THE STATUS OF CUSTOMARY INTERNATIONAL LAW, TREATIES, AGREEMENTS AND SEMI-OFFICIAL OR UNOFFICIAL AGREEMENTS IN LAW OF THE REPUBLIC OF CHINA ON TAIWAN

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TABLE OF CONTENTS

I. Introduction .................................................. 2  
II. The Status of Customary ....................................... 3  
III. The Status of International Treaties and Agreements 10  
    A. Application Authorized by Statutes or Administrative Decrees ...................... 11  
    B. Application without Authorization ....................................................... 13  
    C. Enabling Legislation and the Self-Executing Problem .................................. 18  
    D. Conflicts with Municipal Laws ............................................................... 22  
    E. Treaties and Agreements between Countries without Diplomatic Relations with the Republic of China ....................................................... 25  
IV. The Status of Semi-Official or Unofficial Agreements .................................... 27  
V. Treaty or Agreement Reporting of the Republic of China .................................. 28  
VI. Conclusions ....................................................... 29  
    Glossary ................................................................. 31


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(1)
I. INTRODUCTION

Generally speaking, there are six sources of international law: (1) treaties (agreements); (2) custom; (3) general principles of law recognized by civilized nations; (4) judicial decisions; (5) writers’ views; and, (6) resolutions of international organizations.\(^1\) The status of international law in domestic law, however, is an issue that actually concerns only treaties (agreements) and custom. The “general principles of law recognized by civilized nations” refers to those principles applied by the International Court of Justice, when it faces a problem not covered by treaties or custom. In such an instance, the Court may draw analogy from a principle common to all major legal systems of the world.\(^2\) These principles are not applicable to a domestic court facing a similar situation. In a case before a domestic court, if there is no applicable international custom or treaty, the court will apply the domestic law of that country. With respect to judicial decisions and writers’ views, they serve only as evidence to prove the existence of international custom. As to resolutions of international organizations, they also can serve as evidence of international custom. If a binding resolution is addressed to member states, it still must be implemented by legislation or executive order. Before that process is adopted, a domestic court will not apply that resolution.\(^3\)

In the case of the Republic of China (ROC), the discussion of the status of international law in domestic law also must include semi-official or unofficial agreements in addition to treaties (agreements) and custom. This is because the Republic of China now has diplomatic relations with only 23 countries\(^4\); it thus cannot conclude treaties or agreements with many countries that do not have diplomatic relations with it. However, the Republic of China does con-


clude nominally semi-official or unofficial agreements with many countries without the benefit of diplomatic relations.

II. THE STATUS OF CUSTOMARY INTERNATIONAL LAW

Neither the earlier nor the present Constitution of the Republic of China\(^5\) prescribes whether, in the absence of statutory authorization, customary international law has validity in the internal law of the Republic of China so that it may be applied by the courts of the Republic of China; nor has this question ever been decided authoritatively by the highest judicial interpretation organ of the Republic of China.\(^6\) But, in several statutes and administrative

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6. Between 1912 and 1927, the supreme organ of judicial interpretation was the Ta-li Yuan, which was also the supreme court of China. See Articles 33 and 35 of the Organic Laws of Courts, submitted to the Emperor on February 7, 1910, Ssu-fa li-kuei (Law and regulations on the judiciary), Taipei: Secretariat of the Judicial Yuan, reprint of 1919 edition, 1979, p. 19. According to an order of the President of the Republic of China, issued on March 10, 1912, this, and many other laws, promulgated by the Ch'ing government were provisionally in force until the promulgation of a new law to replace it. *Chung-hua liu-fa* ([Compilation of] China's six laws), Shanghai: The Commercial Press, 1920, p. 1. The Ta-li Yuan was replaced by the Supreme Court (*Tsui-kao fa-yuan*) in 1927, when the Nationalist Party gradually assumed nation-wide power. From 1927 to 1928, the Supreme Court was the supreme organ of judicial interpretation. See Articles 1 and 3 of the Provisional Act of the Organization of the Supreme Court, October 25, 1927, in *Tseng-tin Kuo-min Cheng-fa hsien-hsing fa-kuei* (Expanded compilation of the current laws and regulations of the Nationalist Government), [Second Category] Kuan-chih (Organization of the Government), Vol. 1, Shanghai: The Commercial Press, 1929, p. 30. From the end of 1928 to 1947, the Judicial Yuan (Ssu-fa Yuan), which included the Supreme Court and other organs, was the supreme organ of judicial interpretation. See Article 3 of the Organic Law of the Judicial Yuan, October 20, 1928 and amended on November 27, 1928, in *Chung-hua Min-kuo hsien-hsing fa-kuei td-ch'uan* (A complete compilation of the current laws and regulations of the Republic of China), Shanghai: The Commercial Press, 1933, p. 197. Under the present Constitution, the supreme organ
decrees, the application of customary international law by courts or administrative organs is specifically authorized. For example, Article 1 of the Act Governing Trial of War Criminals, which was promulgated on October 24, 1946, amended on July 15, 1947, and repealed on May 12, 1978, states: "In addition to public international law, the provisions of this Act shall be applicable to the trial and punishment of war criminals. . . ." (Emphasis added.) The Air Defense Law, which was promulgated on August 19, 1937, amended on May 12, 1948, and repealed on January 26, 2005, states in Article 3: "Foreigners or stateless persons with domicile, residence or assets in the territory of the Republic of China . . . have the duty of participating in air defense. In case of necessity, their assets may be requisitioned, subject to restrictions imposed by treaties and international law." (Emphasis added.) The 1945 Provisional Arrangements Governing Handling of Italian Nationals and Properties in China states: "2. Italian nationals in Chinese territory shall be dealt with in accordance with Chinese law and international custom." (Emphasis added.)

It seems clear that these legislative and administrative references to "public international law," "international law" or "international custom" include the rules of customary international law and that the courts of the Republic of China and administrative agencies are obliged to apply these rules in exercising their functions.

