedly *acultural*—standard for defining self-standing polities in the global agora.

The Symbolic Significance of 1648: Ideology and Exegesis

However, a closer look might reveal a different image. The (modern) story of Westphalia and the *actual* Westphalian peace are not at all the same thing. And even the story itself is not a single one, but a collection of tales that have crystallized over time into an indiscernible network of ideological positions, historical interpretations and legal approaches. Westphalia has become a “metaphor”² of many readings. Its historical content has been neutralized (that is, made *neutral*), often leaving it as an empty shell open for any (re)interpretation.

And—thus—present scholarship is confronted with a diverse “menu” of ideological options when bringing Westphalia to the forefront of analysis: “realist” and “liberal” watershed-of-history readings, (post)Marxist class-conflict readings, (neo)Schmittian *jus publicum Europaeum* readings, critical legal deconstruct-Westphalia-while-you-can readings. Many other sub-strains of exegesis emerge, arguing on one point or another, but—nonetheless—still placing 1648 at the center of their narrative. With deference or disgust, with a stake in building conceptual genealogies or from a necessity to wipe it out from history, all major modern political theories acknowledge—even if only in the form of a repressed side-discourse—the impossibility to neglect Westphalia in any legitimation construct.

However, irrespective of the ideological option, a prime question must be answered: is sovereignty causally dependent upon Westphalia? Is it circumscribed to the 1648 momentum as a “story of origins”? If the answer is positive, it might lead to an uncomfortable truth: sovereignty is linked to a historical event—a particular point in space and time—being defined by such specific circumstances. The corner-

stone of international relations (and law) would—thus—tend to be a *cultural construct* emanating from unique historical conditions.

In order to answer such a dilemma, the first step is to part ways with “technical” or “assumed” understandings of the notion and to re-trace the conceptual genealogy of how Westphalia is perceived today. When confronting the *significance* of the 1648 momentum, two different lines of interpretation emerge. First of all, a more “classical” strand of interpretation argues that Westphalia was a decisive event marking “the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world.”³ As 1648 is seen as a “watershed” of history, a disruptive hiatus within history’s winding path, such a perception tends to singularize this exact moment as the birth-place (and birth-time) of sovereignty, which transformed “the territorial state [into] the cornerstone of the modern state system.”⁴

On the other side of the exegetic barricade, it is emphasized that Westphalia—as a historical moment—is not “a turning point” and “not a clear break with the past.”⁵ It rather appears—in this vision—as a retrospective construction of the past, “a product of the nineteenth- and twentieth-century fixation on the concept of sovereignty,” a mechanism devised by later theorists (mainly jurists) in order to legitimize their contemporaneous political positions.⁶

Moving the nascent concept of sovereignty to a later stage in history—perhaps the French Revolution or the industrialization and colonialism of the 19th century—such a perspective still ascribes the notion within a similar narrative, but considers a different degree of significance for 1648 momentum.⁷ Thus, even if the Westphalian treaties “did not create, *de jure*, a system of independent states, perhaps they nevertheless constitute a turning point after which, *de facto*, the imperium’s atrophy allowed the [...] distinct separate polities to effectively exercise exclusive control and power over their territories.”⁸ In other words, this type genealogical exegesis remains a “Westphalian” discourse (of legitimation), but without Westphalia itself.

Although parting ways in giving (or not) 1648 the main position in altering the course of (legal) history, both visions still come to acknowledge a narrative of progression towards the sovereign state. For some, Westphalia is the accomplishment of this path, for some it is only the beginning, for some it is only one step among many others. However, all of them inscribe into a linear perspective of (European) history, culminating in the advent of territorial sovereignty as a fulfillment of a deficient international order.

Therefore, in order to grasp the myriad meanings of “Westphalia,” it is necessary to follow three parallel lines of interpretation: (a) it must first be ascertained what the 1648 Peace actually represented for the drafters of the treaties signed in Osnabrück and Münster, (b) what the systemic consequences (even unintended) of the historical moment were and (c) what Westphalia (retrospectively) came to symbolize for further generations of political and legal scholars. Only by deploying such a broad hermeneutic key can it be discerned which descriptive narrative is truly grounded in the events leading to the 1648 Peace and which is an anachronist reading of the past.

Starting with Westphalia's primary—and historical significance—this was rather a functional one, a mere legal-political *instrument* born out of compromise and meant to defuse a violent crisis that nearly devastated Western and Central Europe in the mid-17th century. It was a solution to end a regional war triggered by theological quarrels, rather than an abstract blueprint for the future “world” order.

At that point in time, Westphalia's purpose was not to establish a new paradigm for a community of equal independent states, but to halt the disintegration of Europe. And such a cessation of hostilities was made “for the glory of God and the security of Christendom.”⁹ It was a stalemate arisen out of wartime exhaustion, not a philosophical “revolution.” The primary motives—as emphatically shown in the preambles—were security considerations, supported by theological underpinnings.

Fashioned as “a Christian, universal, and perpetual peace and a true and sincere friendship”¹⁰ between the Holy Roman Emperor and the Queen of Sweden (in the case of the Treaty of Osnabrück) and the King of France (in the case of the Treaty of Münster) together with their respective allies, the content of the treaties focused on solving the very specific—and pragmatic—issues of the day: territorial reconfigurations, succession rights, confessional relations, establishment of new state actors.

In this sense, none of the treaties were drafted with the intention to profess a utopian vision laying out “neutral” principles of international order, but an acknowledgment of how specific polities can continue to cohabitate without falling again into mutual annihilation. The desire for “universal” peace only extended to certain Christian powers in Europe¹¹ while its “perpetual” character was mere wishful thinking after three decades of continuous generalized strife. More precisely, the treaties of Westphalia sought a restoration rather than a revolution, the return to what was before 1618 (when the great conflict erupted) and not the dawn of a new age.¹²

Nonetheless, the (theoretical and practical) consequences of the embedded peace terms went far beyond the intentions of the treaty drafters. Thus, while rhetorically insisting on the “Christian” nature of the consensus, the Westphalian watershed formalized a new balance of power that no longer corresponded to the medieval notion of *respublica Christiana*. The traditional Empire-Papacy dynamics (already obsolete since the advent of Reformation) were irreversibly displaced by a state-to-state manner of interaction. Not along religious, but political lines.¹³ And with no remaining overarching secular or sacred authority to unify, pacify and coagulate the system as a whole. Anarchical it became indeed. With sovereignty as a “side effect.”

