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TRADE LIBERALIZATION AND POLITICAL CONTROL: REGULATING TRADE BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF CHINA ON TAIWAN

A dissertation presented to the Faculty of Law,
University of Ottawa
in partial fulfillment of the
thesis requirement for the Doctor of Laws degree

by

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ABSTRACT

Trade relations between the People's Republic of China ("PRC") and the Republic of China ("ROC") on Taiwan are complex because of their incompatible trade regimes, diverse political perspectives, different stages of economic development, and contrasting ideologies for legal arrangements. The central theme of this study is to propose solutions to regulate such complex trade relations. It also provides an analysis with respect to the substantive and procedural arrangements of a trade agreement between the PRC and the ROC.

The study is divided into six chapters. Chapter one presents a factual background of PRC-ROC political and economic relations. Chapter two examines the main inconsistencies of PRC-ROC trade and economic regimes, which include problems such as the conflicting perspectives between trade liberalization and political control, the incompatibilities between centrally-planned and market economies, and the functions and limitations of legal arrangements for trade between both governments. Chapters three and four deal with the issues of trade restrictions for national security and foreign policy purposes as well as the prevention of market disruption. Chapter five discusses the impacts and applications of multilateral, regional and bilateral mechanisms for arranging PRC-

ROC trade relations. Chapter six focuses on the procedural arrangements for concluding multilateral and bilateral trade agreements between the PRC and the ROC.

This study concludes that a liberal perspective is an essential approach to maximize the economic benefits of PRC-ROC trade. Such an approach, however, may face difficulties such as governmental interventions which are sometimes inevitable for national security and foreign policy concerns. This study further indicates that political controls on trade activities between both governments should have limitations in order not to impair their own interests.

On a long-term basis, PRC-ROC trade relations need to be liberalized and legalized. This study shows that the GATT system is the most appropriate mechanism in achieving the above purpose. Another option, which is available in case the GATT system breaks down, is the setting up of a regional or bilateral program to promote the regional or bilateral trade interests of the PRC and the ROC.

It is hopeful that this study may serve two purposes. On a concrete level, it could provide a case study on the regulatory policies of PRC-ROC trade relations and propose alternative structures for future development. On a more general level, it could contribute to a better understanding of the nature and scale of the problems involved in the effort of linking two different types of economies, compounded by many aspects of conflicting political, economic, and legal characteristics.

LIST OF ABBREVIATIONS

ADB	Asian Development Bank
APEC	Asia Pacific Economic Conference
ASEAN	Association of Southeast Asian Nations
Can.T.S.	Canadian Treaty Series
CCP	Chinese Communist Party
CoCoM	Coordinating Committee
CPE	Centrally-Planned Economy
DDP	Democratic Progressive Party
E.C.J.	European Court of Justice
EEC	European Economic Community
F. 2d.	(U.S.A.) Federal Reporter (Second Series)
G.A.O.R.	(U.N.) General Assembly Official Records
G.A.Res.	(U.N.) General Assembly Resolutions
GATT	General Agreement on Tariffs and Trade
I.L.M.	International Legal Materials
KMT	Kuomintang
LDC	Less Developed Country
ME	Market Economy
NAFTA	North American Free Trade Agreement
NIEs	Newly Industrialized Economies
NPC	National People's Congress
O.J.	Official Journal of the European Community
PAFTAD	Pacific Trade and Development Conference
PBEC	Pacific Basin Economic Council

PECC	Pacific Economic Cooperation Conference
PRC	The People's Republic of China
ROC	The Republic of China
R.S.C.	Revised Statutes of Canada
T.I.A.S.	(U.S.A.) Treaties and Other International Act Series
U.N.	United Nations
U.N.G.A.	United Nations General Assembly
U.N.T.S.	United Nations Treaty Series
U.S.C.	United States Code
U.S.T.	United States Treaties
U.S.T.S.	United States Treaties Series
VERs	Voluntary Export Restraints

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TRADE LIBERALIZATION AND POLITICAL CONTROL: REGULATING TRADE BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF CHINA ON TAIWAN

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INTRODUCTION

I. PROBLEMS

To most economists, trade liberalization is the most effective way to achieve economic benefits. Recent market reforms in many Communist nations attest that the theory of market economy and liberal trade should prevail over the concept of political control. The development of trade relations between the People's Republic of China ("PRC" or "mainland China") and the Republic of China ("ROC" or "Taiwan") is another example of how market forces affect ideological strife and political tension. However, even among Western nations, trade relations are never totally free from governmental interventions. Trade relations between the PRC and the ROC are still strongly influenced by political controls because of unresolved conflicts between both sides due to their inconsistent ideology, sovereignty, and national security concerns. It is obvious that the conflicts between trade liberalization and political control cannot be resolved easily either on the basis of the world economy or in bilateral trade relations between the two Chinas.

In general, the political controls exercised by both governments on their own economic systems and in their trade relations are reflected in the issues mentioned below which make their further economic integration[1] even more difficult.

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[1] Economic integration is defined by Professor English as "any system providing the basis for systematic and recurrent transactions enlarging the scope for economic interdependence." See H. Edward English, *The Political Economy of International Economic Integration: A Brief Synthesis*, Occasional Papers 22,

First and foremost, both governments have diverse political perspectives in respect of their bilateral trade. In the theory of political economies, such conflicting perspectives are equivalent to the opposing positions of the liberalist and the nationalist. The former supports free trade and asserts that the market should be separated from politics, while the latter believes that international trade is only a strategic instrument for securing national interests. In light of such conflicting perspectives, the trade measures of both sides in respect of their bilateral trade are inconsistent and have given rise to many disputes and tensions.

More specifically, the PRC and the ROC governments have their own political reasons to trade with one another. As for the PRC, its government expects to use trade as a lever to encourage further political reunification between both sides, while the ROC government anticipates that trade and investment from Taiwan will achieve "peaceful evolution" in mainland China. In addition to such discordant political perspectives, the military confrontations in the Taiwan Strait give both governments convenient excuses to set up trade barriers against one another. For these reasons, it would seem difficult to normalize their trade relations.

The ROC and the PRC governments pursue different economic and trading systems. The PRC economy is centrally-planned with a potential transition to a market-type economy.[2] On the other hand,

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Carlton University, (1972), at 2-3.

[2] The PRC government has been working on reforming its economic and trading system for early accession into GATT. *See* World Journal [Toronto], 15 Feb. 1992, at 1; BNA, International

the economy in Taiwan operates with lesser government intervention. Furthermore, Taiwan is being depicted as a nation that should be allowed membership in GATT immediately.[3] In order to obtain meaningful economic integration between both governments, the issue of the incompatibility of the ROC market economy ("ME") and the PRC centrally-planned economy ("CPE") needs to be resolved.

The economic developments of both sides are inharmonic. The per capita GDP of the ROC is at least twenty times larger than that of the PRC.[4] While the major export products of the ROC are from technology and capital-intensive industries, those of the PRC's are derived from low-cost labour industries. With such great economic disparities, both governments might use them as reasons for trade distortion. For the ROC, it might provide some protective measures for domestic industries to prevent the flow of imports of labour-intensive products from the PRC or to halt the deterioration of comparative advantages of Taiwanese industries because of increasing competition from the mainland.[5] For the PRC, it might expect to receive some preferential treatment because of its low-

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Trade Reports, Vol. 9, (19 Feb. 1992), at 313-314. However, this has not fundamentally changed its economic system. Mr. Baucus, Chairman of the U.S. Senate Finance Subcommittee on International Trade, still called China "the most protectionist nation on earth." *See* BNA, International Trade Reports, Vol. 9, (12 Feb. 1992), at 287.

[3] *See* World Journal [Toronto], 4 December 1991, at 11.

[4] In 1991, the per capita GDP of the ROC was US$10,012, and of the PRC was US$316.

[5] *See* Kym Anderson, Changing Comparative Advantages in China (Paris, France: Development Centre of the Organization for Economic Cooperation and Development, 1989), at 11-16.

level development. In sum, government policies of both sides might be devised for structural adjustment or for the needs of various developmental stages, however incompatible they may be with the principle of trade liberalization.

Finally, even if the above issues can be resolved, and both governments do consider proceeding with formal legal instruments to pursue further liberal trade, the discordant perceptions of the function of such legal arrangements may still cast doubt on their economic relations. Under the Marxists' view, law is only an instrument of politics and should be subordinated to the Communist Party.[6] However, in Taiwan, the "rule of law" has widespread support, and a strong legal culture exists among the Taiwanese people. As a result, it is impossible for both governments to carry out any meaningful legal arrangement for trade liberalization without first clarifying how the legal arrangement should be and can function for their trade relations. For all these issues, it can be concluded that economic integration between both sides is a complex task which can be achieved only through a long-term, deliberate plan. Such is the major concern of this study.

II. MOTIVATION

A. Why PRC-ROC Relations?

The discussion of PRC-ROC relations is based on the new international and regional environments of the post cold-war

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[6] *See* Yan-he Lai, "*Zhong Gong Jinggi Fagui Zhi Yanjiu,*" (Research on the Economic Regulations of Mainland China), 39 Chengta Faxue Pinglun (June 1989), at 67-68.

era. Due to the dissolution of the Soviet Union, world politics have moved from a bipolar system to an unstable unipolar system.[7] In the Asian-Pacific Rim, Asian peoples are now facing more uncertainty in terms of regional politics and security[8] because of the gradual retreat of the American presence.[9] It is obvious that the two major powers in East Asia, the PRC and Japan, cannot replace the U.S.'s leadership for economic integration and regional security. Both nations have been inadequate in promoting real democracy[10] or in providing a domestic market for products from their neighbors.[11] Hence, many Asian nations are eagerly expanding their military forces[12] which, consequently, will lead to a deterioration in the regional security of the Asian-Pacific area.

The two most explosive areas in East Asia are the Taiwan Strait and the Korean peninsula. The conflicts on the Korean peninsula have been somewhat reduced following the conclusion of a

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[7] *See* Young Koo Cha, "*The Changing International Order and Northeast Asia in the 21st Century,*" Korea and World Affairs, (Winter 1991), at 644-645.

[8] Time, 10 Feb. 1992, at 8.

[9] Because of U.S. failure to obtain from the Philippine government an agreement to continue the use of Subic Bay and Clark Air Base, the American military force retreated from the Philippines at the end of 1992. And in order to reduce defense expenditures, the U.S. army in Korea and Japan will also be decreased. *See* Young, at 642.

[10] Time, id., at 3.

[11] Japan is not willing to open up its domestic market, as reflected through its various economic and cultural barriers. Thus, almost every nation trading with Japan has a massive trade deficit. The trade deficits of Asian nations with Japan have shot up 43% in 1991, with an amount equivalent to US$ 32 billion. Time, supra note 21, at 1; Gilpin, supra note 1, at 377.

[12] *See* World Journal [Toronto], 13 Mar. 1992, at 39.

peace treaty between the two Koreas.[13] Security in the Taiwan Strait, however, is being threatened by the independence and self-determination movements on the island.[14] This may well cause a political crisis in East Asia. In today's interdependent Asian-Pacific economic-political environment, it is essential that ROC-PRC relations be improved and gradually become stable. Any military conflict between the two sides will inevitably lead to economic and political disasters for the Chinese people of mainland China and Taiwan, as well as for other Asian people in Northeast and Southeast Asia.[15]

Another reason for focusing on ROC-PRC relations is the importance of Taiwan and China in East Asia in promoting stability and prosperity.[16] Regarding Taiwan's status, with the increased importance of the concept of a regional balance of power, a

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[13] Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between the South and the North, put into force at the Sixth Round of the Inter-Korean High-Level Talks, Pyongyang, February 19, 1992. For full text of the agreement, please see Korea and World Affairs (Spring 1992), at 145.

[14] The Democratic Progressive Party of Taiwan avowed that the Taiwanese people should have the right to claim that they are independent and separate from China. *See* World Journal [Toronto], 20 Oct. 1991, at 1. The PRC government responded that it will use force against any independent movements and any foreign forces supporting such movements. *See* World Journal [Toronto], 15 Nov. 1991, at 35.

[15] The ROC has strong economic relations with Northeast and Southeast Asia, especially in trade, investment and tourist sectors. Any ROC-PRC military conflict will seriously hurt the economic interests of these nations. With respect to political relations, such a conflict would cause Asian nations to distrust the PRC.

[16] Frederick F. Chien, "*A View from Taipei*," Foreign Affairs, (Winter 1992), at 94.

politically democratic and economically active island such as Taiwan is, and probably will continue to be, a counter power to help balance Japan and PRC influence in East Asia. Taiwan will contribute common values and institutions to multipolar Asian politics which will thus be more secure than hegemonic or conflicting bipolar politics.[17] With respect to China's role in East Asia in the post cold-war era, although the PRC has lost its significance in balancing with the power of the former Soviet Union, it still plays an important role in the regional economies because of its successful economic reforms since 1979. In addition, the PRC's policy has been considered as an important element in resolving the regional conflict, such as that of South China sea. It therefore can be concluded that Taiwan and China will play a significant role in the East Asia region.

Finally, a steady PRC-ROC relationship will encourage the peaceful evolution, or at least the economic development, of China's coastal provinces.[18] As described by Professor Scalapino, Hong Kong, Taiwan, and Southern China are in the process of forming a natural economic territory ("NET") because of governmental promotion and private sector initiatives.[19] Along with countless

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[17] *See* James A. Baker III, "*America in Asia: Emerging Architecture for a Pacific Community*," Foreign Affairs, (Spring 1992), at 17.

[18] *See* Baker, id, at 16. However, the PRC has been resisting the peaceful evolution which, in its view, is a conspiracy to overthrow the Communist govenrment in Beijing.

[19] *See* Robert A. Scalapino, "*The United States and Asia: Future Prospects*," Foreign Affairs, (Spring 1992), at 20-21.

commercial transactions, cultural exchanges, and personal contacts within the NET, national borders and sovereignty are gradually disappearing, and modernization and democratization are becoming more apparent. As such a peaceful evolution continues and cuts across political lines, common values to maintain regional order can be established. Constant improvement in the ROC-PRC relationship is a necessary element in shaping a healthy evolution of the NET, especially with the variety of people-to-people contacts between them. These include about US$5.7 billion in trade, two million Taiwan tourists travelling to the mainland, and twenty-eight million letters sent in both directions each year.[20] Such activities will undoubtedly have significant implications as the decade advances.[21]

B. Why Trade Relations?

As global ideological disputes decrease, trade relations and economic development will be increasingly important issues in world politics.[22] To an unprecedented extent, economic development has dominated the actual context of international relations.[23] The economic power of a nation is not only related to its internal political stability, but is also significant for its external

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[20] *See* Chien, supra note 16, at 100.

[21] Scalapino, supra note 19, at 21.

[22] *See* Time, 10 Feb. 1992, at 9.

[23] Scalapino, supra note 19, a 20.

influence.[24] For these reasons, all Asian nations, including the ROC and the PRC, as well as the most conservative communist nations - Vietnam and North Korea,[25] have been working on economic reconstruction and are striving to encourage export-led growth. These endeavors can also rapidly enlarge the economic interdependence of Asian nations,[26] and enhance the economic considerations in restructuring their relations.

With respect to the ROC-PRC relationship, the process of political integration may be quite lengthy because of sovereignty disputes.[27] To some extent, however, economic relations seem less controversial, especially when economic interests can provide certain incentives to improving their trade relations. As a result, breakthroughs in economic integration are more likely than in political negotiation.

From the ROC standpoint, mainland China is an attractive market which Taiwanese enterprises can take advantage of to expand their economic scale, and will help to avoid over reliance on the United States market, and to further reduce its trade surplus with the United States.[28] Mainland China can also assist Taiwan in reforming its economic structure into high-tech areas, especially

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[24] Id.

[25] Time, 10 Feb. 1992, at 6.

[26] Scalapino, supra note 19, at 20.

[27] *See* Cal Clark, etc. "*ROC-PRC (Non) Relations: Groping Toward the German Model*," Issues and Studies, (October 1991), at 62.

[28] *See* Ricky Tung, "*Mainland China in Taiwan's Economic Future*," Issues and Studies, (May 1990), at 56.

through technological cooperation with PRC research institutions.[29] Moreover, mainland China is a good overseas production base for traditional Taiwanese enterprises. The nation's cheap labour and low land cost may allow Taiwanese enterprises to compete with other developing Asian countries. In addition, coupled with the PRC's enormous natural resources, Taiwanese enterprises can certainly reduce their production costs and gain a better competitive position in the global marketplace. From the PRC standpoint, with its low cost labour, the contribution of capital, technology transfers and marketing skills from Taiwan can strengthen the PRC's drive for an export-led economy.[30] Most importantly, Taiwan can be a contributing power to explore jointly the natural resources of the South China Sea and the Pacific continental shelf.[31] With the cooperation of Taiwan, Hong Kong, and other Southeast Asian countries which are homes to many overseas Chinese, the PRC can rely less on American and Japanese markets, and provide greater collective bargaining power with these two economic superpowers.[32]

In summary, economics has taken command of international relations, especially in export-led economies like the PRC and the ROC. Furthermore, many manifold economic interests and opportunities have arisen from trade and investment between the people of both sides. In spite of political disparities between

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[29] Id., at 56-57.

[30] World Journal [Toronto], 6 Dec. 1991, at 1.

[31] Id.

[32] World Journal [Toronto], 19 Jan. 1992, at 19.

them, an accelerating trading relationship is not only possible, but inevitable.

III. PURPOSE

This study attempts to serve two purposes. First, on a concrete level, it provides a case study of the regulatory issues of ROC-PRC trade relations. As described earlier, to regulate PRC-ROC trade, the two sides have to face the problems of incompatibilities of the two trade regimes, their various stages of economic development as well as the their diverse political perspectives on trade relations and legal arrangements. This study intends to propose solutions for resolving these incompatibilities. Further, it will provide an analysis of the substantive and procedural arrangements of a possible trade agreement between the PRC and the ROC. Second, on a more general level, it may contribute to a better understanding of the nature and scale of the problems involved in the effort to link two different economies that have many conflicting political, economic and legal characteristics.

As can be expected, several challenges affect the realization of these purposes. First, the PRC economy is in a state of transition to a market economy. Political leaders in the PRC repeatedly affirm that economic reforms will continue and move forward more rapidly.[33] In light of the dissolution of communism in the former Soviet Union and East Europe, economic reform and

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[33] World Journal [Toronto], 12 Mar. 1992, at 1.

prosperity appear to be the only way for the Chinese Communist Party ("CCP") to maintain its legitimate control over mainland China.[34] However, the intertwined economic and political issues make trade liberalization more difficult to achieve. The complexity of a centrally-planned economy with badly run enterprises which are continually losing money, government subsidies and a dual price system, are all obstacles which create uncertainty in the outcome of economic reforms.[35] Accordingly, meaningful economic integration between the PRC and the ROC necessitates a formula with transitional measures which can accommodate an economic system that is in the process of transformation.

Furthermore, the ROC-PRC trading relationship involves a remarkably intricate interplay of international law, national law, and other disciplines, including economics and political science. The daily changes in the political situation make any prediction of ROC-PRC relations unreliable. My goal is to focus on the core fundamentals, particularly the theory, rules and constraints, that shape the complex operation of international trade.