In the absence of a specific authorization by a statute or an administrative decree, can a court of the Republic of China apply a rule of customary international law in exercising its functions? There is no statutory prohibition against such an approach, and in

of judicial interpretation of the Republic of China is the Council of Grand Justices of the Judicial Yuan (Ssu-fa Yuan Ta-fa-kuan hui-i). See Article 79, paragraph 2 of the Constitution of the Republic of China, promulgated on January 1, 1947 and entered into force on December 25, 1947, China Yearbook 1963, Taipei: China Publishing Co., 1964, p. 875. All former interpretations of the Supreme Court and the Judicial Yuan and all former judgments of the Supreme Court which were selected as precedents by the same court, and which were given before the promulgation of the present constitution, are still authoritative in the Republic of China. All former interpretations and judgments that were given by the Ta-li Yuan before 1927 are only of reference value in the Republic of China.


8. Ibid., p. 1136.

9. Shanghai Ch’u Ti-wei Ch’-an-yeh Chu (Shanghai Area Enemy and Puppet Government Property Administration), ed., Chang-ise hui-pien (Collection of rules and regulations), Shanghai: published by the editor, 1945, p. 53.
practice the courts of the Republic of China sometimes have referred to rules of customary international law to clarify the meaning of statutory provisions or to decide a question of jurisdiction. Six cases in which the courts of the Republic of China have applied rules of customary international law will be discussed.

First, according to the Act for the Application of Laws, which was promulgated on August 5, 1918,\textsuperscript{10} the courts of the Republic of China might apply foreign law in civil litigation. In 1921, a Chinese court in Manchuria was confronted with the question of whether it should apply the laws of the defunct Russian Empire or the laws of the Soviet state that was not then recognized by the Republic of China. The court asked the Ta-li Yuan—the supreme judicial organ at that time—for an authoritative interpretation. On August 24, 1921, the Ta-li Yuan replied that, as the new Soviet State was not yet recognized by China, its laws could not have legal validity in China.\textsuperscript{11} In this case, the Ta-li Yuan apparently applied the rule of international law that a state will not give effect through its courts or other organs to the legislative acts of an unrecognized state or government.\textsuperscript{12}

Second, in the case of Rizaeff Freres v. The Soviet Mercantile Fleet, the defendant was sued, as successor of the former Russian Volunteer Fleet, for breach of contract. It claimed jurisdictional immunity on the ground that it was a Soviet state organ. The Provisional Court of Shanghai dismissed the case on September 30, 1927, and held:

As the question of jurisdiction has been raised, that has to be decided before considering other questions. The question of jurisdiction shall be decided in accordance with public international law. According to the custom of public international law, the state-owned navigation organ of a friendly country is not subject to the jurisdiction of this court. As the defendant is a state-owned navigation organ of the Union of Soviet Socialist Republics, it is clear that this court does not have the right to adjudicate this case.\textsuperscript{13}

\textsuperscript{11} Tung-tzu No. 1589 Interpretation, in Kuo Wei, ed., Ta-li Yuan chieh-shih li ch'uan-wen (Complete text of the interpretations of the Ta-li Yuan), Taipei: Secretariat of the Judicial Yuan, reprint of 1930 edition, pp. 923-924.
Third, in the case of Public Procurator v. WANG Min-yao and SUNG Chen-wu, the defendants were prosecuted for committing the offence of interference with public function in the Embassy of the Republic of China at Seoul, Republic of Korea. One of the defendants, WANG Min-yao, argued that the place of committing the offense—Korea—was a foreign territory that was outside the jurisdiction of the Republic of China. The District Court of Taipei rejected the argument on November 8, 1965, and held:

Although an embassy is located in a foreign country, it is not subject to the jurisdiction of the host country. It is still within the reach of Chinese law. This is the so-called “imaginary territory” [fictitious territory] in legal theory and this is also a principle generally recognized by international law. As the place in which the defendant committed the offence was within the premises of the Chinese Embassy in Korea . . . there is no doubt that he should be subject to the jurisdiction of Chinese law.\textsuperscript{14}

Upon appeal, the case was dismissed by the Taiwan High Court on the ground that the Criminal Code of the Republic of China did not specify that an offense committed in the embassies or legations of the Republic of China abroad should be subject to the jurisdiction of the Republic of China.\textsuperscript{15} The Chief Procurator of the Supreme Court brought an extraordinary appeal in this case, again based on the ground of the “fictitious territory” theory of international law. However, this appeal was rejected by the Supreme

\textsuperscript{14} Criminal Judgment No. 54 [1965], Shu-2107, in International Law Reports, Vol. 40, pp. 56-57. Article 7 of the Chinese Criminal Code provides: “This Code shall apply to an offence . . . which is committed by a citizen of the Republic of China beyond the territory of the Republic of China and for which the minimum basic punishment is imprisonment for not less than three years . . . .” The defendants were prosecuted under Article 136 of the Criminal Code where the minimum basic punishment is imprisonment for one year; therefore, the Court could not assume jurisdiction under Article 7. Unless the Court applied the customary international law rule of “fictitious territory,” it could not exercise jurisdiction over this case.

Court, thus affirming the dismissal of the case.\textsuperscript{16} However, the Supreme Court did not challenge the view of the District Court and the Chief Procurator of the Supreme Court that customary international law can be applied by Chinese courts.

Fourth, at the 1969 Term First Meeting of the General Conference of Civil-Criminal Divisions of the Supreme Court of the Republic of China, held on August 25, 1969, the Fourth Criminal Division of the Supreme Court submitted the following question to the decision of the Conference: Should an offence committed by our nationals within an embassy or consulate of our country abroad be considered as an offence committed within our territory or without?