At the same time, despite little emphasis on the notion of *sovereignty* (“*ius territoriale*” or “*Landeshoheit*”) in the treaty texts themselves¹⁴—expressing circumstantial and particular rights of imperial estates or certain rulers—such a concept was inextricably linked afterwards with the 1648 momentum. One can, thus, legitimately enquire why sovereignty became an implicit theoretical corollary of Westphalia. Was it completely anachronistic for legal scholars to trace the origin of notion to this specific historical event? And—more important—what was the hermeneutic process that allowed such a connection to be deployed as a causal link?

What was designed at Westphalia, what emerged due to Westphalia and what scholars posit as the meaning of Westphalia are three different conceptual worlds.

However, they do intersect when unwinding the narrative of sovereignty's conceptual genesis. Although the diplomats that drafted the treaties had no conceivable intention to build-up a new system of international governance and an abstract blueprint for universal interaction, they practically dealt with issues pertaining to territorial sovereignty. This was not necessarily an absolute novelty in European history (Jean Bodin and Hugo Grotius had already laid down much of the theoretical apparatus), but it was a formalized manner to reorganize the political arrangement in the Western part of the peninsula, stemming not from marginal polities, but from all major powers of the day.

As Derek Croxton showed, “[a]lthough no one yet conceived of sovereignty as the recognition of the right of other states *to rule their own territory*, the increasingly complex diplomatic milieu shows how a multipolar system was able to develop. In this sense, one may locate the origins of sovereignty around the peace of Westphalia, but only as a *consequence* of the negotiations, not of an explicit or implicit endorsement of the idea of sovereignty in the terms of the treaties.”¹⁵

Not the Peace terms themselves led subsequent theorists to argue for a Westphalian origin of sovereignty, but their implicit consequences. It was a turning point in *European* history, ending—for good—the fundamentals of imperial (hierarchical) authority. A regional affair, linked to specific challenges, but which paved the way for a formally acknowledged way to formally interact on the continent. And beyond it.

In such a context, territorial sovereignty emerged as a victorious vision to govern internally and engage in diplomatic relations externally, in accordance with the “Westphalian model.” As Stephen Krasner explains, this state-centric paradigm came to be understood as “an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures.”¹⁶ For all later generations of jurists, political theorists and IR scholars, such a reading of sovereignty became embedded within a Westphalian exegetic framework.

However, decrypting the historical development of the concept with a Westphalian hermeneutic key does not—therefore—mean that sovereignty is linked to the strict 1648 moment, but rather that Westphalia becomes a “metaphor” for an “entire *phenomenon* that was rhetorically and ideologically re-centered around that specific event in order to explain the later evolution of state practice and political theory.”¹⁷ Sovereignty becomes inextricably dependent upon Westphalia-as-a-process¹⁸ (and not as an event), allowing (legal) exegesis to instrumentalize it as the assumption upon which the entire international system relies.

Westphalia appears, in this grand narrative, as a self-contained discourse of *legitimation*. Its purpose is not to tell us what was, but what (and how) it should be. It is not meant to be a constative, but rather a performative language-game.¹⁹ One that loosely anchors itself in history, but which develops its entire theoretical apparatus based on “creative” exegesis. Only in such a manner can a story of sovereignty be told convincingly.

Uprooting Westphalia: A Neutral and Universal Concept of Sovereignty

However, this brings us back to the initial dilemma and its uncomfortable consequences. If all sovereign roads lead to Westphalia—one way or another—such a notion is impossible to separate from particular cultural circumstances. In this manner, the inception of sovereignty is confined to a unique set of philosophical challenges which hardly make it “universal.” A Westphalian-type narrative is undoubtedly Eurocentric and (causally) associated with the conceptual prerequisites of this legal macro-space.

Any such vision of statehood and sovereignty appears as just another chapter of a much larger tale: the *jus publicum Europaeum* stretching back from (early) Greco-Roman law to Justinian and—through a Byzantine interlude—to scholasticism and Vittoria. Such a strong geo-cultural descriptor managed to generate parallel sets of consequences: while internally ordering the European space in autonomous and self-standing sovereign polities, it opened up the “rest of the world” to appropriation and to being passive object of their sovereignty.²⁰ Therefore—without a hint of negative inferences about the matter—sovereignty is a European story. And so is the entire foundation of international law.

But why is it (simply) European? Does the Westphalian genealogical itinerary determine the notion’s later nature? And does such a designation—as a European concept—mean that it is improper for universalization? To answer these questions, we must begin by remembering that Westphalian “[s]overeignty, after all, was a concept elaborated to fit the unique circumstances of sixteenth- and seventeenth-century Europe. In short, it was designed to explain and legitimize the rise of the centralized and absolutist state.”²¹

At its origins, Westphalia was a *technique* of solving a precise crisis and to surmount particular historical challenges that pertained to a generalized intra-Christian conflict with political, legal and theological stakes. Westphalia was a discussion about the existence of Europe, about the soul of Europe. For that reason, “the validity of the Peace was, in fact, intended to include the whole continent, with the exception, of course, of the Ottoman Empire,”²² a Muslim super-power with high interest—and participation—in continental affairs, but with no religious “capacity” to take part to this grand Christian peace.

Thus, from the outset, the Westphalian standing of a polity was thought in terms of inclusion-exclusion, based on strict cultural descriptors. Every Christian entity was potentially included—even if not directly present—while any other non-Christian power—even if strongly embedded on the continent—was excluded, deemed to have no place at the pacification of Christian Europe.