IV. SCOPE

This study focuses on the fundamental legal structure of the ROC-PRC trade relationship, especially on the problem of the conflict between trade liberalization and political control. The

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[34] Id.

[35] World Journal [Toronto], 15 Feb. 1992, at 1.

resolution of such a problem involves the issues of regulatory policies, legal structures, procedural arrangements and future programs. For this reason, the latest details of trade rules such as the GATT-sponsored multifiber arrangements will not be presented in this thesis. Furthermore, this study is devoted to the rules of trade in goods, hence, the new "Uruguay Round" issues regarding trade in services, intellectual property protection and trade-related investment measures will also not be covered.[36] Finally, this thesis is based on the materials and references available before January 1993 except where otherwise specified.

There are six chapters to this study. Chapter one presents a factual background of the political and economic relations between the PRC and the ROC. It attempts to examine the features of past relations and the factors which conditioned their changes.

Chapter two focuses on the theoretical framework of the whole study. It first introduces the conflicting perspectives of international trade, i.e., the Liberal, Nationalist, and Marxist

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[36] The GATT Uruguay Round negotiations began on 20 September 1986 and ended on 15 December 1993. For general discussion of the Uruguay Round, please see Ministerial Declaration on the Uruguay Round, B.I.S.D. 33 s/19 (1986); Ernst-Ulrich Petersmann and Meinhard Hilb, ed., The New GATT Round of Multilateral Trade Negotiation: Legal and Economic Problems (Boston: Kluwer, 1989), at 11; R.H. Snape, (ed.), Issues in World Trade Policy: GATT at the Crossroads (New York: St. Martin's Press, 1986), at 1; James M. Lutz, "*Gatt Reform or Regime Maintenance: Differing Solution to World Trade Problems,*" 25 Journal of World Trade, (April 1991), at 19-22; Frieder Roessler, "*The Competence of GATT,*" 21 Journal of World Trade Law, (June 1987), at 73-83; C. Michael Aho, *The Uruguay Round: Will It Revitalize the Trading System?*" 11 Fletcher Forum, (Winter 1987), at 1-12; Will Martyn, "*International Trade: the General Agreement on Tariff and Trade,*" 29 Harvard International Law Journal, (1991), at 199-206.

perspectives. It analyzes the functions and limitations of a liberal perspective for international trade. Given the assumption that a liberal perspective is important for international trade, this study further discusses the major policy issues of international trade which relate to the integration of the PRC-ROC economies. Such issues include the problem of conflicting perspectives between trade liberalization and political control, the incompatibility of centrally-planned and market economies, the special measures for trade between developing and developed economies, as well as the functions and limitations of legal arrangements for trade between both sides.

Chapters three and four deal with two specific issues related to political control of trade activities. Chapter three focuses on the issue of trade restrictions as they relate to foreign policy and national security concerns, while chapter four analyzes the issue of market disruption and safeguard measures.

Under the assumption that there may be further trade liberalization between the ROC and the PRC, chapter five examines the options for arranging their trade relationship. This chapter discusses the advantages and disadvantages of multilateral, regional and bilateral arrangements, as well as their applications for the development of ROC-PRC trade relations.

Whereas chapter two to chapter five concentrate on the substantive issues of the study, chapter six deals with procedural issues for the conclusion of multilateral and bilateral trade agreements between the ROC and the PRC. These issues include how

both governments can become members of GATT, and by what means they can conclude bilateral agreements.

Finally, the last part offers concluding remarks on the regulation of PRC-ROC trade relations in regard to their regulatory policies, legal structures, procedural arrangements and possible programs for integration in the future.

CHAPTER ONE

FACTUAL BACKGROUND:

DEVELOPMENT OF PRC-ROC POLITICAL-ECONOMIC RELATIONS

In this chapter, the author intends to introduce the factual background of the PRC-ROC political-economic relations. It would be helpful for readers to understand the prominent conflicts of trade liberalization and political controls in the development of PRC-ROC trade relations. The search for solutions to such conflicts will be the major concern of this study in the following chapters.

Just several years ago, when exchanges between both sides were still taboo, trade activities were strictly prohibited and few occurred in actuality. In recent years, economic pragmatism and market forces have lessened the political and ideological confrontations between the two sides. Trade restrictions were gradually lifted, and trade activities were increasingly expanded. In the years to come, trade policies of both sides and trade activities between them will be influenced more by market forces than by political controls. In spite of this, political adjustments during the transitional period will still affect the development of their trade relations. In the extreme, military confrontations might seriously damage their economic relations, or a dramatic reunification might integrate both economies as has happened with the two Germanys. In the author's view, a moderate development through market forces for economic integration and political adjustment would most benefit both sides. The history

of PRC-ROC political-economic relations may help clarify such expectations and assumptions. Accordingly, the past developments of PRC-ROC relations are discussed in this chapter which is divided into two parts: (1) the changes in political relations, and (2) the expansion of economic relations.

I. POLITICAL RELATIONS BETWEEN THE ROC AND THE PRC

ROC-PRC political relations have changed from previous bitter battles to the current pragmatic contacts and exchanges.[1] The confrontations between the two governments can be generally interpreted as part of a long history of hostility between the Chinese Communist Party ("CCP") and the Kuomintang ("KMT" or "Nationalist").[2] However, it should be noted that before the KMT government moved its seat to Taipei in 1949, the island of Taiwan was inhabited by native Taiwanese who had moved there from the mainland (of China) several generations ago. The island had also been under foreign rule for many years. The "long history" therefore exposed other elements that affect relations between mainland China and Taiwan.[3] As described by Max Weber, "a

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[1] *See* Simon Long, Taiwan: China's Last Frontier (London: MacMillan Press Ltd., 1991), at 110-157, 203-221.

[2] *See* Yu San Wang, ed., Foreign Policy of the Republic of China on Taiwan (New York: Praeger Publisher, 1990), at 192-195.

[3] Some scholars have interpreted the historical separation of mainland China and Taiwan before 1945 as widening the cultural gap between the people of the two sides. With another forty years of confrontation between the ROC and the PRC, such a gap, which includes political, cultural and economic differences, would make the reunification of both sides more difficult. *See* Fu-me Chang, ed., Taiwan Wenti Taolun Ji (Essays on the Discussions of the

political community is held together not only by coercion but also through common historical experiences".[4] The history before 1949 shows that mainland China and Taiwan actually possessed different historical experiences which created additional barriers to their political and economic integration.[5]

Taiwan Problem) (Taipei: Qianwei Pub. Co., 1990), at 70.

[4] Max Weber, Economy and Society (New York: Bedminster Press, 1968), at XXVII.

[5] The history before 1949 is briefly described below:

Before the collapse of the Ming Dynasty, Taiwan had not been brought into a position of importance in Chinese affairs. In the sixteenth century, both the Japanese and the Portuguese had settled on the island. However, only the Dutch completely controlled the island from 1624 to 1662.

In 1661, Cheng Ch'eng-kung (Koxinga), a Ming Dynasty loyalist, defeated the Dutch governor, Frederick Coyett, ending the Dutch rule on Taiwan. Cheng established the first Chinese administration and mandarinate education system on the island. Nevertheless, Cheng's regime lasted for only twenty-two years and was defeated by the Ch'ing's naval force in 1683. After that, Taiwan became part of China, or, strictly speaking, of Fujian province.

In the early years of the Ching Dynasty, Taiwan had been described as the "Wild East" and lacked adequate administration. Only in the late nineteenth century did Beijing's government reassess the importance of Taiwan in terms of military strategy and economic benefit. Several administrators, dispatched by the Ch'ing Dynasty, inaugurated a radical program of reform and modernization, including constructing railways, developing industries and improving the island's defense.

The Ching Dynasty's efforts on the island did not last long due to the Sino-Japanese war that broke out in 1894. Taiwan was later annexed to Japan from 1895 to 1945. Taiwan was ruled under martial law and controlled by military officials during the early Japanese administration. From 1919 to 1936, there were some political liberalizations and many Taiwanese became assimilated into the structure of the Japanese Empire. During the full-scale Sino-Japanese war from 1937 to 1945, Taiwan became subordinated to the needs of the Japanese war effort, and martial law re-emerged. Under Japanese occupation, Taiwan was regarded as a colony of its "Greater East Asian Co-prosperity Sphere". As a result, various programs of infrastructure building were implemented to increase agricultural production to meet the needs of Japan. In the cultural and educational aspects, traditional Chinese schools were gradually restricted, and the role of Japanese education was

In 1949, after its defeat in the Chinese Civil War, the KMT government moved its seat to Taiwan. At that time, the U.S. government tried to stay neutral in the Civil War.[6] Some experts in the U.S. government believed that the ROC government was "finished" and that the United States should not interfere with the Chinese Communists in taking over Taiwan.[7] In 1950, however, when the Chinese Communist government was preparing its last battle to liberate Taiwan, the Korean War broke out and the PRC government participated in the war. This war caused a direct confrontation between the PRC and the United States. Provoked by the immediate hostility of the PRC government, President Truman changed his position on Taiwan and ordered the Seventh Fleet to patrol the Taiwan Strait to prevent either government from attacking the

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enhanced.

After World War II, Taiwan was "restored" to China - then controlled by the government of the Republic of China. However, the early administration of the ROC government on Taiwan was not smooth. There were frictions between the native Taiwanese and the mainland administrators occupying the top political positions of Taiwan. Such frictions turned into resentment and near-revolution that later led to the "February 28th incident". Unfortunately, this incident resulted in the death of many Taiwanese people, especially the social and intellectual elite. This incident remains an obstacle to mainlander-Taiwanese relations up until this day. See Long, supra note 1, at 9-55; Hungdah Chiu, China and the Taiwan Issue (New York: Praeger, 1979), at 212-213.

[6] *See* U.S. Department of States Policy Memorandum on Formosa, December 23, 1949, Military situation in the Far East hearings before the Committee on Armed Services and the Committee on Foreign Relations U.S. Senate 82nd Cong., 1st Session, Pt. III (Washington, D.C.: U.S. Government Printing Office, 1951), at 1667-1669; Chiu, supra note 5, at 215.

[7] Chiu, Id., at 148.

other.[8] This decision prevented Taiwan from being invaded by the PRC and created two de-facto governments on both sides of the Taiwan Strait.

A. Beijing Policy Towards Taiwan

Beijing's leaders have always stated the goal of reunification as their highest priority. With rapidly changing international circumstances, its policy toward reunification varied greatly during different periods.[9] During the initial period, that is from 1949 to 1978, the PRC avowed to use force to "liberate" Taiwan. In the second period (1979-1990), it called for "peaceful reunification", but still asserted that the use of force may be needed for reunification. In the recent period (after 1990), the PRC government has adopted a more pragmatic approach to deal with this issue. Consequently, its relations with Taiwan have progressively improved.

i. First Stage: Liberate Taiwan

During this period, as mentioned, Beijing constantly avowed to use force to liberate Taiwan. In September 1954, the PRC inaugurated a heavy bombardment of Quemoy, an island near Fujian

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[8] *See* President Truman's statement on the mission of the U.S. Seventh Fleet in the Formosa area, June 27, 1950, American Foreign Policy 1950-1955, Basic Documents, Vol. 2 (Washington, D.C.: U.S. Government Printing Office, 1957), at 2468; James Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 1979), at 144.

[9] *See* A. Doak Barnett, U.S. Arm Sales: The China-Taiwan Tangle (Washington, D.C. : The Brookings Institution, 1982), at 18.

province that is controlled by the ROC government. Both sides battled for a few days.[10] In response to the Communist pressures against Quemoy and other islands, the ROC and the U.S. began negotiations on a mutual defense treaty. Concluded in November 1954, the treaty established the allied relations between the U.S. and the ROC governments.[11]

By 1955, Chinese Premier Zhou En-lai changed his tone toward the Taiwan problem. He offered to talk with the "responsible local authorities" in Taiwan, and consented to provide certain posts to the KMT in the Beijing government.[12] Zhou later pledged that "as far as it was possible, the Chinese people would use peaceful means to liberate Taiwan". He also expressed his optimism over peaceful liberation.[13] Despite these inducements, the PRC again started a massive artillery bombardment of Quemoy. The ROC defenders continued to stand firm and retaliate.[14]

After 1958, because of serious internal problems in mainland China, the PRC reduced military confrontations with the ROC. While the PRC government tendered continuous offers to the KMT to proceed

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[10] Chiu, supra note 5, at 159; Jing-zhong Cheng, "*Zhonggong Duitai Zhengce Di Lishixue Fazhan Ziqi Quxiang*," (Historical Evolution and Trend: CCP's Taiwan Policy)," Taiwan Studies, (Jan. 1989), at 1; Long, supra note 1, at 119.

[11] Chiu, id., at 159, 227-229.

[12] Long, supra note 1, at 119.

[13] Long, id., at 119.

[14] Chiu, supra note 5, at 170.

with political cooperation,[15] it also resumed negotiations with the U.S. government.[16] After many negotiations and compromises, the U.S. and the PRC governments finally issued a Joint Communique at Shanghai in 1972.[17] This Communique evidenced a major improvement in PRC-U.S. relations and had a long-standing influence on U.S. policy toward the ROC-PRC tangle. In this Communique, the PRC asserted that "the Government of the People's Republic of China is the sole government of China; Taiwan is a province of China; the liberation of Taiwan is China's internal affair and all U.S. forces and military installations must be withdrawn from Taiwan; the PRC government opposes the policies of 'one China-one Taiwan', 'one China-two governments', 'two-Chinas' and 'independent-Taiwan', or 'undetermined Taiwan status'."[18]

The United States did not challenge that position. It acknowledged that either side of the Taiwan Strait is Chinese and that there is but one China and that Taiwan is part of China. The U.S. government reaffirmed its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.[19]

The Shanghai Communique was a big breakthrough for the PRC because it proved its success in isolating Taiwan from the

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[15] Id.

[16] Chang, supra note 3, at 2; Long, supra note 1, at 122-123.

[17] Chiu, supra note 5, at 179; Department of State Bulletin 66, no. 1708 (20 Mar. 1972), 435-438.

[18] Chiu, id., at 249.

[19] Id.

international community. However, since the U.S. and PRC governments disagreed on certain issues of Taiwan's future, diplomatic relations between them did not proceed smoothly.[20] The full normalization of the PRC-U.S. relations was finally implemented during the Carter administration on January 1, 1979. In the U.S.-PRC Joint Communique, the U.S. government followed the formula provided in the Shanghai Communique to establish its diplomatic relations with the PRC.[21]

The establishment of diplomatic relations with the U.S. was another victory for the PRC government. The PRC expects to take advantage of its relations with the U.S. to further isolate Taiwan in the international arena. However, the U.S. government did not intend to break off all ties with Taiwan. Through a domestic law, the Taiwan Relations Act ("TRA")[22], the U.S. government continues its contact with the ROC government through an unofficial process.[23] In this Act, the U.S. government reaffirms its interest

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[20] Id., at 181.

[21] Id., at 255; Department of State Bulletin 79, no. 2022 (Jan. 1979), 25.

[22] U.S. Taiwan Relations Act, Public Law 96-98, 10 Apr. 1979, 22 U.S.C. (1987), 3302. (cited herein as "TRA")

[23] According to Section 6(a) of the TRA, U.S.-Taiwan relations shall be conducted and carried out through the American Institute in Taiwan, a non-profit corporation incorporated under the laws of the District of Columbia. On the ROC side, the Coordination Council for North American Affairs was established to facilitate U.S.-Taiwan relations in the United States. *See* Frederick F. Chien, "*The Role of the Coordination Council for North American Affairs in the Context of the United States-Republic of China Relationship*," 6 N.Y. Law School Journal of International and Comparative Law, (1984), at 127.

in solving the Taiwan problem through peaceful means, and it further opposes any "threat to the peace and security of the Western Pacific Area."[24] Because of the enactment of the TRA, Taiwan can continue its substantive relations with the United States, and strengthen its security from U.S. support.

ii. Second Stage: Peaceful Reunification

After 1979, Deng Xiao-ping regained control of the Beijing government. Under the Deng administration, the PRC no longer uses the term "armed liberation". Instead, it proposes "peaceful liberation" as a new strategy toward Taiwan.[25] There were several reasons for the PRC government to adopt this new policy. First, the PRC was unable to invade Taiwan without a long-term restructuring of its military forces. Second, Deng's modernization plan for mainland China requires a peaceful international environment. A military confrontation with Taiwan would no doubt endanger the security and peace of the Asia-Pacific region and therefore destroy his modernization plan. Third, the Beijing government is reluctant to have U.S.-PRC relations deteriorate now that the PRC has returned to the international arena. The deterioration of U.S.-PRC relations would only hinder the PRC's intent to play an important role in many international institutions.

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[24] TRA, section 2.

[25] *See* Martin L. Lasater, U.S. Policy Toward Chinese Reunification (Washington, D.C.: The Heritage Foundation, 1988), at 62.

Beijing's peaceful reunification policy was first determined in December 1978 at the Third Plenary Session of the 11th Party Central Committee.[26] The standing committee of the National People's Congress ("NPC") later reaffirmed this policy as follows:

> "It is our fervent hope that Taiwan returns to the embrace of the motherland at an early date, so that we can work together for the great cause of national development... The responsibility for reunifying the motherland rests with each of us. We hope the Taiwan authorities will place national interests paramount and make valuable contributions to the reunification of the motherland."[27]

A concrete plan of peaceful reunification was presented by the Chairman of the NPC, Ye Jiangying, on September 30, 1981. The nine-principle proposal was an original concept of "one country, two systems",[28] which was later used as a model for the

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[26] Lasater, id., at 62; Long, supra note 1, at 159.

[27] Lasater, id., at 64; Long, id., at 159.

[28] Lasater, id., at 65-66; Long, id., at 161-162. The nine principles are:

(1) A proposal that the Chinese Communist Party ("CCP") and the KMT hold talks for an exhaustive exchange of views.
(2) A call for family reunion visits, and the "three links, four exchanges", i.e. the exchange of mail, trade, air and shipping services, as well as tourist, academic, cultural and sports contacts.
(3) A guarantee of "high degree of autonomy as a special administration" for Taiwan. The PRC central government will not interfere with local affairs on Taiwan.
(4) The preservation of Taiwan's current socio-economic system, its way of life, along with its economic and cultural relations with foreign countries.
(5) All people in Taiwan, whether presently in authority or not, can take up leadership posts in national political bodies, and participate in running the state.
(6) The central government can subsidize Taiwan's local finance.
(7) Taiwan residents will be able to settle in mainland China without discrimination.
(8) Industrialists and businessman in Taiwan are welcome to invest in Taiwan, and their rights and profits will be

reunification of Hong Kong. Following Ye's proposal, the Beijing government promulgated a new Constitution containing provisions for "special administrative regions". The constitution became a legal basis for the autonomy of Taiwan, Hong Kong and Macao after reunification.[29] In 1984, the PRC formally tendered the slogan of "one country, two systems" for the reunification of these territories.[30] In the Sino-Britain Joint Declaration, the PRC reaffirmed that the current capitalist system in Hong Kong would be preserved after reunification in 1997.[31] By 1990, the NPC of the

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guaranteed.
(9) A call for proposals from all nationalities, public figures and mass organizations in Taiwan for reunification.

[29] Long, id., at 163. Article 31 provides: "The State may establish administrative regions when necessary. The system to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions."