The question involves the interpretation of the term "territory of the Republic of China," which appears in Article 3 of the Criminal Code the Republic of China. The Fourth Criminal Division submitted three different theories for the consideration of the Conference. All three theories referred to international law or to custom of international law to clarify the meaning of the term "territory of the Republic of China" in Article 3 of the Criminal Code the Republic of China. For instance, Theory C, submitted by the Fourth Criminal Division, reads in part: "According to international law, the term 'territory of the Republic of China'; referred to in Article 3 of the Criminal Code, certainly consists of real territory as well as imaginary [i.e., fictitious] territory. The former refers, for example, to our territorial land, territorial sea and territorial airspace; and the latter refers, for example, to our vessels, [war]ships, and aircraft outside our territory, and the offices of our diplomatic envoys sent abroad."\textsuperscript{17}

Fifth, in 1994, the President of the International Law Association Chinese (Taiwan) Branch, Professor Hungdah CHIU, forwarded a copy of a questionnaire from the International Law Association regarding the international law practice in the municipal courts of the Republic of China to the Judicial Yuan and requested its response. In the letter addressed in response to Professor Chiu, Secretary-General of the Judicial Yuan stated that


the Judicial Yuan "provides its response to the questionnaire based on the current situation of the legal system of the Republic of China." To answer Question 10 of the questionnaire, the Judicial Yuan replied

The court is bound by the Constitution, treaties (or agreements), laws (including the orders issued from the administrative authorities by authorization of law), interpretations issued by the Council of Grand Justices of the Judicial Yuan and the precedents of the Supreme Court. As to [the validity, content, scope and manner of application of the international custom], the parties involved have the burden to prove them and the court is also competent to initiate an investigation therefor. As to general international law, the court can refer to the legal opinion of the International Court of Justice, other courts in the Republic of China, executive branches and domestic and foreign scholars to ascertain what it is.18

Sixth, in the case of *Kao Lin Co. v. The Embassy of the Republic of Panama in the Republic of China*, the defendant was sued for reselling a Mercedes-Benz sedan to plaintiff. In the default judgment of 2001, the Taipei District Court indicated that although Ambassador Jose Antonio Dominguez, as Head of the Mission of the Republic of Panama in the Republic of China, could claim jurisdictional immunity of the receiving State under paragraph 1 of Article 31 of the Vienna Convention on Diplomatic Relations, the defendant in this case was the Embassy of Panama. Then, the court held, under customary international law, jurisdictional immunity of sov-

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When the relevant rule of international law is a rule deriving from custom, or otherwise from general international law, do the courts ascertain the validity, content, scope, and manner of application of that rule—

(a) from the court's own knowledge of international law?
(b) from the writing of jurists, textbooks, encyclopedia, digests or other writings?
(c) from the jurisprudence of other courts within the forum State?
(d) from the jurisprudence of courts of other States?
(e) from the jurisprudence of international courts of other States?
ereign state is restrictive and a diplomatic mission of a foreign State may not claim state immunity for *acta jure gestionis*.\textsuperscript{19}

Upon appeal, the case was upheld by the Taiwan High Court on the ground that "according to international practices and customs, a state or its representative organ may not claim jurisdictional immunity for *acta jure gestionis* (commercial activities)."\textsuperscript{20}

In the six cases stated above, the application of rules of customary international law by the courts of the Republic of China or judicial authorities seems to have been taken for granted. Moreover, it also should be noted that none of the procurators, attorneys, or judges who participated in these cases raised the question of whether the courts of the Republic of China could apply customary international law in exercising their functions, nor have any writers in the Republic of China challenged this practice.\textsuperscript{21} For these reasons it appears clear that Chinese courts can apply rules of customary international law in exercising their functions without special authorization by statutes or administrative decrees.

Where a statutory provision conflicts with a rule of customary international law, the question arises as to which shall prevail. Neither judicial decisions nor interpretations of the Republic of China have discussed this question. It is believed that the statutory provisions probably would prevail.

If administrative decree or order conflicts with a rule of customary international law in of the Republic of China, it is not clear which prevails. As with statutes, the answer cannot be found in the judicial decisions or interpretations of the Republic of China. Logically, the answer to this question depends upon whether under the Chinese legal system the term "law" includes rules of customary international law. If so, since a law, as a generally accepted principle, will prevail over an inconsistent administrative decree or order,


\textsuperscript{21} After the judgment of *Rizaeff Freres v. The Soviet Mercantile Fleet*, Civil Judgment No. 15 [1926]-4885, the Shanghai Bar Association expressed its opinion to the Chinese Ministry of Justice, challenging the correctness of international law rules applied by Provisional Court of Shanghai. But it did not question the application of international law by the court in its exercise of judicial functions. See LU Ting-k’uei, "The Question of jurisdiction Over State-owned Ships Engaging in Commerce in Public International Law." *China Law Review*, Vol. 3, Nos. 7 and 8 (1929), p.14.
a rule of customary international law would also prevail over an inconsistent administrative decree or order. In several of the cases we have discussed above, the courts of the Republic of China applied some rules of customary international law as if they were applicable laws under the legal system of the Republic of China, but none of these cases appears to have involved an inconsistent administrative decrees or orders. Therefore, whether a rule of customary international law would prevail over an inconsistent administrative decree or order before a court of the Republic of China is still a question that cannot be answered conclusively on the basis of the available evidence.

III. THE STATUS OF INTERNATIONAL TREATIES AND AGREEMENTS

While article 38; article 58, paragraph 2; article 63; and article 141 of the present Constitution, respectively, prescribe the review processes of treaties of the Republic of China and oblige the government of the Republic of China to respect treaties, neither of them explicitly define the treaties in the Constitution. Therefore, interpretation 329 of the Grand Justice Council of the Judicial Yuan of December 24, 1993 explained:

Within the Constitution, “treaty” means an international agreement concluded between the R.O.C. and other nations or international organizations whose title may apply to a treaty, convention or an agreement. Its content involves important issues of the Nation or rights and duties of the people and its legality is sustained. Such agreements, which employ the title of “treaty,” “convention” or “agreement” and have ratification clauses, should be sent to the Legislative Yuan for deliberation. Other international agreements, except those authorized by laws or predetermined by the Legislative Yuan, should also be sent to the Legislative Yuan for deliberation. Those international agreements, which do not need to be sent to the Legislative Yuan for deliberation or cannot be regarded as treaties concluded by governmental agencies or their authorized institutions or groups, should be processed by responsible governmental agencies compliant with legislative or normal executive procedure.22

The status of international treaties or agreements in the law of the Republic of China shall be discussed by the following section.