Of course, such origins of the system are not the only factor to be accounted when analyzing sovereignty’s later development, but they are determinative of the conceptual framework deployed by European actors when dealing with “outer” polities in Asia, the New World or Africa. Its basic tenets of exclusive territorial control and the avoidance of foreign interference were devised for European polities at a

certain point in history when the continent nearly devastated itself due to overlapping jurisdictional claims.

For these reasons, the initial structure of the narrative was rather devised as a mechanism for allowing a hegemonic configuration of the world, one of concentric spheres of influence that gravitate around a European core of sovereignty. Such a notion was not developed to serve other parts of the world for establishing their own autonomy and independence. It was not a tale of global (and diffuse) order, but a tale of European (and monocentric) order. Such were the times and—as happened with any other civilization in a dominant position—legal discourse turned out as another form of privileged (geo)political utterance.

As the world plunged into the colonial 19th century and then emerged out of the Great War, the benevolent principle of self-determination was universalized. This paradigmatic mutation corresponded to neutralizing the entire Westphalian setting—*formally* voiding it of any cultural assumptions—and projecting it to the level of the entire world. New states—and old empires—took upon themselves the cloak of sovereignty. An apparent empty normative shell—with no cultural or political content—seemed to be the best instrument in establishing statehood. However, as history seems to prove, no conceptual genealogy can ever be entirely erased. And no (legal) mechanism remains merely passive in the hands of the mastering power.²³ The instrument itself shapes—and constrains—power in pre-determined paths.

This double process of neutralization and universalization led to the *uprooting of Westphalia*. Sovereignty was re-conceptualized as a positivist artifact devised to both expand it (spatially) and to limit it (materially), fostering a vision of law-as-technology. Such a perspective allowed the sovereign principle to be enshrined as the foundation of a quasi-Kantian universal order, one of equal and mutually exclusive territorial polities which interacted in a normative universe, rather than one of force. Devoid of any “political”—or theo-political—content, sovereignty now appeared as blank a cartographic depiction of “borders,” *a map without any landforms*.

Such a metamorphosis of sovereignty—performed through cultural erasure—affected not only the “rest” of the world, but Europe as well. An identity dilemma became inescapable once the entire global arena was flattened and subject to the same rules and privileges. Nothing about it was “exceptional” anymore and no structural difference could be placed between “us” and “them.” As Westphalia was entirely uprooted and spread all over the world, it no longer seemed that there was a “silent” and “covert” quest for hegemony. Not even a disguised one. This was a phenomenon that gained momentum on its own. A legal-political *golem* that possessed its own life, irrespective—and even against—its creators’ desire.

And thus, sovereignty was unbound.

Taming the Dragon(s): Sovereignty in Greater China

At the same time, the spread of the “neutralized” Westphalian narrative over the world produced radical mutations both in the manner in which politics is

conducted globally, but also upon the understanding of sovereignty itself. In this sense, some Far East polities—such as Meiji-era Japan—managed to immediately take upon themselves the new sovereign clothes and wear them in a European-style, gaining the status of great power and a seat at the table.²⁴ At the same time, other traditional hegemonies of the area were more reluctant in adopting such a new vision and parting ways with centuries of political culture. While the European actors instrumentalized sovereignty to “tame” their Asian counterparts, these actors had different plans for Westphalia. In history, a concept works both ways. Or in too many unforeseen ways.

In conceptual parentheses, our *methodological disclaimer* must be reaffirmed for the purposes of this chapter (and of the next one), making it clear that the following analysis does not aim to ascertain the truth-value or the reality of (post)essentialist claims to identity, nationhood or public self-perception of a given polity, but rather to see how Westphalia-as-discourse was deployed as a language-game for managing the challenges of sovereignty. It is not a description of what Taiwan or PRC really “are,” but rather what they appear to be from the narratives of legitimation they use among themselves and within the larger international agora. It is a story about a story. Not a story about “facts.”

Center and Periphery: When Westphalia Goes to China

When Westphalia went global, it also went (conceptually) rogue. After reaffirming it outside the exclusivist European *oikumene*, sovereignty found new ways of expression (and different challenges) which transformed its foundation. The seemingly “neutral” structure and appearance as a purely technical “mechanism” transformed it into a vector for redrawing the complicated map of power and dominance in the Far East. When European actors were ushered away from the area, the new (and not so new) regional hegemonies shielded themselves with such an instrumental understanding of sovereignty in order to legally replace “outside” authority with self-standing polities.

While the Westphalian narrative proved to be a corrosive tool in the hands of European powers,²⁵ it now became the Asian states’ favorite discourse for asserting their absolute—and unchallengeable—domination upon a given (but increasingly fought over)²⁶ territory. It seemed as a classical story of “center” and “periphery,” in which the latter gained momentum and started to use the former hegemon’s political vocabulary in order to establish itself as a new (although lesser) center.

In reality, the tale of Chinese sovereignty is much more complicated. And different layers of complexity are added when asking the—uncomfortable—questions of traditional worldview, translation of communism (or nationalism) and the debate over who is the “legitimate” sovereign of a “greater” territory. In essence, the dilemma can be simplified to asking if the Westphalian narrative actually works as devised or it only represents a legal pretext for a different type of geopolitical quest. Not only a question of Westphalia’s functionality arises, but also one regarding its desirability.

As always, such an analysis must turn out as an exercise of conceptual archeology. Before the advent of Westphalia in the Far East, a complete and coherent narrative of international relations (and rules) was already in place. The traditional Sinic paradigm was anchored—exactly like its European correspondent—in strong cultural and religious assumptions,²⁷ while also harboring a vision of universality. It was based on two main features that defined it as a Sino-centered system of political interaction: (a) hierarchy and (b) symbolic tribute offering (and submission) by non-Chinese entities.