[30] Long, id., at 164.

[31] For the text of the Declaration and related documents, refer to Joint Declarations of the United Kingdom of Great Britain and North Ireland and the Government of the People's Republic of China on the Future of Hong Kong, 26 Sept. 1984, Great Britain-China, 1984 Gr. Brit. T.S. No. 20 (Cmd. 9352), reprinted in 23 I.L.M. (1984), 1366. Major points of the Joint Declaration are as follows:

"1. After 1997, Hong Kong will become a Special Administrative Region of the PRC under Article 31 of the PRC Constitution. It will enjoy a "high degree of autonomy" except in foreign and defense affairs.
2. Hong Kong will be vested with executive, legislative, and independent judicial power, including that of final adjudication.
3. Hong Kong's chief executive will be appointed by the PRC after elections or consultation in Hong Kong. The government of Hong Kong will be composed of local people.
4. Hong Kong shall maintain its capitalist economic and trade systems for fifty years after 1997.
5. The existing social and economic system will remain unchanged. Freedom of speech, movement, the press, assembly,

PRC further enacted a Hong Kong Basic Law to implement the Joint Declaration.[32] The PRC regarded the "one country, two systems" approach as a model that was applicable not only to Hong Kong, but also to Taiwan as well. The reasons to use such a model apparently were to regain the PRC's sovereignty over Taiwan and to maintain Taiwan's prosperity without the fear of Communist control.[33] However, as Taiwan's situation was different from that of Hong Kong, the Beijing government consented to allow Taiwan to retain

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strike, and religion and other freedoms will be protected by law. Similarly, private property rights will be protected.
6. Apart from displaying the national flag and national emblem of the PRC, Hong Kong may use a regional flag and emblem of its own.
7. Hong Kong may participate in relevant international organizations and international trade agreements. It may establish official and semi-official economic and trade missions in foreign countries, using the name "Hong Kong, China" to maintain and develop relations and conclude and implement agreements with states, regions, and relevant international organizations in appropriate fields.
8. The PRC defense force stationed in Hong Kong shall not interfere in the internal affairs in Hong Kong and the expenditures for these military forces shall be borne by the PRC's Central People's Government.
9. The PRC's National People's Congress will enact a Basic Law to implement the Joint Declaration.

[32] Zhonghua Renmin Gongheguo Xiangang Tebie Xingzhengqu Jibenfa (Hong Kong Basic Law), Adopted 4 April 1990 by the 3rd session of the 7th National People's Congress, Zhonghua Renmin Gongheguo Guowuyuan Gongbao, no. 6, 26 May 1990, at 231-257; for the discussions with respect to the issues of reunifying Hong Kong with the PRC, please see Hungdah Chiu, "*Introduction (Hong Kong: Transfer of Sovereignty)*," 20 Case Western Reserve Journal of International Law, (Winter 1988), at 1-16; Lawrence A. Castle, "*The Reversion of Hong Kong to China: Legal and Practical Questions*," 21 Willamette Law Review, (Spring 1985), at 327-348; Dennis Chang, "*Towards a Jurisprudence of a Third Kind - "One Country, Two Systems" (Hong Kong: Transfer of Sovereignty)*," 20 Case Western Reserve Journal of International Law, (Winter 1988), at 99-125.

[33] Long, supra note 1, at 170.

more of its autonomy, including maintaining its troops which should not constitute a threat to mainland China.[34]

iii. Third Stage: Pragmatic Approach

In recent years, the Beijing government has followed its 1980 policy strategies, which were: (1) to maintain the "one country, two systems" model for reunification, (2) to compel Taiwan to be present at the negotiation table, and (3) to expand contacts between people of both sides.[35] With the first two situations not likely to be realized in the near future,[36] the expansion of economic relations between mainland China and Taiwan became the PRC's major working plan. The continuity of working towards improving economic relations through attracting trade and investment from Taiwan was the focus of Beijing's more pragmatic policy.

Even though the PRC had adopted a more pragmatic approach toward Taiwan, it still did not renounce the use of force.[37] As Deng explained: "Problems can be postponed, but they cannot be ignored forever. When patience runs out and peaceful compromise is refused, there is no other way but to use force."[38] The Beijing government has been especially concerned about the independence

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[34] Id., at 163.

[35] Chang, supra note 3, at 6-8.

[36] World Journal [Toronto], 16 Feb. 1992, at 1.

[37] Id.

[38] Lasater, supra note 25, at 87.

movement in Taiwan. In 1991, when Taiwan's opposition party, the Democratic Progressive Party ("DPP"), asserted the self-determination of the Taiwanese people, the chairman of the NPC, Yang Shang-kun, warned the DPP with statements such as, "Don't play with fire for you will only ruin yourself."[39] More recently, the PRC continued to hold military manoeuvres in an obvious attempt to threaten Taiwan. In one instance, Liu Hun-qing, the vice-chairman of the military committee of the CCP asserted that "We are waiting for the order of the CCP to liberate the sacred territory of our motherland - Taiwan."[40]

In summary, the PRC policy toward Taiwan in the 1990s will be more pragmatic. However, it is still not ready to renounce the use of force to compel Taiwan's reunification under its "one country, two systems" model.

B. Taiwan Policy Towards Mainland China

Taiwanese authorities have been changing their mainland policy in accordance with the transformation of both international and domestic situations. The changes in its policy can be generally divided into two stages. Before 1984, Taipei persisted in its resolve to recover mainland China and adopted the "three-no" policy, i.e., no negotiation, no contact, and no compromise. Since 1984, the policy toward mainland China has become more pragmatic, and the "three-no" policy is fading.

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[39] World Journal [Toronto], 1 Nov. 1991 at 3.

[40] World Journal [Toronto], 15 Mar. 1992, at 2.

i. First stage: Recover Mainland China and Persist in the "Three-No" Policy

After the KMT government retreated to Taiwan in 1949, it adopted the "three-no" policy and referred to the PRC government as "Communist bandits".[41] From the KMT's point of view, the communists' advocacy of peaceful reunification and talks was merely an attempt "to destroy the Republic of China by completely controlling Taiwan, Penghu, Quemoy and Matsu, and to enslave the Chinese people in those areas as they had done to their compatriots on the mainland."[42] As a result, any connections with mainland China were totally prohibited.

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[41] Long, supra note 1, at 127.

[42] Ching-kuo Chiang, The Republic of China's Basic Position and Current Issues (Taipei: The Government Printing Office, Jan. 1982), at 17-18. Aside from its fear of losing control over Taiwan, the ROC government has been insisting on its "three-no" policy for the following reasons:

1. Taipei is not willing to accept Beijing's proposal to regard Taiwan as a local government.
2. "The issue of the ROC and the PRC is not a simple problem that can be solved by talks between two political parties. It involves two different ways of life." With such great disparities between the two societies, it is not possible to proceed with any successful talks.
3. Entering into talks with the mainland could lead to a loss of the ROC's remaining formal diplomatic links with foreign countries.
4. Talks with the PRC might undermine the confidence of local and foreign investors.
5. Foreign governments, to avoid interference in the ROC-PRC talks, might be reluctant to continue to sell weapons to the ROC.
6. A compromise with the communists might stir latent tensions between mainlanders and Taiwanese, and might also force the DPP or separatists to declare an independent Taiwan.
7. Talks with the PRC would undermine the government's anti-communist stand and long-standing hope for a united China under a democratic regime.

ii. Second Stage: Pragmatism and Peaceful Evolution

After 1984, the Taipei policy toward mainland China shifted to a more pragmatic approach. Several pressures have led the ROC government to restructure its policy. First, the international situation has become more and more disadvantageous to the ROC. Aside from being recognized only by less than thirty nations, its seats in most international organizations have been taken by the Beijing government.[43] Second, Beijing's "peaceful reunification" and "one country, two systems" policy seemed to be more persuasive than Taipei's "three-no" policy in international society. This has pressed the ROC government to become more realistic to defend its policy. Third, more and more people in Taiwan, even some DPP members, supported contacts with the PRC to reduce unnecessary tensions.[44] In particular, those from the business community requested the ROC government to reduce restrictions concerning their business activities with the mainland.

From 1984 to 1992, the ROC government attempted to reappear at international events,[45] and to restructure its whole policy as well

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[43] *See* Frederick F. Chien, "*A View From Taipei*," Foreign Affairs, (Winter 1992), at 97.

[44] Lasater, supra note 25, at 96.

[45] Chien, supra note 43, at 97; Long, supra note 1, at 204-219. There were several incidents that illustrated the gradual improvements of peaceful relations between the PRC and the ROC. In 1984, the ROC used the title "Chinese Taipei" to participate in the Los Angeles Olympics, which was the first Olympic event ever attended by both sides. The ROC government lifted in prohibition against indirect trade and investment in 1985. Taipei also maintained its membership under the name of "Taipei, China" in the Asian Development Bank ("ADB") when the PRC was admitted to it in 1986. When a Boeing 704 cargo plane belonging to Taiwan's China

as regulations toward mainland China. On a concrete agenda, a National Reunification Council ("NRE") was established in the President's office to draw up an outline for the new mainland policy.[46] A Cabinet-level Mainland Affairs Commission ("MAC") and the non-official Strait Exchange Foundation ("SEF") were created to implement the mainland China policy and related regulations.[47] The SEF has been authorized to negotiate with PRC agencies on non-political matters, e.g. the repatriation of criminals and the notarisation of documents.[48]

On February 23, 1991, the NRE of the ROC approved the "Guidelines for National Reunification" as its highest principles for mainland China policy. Based on these guidelines, the reunification of mainland China and Taiwan would be accomplished in the following three stages.[49]

"During the first stage, efforts will be made to promote mutual understanding with reciprocal exchanges in order to

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Airlines was diverted to Canton in 1986, the ROC carried out its first negotiation with the PRC for the return of its aircraft and crew members. In 1987, Taiwan residents were permitted to visit their mainland Chinese close relatives via Hong Kong or Tokyo. By 1989, the ROC government dispatched a delegation, led by Finance Minister, Mrs. Shirley Kuo, to attend the ADB meeting in Beijing, which was the first time that ROC officials visited mainland China. Further, the 1991 Asian Pacific Economic Conference ("APEC"), attended by delegations from Beijing, Hong Kong and Taipei in Seoul, was another model of peaceful contact between the two sides.

[46] Chien, supra note 43, at 100.

[47] Id.

[48] Id.

[49] Chen-pang Chang, "*The Republic of China's Guideline for National Unification*," Issues and Studies, (Mar. 1991), at 1-3.

eliminate such enmity as still exists between Taiwan and the mainland. To achieve this end, Taiwan intends to set up an institution to carry out various kinds of bilateral exchanges and to preserve the rights and interests of people on the two sides. Meanwhile, under the "one China policy" and for the purpose of improving the people's welfare, the mainland should actively boost economic reforms and carry out democratic law and policy by permitting free public airing of opinion, while Taiwan should speed up its own constitutional reform, putting its national construction plans into effect, and developing a society in which wealth is equitably distributed. Besides, Taiwan and the mainland should solve all their disputes peacefully, respecting and not repelling each other in the international arena, in order to bring about a phase of mutual assistance and mutual trust."[50]

"During the second stage, efforts will be made to establish equal channels for bilateral government links, helping each other to participate in international organizations, opening direct flights and trade and postal service, and jointly exploiting the mainland's southeastern coastal area in order to narrow the gap in living standards between the two sides and to encourage exchange of visits by high-ranking public figures from both sides."[51]

"During the third and last stage, an institution is to be

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[50] Id., at 1.

[51] Id., at 2.

formed to carry out consultations with mainland China about unification in accordance with the principles of democratic policy, economic freedom, social equity, and the nationalization of military forces, to be followed by discussions of a constitutional system in order to establish a free and democratic country in which wealth is equitably distributed."[52]

In the 1990s, pressures on the ROC government to adjust its mainland China policy have been increasing. These pressures include Beijing's strategies unfavorable to Taiwan, appeals by Taiwan business leaders, the movement for Taiwan self-determination, and the retreat of the U.S. presence in the Asia-Pacific region. The ROC government will become more cautious in implementing the so-called "peace by pieces" policy[53] and improving its step-by-step relations with the PRC.

II. ECONOMIC RELATIONS BETWEEN THE ROC AND THE PRC

With the inauguration of Beijing's "three link, four exchange" policy, and the loosening of Taipei's "three-no" principle, ROC-PRC economic relations have experienced an unprecedented expansion.[54] The improvement of such relations have enhanced the growth of

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[52] Id., at 2.

[53] Chien, supra note 43, at 100.

[54] *See* Yun-wing Sung, The Economic Integration of Hong Kong, Taiwan and South Korea with Mainland China, paper prepared for the 19th Pacific Trade and Development Conference on Economic Reforms and Internationalization and the Pacific Region, Beijing, (May 27-30, 1991), at 9.

commodity trade, investment and service trade.

A. Commodity Trade

In 1991, indirect trade between the ROC and the PRC through Hong Kong reached US$5,793 million, 43% higher than that of 1990. The ROC was the sixth largest trading partner of the PRC, and the PRC was the fourth largest of the ROC in 1990 (TABLES 1 and 2).[55] However, the available figures on trade volume only reflect part of the ROC-PRC trade. Illegal direct and indirect trade through ports other than Hong Kong are estimated to be one quarter of the total trade.[56] As indirect trade through Hong Kong is the only reliable and available statistic, relevant figures found in this study are therefore based on the information provided by the Hong Kong government.[57]

TABLE 3 shows PRC-ROC trade since 1979. As can be seen, the year 1979 was a big breakthrough in trade relations between the two sides of the Taiwan Strait. It was in that year that the PRC changed its Taiwan policy from liberation to peaceful reunification and urged the ROC government to establish the "three link, four exchange" program. In 1980, a Beijing trade mission was sent to

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[55] World Journal [Toronto], 8 Mar. 1992, at 7.

[56] Sung, supra note 54, at 16-17; World Journal [Toronto], 24 Feb. 1992, at 13; The Direct Trade from Taiwan to the Mainland is Fast Increasing. In 1991, direct exports to the mainland amounted to 3.7% of Taiwan's total exports, *see* World Journal [Toronto], 1 Apr. 1992.

[57] Major information related to indirect trade through Hong Kong comes from Hong Kong Trade Statistics and Review of Overseas Trade, Census and Statistics Department, Hong Kong.

Hong Kong to purchase US$80 million worth of Taiwanese goods, which, consequently, increased Taiwan's export to mainland China by 11.5 times over the previous year.[58] The removal of tariffs on imported goods from Taiwan was another cause of its high trade growth after 1980.[59] From the period 1980-84, the indirect trade between the two sides grew an average of 27.1% annually.[60] From 1985 to 1991, indirect trade reached another period of high growth, partly due to Beijing's continuous encouragement of trade with Taiwan and Taipei's easing of restrictions on indirect imports from the mainland. The average annual growth during this period reached 36.3%.

Taiwan has consistently had an overwhelming trade surplus with mainland China. In 1992, Taiwan's aggregate exports bound for the mainland totalled US$6,288 million, while those from the mainland to Taiwan were merely US$1,119 million. This resulted in a trade surplus of about US$5,169 million.[61] For Taiwan, such trade surpluses with the mainland are second only to its favourable trade with the U.S.; but for mainland China, this is its biggest trade deficit.[62]

Taiwan's exports to the mainland in 1990 were mostly synthetic

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[58] Sung, supra note 54, at 9; Ricky Tung, "*Mainland China in Taiwan's Economic Future*," Issues and Studies, (May 1990), at 39.

[59] Sung, id.; Tung, id.

[60] Tung, id.

[61] World Journal [Toronto], 8 Mar. 1992, at 7.

[62] Id.

fabrics (33%), non-electrical machinery (15%), plastic materials (12%) and electrical machinery (8%).[63] Of the 1989 imports from the mainland, Chinese herbal medicine, feathers, clay, and animal furs accounted for 31.3%; manufactured goods 21.5%; textile fabrics and clothing 17%.[64] The cross flow in textile fabrics indicates that intra-industry trade is beginning to supplement the traditional inter-industry trade.[65]

B. Investment

Before the ROC government lifted its prohibition concerning indirect investment within mainland China, only a few small-scale Taiwanese investments were carried out.[66] After Taiwanese citizens were allowed to visit their relatives in mainland China, and after the promulgation of regulations by the PRC government to stimulate investment, Taiwanese investment started to increase.[67] In 1988, there were 430 investment projects reported and its volume reached approximately US$600 million.[68] Even following the June 4 Tiananmen incident in 1989, the flow of investment from Taiwanese investors still continued. That year, the number of investment

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[63] Sung, supra note 54, at 18.

[64] Sung, id., at 18; Ai Wei, "*The Development and Limitations of Taiwan-Mainland Economic and Trade Relations*," Issues and Studies, (May 1991), at 46-47.

[65] Sung, id.

[66] Wei, supra note 64, at 47.

[67] Id.

[68] Id.

projects reached 1,000 for a total value of around US$ 1 billion.[69] From 1990-91, "mainland investment" fever hit Taiwan. Investments conducted within mainland China in both years exceeded US$1 billion.[70] According to PRC statistics, Taiwanese investment in mainland China before June 1991 totalled US$2.4 billion with more than 2,700 investment items.[71]

Taiwan's investment in mainland China is still expanding fast. It has accounted for 21.25% of Taiwan's total foreign investments,[72] and still continues to be Taiwan's most favourable investment target.[73] Not only has the investment amount increased, but the fields of investments have also diversified from manufacturing into real estate, finance, tourism and agriculture. Further, investment projects in the mainland have gradually been shifting from labour-intensive to technology-intensive, and from short-term to ten-twenty year investments.[74]

Taiwan's investment domain has spread recently from the

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[69] Id.

[70] World Journal [Toronto], 15 Jan. 1992, at 1.

[71] Id.

[72] World Journal [Toronto], 1 Apr. 1992, at 13; Taiwan is the ninth largest investing country in the world. Taiwan's main investing areas/nations are mainland China (21.25%), U.S. (18.12%), Thailand (14.63%), Malaysia (11.5%), Hong Kong (11.32%), and Indonesia (5.5%).

[73] It is estimated that 35% of Taiwanese investors intend to invest in mainland China in the 1990s; however, only 11.09% of investors expect to invest in the U.S. Id.

[74] Sung, supra note 54, at 23; Wei, supra note 64, at 52; World Journal [Toronto], 24 Feb. 1992, at 13.

coastal areas of China to the inland area. In 1991, Guangdong was the most attractive investment location, with a total of 410 investment projects valued at about US$490 million, and Fujian, the second largest investment area, has acquired 320 investment projects totalling US$400 million. Investments in Hainan, Beijing, Shanghai, Liaoning, and Jiangsu also increased by 30 to 200%.[75] In short, since the PRC government set its strategic policy to encourage Taiwan investment, Taiwanese investors have been very aggressive. Such attitudes will continue to heighten in the coming years.[76]

C. Service Trade

Service trade, along with the rapid increase in investment, has also been expanding. In 1990, Taiwan was the third largest source of tourists in the mainland with 950,000 visitors. This figure accounted for about 3.5 % of the total number of tourists in China.[77] It was reported that the number increased to 1.2 million in 1991,[78] while the total number of tourists reached more than 3 million from November 1987 to January 1992.[79] With such a high number of Taiwanese tourists to the mainland each year, and with

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[75] World Journal, id.