A. Application Authorized by Statutes or Administrative Decrees

A number of statutes make specific reference to the application of international treaties or agreements. For instance, the Law of Extradition, which was promulgated on April 17, 1954 and amended on July 4, 1980, states in Article 1: “Extradition shall be effected in accordance with treaties. Where there are no treaties or no provisions applicable to a case in existing treaties, the provisions of this Law shall prevail.”23 (Emphasis added.) Article 4 of the Patent Act, which was promulgated on May 29, 1944, amended eight times, and last amended on February 6, 2003, also provides:

A patent application filed by a foreign applicant may be rejected if the home country of such foreign applicant is not a signatory of an international treaty for protection of patent right to which the Republic of China (hereinafter referred to as the “ROC”) is also a signatory, or if the home country has not concluded with the ROC a treaty or an agreement for reciprocal protection of patent rights, or if no patent protection agreement has ever been concluded by and between the organizations or institutions of the ROC and said foreign country, as approved by the Competent Authority, or if the acts of said foreign country do not accept patent applications filed by nationals of the ROC.24

Another example is the Land Law, which was promulgated on June 30, 1930, amended seven times, and last amended on October 31, 2001, states in Article 18: “Only those aliens may acquire or create rights over land in the Republic of China who are nationals of States that have diplomatic relations with the Republic of China and permit, according either to treaty or to their municipal Acts, Chinese nationals to enjoy the same rights in their respective coun-

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23. CHIEN Kuo-ch’eng and LIU Ch’ing-ching, eds., Tsui-hsin hsien-min t’iu-fa ch’uan-shu (Latest complete collection of six laws), Tainan: Distributed by Ta-wei Book Co., 1984, p. 836.
tries."25 (Emphasis added.) The Act Governing Trial of War Criminals, which was promulgated on October 24, 1946, amended on July 15, 1947, and repealed on May 12 1978, refers to both treaties and agreements. Article 2 of that Act provides:

[Persons] committing one of the following acts are war criminals: 1. Foreign military service men or civilians planning, conspiring, initiating or supporting a war of aggression or other illegal war in violation of international treaties, conventions or assurances before or during the war; 2. Foreign military service men or civilians directly or indirectly committing atrocities in violation of laws and customs of war in the war against the Republic of China or during the period of hostilities.26 (Emphasis added.)

Similarly, the application of international agreements is also authorized in some administrative regulations. For instance, the Rules Governing Aerial Accidents of Civil Aircraft, which were promulgated by the Ministry of Communications on October 21, 1953, state in Article 12: "In addition to the provisions of these Rules, aerial accidents of aircraft of foreign nationality occurring within the national territory may be handled in accordance with international regulations."27

It is beyond doubt that where such references exist, courts or administrative organs in the the Republic of China must apply the indicated treaties or agreements in exercising their functions.28 Moreover, it should be noted that whenever a statute or administrative decree refers to "international law" generally, courts or admin-

26. See supra note 7.
istrative organs of the Republic of China also may apply relevant international treaties or agreements, since it is universally agreed that “international law” includes not only customary rules but also treaties and agreements.

B. Application without Authorization

But, in the absence of authorization by a statute or an administrative decree, can a Chinese court or administrative organ apply a treaty or international agreement in exercising its function? The legislative history of the Civil Code, the relevant pronouncements or decisions of judicial and administrative organs, and the majority of the opinions of writers in the Republic of China all support the view that treaties can be applied directly by the courts or administrative organs of the Republic of China.

1. Legislative History of the Civil Code

Article 11 of the Law Governing the Application of the Book of General Principles of the Civil Code was drafted originally as follows: “No foreign juristic person shall be allowed to come into existence except in accordance with the provisions of law and treaties.” (Emphasis added.) However, in Explanation Point 10 of the Resolution Concerning the Legislative Principles of the Book of General Principles of the Civil Code, adopted by the Central Political Conference in its 168th meeting held on December 19, 1928, the words “and treaties” were removed from the draft. The reasons given were:

A treaty which was ratified and promulgated by both parties naturally has binding force between two countries. However, as for its general validity with respect to their nationals, some maintain that at the same time it directly becomes effective with respect to their nationals; others maintain that it must go through the legislative process before it can directly become effective with respect to their nationals. It is proposed that the first process [theory] should be adopted [and therefore, the words “and treaties” should be eliminated].

29. Li-fa chuan-k’an (Journal of legislation), No. 1 (1929), pp. 15-16. The Central Political Conference was the supreme policy-making organ of the National Government at that time.
2. Pronouncements or Decisions of Judicial or Administrative Organs

In its instruction No. 459 to the Ministry of Justice given on July 27, 1931, the Judicial Yuan assumed that treaties can be applied directly by courts in deciding cases. Again, on several occasions when courts submitted to the Judicial Yuan questions concerning the interpretation of Article 4 of the Arrangement Sino-Francais Portant Institution de Cours de Justice Chinoises dans la Concession Francaise de Shanghai, July 28, 1931 and Article 5 of the Agreement Concerning the Chinese Court in Shanghai Public Concession, February 17, 1930, the Judicial Yuan immediately rendered its interpretations and seemed to assume that treaties or international agreements could be applied by Chinese courts.

Similarly, in a conference on legal problems sponsored by the Taiwan High Court and held on February 15, 1966, all resolutions adopted by the participants (judges from the Supreme Court, Taiwan High Court and District Courts) seemed to assume that treaties or agreements could be applied directly by Chinese courts.

With respect to court decisions, the Supreme Court invoked the above stated Agreement Concerning the Chinese Court in Shanghai Public Concession in its decisions Nos. 23 [1934] Shang 1074 and 1813. Again in another case, Public Procurator v. Mat-

33. See Judicial Yuan Interpretation Tuan-tzu No. 945 (July 25, 1933) and No. 1312 (Aug.31, 1935), in Collection of the Interpretation of the Judicial Yuan, supra note 23, Vol. 1, p. 98, Vol.2, pp. 171, 234. The practice of the Ta-li Yuan was the same; it did refer to treaties in several interpretation. E.g., see Ta-li Yuan Interpretation Tung-yu 1455 (1920), in Complete Text of the Interpretation of the Ta-li Yuan, supra note 10, p. 858.
34. See infra note 62 and accompanying text.
35. In 1994, in a letter addressed to Prof. Chiu by the Secretary-General of the Judicial Yuan of the Republic of China regarding the questionnaire of the International Law Association regarding the international law practice in the municipal courts of the Republic of China, the secretary general provided some good examples of decision where the courts applied the provisions of a treaties or rules of customary international law. See Response of the Judicial Yuan of the Republic of China, Chinese Yearbook of International Law and Affairs, Vol. 13 (1994-1995), pp.202-203.
sumoto,37 decided by the District Court of Taipei on November 24, 1965, the Court made several references to the 1944 Chicago Convention on International Civil Aviation38 and seemed to assume that the convention was applicable to the case. After the entry into force of the Sino-American Agreement on the Status of United States Armed Forces in the Republic of China on April 12, 1966,39 several court decisions of the Republic of China have made reference or citation to that Agreement.40 Moreover, in a civil judgment rendered on February 22, 1974 the Supreme Court stated:

This court takes into consideration the fact that the . . . Treaty of Friendship, Commerce, and Navigation Between the Republic of China and the United States was signed on November 4, 194641 and promulgated after the resolution approving its ratification by the Legislative Yuan; and [the instrument of ratification] was exchanged and entered into force on November 30, 1948. (See the first trial file, p. 79.) In accordance with Article 141 of the Republic of China’s Constitution, which provides for “respect[ing] treaties” and Article 63 of the same Constitution which requires treaties be approved by the Legislative Yuan,42 the Treaty of Friendship, Commerce and Navigation does in fact possess valid force equivalent to that of the Chinese domestic law. Therefore, it should be binding in this case.43

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39. Ibid., Vol. 572, p. 3 ff.
42. Article 141 of the Constitution of the Republic of China provides:
Information on the practice of administrative organs concerning application of international treaties is usually not available in published sources. But in at least one published case, the Ministry of Justice invoked Article 14 of the Hague Convention on Nationality to decide the nationality of an orphan found in Japan, in its reply to the Ministry of the Interior dated December 27, 1961. The reply did not mention the problem of the validity of treaties in the law of the Republic of China and seemed to assume that treaties could be applied directly by administrative organs.

3. Opinion of Writers

Some writers in Taiwan have considered this question. Late Professor Lexington E. C. Hung of National Taiwan University (former Grand Justice of the Judicial Yuan) argued that treaties could become directly effective with respect to nationals under the Chinese legal system. He said:

Article 38 of our Constitution provides that the President shall, in accordance with the provisions of this Constitution, exercise the powers of concluding treaties, etc. Article 58 paragraph 2, provides that bills concerning the conclusion of treaties shall be presented to the Executive Yuan Council for decision. Article 63 provides that the Legislative Yuan shall have the power to decide by resolution upon statutory bills . . . conclusion of treaties, and other important affairs of the State. As bills concerning the conclusion of treaties should be jointly decided by the Executive Yuan Council and the Legislative Yuan [just like other bills concerning statutes], it should be interpreted that treaties shall become effective upon ratification; that is to say, they shall at the same time directly enter into force with respect to State and nationals. (See Explanation Point 10 of Resolution Concerning the Legislative Principles of the Civil Code adopted by the Central Political Conference in its 168th meeting held in December 1928).45


Similarly, T'ANG Wu, former Chinese delegate to the Sixth (Legal) Committee of the United Nations General Assembly, wrote that "once bills concerning conclusion of treaties are adopted [by the Legislative Yuan] and promulgated [by the President], there should be no doubt that they have the [force] of law." Late Professor LIU Ch'ing-jui wrote that "according to the provisions of our Constitution, the process of conclusion of treaties is the same as that of the general legislative process" and that therefore their validity "may be regarded as being the same as law in general." Only late professor WANG Po-ch'i takes an opposite position. He is of the opinion that "with respect to nationals, unless otherwise specially prescribed in the Constitution, the general theory is that [treaties] do not directly bind [nationals]."

It appears from the above summary that the majority of writers support the view that treaties duly ratified by the Legislative Yuan should have the force of municipal law under the legal system of the Republic of China. If this is the case, then logically those international agreements concluded solely by the Executive Yuan without submission to the Legislative Yuan for ratification should not have the validity of municipal law, though they may have the same validity as administrative orders and decrees. However, judicial practice before the promulgation of the present Constitution did not appear to differentiate between these two kinds of international treaties.

48. Min-fa tung-tse (General principles of civil law), Taipei: Distributed by the National Taiwan University College of Law, 1957, p. 4.
49. In a recent book published in December 2006 titled The Effect of International Law in sphere of Domestic Law," Professor Yi Huang support the same opinion, see Yi Huang, The Effect of International Law in sphere of Domestic Law, Taipei: Angle, 2006, 107-108.
50. The Constitution of June 1, 1931, did not explicitly provide for submitting treaties concluded by China for ratification by the Legislative Yuan. But the Rules Governing the Exercise of Governmental Power adopted by the Central Executive Committee of the Kuomintang on June 10, 1929, provided that treaties or international agreements should be submitted for ratification by the Legislative Yuan. See Legislative Yuan, ed., Chung-hua Min-kuo fa-kuei hui-pien (Collection of laws and regulations of the Republic of China), Vol. 1, Shanghai: Chung-hua Book Co., 1934, p. 47. Before the promulgation of the present Constitution, the Kuomintang controlled the government and its highest decision making organ was the Central Executive Committee.
In the Supreme Court decision No. 23 [1934], Shang 1074, the Court held that the validity of the Agreement Concerning the Chinese Court in the Shanghai Public Concession is superior to the inconsistent provisions of the Chinese Criminal Code, despite the fact that the Agreement was not subject to the ratification of the Legislative Yuan and was concluded by the Executive Yuan alone.

C. Enabling Legislation and the Self-Executing Problem

In the United States, a distinction is made by courts between “self-executing” and “non self-executing” treaties. An American court will apply a “non self-executing” treaty only when the necessary implementing legislation has been enacted. In the Republic of China, the situation is not clear.

In practice, the government of the Republic of China will enact necessary legislation to implement a treaty when the latter explicitly calls for such an action. For instance, Article 69 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington on March 18, 1965, provides: “Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territory.” To implement this Convention, the Government of the Republic of China promulgated an “Act for Implementing the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,” On December 21 1968.