Its model resembled one of concentric arrangements of power and influence, with the Empire in the middle of the entire structure. The emperor himself was the “Son of Heaven,” ruling by divine mandate and presiding—even if only symbolically—over Chinese and non-Chinese communities as an authority with no bounds whatsoever.²⁸ On the other hand, the symbolical and—rarely *enforced*—Pax Sinica relied on the “tribute system” which “regulated and made possible” the participation of neighboring and foreign (even European) actors in this order.²⁹ Such “peripheral” polities—too far away from the Emperor’s grace—could “present tribute, demonstrating that the virtue of the Son of Heaven had reached lands far and wide. By cherishing these peoples, the Chinese emperor in turn would show his paternal, benevolent status befitting that of a superior.”³⁰

How could this alternative—and radically different—model of state interaction and international law survive along Westphalia? Three different phases succeeded, reflecting the development stages of the sovereignty-discourse in Europe and the increase in relative power of such actors throughout the world. In reality, the conceptual markers of (Westphalian) international law expansion were largely determined by political, economic and military contingencies.

In a *first phase*, in the late 17th and 18th century, the Portuguese and British missions arrived on the coasts of China, where they were condescendingly dismissed as mere distant and (largely) irrelevant “peripheries” for which the Emperor had no interest. The “center” remained immutable while the European actors only sought to take part in it (as tribute-bearers) as it was, not to expand their own model to this area.³¹ This can be explained by emphasizing that Westphalia itself was only a “regional” and culturally imbued arrangement at that time, with no universal desires. Both China and Europe saw themselves as “centers,” but with no stakes in convincing—or converting—each other to the verity of such a position.

On the other hand, the situation was altered in the *second phase*, in mid-19th century. Two phenomena changed the approach: European hegemony and the underlying assumption that its political-legal setting is superior. On being the true—and only “center”—Europe was no longer open for any compromise. Therefore, after the Opium War, China was forced in the position of being a “periphery” in the world order,³² when the Western powers “imposed by force and coercion the Westphalian institutions on East Asia, dismantling in the process the traditional East Asian international order.”³³ After the Treaty of Nanjing (1842), the Sinocentric world order no longer appeared as a competitor for Westphalia, as China passively acknowledged an—eroded and incomplete—sovereignty in the modern sense.³⁴

In a later, *third phase*, once Westphalia was completely “neutralized” itself, a legal technique meant to ensure the universality of (truly) equal sovereign statehood, Asian actors themselves adopted it as a privileged discourse of independence and “decolonization.” Sovereignty—as a language-game—became the only desirable model for statehood and interaction on the global arena. This type of Westphalian narrative created a world with no “periphery,” but a world of many “centers.”

And the dragon had been (legally) tamed. At least at a formal level.

Nothing but Territory: The Clash of Sovereignties

The adoption of such a system in a radically different environment created new challenges and unsolvable dysfunctions. At first glance, Westphalia might have seemed neutral and universal—empty of any cultural pre-requisites—and China might have seemed uprooted from its Sinocentric perspective. The reality, however, revealed a more enduring competition of worldviews and a repressed sense of centrality which was only temporarily blurred by an *instrumental* Westphalian legal discourse.

A point of fracture in this story of *exclusive territorial authority* emerged in the period following World War II and the resumption of hostilities between the intra-Chinese belligerents. As the self-styled “nationalist” side of Chiang Kai-shek collided against the “communist” forces of Mao, the territory of China was subject to a constant drawing and redrawing process, changing masters in the course of the Civil War. Boundaries were in place internally, but both actors claimed the complete and final sovereignty upon the entire polity.

In a certain sense, this was a pre-Westphalian situation of overlapping demands to jurisdiction which sought to be resolved in the most Westphalian manner available: a mutually exclusive quest for absolute dominion upon a territorial unit. Sovereignty was affirmed in an intransigent language-game that became even more dysfunctional once the belligerents were spatially separated and refrained from military conflict. If Westphalia had one good use, it was exactly that: sorting out adverse claims and placing borders between them. (Geographical) territory was to be reinforced by the cold letter of the law.

However, the tale of the two competing Chinese sovereigns would prove to be different.

Once the military conflict was reined in during 1949–1950, it seemed that things would lead to a partition of the territory as Chiang Kai-shek and his remaining forces (along with civil administration) retreated from the mainland and transferred the entire “state” apparatus to the island of Taiwan. At the same time, Mao remained the—factually—undisputed hegemon of continental China, subjecting it to an intensive centralization process. While the nationalist forces maintained their claim to being the sovereign of the Republic of China (hereafter ROC), the communist side also considered itself to be the sole authority over the People’s Republic of China (hereafter PRC) whose advent it proclaimed in 1949.

While Hainan was conquered by Red China the following year and a nationalist

insurgence lingered in mainland China for some years, it appeared that the conflict of the two republics reached a stalemate. Each controlled—*de facto*—a clearly defined territory, but claimed—*de jure*—the sovereignty over the entire land (mainland China *plus* Taiwan). Both ROC and PRC maintained the theory of a *single, undivided and permanent* sovereignty upon greater China, although their exclusive territorial control was firmly established upon one portion or another of it. In a purely Westphalian setting, the issue would have been surgically solved: partition, demarcation and territorialization behind strictly imposed borders. Internal sovereignty would have been reflected externally.

Nevertheless, despite each polity consolidating its exclusive grasp of a given territory (ROC upon the island of Taiwan and several other small islands; PRC upon the mainland and all the other remaining islands), none of them seriously considered to use the Westphalian narrative in order to create a distinct (sovereign) state, independent of the other. Rather, both entities constructed a legal and political discourse aimed at affirming their undisputable authority upon the entire territory.

For these purposes, Westphalia—and the rules of international law—attained a different type of instrumentalization: a technical language-game devised to support the claim of that polity which uttered it. In a purely legal setting—although largely fictional for both accounts—ROC argued that its sovereignty was continuous from 1912 (without any interruption in 1949),³⁵ while the PRC leaders argued that since its proclamation this was the successor state of the ROC and all attributes of sovereignty were incorporated by the newly created Communist state.