[76] Sung, supra note 54, at 20.

[77] World Journal [Toronto], 15 Jan. 1992, at 1.

[78] World Journal [Toronto], 24 Feb. 1992, at 13.

[79] World Journal [Toronto], 15 Jan. 1992, at 1.

the relatively high expenditure per Taiwanese visitor (more than US$ 2 thousand), the PRC is undoubtedly in a better position to balance its commodity trade deficit with Taiwan.

D. Balance of Payments

Capital flow from Taiwan to mainland China is larger than from mainland China to Taiwan. It was estimated that more than US$5 billion as the result of tours, gifts and investments went to the mainland in 1991. As a result, although Taiwan has enjoyed a trade surplus from commodity trade at US$3.5 billion in 1991, there is still a deficit on the overall balance of payment. Nevertheless, since the New Taiwan dollar (NT$) is facing the pressure of fast appreciation, the high capital outflow and uneven balance of payments can be one way to reduce the pressure. Therefore, such deficits may appear to be more advantageous to the ROC.[80]

III. CONCLUDING REMARKS

It is clear that various types of political developments in PRC-ROC relations would have an economic impact. For instance, a direct military confrontation would seriously damage decades of economic relations and economic accomplishments. A German model of reunification would integrate both economies but with heavy

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[80] Id.

economic and socio-psychological costs.[81] Nevertheless, from the history of their political-economic relations, there are strong reasons to believe that both economies will gradually be integrated through a moderately-paced process. As described earlier, with regard to political relations, both governments have moved from a hostile policy to a pragmatic one. In economic relations, both sides have started their economic integration through increasing investment and trade. Following this trend, moderate progress in trade liberalization between both sides will continue. The following chapters will be based on this assumption and will analyze the legal issues related to such an integration and liberalization.

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[81] Woo Sik Kee, "*The Path Towards A Unified Korea Economy*," Korea and World Affairs, (Spring 1991), at 32-34. Nicolai Wolfgang, "*German Unification as a Special Case of Transition from Centrally Planned Economy to Market Economy*," Korea and World Affairs, (Winter 1991), at 722-739. Many thoughtful Germans regret that reunification was achieved in such a way as to degrade the dignity of East Germans, which were not placed on a more equal footing. It is estimated that the economic cost of German reunification will reach US$ 542.4-609.4 billion in ten years. Such heavy costs have placed a major economic burden on the whole of Germany.

TABLE 1

TAIWAN'S TRADE BY REGION IN 1992
(US$ Million)

	TOTAL TRADE Value	EXPORTS Value	IMPORTS Value
U.S.	39,334 (25.4)	23,572 (28.9)	15,772 (21.9)
Japan	30,684 (20.6)	8,894 (10.9)	21,790 (30.3)
China	7,406 (4.7)	6,288 (7.7)	1,119 (1.6)
Hong Kong	9,795 (6.05)	9,128 (11.2)	662 (0.9)
Europe	26,376 (17.2)	13,932 (17.1)	12,444 (17.3)
ASEAN	14,220 (9.2)	8,158 (10.0)	6,062 (8.4)

Note: Figures in parentheses represent percentage shares in Taiwan's total exports or imports.

Sources: Zhongyang Yinhang Nianbao (Annual Yearbook of ROC Central Bank, 1992).

TABLE 2

CHINA'S TRADE BY REGION IN 1990
(US$ Million)

	TOTAL TRADE		EXPORTS		IMPORTS	
	Value	Rank	Value	Rank	Value	Rank
U.S.	20,142 (17.5)	1	13,554 (21.8)	1	6,588 (12.3)	2
Japan	18,230 (15.8)	2	10,642 (17.1)	2	7,588 (14.2)	1
Hong Kong	10,915 (9.5)	3	4,829 (7.8)	3	6,086 (11.4)	3
Germany	6,732 (5.8)	4	4,048 (6.5)	4	2,684 (5.0)	5
USSR	4,379 (3.8)	5	2,238 (3.6)	6	2,140 (4.0)	6
Taiwan	3,890 (3.4)	6	612 (1.4)	-	3,278 (6.1)	4
S. Korea	3,652 (3.2)	7	2,099 (3.4)	7	1,553 (2.9)	8
Singapore	3,231 (2.8)	8	2,373 (3.8)	5	858 (1.6)	-
France	2,897 (2.5)	-	1,234 (2.0)	-	1,663 (3.1)	7

Note: Figures in parentheses represent percentage shares in China's total exports or imports.

Sources: China's Customs Statistics and Census and Statistic Department of Hong Kong Government.

TABLE 3

INDIRECT TRADE BETWEEN CHINA AND TAIWAN VIA HONG KONG
(US$ Million)

	Taiwan's Exports to China		China's Exports to Taiwan	
	Volume	Rate(%)*	Volume	Rate(%)*
1979	21.47		279.20	
1980	234.97	1,031.83	76.21	39.86
1981	384.15	81.08	75.18	9.35
1982	194.45	-42.08	84.02	27.89
1983	157.84	-2.84	89.85	28.00
1984	425.45	170.73	127.75	42.92
1985	986.83	131.36	115.90	-9.51
1986	811.33	-17.18	144.22	24.43
1987	1,226.53	51.17	288.94	100.35
1988	2,242.22	82.81	478.69	65.68
1989	2,896.49	29.18	586.90	22.60
1990	3,278.25	13.18	765.36	30.41
1991	4,667.15	42.36	1,125.85	47.11
1992	6,287.90	34.73	1,118.97	-0.62

* Figures represent percentage change as compared to previous year.

Source: Data on indirect trade - Census and Statistic Department of Hong Kong.

CHAPTER TWO

THEORETICAL FRAMEWORK: SELECTED ISSUES REGARDING INCOMPATIBILITY OF THE PRC-ROC TRADE REGIMES

Economically, the PRC and the ROC are markedly different from each other. Since 1949, the PRC has been structured as a socialist state, whereas the ROC has had a system based on capitalist principles. Because of such opposing systems, trade policies and trade regimes of both nations are incompatible in many aspects. These differences have made integration of both economies through market forces more complicated. This study attempts to analyze the theoretical issues which are of major concern to both sides in pursuing economic integration.[1] These issues include: (1) the conflicting perspectives towards international trade; (2) the resolution of tensions arising from trade liberalization and political control; (3) the incompatibility of centrally-planned and market economies; (4) the incompatibility of developing and developed economies; (5) the functions and limitations of legal arrangements for trade relations. The analysis of the above issues will serve as an outline for the discussions of subsequent chapters.

I. CONFLICTING PERSPECTIVES TOWARDS INTERNATIONAL TRADE

Trading activities and trade relations between nations not

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[1] See H. Edward English, "*The Political Economy of International Economic Integration: A Brief Synthesis,*" Occasional Papers 22, Carlton University, (1972), at 2-3.

only reflect common interests, but also their confrontations and quarrels. The negative aspects of trade relations result from conflicting perspectives towards international trade, particularly from the disharmony of liberalist, nationalist, and marxist perspectives which lead to antagonistic trade policies and systems. Since trade liberalization is the central theme of this study, it is therefore essential to analyze the general background and issues of a liberalist perspective for the development of trade relations. This study first introduces various perspectives of international trade and their corresponding systems, and then presents the functions and limitations of a liberalist perspective. Finally, the concluding remarks attempt to outline the prospects for the liberal school and regime.

A. Various Perspectives of International Trade

The Wealth of Nations written by Adam Smith (1723-1920) is recognized as the basis of the liberalist theory which supports the importance of the market in promoting individual freedom and material prosperity.[2] Following Smith, numerous scholars, including David Ricardo (1772-1823), Eli F. Heckscher, Bertin Ohlin and Paul Samuelson, have written many books to uphold liberalist theories of political economy, particularly those on international trade. In spite of the many differences among these books, the

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[2] Barry Clark, Political Economy: A Comparative Approach (New York: Praeger, 1991), at 24, 44-45; Robert Gilpin, The Political Economy of International Relations (Princeton: Princeton University Press, 1987), at 173.

main framework of their arguments can be summarized as follows:

- The Theory of Invisible Hand: Trade should be free from politics and nations should do their best to pursue wealth and power. Trade barriers will hinder domestic welfare and economic growth. Markets should be left alone, so that public goods can be best used for their advantages.[3]

- The Theory of Comparative Advantages: The flow of trade is determined by the relative costs of goods produced. In order to maximize profits, nations should specialize in the production of certain goods whose costs are comparatively low, and leave the production of other goods to other nations. Consequently, all nations will universally benefit from their specialization based on comparative costs and gain more from exchange.[4]

- The Heckscher-Ohlin-Samuelson Theory: International trade occurs when certain nations favour certain production factors which lead them to specialize in the production of certain goods that are to their best advantage. Nations can combine such factors as capital, labour, resource, management or technology to gain the highest comparative advantages in international trade.[5]

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[3] Clark, id., at 24; Gilpin, id., at 173; Raymont J. Waldwann, Managed Trade (Cambridge, MA: Balliager Pub. Co., 1986), at 22; Robert A. Issak, International Political Economy (Englewood Cliffs, N.J.: Prentice Hall, 1991), at 78;

[4] Issak, id., at 79; Gilpin, id., at 174; Waldwann, id., at 22.

[5] Gilpin, id., at 175; Issak, id., at 81.

All forms of economic liberalism support free trade based on market forces and price mechanisms.[6] The theory is that only a market economy can provide efficient production and distribution.[7] To achieve freer trade, all nations should lift trade barriers and encourage international trade, which in turn will help nations achieve maximum economic growth and individual welfare.[8]

Liberalists believe that markets should be separated from politics, i.e., governmental intervention.[9] They also believe that international trade can improve world peace because it will promote mutual interests among nations.[10] Economic interdependence creates a positive linkage among peoples, encourages harmony of interests among societies, and directly spreads the spirit of political freedom around the world.[11] However, as market economies can also cause uneven economic gains among domestic and international participants, the problem has given rise to nationalism and marxism.

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[6] Gilpin, id., at 27.

[7] Gilpin, id., at 27, 31.

[8] Gilpin, id., at 27.

[9] Gilpin, id., at 26. Liberalist public choice theory asserts that the role of the government is to prevent the failure of the market, not to intervene in the operation of market. Clark, supra note 2, at 50.

[10] Gilpin, id., at 31.

[11] Gilpin, id., at 171.

Customarily, marked by the Treaty of Westphalia of 1648,[12] the nation-state has become a basic unit of international society and nation-state attempts to increase its power in the world.[13] Many writers[14] have supported a nationalist theory of international trade which can be briefly described as follows:

- Market and economy should not be separated from politics. Political considerations should be taken into account in determining economic and trade relations.[15]
- A nation-state should pursue industrialization, production and export to build up national wealth and power.[16]
- The first objective of the government is national security, even if it is counter-productive.[17]
- Economic interdependence arising from international trade is not for mutual interest but is a means of power struggle.[18]

The government will lose its autonomy and discretionary

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[12] Issak, supra note 3, at 77; Richard A. Falk, "The Interplay of Westphalia and Charter Conception of International Legal Order in Trends and Pattern," The Future of International Legal Order, (ed.) Richard A. Falk and Cyrns E. Black (Princeton, N.J.: Princeton University Press, 1969), 32-70.

[13] Issak, id., at 77.

[14] Early writers of nationalist theory include Edmund Burke (1795-1881), Vilfredo Pareto (1848-1923) and Joseph Schumpeter (1883-1950), Clark, supra note 2, at 78.

[15] Gilpin, supra note 2, at 26.

[16] Gilpin, id., at 34.

[17] Edmund Dell, The Politics of Economic Interdependence (London: The MacMillan Press Ltd., 1987), at 13.

[18] Dell, id., at 18.

powers in the economic struggle.[19] Consequently, economic interdependence makes nation-state insecure.

Nationalists believe that international trade is only a strategic instrument for gaining national interest. Therefore, a nation-state which implements such theory should increase exports, reduce imports, and increase employment at home - regardless of the negative effects of these policies on other nations.[20]

The theory of marxism is probably one of the most powerful theories of political economy which has affected the lives of billions of people in the twentieth century. Followers of Karl Marx (1818-1883) have created many socialist empires which have directly challenge Western nations in implementing liberal political-economic systems, and have often interpreted marxian theory in their own way in trying to address their domestic problems. Below is a brief description of the principles of marxism as it relates to trade.

- Marxists emphasize uneven distribution of wealth and power arising from domestic and international trade, and believe that small nations fall into unequal positions as a result of such economic development, thereby making them lose their economic security.[21]

- Traditional economies and social structures of third world countries will be ruined by the competitive international

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[19] Id., at 19.

[20] Issak, supra note 3, at 77.

[21] Gilpin, supra note 2, at 51.

market forces.[22]

- Dependence theorists encourage developing countries to minimize their contacts with those developed countries which will hinder their development processes in order to thwart the latter's attempt to maintain them as dependent and backward nations.[23] Therefore, socialist countries, most of them being developing countries, need to be self-sufficient and should not expand their economies internationally.[24]

Marxists do not firmly support free trade, partly because they perceive international trade as something that hampers the economic development of developing countries. On the contrary, they support protectionism as it can shield developing nations from harms arising from global competition.[25] Since Marxists are committed to global equality, free trade is a much less crucial issue than it is for liberalists.

B. The Importance of a Liberal Perspective: The Arguments of Liberals

The operations of the world economy is confusing. Nations swear to uphold the spirit of liberal regimes at every international conference on the one hand, but yield to domestic

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[22] Clark, supra note 2, at 278. However, Marxists believe that the Third World countries will benefit from trade with Western nations by creating employment opportunities.

[23] Id., at 278.

[24] Gilpin, supra note 2, at 151.

[25] Clark, supra note 2, at 281.

political pressures and repeatedly make regional discriminatory arrangements against non-members on the other. The PRC-ROC trade relations are characteristic of such conflicting perspectives and polices which have led to significant confrontations and quarrels between both sides. Considering the increasingly interdependent trade relations, an option to resolve such dilemma is to strengthen the liberal regime among or between related parties. The following analysis presents the arguments of a liberalist perspective for international trade as well as for PRC-ROC trade.

The core theory of the liberalist perspective is its belief in the autonomy of market forces and price mechanisms. Under the market economy, prices are automatically adjusted and determined by the forces of supply and demand or through the negotiations of buyers and sellers.[26] A well-functioning self-regulating market economy allows all potential buyers and sellers to determine the terms of exchange at their discretion. Under such market mechanisms, at least two basic economic functions can be attained. One is the efficient allocation of existing resources, because rational choice has to be made according to market-determined prices.[27] Market efficiency is also promoted by market competition which forces producers to achieve excellence by constant technological innovation and invention.[28] Consequently,

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[26] Gilpin, supra note 2, at 18.

[27] Clark, supra note 2, at 6-7.

[28] CED, Breaking New Ground in US Trade Policy (Boulder, CO: Westview Press, 1991), at 23.

economic welfare can be enhanced through such market efficiency and innovation.[29]

Another function of market mechanisms is the expansion of economic growth. Economic growth occurs because of the combination of technological development, reallocation of resources and stimulation of human energy.[30] Competition and anticipation of profits encourage individuals and business organizations to carry out innovative and risk-taking activities which provide the impetus for growth. Market forces facilitate reallocation of resources and stimulate productive activities, which further expand production. Market forces also encourage individuals to improve the efficiency of economic activities through the broadening of individual choices and enhancing of human energy. Hence, economic welfare is expanded due to the efforts of these self-discovering and self-renewing individuals.

Liberals believe that international trade should be operated under the autonomy of price and market mechanisms. Free trade, without government intervention, therefore becomes the highest principle of international economic activities. Based on such principle, economic efficiency and growth can be accelerated. In addition, international trade can also spread technology and innovation which will benefit individuals and business organizations to enlarge economic activities, enhance consumer

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[29] Gilpin, supra note 2, at 19.

[30] Gilpin, id., at 19; Clark, supra note 2, at 8.

welfare and reduce input costs.[31]

International trade also has an effect on politics and culture. With respect to the political aspect, liberals believe that trade is a force that promotes peace because economic interdependence creates positive bondage and promotes mutual interests among nations.[32] As to the cultural impact, markets and trade can restructure society based on freedom and equality. In the market, individuals are free to make choices in the employment of resources, consumption of goods and services and determination of lifestyles. Consequently, the market can help restrain governmental abuse of the rights of individuals.[33] Liberals also assert that market competition adjusts social relations from the traditional style of social status based on race and religion to the modern style of equity determined by the productivity of individuals.[34] International trade expands such cultural pursuits geographically, spilling over national boundaries and encompassing all human races. Liberals believe that political liberty cannot long be separated from economic freedom. Former U.S. President George Bush once said: "No nation has yet discovered how to import the world's goods and services while stopping foreign ideas at the

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[31] Gilpin, id., at 171.

[32] Id.

[33] Clark, supra note 2, at 10.

[34] Id., at 11.

border."[35] In the liberals' view, the information-communication revolution and the spread of the market economy will lead to more political reforms in the 1990s.

The GATT system might be an example of the worldwide trade liberalization which implements market economy through removal of trade barriers. In the first seven rounds of GATT trade negotiations, import tariffs were reduced from an average of over 40% to 4%. The Tokyo Round talks alone reduced the weighted average, measured by average tariff against actual trade flows, from 7.0 to 4.7% on manufactured goods in nine of the world's major industrial markets.[36] With such trade liberalization, world merchandise trade has increased from US$112.4 billion in 1948 to US$7,093 billion in 1990.[37] Since trade accounts for a significant proportion of gross domestic product ("GDP"), the increase in trade will certainly lead to economic growth and improved welfare for all nations. Because of the removal of trade barriers, both developed and developing nations can demonstrate their respective comparative advantages and competitive edges in the production and marketing of goods and services. Consequently, economic efficiency is enhanced through the implementation of the GATT system.

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[35] Abstracted from James A. Baker III, "*America in Asia: Emerging Architecture for a Pacific Community*," Foreign Affairs, (Spring 1992), at 1ϵ.

[36] Issak, supra note 3, at 85.

[37] IMF, International Financial Statistics (Washington D.C.: International Monetary Fund, 1965/66), at XVI; GATT, International Trade 90-91 (Geneva: General Agreement on Tariffs and Trade, 1992), at 2-3.

The political and cultural functions of a market economy are well illustrated by the latest developments in Europe. On the political side, as suggested, the economic integration of Western Europe in 1992 led to the reduction of a security crisis.[38] This shows how a market economy can create a positive linkage among nations. With respect to its cultural impacts, the collapse of the communist regimes in East Europe can somewhat illustrate the influence of economic activities among nations. For instance, when the people of East Germany realized their inferior economic living standards when compared with their Western neighbours, thousands of refugees fled to West Germany, thus adding pressures for political reform or revolution behind the Iron Curtain.

With respect to PRC-ROC relations, trade between both sides has also enhanced economic welfare. Because of continuing investment from Taiwan in mainland China, industries in mainland China can obtain advanced technology and abundant capital to renovate their production equipment and skills, while Taiwan can transform its industrial structure through the shift of its labour-intensive industries to mainland China. Such reallocation of resources enables both sides to obtain the optimum effect of their respective production factors, hence economic growth for both sides can be achieved. Such impacts can be best demonstrated by the economic growth in the coastal provinces of the mainland, such as Fujian and Guangdong, which attract substantial investment from

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[38] Alexander J. Motyl, "*The Modernity of Nationalism: Nations, States and Nation-States in the Contemporary World,*" Journal of International Affairs, (Winter 1992), at 320.