Sometimes, the Government of the Republic of China also has enacted necessary legislation or has promulgated administrative decrees to implement a treaty even though the treaty does not call for such an action. Thus, on February 10, 1966, the Chinese government promulgated the “Act Governing Criminal Cases Involving United States Military Personnel During the Period of Sino-American Mutual Defense” to implement the Sino-American Agree-

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51. See Essentials of precedents of the Supreme Court, supra note 36.
ment on the Status of United States Armed Forces in the Republic of China which was signed on August 31, 1965.\textsuperscript{56} Similarly, on June 10, 1947, the Executive Yuan promulgated "Measures Governing the Privileges and Immunities of the United Nations and Its Affiliated Organizations and Their Personnel in China,"\textsuperscript{57} to implement Article 105 of the United Nations Charter.\textsuperscript{58}

These implementing laws or decrees do not reproduce every article of the treaty or agreement concerned; they merely supplement or clarify its provisions. Therefore, in practice, courts or administrative organs of the Republic of China will apply both the treaty or agreement, and the implementing laws or decrees.\textsuperscript{59}

In the Apple Computer II Case, the question of the "self-executing" or "non self-executing" nature of certain provisions of the Sino-American Treaty of Friendship, Commerce and Navigation became a crucial issue. Apple Computer, Inc., a U.S. company, sued several persons in the form of self-prosecution in Taiwan for copying its software programs and manuals. The defendants argued that the plaintiff had no standing before the court of the Republic of China to bring a self-prosecution because it had not registered for approval in accordance with the Company Law of the Republic of China. Apple Computer, Inc., however, invoked Article 3, paragraph 2, of the Sino-American Treaty of Friendship, Commerce, and Navigation which provides:

\begin{quote}


58. United States, \textit{Treaty Series}, No. 992. Article 105, paragraphs 1 and 2 of the Charter provides:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

\end{quote}
Corporations and associations created or organized under the applicable laws and regulations enforced by the duly constituted authorities within the territories of either High Contracting Party shall be deemed to be corporations and associations of such High Contracting Party and shall have their judicial status recognized within the territories of the other High Contracting Party, whether or not they have a permanent establishment, branch or agency therein.\(^{60}\)

Apple Computer, Inc. argued that it should have the status of a juristic person in accordance with these provisions.

The District Court of Taipei considered these provisions not to be self-executing and held in its judgment of January 28, 1983:

Before applying a treaty, the court should review whether the provisions of the treaty are [sufficiently specific]. If the treaty merely provides for [general] principles, then it can be applied by the court only after necessary domestic implementing legislation has been enacted. Reviewing the said treaty here, its provisions on the status of juristic persons are in the nature of [general] principles only. [On the other hand,] since the treaty's entry into force [in 1948], the Company Law has been revised several times and Chapter 7 of the Law clearly provides that a foreign corporation [which has not registered] for approval by [our government] cannot be considered [incorporated in the Republic of China]. The Code of Civil Procedure treats an unapproved foreign corporation as an unincorporated body having no juristic personality.

In view of the above, a corporation that is established in accordance with the United States Law cannot be treated as a juristic person, if it has not yet been approved for registration in accordance with our law. In this case, the self-complainant has not been approved for registration in accordance with our law, so it is clear that it does not have the status of juristic person as explained above. Therefore, this court hereby enters [a] judgment of [dis-

\(^{60}\) Treaties between the Republic of China and Foreign States (1927-1957), supra note 31, p. 691.
missal of] the complaint without going through oral proceedings.\textsuperscript{61}

Upon appeal, the Taiwan High Court, in its judgment of March 14, 1983, reversed the District Court’s judgment and held:

Article 3, paragraph 2 of the Treaty of Friendship, Commerce, and Navigation Between the Republic of China and the United States of America provides that: “Corporations and Associations created or organized under the applicable laws and regulations enforced by the duly constituted authorities within the territories of either High Contracting Party shall be deemed to be corporations and associations of such High Contracting Party and shall have their judicial status recognized within the territories of the other High Contracting Party, whether or not they have a permanent establishment, branch or agency therein.” Article 6, paragraph 4 of the same treaty further provides: “The nationals, corporations and associations of either High Contracting Party shall enjoy freedom of access to the courts of justice and to administrative tribunals and agencies in the territories of the other High Contracting Party, in all degrees of jurisdiction established by law, both in pursuit and in defense of their rights.” Since the systems of filing a complaint and private prosecution are included in our Code of Criminal Procedure, can we agree that they should not be included within the meaning of the term “freedom of access” [provided in Article 6, paragraph 4 of the Treaty]? Moreover, the Taipei District Court’s [opinion] that the above treaty provisions are in the nature of [general] principles and need to be supplemented by domestic legislation before they can be applied, is obviously a question that must be further [analyzed] and researched. [It was inappropriate for the Taipei District Court to rush to a conclusion without studying in detail this question]. Thus, the reason for filing this appeal cannot be considered unjustified. The [Taipei District Court’s

judgment is hereby reversed and the matter is remanded]
to the said court for retrial without oral proceedings.62

The case later was appealed to the Taiwan High Court again,
which on December 6, 1984, rendered a judgment against the
defendants.63

In the case of Public Procurator v. LIAO Jen-lu et al., the
Taipei District Court, in its judgment rendered on January 24, 1984,
held that Article 6, paragraph 4, of the Sino-American Treaty of
Friendship Commerce and Navigation is self-executing.64

D. Conflicts with Municipal Laws

When a treaty and a municipal law conflict, which rule should a
Chinese court or administrative organ of the Republic of China apply? The present Constitution is silent on this question.65

In its instruction No. 459 to the Ministry of Justice, the Judicial
Yuan on July 27, 1931, stated:

In principle [if a treaty is in conflict with the municipal law] . . . the validity of treaties should prevail. If the
treaty is ratified after the date of, or on the same day of,
the promulgation of the law, no problem will arise; if the
ratification was made before [the date of] the promulga-
tion [of the law], [the Ministry] should report the points of
conflict and wait for instruction.66

Dr. CHA Liang-chien, former President of the Supreme Court
and Minister of justice of the Republic of China, is of the opinion