The unusual confrontation resulted in a paradox: overlapping discourses of legal-political hegemony (both arguing for one “China” that is indivisible) while the controlled territories were practically demarcated and separated. Each party regarded the other as unlawful in its claims and refrained from admitting it any attributes of (veritable) sovereignty. For both, Westphalia—and its rules—meant little in practice. It only served as a narrative of self-legitimation, a linguistic—and legal—artifice deployed to conceal a more profound reality: the *persistence of the Sinocentric paradigm* in a modern and secularized international arena.

While the recognition issue varied over time—as an engagement with the “outside” world—the sovereignty impasse was decided only within this framework of a proclaimed single Chinese community. It was a “cross-strait” problem and it remained so. Both sides used Westphalia-as-discourse to speak to the global audience, but maintained a tight “internal” understanding of political power, of its sources and structures. When analyzed closer, this vision actually reflects a traditional Sinic approach to sovereignty: the center of the (Chinese) world is singular and imbued with unquestioned legitimacy. One must only find out *where* that center is in order to grasp the hierarchic out-spread of authority.

The essence of the initial PRC-ROC sovereignty debate appears different when followed from this perspective. If Taipei is the privileged holder of legitimacy—one that was transferred from the mainland in an Asian version of *translatio imperii*—it may not give in to pretensions of the PRC, not until it is assured that its undiluted—and unspoiled—sovereignty can safely “return” to the continent in full Sinic

regalia. Conversely, as it considers itself to be the “empire-in-exile” which might—if needed—even resist on its own, renouncing the actual control of the mainland which is just a territory beyond its control. On the other hand, if Beijing is the veritable *locus* of authority, it might even allow Taiwan its complete autonomy, when admitting to symbolically “pay tribute” to the center.

Therefore, the cross-strait great game was not one of affirming the exclusive territorial control of one polity, but rather a process of building up a privileged—and unique—*locus* of sovereignty. Both parties aimed to re-configure the “center” of the Sinic *oikumene* as a source of political legitimacy. And this is the reason why PRC and ROC are still so absorbed by each other and the stabilization of their relations. They may have admitted a series of Westphalian solutions—as temporary and superficial technical arrangements—but remained on the path of pursuing the (re)construction of a unified Chinese community.

In the end, each side saw itself as the sole bearer of legitimacy, as the “true” center of China. And, across the strait, *nothing but territory*.

The Cross-Strait Duplex: A Sovereignty Stalemate

Therefore, these initial positions determined both actors to conceal a vision—even if declaratively repressed—of Sinocentric (regional) order. Throughout the post-war period, each party adamantly maintained that it would launch itself into a “counterattack” to reclaim the mainland or into a “liberation” of the island, but gradually such rhetorical stances softened up and allowed for an even more curious dynamic: acknowledging the existing “duplex” reality³⁶ and searching ways for *cohabitation without settlement*. At least without a formal one. The Westphalian narrative proved powerless in either ensuring the conditions to reach over the strait, or in creating a definitive rift in its middle.

Dealing with a Shifting Recognition

The 1971 (and 1979) moment—when most of the “outside” world switched its diplomatic recognition to PRC instead of ROC—also marked a new phase for the cross-strait relations. Not only was the tactical approach modified, but also the applicable language-games. In this sense, the (now) confident mainland officials started to replace the concept of “liberation of Taiwan” with the more conciliatory one of “peaceful unification of the motherland.”³⁷ Such a formulation indirectly admitted that the insular territory was not one “occupied” by an enemy that needs to be expelled, but rather a part of a larger Chinese community that—at least temporary—was outside the PRC control.

For this reason, in 1981 and 1982, attempts to start reunification discussions were made by mainland representatives. The most articulate one—and conceptually sophisticated—was that proposed by Deng Xiaoping, offering the “concession” of “One Country, Two Systems,” later to be applied to Hong Kong and Macau. How-

ever, such a vision gained no adherence in Taiwan and the ROC authorities rejected the proposal, arguing that China (the overarching and complete polity whose sovereignty they still claimed) should “only have one good system, not two incompatible systems.”³⁸

No further progress was made in tackling the dilemma of cross-strait sovereignty³⁹ until the early '90s when Taiwan and communist China established two quasi-diplomatic mechanisms meant to be used in approaching the other side of strait. Thus, ROC deployed its newly-created Strait Exchange Foundation (SEF) to deal with the PRC-based Association for Relations Across the Taiwan Strait (ARATS) and—in 1992—the representatives of these special-purpose instruments reached an ambiguous agreement. The 1992 Consensus, as it became known, informally asserted that there is “one China, with different interpretations.” The fundamentals of “unity” were not questioned, but only the applicable hermeneutics in finding out what that China really is and how it can be considered “one.”⁴⁰

Ever since 1992 that became the basis of any negotiations, of any change of power in Taiwan and a source of political confrontation within the island’s political establishment. A year later, the PRC authorities (more precisely the Taiwan Affairs Office) issued their White Paper offering—again—the “peaceful reunification” through the failed formula of “One Country, Two Systems,” by building upon the terms of the Consensus and providing a distinct exegesis of their meaning.⁴¹ The ROC reaction was not even lukewarm. The status quo carried on without any change on the horizon.

However, starting with the mid-'90s, one could observe that Taiwan started to exhibit some sporadic attempts in affirming a distinctly insular *sovereign* entity. More precisely, in 1999, Lee Teng-hui used the troubling expression of “special state-to-state relations” which angered PRC authorities and seemed to break-up with the Consensus.⁴² A step further in this rhetoric-of-sovereignty was taken by the next president, Chen Shui-bian (of the DPP), who displaced the KMT establishment in 2000. Even though he started with his famous declaration of “four nots and one no,”⁴³ he soon argued that the cross-strait relations should be seen as interactions between “one state on each side (of the Straits).”

As this seemed to move to a rather Westphalian narrative of “independence” (and a move against its second White Paper⁴⁴), PRC also responded in a hardline Westphalian mode: fight against “secessionism.” Thus, in 2005, Beijing enacted its Anti-Secession Law which—legally—threatened to use “non-peaceful” means if Taiwan would move to declaring itself a separate state, outside the conceptual artifice of One China in two polities.⁴⁵ Things seemed to become serious and—gradually—both sides backed down their rhetoric-of-sovereignty.