Taiwan and Hong Kong. Of course, trade between Taiwan and these areas does not benefit one side only. Taiwan businessmen also earned profits from their investment in mainland China. In summary, trade relations between the PRC and the ROC prove the benefits of trade liberalization and functions of liberal theory.

It is too early to conclude that economic activities between the PRC and the ROC will lead to political reforms in mainland China, or to the improvement of freedom and equality of the Chinese people. Nevertheless, as suggested, economic reforms in the mainland have indirectly strengthened the security of the people on Taiwan. Western observers have predicted that the PRC will not easily use force against Taiwan at the expense of its ten-year economic development.[39] Indeed, market reforms and increasing trade activities in mainland China have made the old guard communist leaders reconsider the political and economic risks of using military force against Taiwan. Hence, as predicted, by encouraging the PRC government to continue its market reforms would, more or less, reduce the risks of a security crisis for the people on Taiwan.

C. Limitations of a Liberal Perspective and Their Resolutions

The implementation of liberalism faces many challenges in international trade.[40] First of all, trade liberalization does not

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[39] Martin L. Lasater, "*Ruhe Xianzu Zhonggon Dui Tai Dongwu* (The Means to Prevent Chinese Communists From Using Force Against Taiwan)," Zhonguang Ribao (Central Daily), (22 Feb. 1992), at 1.

[40] Gilpin, supra note 2, at 54-57.

guarantee that participants of international trade can obtain even gains. Some are winners which enjoy a huge trade surplus, and some are losers who have to face enormous trade deficit. This would lead to political and emotional tensions among trading partners.[41] One of the reasons for the different economic gains in international trade is unfair trade practices introduced by participating nations, such as strategic trade policies, and arbitrarily-adjusted comparative advantages through governmental intervention.[42] Another reason is the painstaking shift of the comparative advantages of industrially declining nations, such as the U.S. and West Europe, which are reluctant to remove protective measures for certain industries.[43] Because of these reasons, protectionists have been dominating domestic politics and have hindered the expansion of the world economy. To resolve such a dilemma, the world trading system has to be strengthened,[44] and capitalist states need to coordinate their policies to resolve their differences.[45] Without these measures, the world economy might disintegrate into national conflicts, with domestic interests prevailing over the benefits of free trade.

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[41] Id., at 179.

[42] Id., at 215, 221-223.

[43] Id., at 374.

[44] For the rules of an open world economy, see the discussion on the new Uruguay Round, Raymond Vernon, et. al. Beyond Globalism: Remaking American Foreign Economic Policy (New York, NY: The Free Press, 1989), at 171-174.

[45] Gilpin, supra note 2, at 63.

Another challenge to trade liberalization is the overwhelming concern for national security and foreign (or external) policy. Economic sanctions and export controls against antagonistic nations are not infrequent in the international arena. For most nations, national security and foreign policy are more important than free trade.[46] Governments therefore have attempted to retain the maximum independence for their own economic security as they believe that interdependence is against their political interests.[47] The arguments of liberals cannot provide persuasive answers for the removal of such trade restrictions. Nevertheless, it should be understood that the use of trade instruments for national security or foreign policy purposes would not only causes economic loss for the imposing nations,[48] but it would also creates political tensions. Accordingly, politicians have to calculate the gains and losses of trade restrictions for political ends. A liberalist perspective towards international trade is still useful for measuring the economic costs of a nationalist regime and avoiding the misuse of foreign policy at the expense of economic efficiency.[49]

In general, the difficulties of implementing trade liberalization are often the result of unresolved tangles between

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[46] Dell, supra note 17, at 15.

[47] Id., at 98.

[48] Gordon B. Smith, The Politics of East-West Trade (London: Westview Press, 1984), at 175-194.

[49] Dell, supra note 17, at 20.

trade and politics. Liberals assert that trade activities should be based on market forces and price mechanisms,[50] and that the market should be separated from politics. However, a purely free market system has never been completely realized. The fact is that political considerations have often prevailed over the importance of the free market.[51] This, coupled with the declining world leadership of the United States which is not willing to subordinate its short-term interests to long-term ones and the nobler goal of the international economy,[52] has weakened the chances for the world economy to proceed on the right track. The flaws of liberalist theory have therefore compelled liberals to modify their theories.

In the modern liberal's view, the market system is still the best method for the world economy to operate most efficiently. Yet liberals have revised the concept of "free trade", and have come up with a softer system called "managed trade," which lies somewhere between free trade and protectionism.[53] The point of such revision is that "countries should develop cooperative strategies governing international trade, permitting some protection where justified by circumstances, but otherwise seeking to lower trade

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[50] Gilpin, supra note 2, at 44.

[51] Id., at 45.

[52] Id., at 365.

[53] Clark, supra note 2, at 288.

barriers."[54] According to such a theory, government can take some protective measures if justified by circumstances. However, liberals do not provide a clear principle for us to draw the line between liberalist and protectionistic perspectives, and the justifications of protective measures are totally under the control of individual states.[55] This is a problem faced by all governments. In formulating its trade policy and system, a government has always found it difficult to achieve a balance among economic efficiency, the pressures of domestic politics and international bargaining. In the case of PRC-ROC trade relations, both governments, though generally willing to gradually reduce trade barriers for their trade regimes and reciprocal treatments, have encountered difficulties in removing certain ideological concerns and foreign (or external) policy considerations. The line between justified protection and liberal principle cannot be easily drawn.

D. Summary

A liberal perspective emphasizes the importance of market forces and price mechanisms for the development of trade relations,

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[54] Id., at 289. CED, supra note 28, at 24. In addition to national security, CED asserted that "there are two broad categories of justifications for trade policy: (1) to correct for distortions in the operation of market forces... and (2) to provide temporary relief to facilitate the adjustment processes...."

[55] Clark, supra note 2, at 101. As described by Professor Clark, "modern liberalism offers no ultimate resolution of the conflicts between human rights and property rights, between freedom and equity or between individualism and community .... "

which should be separated from politics and from governmental intervention. Liberals argue that trade liberalization can help achieve certain economic and political purposes. Economically, it can achieve benefits through the efficient allocation of existing resources, and facilitate the expansion of economic growth through market competition. Politically, a liberal trade system can promote peace and help restructure society based on freedom and equality. To some extent, the development of PRC-ROC trade relations has shown that market and price mechanisms can reallocate resources on both sides, including capital and technology, and can have positive economic and political results. However, the liberal perspective on trade relations also has its limitations. Its assumption concerning the separation of market and politics does not exist in the real world. Governments often justify their interventions into trade activities on the ground of national security, foreign policy and other political considerations. The conflict between trade liberalization and political controls has therefore become a thorny dilemma for most governments. Such an issue is also the major concern in developing PRC-ROC trade relations.

II. THE PROBLEM OF CONFLICTING PERSPECTIVES BETWEEN TRADE LIBERALIZATION AND POLITICAL CONTROL

Free trade between mainland China and Taiwan has never really been practiced over four decades. Obviously, conflicting political perspectives are the major obstacles to trade liberalization. To

the PRC government, trade is a lever for achieving its reunification policy.[56] To the ROC government, trade is an important instrument for disseminating its Taiwan experience in inducing a peaceful evolution in mainland China.[57] In addition to these conflicting political perspectives, national security and defense concerns have also been cited by both governments in restricting their trade relations. The trade systems of both sides thus reflect their respective special political expectations and concerns. Because of such political impact, it is almost impossible for both sides to implement trade liberalization without restructuring their regulatory policies. This section is therefore intended to address two important issues relating to the regulatory policies of both the PRC and the ROC governments. One issue is whether or not trade relations can be used to achieve political integration of both sides; the other issue is whether national security or foreign policy concerns should constitute justifications for limiting the development of their trade relations, and what would be the appropriate limitations in imposing trade controls for national security concerns. A brief analysis regarding the legal framework of trade controls for national security and foreign policy is also provided in the last part.

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[56] Jing-zhong Cheng, "*Zhonggong Duitai Zhengce Di Kishixue Fazhan Ziqi Quxiang* (Historical Evolution and Trend: CCP's Taiwan Policy)," Taiwan Studies, (Jan. 1989), at 7-8.

[57] Ying-jeou Ma, "*The Republic of China's Policy Toward the Chinese Mainland*," Issues and Studies, (Feb. 1992), at 9.

A. Trade Relations: A Road to Political Integration

The PRC and the ROC governments have both regarded their trade relations as crucial elements of their respective policies. On the PRC side, the promotion and encouragement of trade with and investment from Taiwan are expected to induce more Taiwanese businessmen to mainland China. With the Taiwanese expanding business interests in the mainland, the PRC government can take advantage of this force to put pressure on the ROC government to gradually lift its trade controls. The PRC leaders believe that vital economic interests of Taiwan businessmen in mainland China would help to minimize the ROC's political options. Consequently, the KMT government will be forced to negotiate with the PRC government regarding the reunification of Taiwan and mainland China.[58] To the PRC government, continuing contacts between both sides will at the very least help the Taiwanese to recognize their historical and cultural proximity with the mainland, hence weakening the separatist movement in Taiwan.[59] On the other hand, fearing that peaceful evolution may be induced,[60] the PRC

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[58] World Journal [Toronto], 24 Dec. 1991, at 1.

[59] World Journal [Toronto], 10 Apr. 1992, at 35.

[60] Roger W. Sullivan, "*Trade, Investment, and the Fear of "Peaceful Evolution"*," Issues and Studies, (Feb. 1992), at 54. In the views of the PRC leaders, both trade and investment are seen as instruments for "peaceful evolution", which the PRC leaders see as "international reactionary forces" to subvert communism in mainland China. General Secretary of the Chinese Communist Party ("CCP"), Chiang Tse-min, asserted that "they adopted political, economic and cultural means to propagate the political and economic patterns, sense of values, decadent ideas and life-style of the western capitalist world to engage in subversion against the socialist world."

government has imposed strict controls on non-economic activities of Taiwanese businessmen on mainland China, including the prohibiting of Taiwanese businessmen from establishing trade associations or chambers of commerce,[61] and the censorship of any news relating to actual activities of Taiwanese businessmen in the mainland.[62]

On the ROC side, as a pluralistic society, various political groups on Taiwan have taken different political positions regarding the economic activities of Taiwanese businessmen in mainland China. The Democratic Progressive Party ("DPP"), the largest opposition party in Taiwan, has declared that no political aims should be attached to economic activities as the latter are meant to obtain economic benefits only. They have also asserted that the mainland is only one of the markets in the world in which Taiwanese can globalize their businesses.[63] In contrast, some radical members of the KMT have urged the ROC government to encourage business activities across the Taiwan Strait so as to accelerate the peaceful reunification of China.[64] While the formal policy of the KMT government tends to place more constraints on trade and investment between the mainland and Taiwan, the KMT government does, however, expect that these business activities will help realize at least two political aims. First, through the energetic

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[61] World Journal [Toronto], 22 Jan. 1992, at 35.

[62] World Journal [Toronto], 24 Jan. 1992, at 35.

[63] World Journal [Toronto], 16 Nov. 1991, at 11.

[64] World Journal [Toronto], 2 Mar. 1992, at 11.

activities of Taiwan businessmen, the experiences and stories of Taiwan's economic success and political reform can be retold and learned by people in the mainland. Consequently, expectations for democratic life in the mainland can be enhanced.[65] Second, the ROC government believes that economic integration can encourage mutual responsiveness and reciprocal adjustment,[66] for political disparity can gradually be reduced and political reunification reached. At the minimum, these economic activities can further expand communications and exchanges across the Taiwan Strait. Hence, tensions, misunderstandings and miscalculations by both sides can gradually decrease.[67]

The political perspective on trade relations based on the theory of international relations is not a theory of pure science, but rather one of beliefs and values. However, some theories in this respect can serve to support the arguments of both the PRC and ROC governments as regards their regulatory policies and systems. These theories need to be examined as follows:

One theory holds that trade relations is a way of allocating power in the international community. The assertion is that trade relations create international interdependence which is defined to denote "the sensitivity of economic behaviours in one country to

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[65] World Journal [Toronto], 25 Mar. 1992, at 2.

[66] Cal Clark, et. al., "*ROC-PRC (Non) Relations: Groping* Toward the German Model," Issues and Studies, (Oct. 1991), at 69-70.

[67] Note, "*Basic Issues in Cross-Strait Relations,*" Issues and Studies, (Mar. 1991), at 21-24.

developments or policies originating outside its own border."[68] According to this definition, the extension or sensitivity of dependence arising from trade relations can be measured by the opportunity costs of disrupting such relationship.[69] Hence, "dependence on trade" can be regarded as the opportunity cost for the "gains from trade".[70] The more nation A gains from nation B, the more nation A is dependent on nation B. Accordingly, nation B has more leverage for adjusting its own position on international relations, thus creating a situation of unbalanced power.[71]

The strategic policies of the PRC government can help illustrate this theory. The PRC government has encouraged trade with and investment from Taiwan. Therefore, Taiwan will gain more from trade and investment, and will become more dependent on its economic activities with the mainland. As these economic gains grow to the extent that the ROC government begins to fear losing those interests, the PRC government can use such kind of economic dependency as an instrument for achieving its political objectives. Meanwhile, although the ROC government can take advantage of the PRC's expectations in expanding trade relations as its bargaining

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[68] Marina V.N. Whitman, Reflections of Interdependence: Issues for Economic Theory and U.S. Policy (Pittsburgh: University of Pittsburgh Press, 1979), at 265.

[69] David A. Baldwin, "*Interdependence and Power: a Conceptual Analysis*," 34 International Organization, (Autumn 1980), at 488.

[70] Id., at 478.

[71] Id., at 495.

chip,[72] the ROC government is still at a disadvantage in the power allocation as a result of the expanding PRC-ROC trade relations. Several reasons support this development. First, trade is more important to Taiwan than to mainland China. Exports contribute 46.53% of Taiwan's GNP as opposed to only 14.3% of China's GNP.[73] Therefore, Taiwan will have to bear huge opportunity costs if its economic relations with the mainland are disrupted. Second, as a democratic society, Taiwan will feel more impact from any adverse changes in its said economic relations than its powerful neighbour, mainland China, as an authoritarian society.[74] The PRC government can also directly or indirectly use pressure groups on Taiwan to exaggerate such impacts, thereby impelling the ROC government to soften its political stance.

Another theory of interpreting the functions of economic

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[72] In April 1992, the PRC agencies requested that Taiwanese tourists submit more documents for visa applications. This was regarded as an unreasonable request in the views of the ROC government. Therefore, the ROC government threatened to completely stop all activities between both sides. Because of such pressure from Taiwan, the PRC government was forced to continue following its old procedure in issuing visas to Taiwanese tourists. This kind of negotiation process verifies that the ROC government can use the PRC's expectations as a bargaining chip to obtain its advantageous position. *See* World Journal [Toronto], 29 Apr. 1992, at 2.

[73] Monthly Statistics of Exports and Imports (Taipei: Department of Statistics, The ROC Ministry of Finance, 1991); Almanac of China's Foreign Economic Relations and Trade (Hong Kong: The Editorial Board of the Almanac of China's Economic Relations and Trade, 1992), at 399.

[74] Note, supra note 67, at 22.

integration that arise from the increased economic interdependence[75] is the so-called neo-functionalism.[76] Such an approach has been quite fashionable in exploring the integration process of the European Community ("EC"). The central theme of the neo-functional approach is that the sectoral integration is inherently expansive. Accordingly, integration of some functional tasks would tend to beget its own impetus and spread to other sectors and tasks such as the integration process of the EC which has expanded its cooperative programs from customs union to monetary union.[77] The logic behind such functional spill-over can also be extended to political spill-over and cultivated spill-over.[78] The political spill-over resulting from the learning process gives rise to the perception that interests of various parties are better served by seeking supernational, rather than national, resolutions. Therefore, various entities will refocus their activities and expectations to the new centre or new decision-making processes.[79] The cultivated spill-over, which explains the functions of decision-making agencies such as the Commission of the Community, continually redefines conflict and

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[75] H. Edward English, "*International Economic Integration and National Policy Diversity*," Occasional Papers in International Trade Law and Policy, Centre for Trade Policy and Law, (1990), at 2-3.

[76] Jeppe Tranmholm-Mikkelsen, "*New-Functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC*," 20 Millennium, (1991), at 1-20.

[77] Id., at 4-6.

[78] Id., at 5-6.

[79] Id., at 5.

solution processes that leads to the expansion of powers of such decision-making agency and the improvement of common interests.[80] These theories certainly need decades of investigations to attest its logic. Nevertheless, the experiences of EC integration, especially those after the enactment of the Single European Act, can more or less explain how the functions of spill-over have been achieved, particularly through the attempts of the Commission of the Community.

This theory serves to illustrate why removal of trade barriers between the ROC and the PRC has helped achieve the success in the negotiation process between both sides. The process starts from the extradition of illegal emigrants to many other tasks and sectors, including the notarization of official documents, judicial assistance and investment protection, etc. The functions of negotiating agencies, such as the Strait Exchange Foundation ("SEF") of the ROC and the Association for Cross-Strait Relations ("ACSR") of the PRC have recently been enhanced from non-political affairs to political ones.[81] This change again supports the logic of political and cultivated spill-over. Once the functions of negotiating agencies intervene in the political fields, economic integration will be upgraded to political negotiation or

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[80] Id., at 6.

[81] During the negotiations for an agreement on the notarization process of PRC documents, the PRC agency requested that the phrase "both sides agree on the one-China principle" be included in the agreement. However, the ROC Strait Exchange Foundation insisted that it was not entitled to touch upon such political matters. *See* World Journal [Toronto], 28 Mar. 1992, at 13.

integration.[82]

Obviously, trade relations can produce economic interdependence which helps in the shaping of the economic integration process. However, political integration is more dependent on political acts and intentions. The willingness to establish common business interests is not equivalent to the willingness of transferring loyalty and sovereignty to a new centre. For instance, Canada and the U.S. have very close economic relations.[83] Nevertheless, the lack of willingness to share sovereignty and the insistence on national identity between the U.S. and Canada make it hard to realize political integration.[84] In the PRC-ROC case, although close economic relations between them can be expected, the political gap, especially on the issue of sovereignty, makes political integration very difficult. The ROC's unwillingness to compromise with the PRC is particularly a key issue of such a difficulty. The rise of the European Community[85]

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[82] Tranholm-Mikkelsen, supra note 76, at 9.

[83] In 1989, 73.3 % of Canadian goods were exported to the U.S., and 65.2 % of Canada's imports came from the U.S. *See* Statistics Canada, 1989.

[84] In the 1992 Constitution Reform of Canada, national identity has been called for building a new Canada. *See* The Ottawa Citizen, [Ottawa], 1 Mar. 1992, at A4. In March 1992, Canada's Constitutional Committee recommended that the constitution include the statement "We are the people of Canada, drawn from the four winds of the earth, a privileged people, citizens of sovereign state ...."

[85] Note, "*Europe and the Global Crisis,*" Journal of World Economy, (Apr. 1986), at 7.

and the reunification of Germany[86] showed that political integration can only be based on equality and balance.[87] Hopes of integration under threat or use of force will finally be dissipated as in the case of the break-up of the Soviet Empire[88].