Yearbook, ibid., pp. 267-268.
63. Chung-kuo shih-pao (China times), December 7, 1984, p. 3
64. Criminal Judgment 72 [1983], Yi-5218, translated in Chiu, “Contemporary Prac-
3, pp 229-233.
65. Article 141 of the constitution provides that “the foreign policy of the Republic
of China shall . . . respect treaties and the Charter of the United Nations . . .” It does not
say that treaties can operate internally. Article 80 provides: “Judges shall be above par-
tisanship and shall, in accordance with law, hold trials independently, free from any
interference.” According to No. 38 of the Council of the Grand Justices of the Judicial
Yuan, the phrase “in accordance with law” includes “all ordinances and regulations not
in conflict with the constitution or existing laws.” See China Yearbook 1955-56, Taipei:
China Publishing Co., n.d., p. 147. The Council does not expressly say that this phrase
includes customary international law, treaties or agreements.
66. Collection of Reasons, precedents and Interpretations of the Six Laws of the Re-
public of China, supra note 30, p. 8.
that "this instruction means our country in fact recognizes that the validity of a duly promulgated treaty is superior to a municipal law...".\textsuperscript{67}

In judicial practice, in a case before the Supreme Court in 1934 concerning the question of conflict between the provisions of the Agreement Concerning the Chinese Court in Shanghai Public Concession and the provisions of the Chinese Criminal Code, the Court explicitly stated that "the validity of an international agreement is superior to municipal law."\textsuperscript{68}

In a conference on law sponsored by the Taiwan High Court and held on February 15, 1966, the participating judges raised the following question: "According to existing law, civilians committing the offenses of sedition or espionage are tried by a military organ; if American armed forces or their family members committed these offenses, should they still be tried by a military organ?" The conference adopted the following resolution:

In accordance with the agreed minutes of the Agreement on the Status of the United States Armed Forces in the Republic of China, the term "the authorities of the Republic of China" referred to in [Article XIV, paragraph 1 (b) is understood] to have reference only to the District Courts, High Courts and Supreme Court of the Republic of China; it does not include military organs. As a treaty prevails over laws in general the offenses of sedition and espionage committed by American armed forces or their family members should be tried by civilian courts.\textsuperscript{69} [Emphasis added.]

On July 31, 1985, the Supreme Court held that the principle of the supremacy of international agreements over domestic law should be applied in a conflict between a domestic law and Article 6, paragraph 4 of the 1946 Sino-American Treaty of Friendship, Commerce and Navigation.\textsuperscript{70}


\textsuperscript{68} \textit{Essentials of Precedent of the Supreme Court}, supra note 36, p. 412.

\textsuperscript{69} \textit{Lien-ho pao} (United daily news), February 16, 1966, p. 3.

In 1990, the Taiwan High Court in a case regarding American Encyclopedia Britannica elaborated the issue of treaties conflicting with municipal laws of the Republic of China. The court held:

Whether treaties have force of domestic laws is not provided for by law. In view of Article 58, paragraph 2; Article 63 and Article 57, [paragraph 1], sub-paragraph 3 of the Constitution, the review procedure thereof is the same as that of general domestic laws. They should be deemed to have the same force as the domestic laws and should be applicable by the court. (See, the Judgment of 72 [1983] -t’ai-shang-tzu no. 1412 by the Supreme Court [of Taiwan].) Besides, based on the “respecting treaties” provision of Article 141 of the Constitution, the force of treaties should have supremacy over the general domestic laws (see, the Precedent/Judgment of 23 [1934]-Shang-tzu no. 1074), thus becoming special laws. Thus, where treaties are in conflict with the general domestic law, treaties should have priority to be applied according to the principle of supremacy of special law over general laws. Furthermore, the principle of supremacy of special laws over general laws also applies where the special laws are enacted prior to the general laws. It is self-evident under the provisions of Article 16 of the Law Governing the Central Standards of Laws: “the special provisions shall have priority in application as to the same matter prescribed by the general provisions. After the general provisions are amended, the priority remains the same.” The appellee alleged that the Treaty of Friendship, Commerce and Navigation between the Republic of China and the United States of America was signed in 1946 and the Copyright Law was amended in 1985 and according to the principle of supremacy of subsequent laws over prior laws, the provisions of the Copyright Law should have priority in application. Thus, Britannica Inc. should have applied for the copyright registration of the book in dispute in our country in order to obtain the copyright based on Article 17, paragraph 1 of that Law. Those allegations cannot be admitted in accordance with the description above.

Although the instruction given by the Judicial Yuan, the decisions of the Taiwan High Court and the Supreme Court, and the resolution of the conference on law sponsored by the Taiwan High Court do not have the same authority as that of an interpretation given by the Council of Grand Justices of the Judicial Yuan, they are an important guide for handling this question until the Council of Grand Justices of the Judicial Yuan makes an authoritative interpretation. Therefore, it is safe to conclude that a court of the Republic of China will regard a treaty as superior to a municipal law that is inconsistent with it. If a court of the Republic of China takes such an attitude toward the question of conflict between a treaty and a municipal law, there is no reason to believe that an administrative organ of the Republic of China will take a different attitude.

E. Treaties and Agreements between Countries without Diplomatic Relations with the Republic of China

Most countries which have recognized the Chinese Communist Government have considered their treaties or agreements with the Republic of China terminated. Under these circumstances, it is only natural for the Republic of China to consider these treaties or agreements no longer in effect under Chinese law. Before 1964, the official treaty collection of the Republic of China noted those treaties or agreements as "temporarily suspended from operation." However, no such note has been attached to the official treaty collections of the Republic of China published after 1965, except for Bolivia and Lesotho. The legal status of such treaties or agreements is therefore unclear.