Adapting to a Westphalian Aporia

With the return of the KMT to leadership, Ma Ying-jeou—the 2008–2016 President—moved to a more conciliatory tone in respect to PRC and endorsed a status quo approach. In his inauguration speech, he emphasized that the starting point for

cross-strait relations would be the 1992 Consensus and that his reign shall be based on the idea of “no unification, no independence and no use of force” by which the insular entity may afford to “maintain the status quo in the Taiwan Strait.”⁴⁶ Therefore, Westphalian hard-speech of either independence-secession or of unification with the mainland was reduced to a minimum, leaving only a lingering notion of (de facto) sovereignty, meant to prevent aggressive stances from PRC, rather than advancing a geopolitical position.

On the other hand, given the 2016 elections and the advent of the DPP back to power, it might be too soon to argue what precise conceptual direction Tsai Ing-wen’s presidency will take. However, she has already clearly stated in her recent National Day Address that “[t]he new government will conduct cross-strait affairs in accordance with the Constitution of the Republic of China, the Act Governing Relations between the People of the Taiwan Area and the Mainland Area.” Moreover, she indirectly stressed the importance of the 1992 moment and the need to “cherish and sustain its accumulated outcomes.”⁴⁷

At first glance, the reference to the constitutional order and the acknowledgment of the 1992 process seem to point to a direction of stability, rather than one of confrontational rhetoric with the mainland.⁴⁸ Even though she represents the rather independence-minded DPP, Tsai Ing-wen appears to have taken note of a weariness in the public opinion regarding any tensions with PRC, preferring an ambiguous and ill-defined status quo that bears no challenge and no risk.⁴⁹

Therefore, if the Taiwanese more recent position on sovereignty would be analyzed closely—leaving aside the KMT-DPP versions of the island’s politico-ontological status—it might reveal that even the support for “independence” does not go so far as to *fundamentally* challenge the 1992 Consensus. As Richard Bush pertinently described the situation, even in its “recalcitrant” periods, “Taipei’s goal has not been to avoid being a part of China[...]. Rather, the issue was *how* Taiwan might be part of China—or more precisely, how the governing authority in Taipei would be part of the state called China” and not simply become a subordinate entity within PRC.⁵⁰ The limits of the sovereignty discourse were mostly confined to a “de facto” stance and its preservation in case of unification.

China—and not Taiwan/ROC as a self-standing separate state—still dominated the political imagery of the island’s elite. If this was a true belief in the beginning, it was inertially maintained afterwards in order to cope with the mainland’s carrot-and-stick approach, as well as with long-standing allies that did not wish to see the status quo disturbed. For these reasons, the “singular” China principle is still in place, as the island does not profess a “separatist” agenda in a European sense and it cannot appear to do so on the world stage. It is neither a Kosovo, nor a Catalonia. Not even a self-professed Ireland or an exotic version of Corsica. Analogies with other cases are radically flawed as they neglect the basic tenets of Taiwan’s existence and (greater) Chinese sovereignty.

This Westphalian *aporia*—and intentionally professed ambiguity—also explains why Taiwan (otherwise so direly endangered by PRC’s hegemonic narrative) still supports nowadays the mainland’s claims for the Nine-Dash Line that aims to dimin-

ish the sovereignty of PRC's neighbors over their territorial waters. In the context of the Permanent Court of Arbitration adverse decision against PRC establishing Philippines' rights in the South China sea, Tsai Ing-wen presidential office publicly argued that "[t]he decisions of the tribunal which impinge on the interests of the ROC, especially with regard to the status of Taiping Island, have seriously undermined the rights of the ROC over the South China Sea Islands and their relevant waters. The ROC government *does not accept any decisions that undermine the rights of the ROC, and declares that they have no legally binding force on the ROC.* The ROC government reiterates its firm position that the ROC has sovereignty over the South China Sea Islands and their relevant waters."⁵¹

In other words, despite backing down the rhetoric of greater China in cross-strait relations and in the day-to-day discourse for the global agora, once the essence of Chinese (not PRC) sovereignty over its traditional sphere of hegemony was challenged, the Westphalian rules were given no importance. Only the historical argument of Chinese preeminence within its "undisputed" realm. And those are the true limits of Westphalia in this region of the world. It might work as a "deterrence" discourse for other power-players, but it has no weight in arriving at palatable regional status quo. At least not for the Chinese actor(s).

Conclusions: Beyond the Margins of Westphalia?

For all these reasons, it could be conclusively argued that Westphalian sovereignty is only professed in cross-strait relations when tensions are increasing. It is not assumed as a foundational paradigm, but only as an instrumental discourse meant to gain each actor some additional "leverage" in their great game: (1) while the mainland is brutalizing its stance, arguing for a strict Westphalian definition of Taiwan as a mere rebel/separatist province, (2) the insular position extends its "independence" language-game in asserting that its *de facto* sovereignty should—naturally—have evolved into a *de jure* sovereignty if it gazed in that direction.

However, in reality, Westphalia retains only a marginal understanding of the situation, resembling a crisis-discourse that does not accurately portray the essence of cross-strait relations. It is rather used as a geopolitical pressure-valve that deploys formal threats toward the other actor (and its allies). It is not meant to create new facts on the ground—or in diplomatic quarters—but to deter any regional or global players from disturbing the ambiguous (but entrenched) status quo.

Westphalia might seem to use the same vocabulary, but a different grammar applies.

Notes

1. This theory—although in a Western-based framework—was previously developed in Horia Ciurtin, "Paradoxes of (Sovereign) Consent: On the Uses and Abuses of a Notion in Inter-

national Investment Law,” in *ICSID Convention After 50 Years: Unsettled Issues*, ed. Crina Baltag (Kluwer Law International, 2017), p. 36 et seq.

2. As Martti Koskenniemi intuitively affirmed, there is a “metaphoric sense of Westphalia”—see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2004), p. 51.