The PRC strategy of using trade relations as a leverage for reunification will be regarded by the ROC as another kind of force and may become counter-productive. However, peaceful evolution as hoped for by the ROC also has its limitations. As an authoritarian society, the central government of mainland China has been traditionally controlled by only a few top leaders. Because of this, it will take a long time before a peaceful evolution, or a pluralistic society, can be established in the mainland. Since the development of a democratic system in the mainland is ROC's prerequisite for reunification, the process of inducing a peaceful transition to reunification might take at least several decades. Given such a long process, the political use of economic instruments offers less for long-term reunification than for short-term adjustment of relations. In summary, trade relations between the PRC and the ROC have their positive and negative political impacts which are important for the management of their relations.

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[86] Clark, supra note 66, at 58-62.

[87] The balance within the European Community is not an exact arithmetic one, but is based on mutual respect. Note, supra note 85, at 34. According to this principle, the disparity of the size of population and territory between the mainland and Taiwan should not be a justification for repressing the willingness of Taiwan for the political agenda of the PRC government.

[88] Frederick F. Chien, "*A View From Taipei*," Foreign Affairs, (Winter 1992), at 102.

However, use of trade relations for political reunification seems to exaggerate the importance of trade relations. Therefore, another option for both governments is to remove their non-pragmatic political considerations and allow their trade relations to proceed with less governmental interventions.

B. National Security and Foreign Policy: Justifications for Governmental Interventions

National security or foreign policy has often been cited as the justification for imposing trade controls in the international community. These trade control measures include embargoes,[89] import and export restrictions,[90] and the grant of most-favoured-nation status.[91] In the case of ROC-PRC relations, both sides have been imposing embargoes on each other by only allowing indirect transportation between both sides. Goods allowed to be exported and imported also have been seriously restricted. These measures

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[89] e.g. U.S. government embargoes on North Korea, Cuba and others. Donald E. Dekieffer, "*Foreign Policy Trade Controls and the GATT*," 22 Journal of World Trade, (June 1988), at 78.

[90] e.g. U.S. government's previous export controls on the Soviet Union and its allies under the Export Control Act of 1949, the Export Administration Acts of 1969 and 1979, the Trading with the Enemy Act, the International Emergency Economic Power Act, the Arms Export Control Act and the Automatic Energy Act of 1954. *See* ALI, Restatement of the Law, the Foreign Relations Law of the United States (St. Paul: American Law Institute, 1987), at 307-312; Andreas F. Lowenfeld, Trade Control for Political Ends (New York: M. Bender, 1983), at 7-9.

[91] e.g. U.S. government granted MFN status to the PRC. *See* Richard H. Solomon, "*China and MFN: Engagement, Not Isolation, In Catalyst for Change*," U.S. Department of State, Bureau of Public Affairs, (1990), at 2.

clearly indicate that trade between both sides have been subjected to political considerations, especially those of national security and foreign policy concerns.

Theorists of political economy have recognized that national security can be an exceptional part of a liberal trade regime.[92] Many international trade agreements have provided exceptional clauses for national security. According to Article XXI of the General Agreement on Tariffs and Trade ("GATT"),[93] a contracting party can take actions in compliance with GATT rules to protect its essential security interests or to maintain international peace and security. Article 2003 of the Canada-U.S. Free Trade Agreement[94] and Article 18 of the Australia-New Zealand Closer Economic Relations - Trade Agreement[95] both follow the GATT model in excluding the application of trade agreements for security interests. Difficulties often arise in determining whether certain protective measures are being taken for security or for economic interest, whether foreign policy is an exception to the restriction of liberal trade, and what the appropriate scope should be regarding trade restrictions.

Both the PRC and the ROC governments have been imposing many

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[92] Clark, supra note 2, at 111.

[93] GATT, 30 Oct. 1947, T.I.A.S. no. 1700, 55 U.N.T.S. 187.

[94] Canada-U.S. Free Trade Agreement, H.R. Doc. No. 216, 100th Cong., 2nd Sess. 297 (1988), reprinted in 27 I.L.M. (1988), 281.

[95] Australia-New Zealand Closer Economic Relations - Trade Agreement. (Done at Canberra, 28 Mar. 1983; entered into force, 1 Jan. 1983) 22 I.L.M. (1983).

import and export restrictions on the trade between them. Since no trade agreements have been concluded, both governments are free to determine whether their national security or political concerns are justifiable for purposes of trade controls. However, both governments still need to consider the necessity of adopting protective measures which may be counter-productive to their security and policy concerns. The history of East-West trade can provide some lessons for both the PRC and ROC governments in formulating their respective policies. Because of the cold war between the U.S.-led and the Soviet-led blocs, the previous direction of U.S. foreign policy was meant to halt communist expansion and to create preconditions for the eventual dissolution of the Soviet system.[96] The strategy of the U.S. government was to use trade controls to keep the Soviets in relatively inferior military and economic positions, which aimed to reduce the Soviet capacity to intervene in international affairs. Restrictions on the transfer of military and industrial goods, sophisticated technology, and agricultural products were therefore imposed by the U.S. government and its allies.[97]

The U.S. policy on trade controls has not always been consistent and has often shifted between moderate[98] and harsh

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[96] Philip J. Funigiello, American-Soviet Trade in the Cold War (Chapel Hill and London: The Univ. of North Carolina Press, 1988), at 214.

[97] Id., at 219.

[98] Henry R. Nau, The Myth of America's Decline (Oxford: Oxford Univ. Press, 1990), at 303; Funigiello, supra note 96, at 323; Raymont J. Waldwann, Managed Trade (Cambridge, MA: Ballinger Pub.

controls.[99] As described by a former U.S. Secretary of State[100], the East-West trade has its ups and downs depending on the U.S. policy which can be regarded as "light-switch diplomacy," meaning that it has always swung back and forth between denial (overemphasis on defense) and detente (overemphasis on commerce).[101] From 1985 to the present, the U.S. government has advocated the deterrence approach for East-West trade purported to control the flow of high technology to the communist nations, and to allow non-strategic trade to rely on market levels.[102] Most recently, Western allies have encouraged Eastern European nations to proceed with their market reforms. Therefore many trade agreements in recognition of these reforms have been concluded for trade, commercial and economic cooperation between both blocs.[103]

From the history of East-West trade, several features are

Co., 1986), at 131-134.

[99] Nau, id.; Waldwann, id., at 134.

[100] Nau, id., at 315, the remark of George Schultz in Business Week in 1979.

[101] Id., at 323.

[102] Nau, id., at 321-325; Waldwann, supra note 98, at 136; Funigiello, supra note 96, at 223-225.

[103] Marc Marsceau, ed., The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe (Dordrech, Netherlands: Martinus Nijhoff Publishers, 1989), at 310-320; Nancy J. Goodman, "*International Agreement: Poland Bilateral Investment Treaty - A Reflection of United States Efforts to Shape the Economic Development* of Eastern Europe," 32 Harvard International Law Journal, (1991), at 255-264; BNA, Int'l Trade Reporter, 4 Mar. 1992. The European Free Trade Association expected to sign a free trade pact with Poland, Hungary, and the Czech and Slovack Federal Republic in 1992.

noteworthy to the PRC and the ROC governments in formulating their respective policies. First, to use trade controls in implementing foreign policy has its limitations. Imposing trade controls or economic sanctions against a powerful adversary in the hopes of its collapse has proved to be ineffective.[104] In the case of PRC-ROC relations, mainland China had been economically isolated and self-sufficient before its open-door policy which began in 1979, but did not collapse as expected by the ROC government. On the ROC side, in spite of its comparatively smaller economy, its functioning as a separate entity, politically and economically, from the mainland has been supported by Western allies for decades, and thus cannot be easily influenced by the PRC government which has attempted to isolate Taiwan internationally. Because of increasing interdependence among Asian Pacific political and economic environments, it has become more difficult for the PRC government to proceed with its "isolation" policy. Accordingly, trade controls by both sides could not be expected to lead to the overthrow of each other's government.

Second, since strategic trade controls have an adverse impact on the targeted country's military strength, technology flow can be used as an effective diplomatic instrument for achieving political goals. In practice, the Western Coordinating Committee ("CoCoM") has remained a powerful agency for enforcing collective national decisions on strategic technological flow to the communist nations,

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[104] Funigiello, supra note 96, at 217.

including the PRC.[105] Because of its agreement with the U.S. government for controlling high-technology flow,[106] the ROC can therefore join the Western allies in hampering the growth of the PRC's arsenal industry.

Third, trade controls for foreign policy purposes might be abused. In the U.S., trade controls have been advocated by domestic pressure groups who aim at protecting their own economic interests, though they have often relied on U.S. foreign policy concerns as an excuse.[107] In particular, labour unions and declining industries, in fear of competition, might resort to humanitarian concerns in trying to restrict exports from communist nations into the U.S. These pressure groups, having relied on non-economic excuses to camouflage their economic interests, are far from the spirit of trade liberalization of GATT rules.[108] Consequently, a government pursuing an open economy and trade liberalization need to be aware of pressure groups which may try to take advantage of national security or foreign policy concerns to

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[105] The CoCoM was established by seven countries: Great Britain, France, Italy, the Netherlands, Belgium, Luxembourg and the United States. Later, it was joined by other members of the North Atlantic Treaty Organization (except Ireland) - Portugal, Greece, and Turkey - as well as Japan. The Coordinating Committee was organized under the above Consultative Group in 1949. *See* Lowenfeld, supra note 90, at 12-13.

[106] World Journal [Toronto], 4 May 1992, at 11.

[107] Donald E. Dekieffer, "*Foreign Policy Trade Controls and the GATT*," 22 Journal of World Trade, (June, 1988), at 78.

[108] ALI, supra note 90, at 308.

achieve their economic purposes.[109] In the case of PRC-ROC trade relations, manufacturers in Taiwan have begun to worry that their interests might be undermined with the gradual removal of import restrictions. For instance, Taiwanese agricultural producers have opposed the importation of PRC products by arguing the importance of domestic agricultural production for defense considerations. In actuality, Taiwanese agricultural producers have their comparative advantages in spite of fast rising labour costs and land prices. Protective measures and governmental subsidies for the agricultural sector have hurt the interests of domestic consumers and increased the financial burdens of the ROC government. Accordingly, it would be unwise for the ROC government to protect its industries without considering the economic costs of adopting protective measures for security concerns.

Fourth, it is not easy to implement trade controls for foreign policy purposes in an efficient manner. Domestic interest groups have always tried to maximize their interests in spite of governmental policies. They might persuade legislators to lift trade controls, which can therefore raise tensions between the executive and the legislative branches.[110] In addition, interest groups might attempt to avoid trade controls by establishing affiliates in a third country. Hence, governments have to face the

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[109] Gary Bark and Jan Tumlir, "*The Political Problem of Adjustment*," 9 The World Economy, (1986), at 145.

[110] Nau, supra note 98, at 314.

extraterritorial difficulties of enforcing domestic laws.[111] Further, in a world of interdependent economy, trade controls will impair the economic interests of domestic enterprises, but benefit those in a third country. A third nation can take advantage of trade controls for its own benefit, and, for example, transfer technologies to an adversary of the nation which imposed controls. The U.S. and its Western allies have encountered conflicts of interest arising from the discordant trade controls on communist nations, which helps to explain the difficulty of imposing international trade controls.[112] Accordingly, any government expecting to impose trade controls efficiently would face huge difficulties in international cooperation as well as resistance from domestic interest groups.

Fifth, trade controls which may produce a psychological impact have become a bargaining chip. Governments have often resorted to trade controls as a barometer in determining whether to endorse another government's policy.[113] During the process of trade liberalization between the PRC and the ROC, both governments can take advantage of the progress of trade liberalization to gradually cultivate reciprocal trust. Through the step-by-step improvement of trade relations, psychological bases for political negotiations

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[111] Nau, id., at 307; Lowenfeld, supra note 90, at 9.

[112] Nau, id., at 304. The West European nations have often been reluctant to coordinate with the U.S. policy of imposing trade controls on the East European nations, thereby making it difficult to implement the U.S. policy efficiently.

[113] Id., at 296.

can therefore be established.

Sixth, the process of trade controls should be systematic, efficient and transparent. During the 1980s, Western allies developed many guidelines, frameworks and studies to address East-West trade issues.[114] The OECD has played an important role in monitoring and assessing the advantages and disadvantages of the overall East-West trade, and has also provided scientific resources for reviewing the list of technologies and products under control. In 1985, Security and Technology Experts Meetings were established to advise CoCoM members in the evaluation of trade controls.[115] Learning from Western experiences, both the PRC and ROC governments might need to restructure their trade control regimes for more efficient implementation. The ROC especially should draw on the more advanced Western experiences regarding technology exports to mainland China to optimize its trade control regime against the PRC.

In sum, in certain circumstances, national security and foreign policy can be used to justify exceptions to trade liberalization. However, trade control for these reasons should be applied cautiously in order not to hamper or impair a country's own economic efficiency and interests.

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[114] Id., at 316.

[115] Nau, id., at 322.

C. Legal Framework of Trade Controls for National Security and Foreign Policy

A detailed analysis regarding the legal framework of trade controls for national security and foreign policy will be presented in Chapter three.[116] In this section, the general principles of trade control systems will be introduced. Generally speaking, both international and domestic regimes have regulated the implementation of trade control for political purposes. On the international level, GATT and many bilateral trade agreements have provided certain provisions as exceptions for liberal trade. For instance, Article XXI of the General Agreement provides a clause for Contracting Parties to be exempted from GATT obligations if they consider it necessary for the protection of their essential security interests, although GATT does not provide any guidelines to determine what constitutes "essential security interests". Basically, the GATT forum tries to separate itself from politics. Thus, the exercise of security exceptions is subject to the discretion of any Contracting Party. On the domestic level, many Western nations, such as the U.S. and Canada, have set up fairly sound regimes to address this issue. Generally speaking, in these democratic societies, the governments will take a position to balance their commercial interests and policy concerns. In order to do that, they have to build up a widely acceptable procedure for

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[116] Three issues are especially analyzed in Chapter Three: the legitimacy of trade control systems, procedural arrangements for trade control as well as extraterritorial application of trade control rules.

determining the scope and extent of trade restrictions.

D. Summary

Both the PRC and the ROC governments have regarded the trade relations between them as crucial elements for their respective political agenda. On the PRC side, it expects to use trade relations as a lever to reunify with Taiwan. In theory, the development of trade relations can affect politics by reallocating power in the international arena and creating economic interdependence between societies. However, it is not true that such political impacts would necessarily make people in Taiwan willing to transfer their loyalty and sovereignty to another centre. Accordingly, it is probably not an appropriate policy for a government to exaggerate the importance of trade relations and intervene in trade activities for its political purposes. Further, political control on trade activities for national security and foreign policy concerns have often prevailed over the interests of trade liberalization and cannot be easily regulated in international trade regimes. Since such a policy cannot be easily implemented, it needs to be deliberately devised through a systematic legal framework to achieve its original purpose and incur the least costs.

III. THE INCOMPATIBILITY BETWEEN CENTRALLY-PLANNED AND MARKET ECONOMIES

In addition to the conflicting political perspectives towards

PRC-ROC trade relations, the nature of the PRC and ROC economies, characterized as a centrally-planned economy ("CPE") and a market economy ("ME") respectively, is another obstacle to the integration of both economies. Actually, the issue of the incompatibility of a CPE and an ME is another aspect of conflict between trade liberalization, as invoked by an ME, and political control, as supported by a CPE. In order to further clarify such an issue, which is the central theme of this study, this section first analyzes in detail the nature of a CPE whose government dominates trade activities and relations for its political purposes, and then further examines the trade policy and system of a CPE which are incompatible with those of an ME in many aspects, such as administrative controls, discriminatory measures, transparency, reciprocity, fair competition and capital movement.

A. Nature of Centrally-planned and Market Economies

In an ME, the price and quantity of goods are determined by the supply and demand of such goods as well as the benefits sought by producers and consumers.[117] In a CPE, the quantity of goods is determined by the planning authorities based on pre-established economic goals.[118] Accordingly, price is set to meet the planned

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[117] David M. Streifford, Economic Perspective (Boston, MA: Richard D. Irwin Inc., 1990), at 35.

[118] Paul D. Mckenzie, "*China's Application to the GATT: State Trading and the Problem of Market Access*," 24 Journal of World Trade, (Dec. 1990), at 136; Leak A. Haus, Globalizing the GATT: The Soviet Union's Successor States, East Europe and the International Trading System (Washington, D.C.: The Brookings Institution, 1992), at 21; K. Gryzbowski, "*Socialist Countries in GATT*," 28 The

quantity. An ME and a CPE are different from each other in their operation as economic systems. First, the decision-making process for production and consumption is decentralized in an ME, as opposed to centralized in a CPE. Second, the degree of economic choice and freedom is extensive in an ME, and limited in a CPE. Third, title to resources (labour, capital, land and other assets) is held by individuals in an ME, and by the central government in a CPE. Fourth, the profit motive for production is strong in an ME, and very limited in a CPE.[119]

With respect to foreign trade, an ME operates according to its comparative advantages of production. If producing certain goods has low comparative advantages, the price of such goods will be high, thereby inducing the importation of "low-priced" foreign goods to gain high comparative advantages, and vice-versa.[120] However, in a CPE, import is not determined by the rules of comparative advantages and price mechanisms, but rather is centrally planned to meet domestic demand, and export is manipulated by the government for strategic purposes.[121] The foreign and domestic prices are not directly linked. In order to control foreign trade, foreign exchange is allocated by the government, rather than by private enterprises.[122]

American Journal of Comparative Law, (1980), at 551.

[119] Id., at 35.

[120] *See Chapter Two, part I.*

[121] World Journal [Toronto], 14 Mar. 1992, at 35.

[122] Mckenzie, supra note 118, at 136.

Currently, no nation is a pure CPE or ME in terms of economic and trade systems. Almost all of them are mixed economies possessing both centrally-planned and market features.[123] Hence, the only way to describe the real nature of socialist economies is to use the term "more non-market" economies.[124] In the case of the PRC's economy, market-oriented reforms have been implemented since Deng's "open-door" policy of 1979.[125] Recently, in order to accede to the GATT, many reforms on economic and trade systems have actively been introduced.[126] Accordingly, it is no longer appropriate to regard the PRC economy as a pure CPE.

However, in terms of economic features, current PRC economy is obviously "more non-market". At least one-third of consumer goods are still being administered by the central government with power to determine their prices.[127] Many import barriers and state monopolies make the normal operations of market mechanisms difficult.[128] Further, in its political propaganda and constitution, the PRC still continues to describe itself as a

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[123] Streifford, supra note 117, at 35; John H. Jackson, "*State Trading and Non-market Economies*," 23 The International Lawyer, (Winter, 1989), at 894.

[124] Jackson, id., at 895.

[125] Mark Selden, The Political Economy of Chinese Socialism (Armonk, N.Y.: M.E. Sharpe Inc., 1990), at 7.

[126] BNA, Int'l Trade Reporter, 4 Mar. 1992, at 387-388.

[127] World Journal [Toronto], 10 Mar. 1992, at 35.