If a country, after recognizing the Chinese Communist Government and terminating diplomatic relations with the Republic of China, continues to consider its treaties or agreements with the Republic of China as remaining in force, the Republic of China will reciprocate. Such has been the situation between the United States and the Republic of China since January 1, 1979-the date of the

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73. See Editor’s note in Treaties between the Republic of China and Foreign States (1927-1957), supra note 31.
U.S. recognition of the Chinese Communist Government. The U.S. Taiwan Relations Act of 1979\textsuperscript{75} provides in Section 4(c) that

for all purposes . . . the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.\textsuperscript{76}


After January 1, 1979, and until further adjustment of the relations between the [Republic of] China and the United States of America, all treaties and agreements between the two countries . . . should continue to be implemented until new substitute arrangements are made. Please be advised of this matter and inform your subordinates accordingly.\textsuperscript{77}

The continuity of the Sino-American treaties and agreements was reaffirmed in the Letter of the Ministry of Foreign Affairs of Wai (68) Pei Mei (1) No. 06514 of April 13, 1979 to the Ministry of justice [now Legal Affairs] which states:


Since the breaking of Sino-American diplomatic relations, except for the Sino-American Treaty of Mutual Defense to be terminated on January 1, 1980 and the consequent termination of the Agreement on the Status of United States Forces in the Republic of China, all other treaties or agreements, including those provisions involving the judiciary, shall remain in force. Those treaties with an effective period shall lose their validity according to their terms if not extended.78

IV. THE STATUS OF SEMI-OFFICIAL OR UNOFFICIAL AGREEMENTS

Because many countries have recognized the Chinese Communist Government and terminated their diplomatic relations with the Republic of China, it is not possible for them to conclude international agreements with the Republic of China under traditional international law and diplomacy. As a result, many "unofficial agreements" have been concluded between "unofficial agencies" of the Republic of China and their counterparts in those countries.

Moreover, ever since the Republic of China's seat at the United Nations was taken over by the Chinese Communist Government on October 26, 1971, the Republic of China has been unable to participate in multilateral conventions concluded under the auspices of the United Nations and its affiliated agencies. However, on a few occasions, the Republic of China has concluded unofficial agreements with a country, without the benefit of mutual, official or diplomatic relations, for the application of a multilateral convention between them. For instance, an agreement in the form of an exchange of letters was concluded on September 7, 1982 between the Coordination Council on North American Affairs (the Republic of China's unofficial office in the United States) and the American Institute in Taiwan (the United States' unofficial office in the Republic of China) concerning the mutual implementation of the 1974 International Convention for the Safety of Life at Sea.79

Unofficial agreements between the United States and the Republic of China in the United States have full force and effect under the law of the United States, pursuant to sections 6 and 10(a) of the

78. Ibid., pp. 256-257.
United States Taiwan Relations Act of 1979.\textsuperscript{80} However, the legal status of unofficial agreements between the Republic of China and other countries is not clear, nor is their legal status in the Republic of China clear, though these agreements have been implemented in practice by the government of the Republic of China. Some of them even have been included in the official collection of treaties compiled by the Ministry of Foreign Affairs.\textsuperscript{81} It is submitted that those unofficial agreements included in the official treaty collection of the Republic of China should be considered to have the same validity as those concluded with countries having diplomatic relations.

As a matter of fact, these so-called "unofficial agreements" are in fact negotiated between government officials, so it may be more proper to refer to them as "semi-official" agreements.

\textbf{V. TREATY OR AGREEMENT REPORTING OF THE REPUBLIC OF CHINA}


\begin{flushright}


\textsuperscript{82} \textit{Journal of Legislation} began publication in 1929, but after the entry into force of the present Constitution, it ceased to publish. The present \textit{Journal of Legislation} began in 1951. The predecessor of \textit{The Gazette of the Presidential Office}, which began in 1948, is \textit{Kuo-min Cheng-fu kung-pao} (Gazette of the National Government), which was published between 1927 and 1947. It includes all treaties approved by the Legislative Yuan (whose members are appointed) for ratification.
\end{flushright}
Yearbook of International Law and Affairs\textsuperscript{83} includes a list of treaties and agreements concluded in previous years and reproduced the text of some treaties or agreements. As for unofficial agreements between the Republic of China and foreign countries, some of those agreements have been included in official treaty collections since 1977.

The Ministry of Foreign Affairs has not yet published a collection of multilateral treaties to which the Republic of China is a party. However, as most multilateral treaties require the ratification of the Legislation Yuan, they are also published in the \textit{Li-fa chuan-k'an and the Tsung-tung-fu kung-pao}. However, since these two series began publication only in early 1950, for earlier multilateral treaties to which China is a party, one has to consult \textit{Chung-kuo ts'an-chia chih kuo-chi kung-yueh hui-pien} (Collection of international conventions to which China is a party), which was edited by HSIEH T'ien-tseng and KUO Tzu-hsiung and was published in 1937. The book was out of print for a long time, but it is now reprinted by the Taiwan Commercial Press. Unfortunately, this book only covers the period up to 1936, so that for the period 1936-50, no convenient Chinese collection is available. One may, however, consult the United Nations Treaty Series, the League of Nations Treaty Series, and U.S. Treaties in Force\textsuperscript{84} to locate multilateral treaties to which the Republic of China is a party.

\textbf{VI. CONCLUSIONS}

Four conclusions may be drawn from this study. First, although the present Constitution of the Republic of China does not expressly prescribe the position of international law in law of the Republic of China, judicial practice of the Republic of China indicates that international law has the validity of municipal law in the Republic of China and can be applied directly by courts or administrative organs of the Republic of China in the exercise of their functions. Second, the question of the conflict between rules of customary international law and municipal law under the legal system

\textsuperscript{83} Since Vol. 19, the title of Chinese Yearbook of International Law and Affairs has been changed as “Chinese (Taiwan) Yearbook of International Law and Affairs.”

\textsuperscript{84} The \textit{U.S. Treaties in Force} is a publication published annually by the United States Department of State which lists all bilateral and multilateral treaties to which the United States is a party. The publication also lists all contracting parties to a multilateral treaty to which the United States is a party; as the United States participates in many multilateral treaties, it is also possible to locate in this publication most of the multilateral treaties to which the Republic of China is a party.
of the Republic of China is still an open one which cannot be definitively answered on the basis of the presently available information. Third, judicial practice and the majority opinions of writers in the Republic of China support the view that under the legal system of the Republic of China, the validity of a treaty is superior to a municipal law that is inconsistent with it. Finally, the status of agreements concluded between the Republic of China and countries that have no formal diplomatic relations with the Republic of China is not clear but it is generally believed that such agreements should have a status equal to those treaties or agreements concluded between the Republic of China and other states maintaining diplomatic relations with the Republic of China.
### GLOSSARY

**Selected Names and Terms**

1. Hungdah CHIU  
丘宏達
2. Chun-I CHEN  
陳純一
3. Lexington E.C. HUNG  
洪應灶
4. T’ANG Wu  
湯武
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