3. Leo Gross, “The Peace of Westphalia, 1648–1948,” *American Journal of International Law* 42(20) (1948), p. 28. <https://doi.org/10.2307/2193560>

4. Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: McGraw-Hill, 1985), p. 294.

5. Stephen Krasner, “Westphalia and All That,” in *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, eds. Judith Goldstein and Robert O. Keohane (Ithaca, NY: Cornell University Press, 1993), p. 235.

6. In this regard, see the excellent historically documented study of Andreas Osiander, “Sovereignty, International Relations and the Westphalian Myth,” *International Organization* 55(2) (Spring 2001), p. 251.

7. For instance, see the image portrayed by Andreas Osiander, 2001, pp. 282–284. Or Stéphane Beaulac who argues that Westphalia “constitutes but one instance where distinct separate political entities strived for more power through independence, which was only achieved long after the Peace”—Stéphane Beaulac, “The Westphalian Legal Orthodoxy—Myth or Reality?,” *Journal of the History of International Law* 2(2) (2000), p. 151.

8. *Ibid.* p. 169.

9. See the content of the “Peace Treaty of Osnabrück between Emperor Ferdinand III and Queen Christina of Sweden and their respective allies, Osnabrück (October 14/24, 1648)” as translated from the Latin original in “Peace Treaties of Westphalia” in *German History in Documents and Images: Volume 1. From the Reformation to the Thirty Years War*, eds. Thomas A. Brady, Ellen Yutzy Glebe et al. (1500–1648), available online at http://germanhistorydocs.ghi-dc.org/pdf/eng/87.%20PeaceWestphalia_en.pdf, accessed 31 October 2017.

10. *Ibid.*

11. Derek Croxton, *Westphalia: The Last Christian Peace* (New York: Palgrave Macmillan, 2013), p. 3. https://doi.org/10.1057/9781137333339_1

12. Charles S. Maier, *Once Within Borders: Territories of Power, Wealth, and Belonging Since 1500* (Cambridge, MA: Belknap Press, 2016), p. 78. <https://doi.org/10.4159/9780674973909>

13. Wayne Hudson, “Fables of Sovereignty,” in *Re-envisioning Sovereignty: The End of Westphalia?*, eds. Trudy Jacobsen, Charles Sampford and Ramesh Thakur (Aldershot: Ashgate, 2008), p. 28.

14. Article VIII (1) of the Peace Treaty of Osnabrück talks about “*libero iuris territorialis tam in ecclesiasticis quam politicis exercitio*” or—in the German version—“*ungehinderten Ausübung der Landeshoheit sowohl in geistlichen als auch in weltlichen Angelegenheiten.*”

15. Derek Croxton, “The Peace of Westphalia of 1648 and the Origins of Sovereignty,” *The International History Review* 21(3) (1999), p. 591 (our emphasis in the original text). <https://doi.org/10.1080/07075332.1999.9640869>

16. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), p. 20. <https://doi.org/10.1515/9781400823260>

17. Ciurтин, 2017, p. 38.

18. See, for instance, David Kennedy’s depiction of this relation which affirmed that “people remember 1648 because they associate it with the origin of the complex process of intellectual and institutional reinvention through which it came to be a matter of common sense that the politics of the world would be organized around sovereign states: a transformation that took more than three hundred years to achieve.”—David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Oxford: Princeton University Press, 2016), p. 20.

19. This constative-performative (often apparent) distinction is best presented in Austin’s classical account on speech acts—see John L. Austin, *How to Do Things with Words*, 2nd edition (Oxford: Oxford University Press, 1975).

20. As usual, the Schmittian account of this narrative is an excellent theoretical and historical depiction of the process—see Carl Schmitt, “Der neue Nomos der Erde,” *Gemeinschaft und Gesellschaft: Zeitschrift für soziale und politische Gestalt* 3 (1955).

21. Joseph Camilleri, "Sovereignty Discourse and Practice—Past and Future," in Jacobsen, Sampford and Thakur (eds.), 2008, p. 35.

22. Heinz Duchhardt, "The Peace of Westphalia: A European Peace," in *The Ashgate Research Companion to the Thirty Years' War*, eds. Olaf Asbach and Peter Schroder (Aldershot: Ashgate, 2014), p. 309.

23. In this sense, one could not avoid thinking this as a legal paraphrasing of Heidegger's (in)famous excursus on technology. Only that—for the purposes of our study—we must take into consideration a construct of law-as-technology. See Martin Heidegger, "The Question Concerning Technology," in *Martin Heidegger: Basic Writings*, ed. D. F. Krell, revised and expanded edition, translated by W. Lovitt with revisions by D. F. Krell (London: Routledge, 1993), pp. 311–341.

24. In this sense, see the excellent account of Japan's use of sovereignty and international law for integrating in the European great game of hegemony by Douglas Howland, *International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century* (New York: Palgrave Macmillan, 2016).

25. For instance, the manner in which Western powers used the fiction of extraterritoriality to extend their sovereignty and limit their Asian counterparts' sovereignty in the 19th and 20th centuries—see Douglas Howland, "The Foreign and the Sovereign: Extraterritoriality in East Asia," in *The State of Sovereignty: Territories, Laws, Populations*, eds. Douglas Howland and Luise White (Bloomington & Indianapolis: Indiana University Press, 2009), pp. 35–55.

26. Asian powers themselves engaged in power games and legitimation sovereignty discourses in order to challenge each other's territorial boundaries, resembling the European actors' behavior and also taking it a step further—see, for example, the disputes around Manchuria in David Tucker, "Colonial Sovereignty in Manchuria and Manchukuo," in Howland and White (eds.), 2009, p. 84 et seq.

27. Confucian principles laid the foundations of this model with its hierarchical vision of social order and need for stability.