[128] World Journal [Toronto], 14 Mar. 1992, at 35.

socialist country with a planned economy.[129] In spite of a new clause in the 1993 Constitutional Amendments to strengthen its market economy, it still considered itself as a socialist state. Hence, it can be concluded, either from the viewpoint of subjective ideology or objective economic system, that it would take a long time for mainland China to become a "more market" economy.

On the ROC side, although governmental intervention in the promotion of economic development still exists, prices of goods and market mechanisms dominate the operation of the domestic economy and foreign trade. Its import tariffs are low, and non-tariff barriers are rare. State monopolies in Taiwan are in effect only in a few exceptional fields. Generally speaking, the economic system of Taiwan is more like an ME than a CPE.[130]

Understandably, difficulties will arise from the integration of such discrepant economies of the PRC and the ROC. Issues about their import and export regimes need to be resolved before a complete economic integration can be realized.

B. Incompatibility of Centrally-Planned and Market Economies

A market economy, such as that of Taiwan, pursues free trade

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[129] Robert E. Herzstein, "*China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*," 18 Law and Policy in International Business, (1986), at 396. In the preamble of the PRC 1982 Constitution, the PRC government declares that the Chinese people should invest the socialist reform and develop in socialist democracy. See BNA, International Trade Reporter, 3 March 1993.

[130] Further analysis of the economic and trade systems of Taiwan, see Chapter four, part III.

among nations, whereas a centrally-planned economy, such as that of mainland China, advocates controlled trade in implementing its central economic plan. Given such conflicting perspectives towards trade relations, the governments of an ME and a CPE have taken disharmonious administrative measures in connection with their trade systems. These disagreements exist on many aspects, including tariff and non-tariff measures, non-discriminatory processes, implementation of reciprocity, transparency of trade policy and trade rules, unfair trade practices, as well as the operation of exchange rates. As described earlier, Taiwan or mainland China is not a pure ME or CPE. Nevertheless, the concept of an ME or a CPE, as used in this section, should generally be consistent with its current economic situation.

i. Incompatibility of Trade Liberalization and Trade Controls

An ME advocates free trade to decrease or eliminate governmental interventions in trade activities. By contrast, a CPE favours the maximization of governmental controls on trade. Theoretically, the protective measures of an ME, including tariff and non-tariff barriers, are not so significant to a CPE, because all these measures can be replaced by state planning based on administrative discretion.[131]

With respect to the tariff system, imports and exports of an

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[131] Qin Ya, China and GATT: Toward a Meaningful Participation? Harvard unpublished S.J.D. thesis, (1990), at 31.

ME, such as Taiwan, are influenced by tariffs which in turn affect the price of goods. Nevertheless, in a CPE, such as mainland China, imports and exports are determined by state plan, rather than price mechanisms. Accordingly, tariffs do not play an essential role in controlling exports and imports.[132] Reducing or eliminating tariffs will not necessarily increase imports. From this point of view, a CPE is quite incompatible with the GATT system which encourages tariff reductions to promote trade liberalization.[133]

Although a CPE does not need to resort to non-tariff measures for trade control purposes, extensive non-tariff barriers still exist in order to strengthen its administrative trade controls. When a nation starts to decentralize its administrative trade controls, these non-tariff barriers will become obstacles in its transition toward a market economy. An ME faces many obstacles in trying to gain market access to a CPE.[134] First, many import licensing requirements and import monopolies have been granted to enable the CPE to resist import needs.[135] Second, unique sanitation and other technical barriers become procedures which are

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[132] Feng Yu-shu, "*China's Membership of GATT: A Practical Proposal*," 22 Journal of World Trade, (Dec. 1988), at 55; Eliza R. Patterson, "*Improving GATT Rules for Non-market Economy*," 20 Journal of World Trade Law, (Mar.-Apr. 1986), at 187.

[133] Article XXVIII of GATT provides the processes of tariff negotiations purported to reduce tariff barriers.

[134] Herzstein, supra note 129, at 375.

[135] Qin, supra note 131, at 211 et. seq.

utilized by socialist states for trade control purposes.[136] Third, "import substitution" has often been used in a CPE to encourage domestic state enterprises to purchase domestic goods, rather than foreign ones. Importers of goods which appear on such a list would find it difficult to get foreign exchange, or import licenses. Therefore, imports are depressed in a CPE.[137] Some of the above protective measures that have been implemented through administrative controls are not subject to GATT rules and need extra-GATT procedures to be overcome.[138]

For its survival, a socialist government needs to control state enterprises which contribute the major part of its industrial output. For this reason, communist governments are reluctant to relinquish administrative controls over the trade system in order not to threaten state enterprises.[139] This explains why the incompatibility of an ME and a CPE lies not only in their trade systems, but also in their political systems.

ii. Incompatibility of Discriminatory and Non-Discriminatory Measures

In an ME, trade activities are based on the principle of non-discrimination. According to GATT rules, non-discriminatory

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[136] BNA, Int'l Trade Reporter, 8 Apr. 1992. at 635.

[137] Id.

[138] Jackson, supra note 123, at 892-893.

[139] Roger W. Sullivan, "*Discarding the China Card*," Foreign Policy, (Spring 1992), at 16.

treatment includes most-favoured-nation ("MFN") status and national treatment. The MFN status means that the treatment of imports and exports accorded to one trading partner should also be granted to all other trading partners.[140] If all nations accord MFN treatment to each other, trade barriers will simultaneously be reduced. All private traders, regardless of their home country, would be treated equally and goods would be exported and imported purely on commercial considerations.

The difficulties of applying MFN treatment to a CPE are due to its secret state plan and administrative controls which discriminate against foreign goods. Other countries find it difficult to know whether the CPE has complied with non-discriminatory rules.[141] Bilateral undertakings in socialist states are common and often discriminate against goods from third countries.[142] These undertakings are performed through secret agreements which make it difficult for private traders to detect whether or not their interests have been prejudiced.

As to national treatment, an ME advocates that imports and

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[140] Article I (1) of GATT provides:
... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all contracting parties. Detailed analysis of MFN clause, see John H. Jackson, Legal Problems of International Economic Relations (St. Paul, Minn.: West Pub. Co., 1986), at 430-482.

[141] Feng, supra note 132, at 55; Qin, supra note 131, at 32; M.M. Kostecki, East-West Trade and the GATT System (New York: St. Martin's Press, 1979), at 35-36.

[142] Qin, supra note 131, at 250 et. seq.

domestic products should be treated equally, and internal taxation, charges, quantitative restrictions and other obligations should not be applied to only foreign goods to protect domestic products.[143] In a CPE, many special measures might be imposed on imports according to its state plan. These include special internal tax and price controls, certification and registration of imports and favourable credit for domestic products.[144]

iii. Inapplicability of the Concept of Reciprocity

Reciprocity is an exchange of concessions between or among governments purported to maximize their economic gains from trade cooperation. The concept of reciprocity is an important principle for reducing trade barriers among market economies.[145] In a CPE,

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[143] Art. III (2) of the GATT provides non-tariff measures imposed on internal commerce: " ... internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amount or proportion, should not be applied to imported or domestic products so as to afford protection for domestic production."

Article XI (1) of the GATT also provides for concerns on non-tariff measures imposed at the border (importation of goods): "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Contracting Party on the importation of any product of the territory of any Contracting Party or on the exportation or sale for export for any product destined for the territory of any contracting party. For more detailed analysis of "national treatment", see Jackson, supra note 123, at 483 et. seq.

[144] Qin, supra note 131, at 251 et. seq.; Feng, supra note 132, at 55.

[145] Qin, id., at 33-34; Kostecki, supra note 141, at 36 et. seq.

the concept of reciprocity is almost inapplicable. Because of the nature of the CPE's central economic plan and administrative trade controls, the government of an ME and its private enterprises find it difficult to expand export opportunities, even if the government of a CPE has agreed to reduce trade barriers or grant MFN status.[146] This incompatibility explains why the governments of CPEs, such as Hungary, Poland and Romania, have been requested to make extra concessions when they applied for accession to the GATT. Other contracting parties which did not expect tariff reductions can reciprocally benefit in terms of export opportunities. In order to allow other contracting parties to gain reciprocal benefits from the accessions of CPEs to the GATT, extra-GATT concessions, including import commitments, have been made by the governments of these CPEs.[147]

Although several decades have elapsed since the accession of these CPEs to the GATT, the extra-GATT concessions have been proven unsuccessful in expanding East-West economic relations and the CPE states have been unsuccessful in honouring their import

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[146] Qin, id.

[147] *See* Protocol for the Accession of Poland, B.I.S.D.15S/52; Protocol for the Accession of Romania, B.I.S.D. 18S/10; Protocol for the Accession of Hungary, B.I.S.D. 20S/3. For more detailed analysis, *see* Kostecki, supra note 141, at 23-34; Qin, id., at 34-39; Jackson, supra note 123, at 894-895; Feng, supra note 132, at 59-62; Grzybowski, supra note 118, at 550-551; Herzstein, supra note 129, at 384; Marc Marsceau, The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe (Dordrech, Netherlands: Martinus Nijhoff Publishers, 1989), at 259 et. seq.; Patterson, supra note 132, at 186.

commitments.[148] These failures were attributable to the difficulties in applying the principle of reciprocity between an ME and a CPE in the calculation of costs and benefits of various concessions, i.e., tariffs, quotas and import commitments.[149] Under such circumstances, the best way to enhance the effects of concessions between an ME and a CPE is not to take advantage of the principle of reciprocity, but to reduce administrative controls in a CPE.

iv. Inapplicability of the Principle of Fair Competition

In order to prevent unfair competition and market distortion, the GATT and many national laws have developed the use of "countervailing" ("CV") and "anti-dumping" ("AD") duties to negate the effects of dumping and subsidies.[150] The rules regarding the imposition of CV and AD duties are nevertheless difficult or almost impossible in theory or in practice to be applied to a CPE. First, the concept of fair and unfair trade based on the market situation, i.e., the theory of comparative advantages, does not make sense for a CPE which uses pure non-market mechanisms in the production of goods.[151] Second, CV and AD duties are based on the production

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[148] Qin, id., 37-39.

[149] Kostecki, id., at 40.

[150] GATT rules about the imposition of countervailing and anti-dumping duties are provided in Articles VI and XVI of the GATT as well as the Anti-dumping and Subsidies Code, negotiated during the Tokyo Round (1973-79) talks.

[151] Patterson, supra note 132, at 196.

costs and the expected profits of the seller, which are determined by market conditions of the producing country.[152] These difficulties have given rise to obstacles for normal competition and integration between an ME and a CPE.

a. Anti-dumping Duties

Under the GATT and many national laws, dumping is defined as a sale for export at less than the normal value, or the domestic price, or the highest comparable price for a "like" product for export to a third country. A dumping duty, equivalent to the price difference, can therefore be imposed if material injury occurs in the importing country.[153] In order to enforce the rules of AD duties, the domestic price of the dumped goods has to be determined. However, as mentioned, the price of goods in a CPE is artificially fixed by state plan, rather than through the calculation of the production costs and expected profits. Consequently, it is difficult to determine the margin of dumping as the domestic normal value is not available.[154] In order to resolve such dilemma, a "surrogate country" approach has therefore been introduced in the GATT rules and national trade

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[152] Qin, supra note 131, at 33.

[153] Article VI, paragraphs 1, 2 of GATT.

[154] Qin, supra note 131, at 329; Patterson, supra note 132, at 196.

regulations.[155] Under such an approach, the importing country will first identify a market-oriented country based on its available information, geographic proximity, or comparable level of development with the correspondent country.[156] The second step is to list the price of various input components for producing the same goods in the surrogate country. Based on this information, the authorities would then compile an overall constructive cost, and, by adding the statutory mandated profit and administrative cost, arrive at the "normal value".[157]

The "surrogate country" approach is an approach used internationally for determining the home market value of goods from a CPE. However, neither an ME nation nor a CPE nation finds it acceptable. The difficulties of applying such approach is the lack of objective and universal formula in which a surrogate country can be identified and the production costs and other expenses calculated. The broad discretion based on limited information of the authorities has been a subject of dispute between exporting and

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[155] *See* AD Article VI: 1(2), which reads: "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by state, special difficulties may exist in determining price comparability for the purpose of paragraph 1, and in such cases, importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."

[156] *See* B.I.S.D. 15S/111; 18S/96 and 20S/37; regarding the U.S. law, see The Omnibus Trade and Competitive Act of 1988, 102 Stat. 1107 (1988) 19 U.S.C. sec. 1677b(c) (1988); with respect to Canada's law, see Special import Measures Act, R.S.C. 1985, C.S.-15.

[157] Jackson, supra note 123, at 905; Qin, supra note 131, at 336-337.

importing countries.[158] Many scholars have criticized the "surrogate country" approach as being arbitrary, unpredictable, unfair and unworkable.[159] Suggestions and proposals have therefore been put forward to improve such approach to construct a fair value for the CPE.[160]

The abuse of anti-dumping rules would make it harder for a CPE to compete in the world market and might become an excuse by the importing country for protecting its own industry.[161] However, non-use of anti-dumping rules would hurt the industry and economy of the importing country. Accordingly, a better solution is to maintain special anti-dumping rules for a CPE, and to apply such rules with great care.[162] Adjustments for the calculation of the production cost and profit should be allowed to reflect the real "constructive" value of goods for a CPE.[163] Further, the importing country should recognize the economic reforms which a CPE undergoes toward an ME. Certain products, especially those made in an ME, such as the special economic zone of the PRC, should be

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[158] Jackson, id; Qin, id., at 340; Patterson, supra note 132, at 197; Wenguo Cai, "*Canadian and U.S. Antidumping Laws and Chinese Exports*," 14 World Competition, (Sept. 1990), at 126-130; Tung-Pi Chen, "*Are the Antidumping Laws of Canada and Other Western Countries Keeping Pace with China's Structural Reform*," 19 Law and Policy in International Business, (1987), at 717.

[159] Id.

[160] Cai, id., at 130-132.

[161] Jackson, supra note 123, at 908.

[162] Id.

[163] Cai, supra note 158, at 132.

"graduated" from the "surrogate country" approach. Such procedure would definitely encourage a CPE to further reform its economic and trade system to comply with the world ME rules.

b. Countervailing Duties

With respect to countervailing duties, many difficulties have also arisen when the importing country tries to determine what production costs can be attributed to government interventions as a subsidy in a CPE.[164] The subsidy is meaningless in an economy without a market system and price mechanisms.[165] However, even if one overcomes the conceptual problems and agrees that a subsidy exists in a CPE, there are no comparable economic activities in an ME that can be used to ascertain the level of subsidy.[166] For these reasons, major Western nations either deny the applicability or never use the rules of CV duties on the products of a CPE.[167] In the author's view, imposing CV duties on products of CPEs is

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[164] Patterson, supra note 132, at 196.

[165] Jackson, supra note 123, at 907; Qin, supra note 131, at 355.

[166] There are few suggestions on the calculation method of subsidy in a NME. The benchmark approach proposes that, when the imports from a NME is priced under the benchmark price, such imports are subsidized. The difficulty of applying such proposal is the process to fairly set a benchmark. Jackson, id.

[167] The U.S. and Canada authorities took the position that the CV duties do not apply to the products of CPE countries. *See* Carbon Steel Wire from Czechoslovakia: Final Negative Countervailing Determination, 49 Fed. Reg. 19, (1984), 370; Chen, supra note 158, at 23; The EC regulations adopt the same manner of imposing AD duties for calculating subsidies. However, no case has been made against CPE nations. *See* Marsceau, supra note 147, at 293.

conceptually and administratively difficult. However, government interventions in a CPE like the PRC have been gradually reduced. Once the market mechanism is being practiced for certain products or in some economic areas, information on subsidies for certain products and areas would become more available, and the imposition of CV duties would be less difficult. In the author's view, application of CV rules to CPEs would not only prevent the distortion of world trade, but also encourage the CPEs to facilitate the economic reforms towards an ME. In addition, it could avoid the inconsistent practice of Western nations applying CV duties toward a CPE nation.

c. Summary

Application of the rules regarding AD and CV duties to CPEs have been proven unsuccessful because of the lack of objective criteria to determine the fair value of imports and the actual subsidy provided by a CPE. With economic reforms in many CPEs, AD and CV rules would become more and more applicable, particularly when market mechanisms are being implemented to a certain extent in many CPEs. The new issues for an ME nation would be how to accommodate its AD and CV rules for those CPEs in transition toward an ME. To manage these issues might be more difficult than to find out the rules for nations under pure CPEs.

v. Inapplicability of the Principle of Transparency

In a market-economy system, the authorities are obliged or

encouraged to disclose their export and import related laws, regulations, judicial decisions, and administrative rulings,[168] so that foreign companies can easily gain access to their domestic market and equally compete with domestic companies. However, in the case of a CPE, state plans and administrative control measures, including subsidy programs, price formulation methodologies, the form and content of plans, as well as the criteria for granting import licenses and foreign trade businesses, are all held in strict confidence.[169] Inefficient regulations of CPEs and lack of information prevent foreign companies from gaining access to the market of CPEs and from competing with their domestic companies on an equal footing. Foreign companies are often denied export opportunities because of their lack of knowledge about the criteria used by the CPE in making purchasing decisions. The only solution to this problem is to require a CPE to disclose its economic and trade regimes except those prejudicial to the public interest or private commercial interest of its economy.[170]

vi. Incompatibility of Control and Liberalization of Capital Movement

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[168] For GATT rules about transparency, see Art. X of the GATT, and the "Understanding Regarding Notification, Consultation, Dispute Settlement," adopted in the Tokyo Round trade talks of the GATT, B.I.S.D. 26S/210.

[169] Qin, supra note 131, at 274; Patterson, supra note 132, at 200-201.

[170] Article X: para.1 of GATT.

Monetary and trade affairs are inextricably intertwined.[171] Exchange controls, adopted by many CPEs and developing countries, have produced the same restrictive effects on trade as quantitative restrictions or high tariffs.[172] A CPE relies on exchange controls in encouraging exports and discouraging imports. First, the authorities of a CPE often manipulate the exchange rate to make their exports more competitive, and imports more costly.[173] Further, foreign exchange is centrally controlled in a CPE under its state plan. The authorities determine the volume and source of imports through the regulation of the availability of foreign exchange.[174] In addition, administrative controls on the availability of bank loans also serve to curb imports.[175] The effects of exchange controls are clear. Besides being used as a policy tool to hinder imports, they also become effective measures of discrimination against products, countries and currencies.[176] For these reasons, exchange controls have been condemned by the GATT and the International Monetary Fund since their objectives are to restrict those exchange controls that would frustrate the

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[171] John H. Jackson, The World Trade System (Cambridge, MA: MIT Press, 1989), at 22.

[172] Qin, supra note 131, at 232.

[173] Grzybowski, supra note 118, at 551.

[174] Mckenzie, supra note 118, at 148.

[175] Qin, supra note 131, at 233.

[176] Hartland-Thunberg, China, Hong Kong, Taiwan and the World Trading System (New York: St. Martin's Press, 1990), at 83.

spirit of trade liberalization.[177] For fair competition, liberalization of exchange controls would be a core issue of economic integration between a CPE and an ME.