28. A classical account in this regard is that of Gerrit W. Gong, "China's Entry into International Society," in *The Expansion of International Society*, eds. Hedley Bull and Adam Watson (1984), p. 173 et seq. Also see the description of Fairbank which stated that the Emperor's authority "not only reached throughout China proper but continued outward beyond the borders of China to all mankind [...] as parts of a concentric hierarchy"—see John K. Fairbank, "A Preliminary Framework," in *The Chinese World Order: Traditional China's Foreign Relations*, ed. John K. Fairbank (Cambridge, MA: Harvard University Press, 1968), p. 8.

29. Yongjin Zhang, "Curious and Exotic Encounters: Europeans as Supplicants in the Chinese Imperium, 1513–1793," in *International Orders in the Early Modern World: Before the Rise of the West*, eds. Shogo Suzuki, Yongjin Zhang and Joel Quirk (London: Routledge, 2014), pp. 56 et seq.

30. Shogo Suzuki, *Civilization and Empire: China and Japan's Encounter with European International Society* (London: Routledge, 2009), p. 39.

31. Zhang, 2014.

32. As Antony Anghie pertinently showed, this was the age in which positivist jurisprudence "claimed that international law was the exclusive province of civilized societies," thus separating the "center" from the "periphery" in a European-dominated Westphalian setting—see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), p. 53.

33. Zhang, 2014, p. 58.

34. The Treaty itself used a language of sovereign equality and—at the same time—coerced China to admit the establishment of British diplomatic missions on its territory—see Suzuki, 2009, p. 58.

35. For more details upon this troubled part of Chinese history, see Denny Roy, *Taiwan: A Political History* (Ithaca, NY: Cornell University Press, 2003); Jonathan Manthorpe, *Forbidden Nation: A History of Taiwan* (New York: Palgrave Macmillan, 2005).

36. This "duplex" metaphor was coined by Richard C. Bush who portrayed it as an "imaginary duplex [...] known as China. The PRC 'family' inhabits one dwelling and the ROC 'family' the other."—see Richard C. Bush, *Untying the Knot: Making Peace in the Taiwan Strait* (Washington, D.C.: Brookings Institution Press, 2005), p. 104. In these terms, he followed the relations between

the two “patriarchs” of the dwellings and how they claimed—initially—to be the owners of the entire duplex structure, followed by an interaction that allowed their authority to be defined in different ways, without reaching a veritable compromise.

37. Kevin G. Cai, “Introduction: Cross-Taiwan Straits Relations Since 1979,” in *Cross-Taiwan Straits Relations Since 1979: Policy Adjustment and Institutional Change Across the Straits*, ed. Kevin G. Cai (Singapore: World Scientific Publishing, 2011), p. 2.

38. Ma Ying-jeou, “Taiwan’s Approach to Cross-Strait Relations,” *Aspen Institute*, Working Paper (January 2003), p. 30.

39. However, a certain symbolic step was taken in 1987 when the ROC authorities allowed their subjects to visit relatives on the mainland and thus stopping a several-decade interdiction to travel to PRC territory.

40. For precise details upon the language used in the 1992 Consensus, see Xu Shiquan, “The 1992 Consensus: A Review and Assessment of Consultations Between the Association for Relations Across the Taiwan Strait and the Straits Exchange Foundation,” *American Foreign Policy Interests* 23 (2001), pp. 121–140.

41. See Taiwan Affairs Office of the State Council, “The Taiwan Question and Reunification of China,” *Beijing*, August 1993, http://www.gwytb.gov.cn/en/Special/WhitePapers/201103/t20110316_1789216.htm, accessed 22 October 2017.

42. See George W. Tsai, “Cross-Taiwan Straits Relations: Policy Adjustment and Prospects,” in Cai (ed.), 2011, p. 120.

43. More precisely, he pledged in his inaugural speech that “I will not declare independence, I will not change the national title, I will not push for the inclusion of the so-called state-to-state description in the constitution, and I will not promote a referendum to change the status quo in regard to the question of independence or unification. Furthermore, there is no question of abolishing the Guidelines for National Unification and the National Unification Council.”—*apud* Ma, 2003, p. 31.

44. See the Taiwan Affairs Office of the State Council, “The One-China Principle and the Taiwan Issue,” *Beijing* (2000), available at http://www.gwytb.gov.cn/en/Special/WhitePapers/201103/t20110316_1789217.htm, accessed 22 October 2017.

45. Tsai, 2011, pp. 123–124.

46. Lee Ming, “Cross-Taiwan Straits Relations and Ma Ying-jeou’s Policy of Diplomatic Truce,” in Cai (ed.), 2011, p. 196.

47. See President Tsai’s 2016 National Day Address, 10 October 2016, <http://www.mac.gov.tw/ct.asp?xItem=115684&ctNode=7909&mp=3>, accessed 22 October 2017. An interesting thing to note is her reference to the Act Governing Relations between the People of the Taiwan Area and the Mainland Area whose provisions are in affirming that mainland China is part of the “territory of the Republic of China outside the Taiwan Area” (art. 2.2).

48. For more details, see David G. Brown and Kevin Scott, “China-Taiwan Relations: Taiwan Sets a New Direction,” *Comparative Connections* 18 (1) (May 2016), pp. 67–78.

49. Some authors coined this trend as a “fading” independence movement who lost any serious ground—see Robert S. Ross, “Taiwan’s Fading Independence Movement,” *Foreign Affairs* 85 (2) (March/April 2006), pp. 141–148. On the other hand, it is uncertain how low (or high) the support is for independence given that no one really wants to compound PRC threats.

<https://doi.org/10.2307/20031917>

50. Bush, 2005, p. 81.

51. See the press release from the Office of the President, 12 July 2016, <http://www.mac.gov.tw/ct.asp?xItem=115097&ctNode=5908&mp=3>, accessed 22 October 2017.

Although it has taken some steps to soften its rhetoric, Taiwan still formally maintains the claim that China (itself) should benefit of the entire zone comprised within the line—see Lynn Kuok, “Tides of Change: Taiwan’s Evolving Position in the South China Sea—And Why Other Actors Should Take Notice,” *The Brookings Institution—Center for East Asia Policy Studies*, East Asia Policy Paper 5 (May 2015).

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