C. Summary

It is clear that a wide range of incompatibilities existbetween an ME and a CPE. To have a meaningful integration, these incompatibilities need to be resolved. One solution is to transform a CPE into an ME. However, as experienced by Eastern Europe, economic reforms cannot be rapidly achieved.[178] Another solution is to set up safeguards for an ME. Before the substantial liberalization of a CPE, safeguards will be necessary for the protection of the industries of an ME. Accordingly, the framework and issues of safeguards will be further analyzed in Chapter Four of this study.

IV. THE INCOMPATIBILITY OF DEVELOPED AND DEVELOPING ECONOMIES

One of the major economic differences which may be regarded as an obstacle to trade liberalization between the PRC and the ROC is their different stages of economic development. Obviously, the economic development of Taiwan is more advanced than that of

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[177] Article XV of the GATT. Because of these provisions, exchange control measures to restrict imports would depend primarily on IMF's determination to see if they violate the IMF requirements.

[178] *See* Nicolai Wolfgang, "*German Unification as a Special Case of Transition from Centrally Planned Economy to Market Economy,*" Korea and World Affairs, (Winter 1991), at 722-79.

mainland China. In terms of per capita gross national product ("GNP") or manufacturing share of GNP,[179] Taiwan can be regarded as a developed economy, while mainland China is still a less developed country ("LDC").[180] That is why both governments' respective applications for accession to the GATT have invoked different treatment status.[181]

In the theories of political economy, nationalists or marxists have different views from those of liberalists regarding trade relations between developing and developed economies. The former may invoke protective trade policies and measures to prevent

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[179] Paragraph 1 of Article XVIII of the GATT defines the LDC as a nation with an economy of "low standards of living" and "early stages of development," which is in turn defined as an economy which has "just started its economic development", or which is "undergoing a process of industrialization to correct an excessive dependence on primary production." However, the definitions of these terms do not clearly provide for the criteria of LDCs. Later, in a GATT panel report, the application of Article XVIII was accorded with the per capita gross national product and manufacturing share of GNP. *See* John H. Jackson, World Trade and the Law of GATT (Indianapolis: Bobbs-Merrill, 1969), at 651-653. Further, the United Nations General Assembly also has approved a list of LDCs for Development Planning, G.A. Res. 2768,26 U.N.G.A or Supp. No. 29, at 52.

[180] Although Taiwan's economy is more advanced than that of the mainland, the latter is more technologically developed than Taiwan in many areas, especially fundamental science, satellite and defense industry. *See* Fu Feng-cheng, "*Technology Transfers from Chinese Mainland to Taiwan,*" Issues and Studies, (Sept. 1991), at 143-144.

[181] Taiwan has applied for acceding GATT as a developed economy, Board of Foreign Trade, Reference Paper on Economic Development and Prospect of the Republic of China, Ministry of Economic Affairs, (April, 1991), at 2-5, 2-6. In contrast, the PRC invoked that "it should be treated as a developing country under the GATT and be entitled to more favourable treatment generally accorded to developing countries within the GATT system." Qin, supra note 131, at 10.

competition from other economies. In their view, trade liberalization in a developed economy would eventually affect the competitiveness of its products on the world market, for which removal of certain restrictions on trade activities would be necessary in order to maintain its competitive edge. For a developing economy, trade-related preferential treatment should be accorded by a developed economy as the former is a less competitive economy. Both arguments have invoked special measures against each other. In the liberalists' view, both are improper and do not conform to the spirit of free trade. What both economies need to do for improving their trade relations is to introduce a more open and liberal trade regime which can simultaneously enhance the comparative advantages of both sides. The following analysis will further clarify this point.

A. Economic Integration: Competitive or Complementary, Gradual or Disruptive

A developed economy faces two difficulties in pursuing economic integration[182] with an LDC. Fear of losing its competitiveness is one, and possible market disruption is another. Both concerns would prompt a developed country to adopt protective measures against an LDC.

In the case of Taiwan, its government has been concerned about possible transformation of the PRC economy from a complementary

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[182] *See* H. Edward English, "*The Political Economy of International Economic integration: A Brief Synthesis*," Occasional Papers 22, Carlton University, (1972), at 2-3.

stage into an overly competitive one.[183] Since 1990, the pattern of investment from Taiwan to the mainland has been revolutionized. Taiwanese investment has shifted from labour-intensive industries to capital- and technology-intensive ones, from downstream industries to upstream ones, and from small businesses to large-scale ones. In the ROC's view, such structural changes of investment in the mainland will reduce the competitiveness of Taiwan's products in the international market.[184] Accordingly, trade restrictions have to be imposed in order to maintain its economic superiority.[185]

In the economist's view, trade between Taiwan and mainland China is currently complementary.[186] However, downstream production in the mainland would give rise to the demand for upstream production. For instance, mainland China has been relying on Taiwanese chemical companies to provide upstream products for their exports. Because of increasing demands for these products and because of the enhancement of industrial technology, mainland China has started its own or has encouraged Taiwanese or foreign companies to set up such enterprises. Hence, industries in the

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[183] World Journal [Toronto], 21 Mar. 1992, at 5. The ROC Minister of Economic Affairs, Mr. Vincent Siew, was especially concerned about Taiwan's dependence on the mainland's market.

[184] Id.

[185] World Journal [Toronto], 29 Mar. 1992, at 5.

[186] Yun-wing Sung, "*The Economic Integration of Hong Kong, Taiwan and South Korea with Mainland China*," A Paper Prepared for the 19th Pacific Trade and Development Conference on Economic Reforms and Internationalization: China and Pacific Region, Beijing (May 27-30, 1991), at 3.

mainland will have to be gradually upgraded. As a result, enterprises in mainland China would become less dependent on materials from Taiwan, and industries of both sides would become more competitive, rather than complementary, in the long run.[187] In fact, mainland China has changed its comparative advantages so fast that members of the Association of Southeast Asian Nations ("ASEAN") and some industries of Newly Industrialized Economies ("NIEs") have started to feel the threat from mainland China.[188] Hence, the ROC's worries are warranted, though the introduction of trade protectionism in order to maintain its superiority does not seem to be the proper response to the problem.

In the author's view, trade restrictions are an inadequate policy for maintaining comparative advantages. First, comparative advantages can only be shifted, not maintained. In a rapidly changing world, no nations can preserve the status quo.[189] In the liberalists' theory, the adjustment problem is to let the market determine the trade flows and the global location of economic activities.[190] Advanced economies, including Taiwan, should not preserve its declining industries. Rather, they should shift to emerging industrial sectors where their comparative advantages lie,

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[187] Tian-zhi Chen, "*Taiwan He Dalu Changye Shi Jingzheng Huo Hubu,*" (Are Industries of Taiwan and Mainland Competitive or Complementary?) 19 Jinggi Qianzhan, (July 1990), at 12.

[188] John Wong, "*Integration of China into the Asian-Pacific Region,*" 11 The World Economy, (1988), at 342.

[189] Ronald J. Wonnacott, "*Canada and the U.S.-Mexico Free Trade Negotiation,*" Commentary, C.D. Howe Institute, (Sept. 1990), at 4.

[190] Robert Gilpin, supra note 2, at 385.

such as high-technology, capital-intensive and service industries.[191] Further, Taiwan can in no way prevent mainland China from acquiring its comparative advantages.[192] A substantial change in comparative advantages in mainland China has started before trade with and investment from Taiwan.[193] In the future, such change will accelerate no matter how much trade and investment will flow from Taiwan.[194] In addition, restrictions on trade with the mainland would not succeed in maintaining low-productivity production on Taiwan. In fact, many Taiwanese industries have shifted their production to Southeast Asian nations with lower labour costs and land prices. The ASEAN nations would likewise also increase their comparative advantages and become more competitive with Taiwan. The pressure of competition from ASEAN nations would not be less than that from mainland China. Hence, restrictions on trade with the mainland to preserve its comparative advantages would not be a feasible option for Taiwan.

Second, trade controls and the shift of comparative advantages are not necessarily relevant. A successful shifting of comparative advantages would depend on whether an economy could continually climb the technology ladder in the production of high value-added goods. The maintenance and shifting of comparative advantages

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[191] Gilpin, id., at 385.

[192] Wonnacott, supra note 189, at 4.

[193] Kym Anderson, Changing Comparative Advantages in China (Paris: Development Centre of the OECD, 1989), at 11-12.

[194] Id., at 56.

might be relevant to technology controls, rather than trade controls. Trade controls can only produce trade distortions and, therefore, generate economic costs, which again is not a feasible policy in the liberal economist's point of view. Taiwan especially needs cheaper inputs of production if its competitiveness on the world market is to be maintained. Trade controls will only increase costs of its industrial products and will reduce, not maintain, its own comparative advantages.

Market disruption is another crucial concern for a developed economy in pursuing trade liberalization with a developing economy. The concept of market disruption is generally considered as a problem from the import surge of low-priced products not caused by any unfair trade practices.[195] Disruptive imports often result in price falls of domestic goods, decline of sales profit, increase of unemployment, and low use of production capacity by domestic industries.[196] Consequently, the importing country would attempt to curtail or restrict imports from an LDC.[197] Many methods on international and national levels have been utilized to prevent harm to domestic industries to avert market disruptions. These measures include safeguards against large-scale imports,[198]

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[195] Jagdish N. Bhagwati, The New International Economic Order (Cambridge: MIT Press, 1977), at 159.

[196] Qin, supra note 131, at 294.

[197] Bhagwati, supra note 195, at 159-160.

[198] Article XIX of the GATT provides emergency action on the importation of a particular product. Three conditions have to be met to impose import restrictions: (1) The disruption resulted "from the obligations incurred by a contracting party under this

subsidies for the domestic industries during their adjustment,[199] and imposition of voluntary export restraints ("VERs") on the exporting country.[200]

The above measures have been criticized by liberals for their deviation from the principle of trade liberalization. First, import restraints would cause exporting countries to incur unfair economic losses.[201] Second, the benefit to consumers of importing countries has to be sacrificed due to the high price of domestic products. The industries of importing countries also would lose their competitiveness due to high costs of imports from the exporting country. Third, restructuring of economic development and shifting of comparative advantages of importing countries might be delayed because of import restrictions.

In spite of the above criticisms regarding import restrictions against market disruptions, various safeguards have been included in many international agreements and national legislation. Unfortunately, it is apparently not easy to remove these

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Agreement, including tariff concessions"; (2) The import increased in substantial quantities; and (3) the import has caused or threatens to cause serious injury to domestic producers. In addition to the GATT, many national laws also provide safeguards against market disruptions, e.g. Section 406 of the 1974 Trade Act, 19 U.S.C. Section 2436 (e) (2) (A).

[199] Qin, supra note 131, at 281.

[200] Arrangements of trade in textiles are a well-known example of VER. The Multifibre Arrangement has been implemented since 1973 against market disruption of textiles by perpetuating a quota system which deviates from the GATT rules. *See* Jackson, supra note 179, at 181.

[201] Bhagwati, supra note 195, at 171.

restrictions. First of all, the GATT rules concerning safeguards have been inadequately interpreted and defined; therefore, many domestic laws and executive orders containing restrictions have been enacted or promulgated.[202] Further, the problem of short-run adjustments is a politically sensitive issue in that it involves substantial displacement and reemployment of low-wage workers. Labour unions or other similar groups will try to use it as an excuse for preventing the importation of cheaper foreign goods, which will further lead to the loss of workers' jobs. In addition, to liberalize trade with developing countries generally requires overcoming the fear of unknown administrative controls on exports, especially those existing in a CPE. Trade barriers imposed by a developed country against a developing one are often due to lack of reliance on its trade system.[203] Accordingly, to remove this psychological barrier would be a difficult issue in realizing trade liberalization between developed and developing economies. The above issues are also applicable to the improvement of PRC-ROC trade relations and will become obstacles for Taiwan in its removal of import restrictions against products from the mainland to prevent market disruptions.

B. Preferential or Normal Treatments For A Developing Country

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[202] The Uruguay Round talks of the GATT is currently working on the codification of safeguards. *See* Qin, supra note 131, at 306.

[203] Id., at 306.

Whether the world economy and the trade systems are disadvantageous to LDCs is an issue that has long been debated. The slow growth of earnings from the exportation of primary products and the poor development of the manufacturing industry are the two main problems developing economies encounter in their economic development.[204] The reasons for such problems are twofold. First, production of primary products is influenced by fluctuating world market conditions. Second, developing economies badly need capital and technology from developed countries for producing manufactured goods. Further, the export market is competitive and difficult for developing countries to penetrate.[205] Hence, some economists have advocated the concept that international trade is unfair and damaging to developing economies.[206] World trade has also been regarded as unsuitable as it may lead to uneven economic growth in certain countries.[207] For these reasons, many international and national institutions have been established for promoting the economic development of developing countries.[208] Nevertheless, more recent reports have

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[204] Rolf J. Langhammer, Economic Impact of Generalized Tariff Preference (Hampshire, U.K.: Gower Publishing Co., Ltd., 1987), at 7.

[205] Gilpin, supra note 2, at 303.

[206] Clark, supra note 2, at 285.

[207] Oliver Long, Law and its Implications in the GATT Multilateral Trade System (Dordrecht Netherlands: M.Nijhoff Pub., 1985), at 90.

[208] On the international level, the United Nations Conference on Trade and Development ("UNCTAD") was established in 1964 for recommending international organizations to adopt special measures for LDCs. In the General Agreement, Article XVIII provides a general framework as a special measure for LDCs. In 1965, the GATT

argued that the under-development of the LDCs resulted more from their internal inefficiency than their external dependence on developed countries.[209] A report, presented by a group of seven distinguished experts to the GATT, expressed the view that:[210]

> "Developing countries receive special treatment in the GATT rules. But such special treatment is of limited value. Far greater emphasis should be placed on permitting and encouraging developing countries to take advantage of their competitive strengths and on integrating them more fully into the trading system, with all the appropriate rights and responsibilities that this entails."

Throughout the Third World, many societies have proved that internal efficiency, including political stability, social discipline, and market system, are the key factors to and prerequisites for economic development. Lack of efficient

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adopted a chapter in Part IV to recognize that LDCs would not expect reciprocity in return for commitment to reduce barriers against the exports of LDCs. In 1974, the preferential treatment for LDCs was again approved in the U.N. declaration on the "New International Economic Order". [U.N. resolution 3201 (5-VI) of 1 May 1974.] In 1971, the Contracting Parties of the GATT voted in favour of a ten-year waiver from the MFN clause for LDCs. Hence, the Generalized System of Preference ("GSP"), under which LDCs would be charged no or less duty for their exports to the developed countries, was established. In 1979 at the end of the Tokyo Round multilateral trade talks, the so-called "enabling clause" provided a legal basis for the extension of the GSP. (B.I.S.D.26S/203). Many resolutions adopted in the Tokyo Round talks, including "Declaration on Trade Measures Taken for Balance-of-Payment Purposes", "Safeguard Action for Development Purposes" and "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance," have been adopted.(B.I.S.D. 26S/205, 26S/209, 26S/210). On the national level, for example, the U.S. has adopted the GSP system, income tax benefits, investment encouragement and financial aid for LDCs. *See* ALI, supra note 90, at 304-305.

[209] Gilpin, supra note 2, at 304.

[210] Fritz Lentwiler et. al., Trade Policies for a Better Future: Proposals for Action, the Leutwiler Report (Geneva: GATT Secretariat, 1985), at 44.

development strategies is the main problems facing LDCs.[211]

With respect to the world trade system, it has been recognized that the GATT rules do not explicitly discriminate against trade by LDCs.[212] In contrast, special measures for the benefit of LDCs have been criticized by many scholars. First, these special measures violate the principles of the GATT, including those of non-discrimination and reciprocity. Nearly no substantive GATT obligations have been imposed on the developing countries as contracting parties.[213] Consequently, not only are the markets of LDCs not accessible to the developed countries, but LDCs can find excuses for the market-distortive measures they have imposed in a manner that is disadvantageous to the development of their economies.

Further, the GSP system has been proven unsuccessful in achieving its original objectives, i.e., to increase export earnings for the developing countries, and thereby to accelerate their economic growth.[214] First, in order to benefit from GSP, a developing country may focus its production on certain industries in which it may not have comparative advantages, thereby causing

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[211] Gilpin, supra note 2, at 304.

[212] Jackson, supra note 171, at 276.

[213] ALI, supra note 90, at 303; Hudec, infra note 219, at 229. Article XVIII of the General Agreement permits LDCs to implement protective measures which might deviate from their GATT commitments for their economic developments. Those measures include tariffs or quantitative restrictions and subsidy programs, etc. Because the principle of reciprocity is generally not applicable to LDCs, DCs would not require LDCs to removal these trade barriers.

[214] Langhammer, supra note 204, at 71.

misallocation of resources.[215] Second, in the liberal economist's view, preferential measures are costly because competitive products would be denied access to their market; therefore, the price of goods would rise and total exports would be reduced.[216] Third, in actuality, GSP only favours few countries which have been quite strong in the development of their export industries. Over three-fourths of the trade which benefitted from GSP was generated by not more than a dozen countries, and most of these probably do not need GSP for their economic growth.[217] Fourth, GSP is voluntary, not mandatory, under the GATT system. The U.S. and the E.C. have imposed many restrictions on the application of the GSP system. Consequently, only a few developing countries can substantially benefit from the GSP.[218] Fifth, the gap between MFN tariffs and preference margins has been gradually narrowed.[219] Sixth, the GSP system is by no means non-reciprocal, and developed countries have more often than not relied on GSP as a leverage in forcing LDCs to accept the voluntary export restraint. Hence, LDCs, though having

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[215] Kim Kihwan, "*Trade Negotiations and Developing Countries in the Asian and Pacific Region*," 4 Asian Development Review, (1986), at 52.

[216] P. Nicolaides, "*Preferences for Developing Countries: A Critique*," 19 Journal of World Trade Law, (1985), at 381.

[217] Id., at 382.

[218] LDCs have complained that not all LDC industrial products, and not all LDCs, were given preferential treatment; and that goods on the GSP list are subject to value and quantity restrictions. Id., at 381.

[219] Robert E. Hudec, Developing Countries in the GATT Legal System (London: Gower Pub. Ltd., Co., 1987), at 153.

benefitted from the GSP, probably have lost more from their exports of textiles, clothing and other favourable products.[220]

The principle of reciprocity should play a vital role for trade not only among developed countries, but also among developing countries. Both developing and developed countries can benefit from the principle of reciprocity on trade. The developing countries, in particular, should undertake the MFN obligations by opening their economies to ease domestic protectionist pressure.[221] Developing countries have most to gain from a world trade system characterized by non-discrimination and reciprocity. In addition, the benefits of carrying out GATT obligations not only lead to efficient allocation of resources, but also help developing countries obtain better bargaining positions during GATT negotiations.

C. Summary

From the above, it can be concluded that various levels of economic development are inappropriate justifications for restricting liberal trade. For the ROC, it is not necessary to

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[220] Langhammer, supra note 204, at 71. In spite of the weakness of the GSP, it is still welcomed by LDCs. Developed countries, therefore, have to continue to grant GSP to LDCs to obtain their political support. Hudec, id., at 227. Furthermore, the GSP is being regarded as a "guarantee of stable conditions for market access during the pay-off periods of export-oriented investments." Langhammer, supra note 204, at 74.

[221] Nicolaides, supra note 216, at 385; Hudec, supra note 219, at 229.

restrict its trade activities with the PRC to maintain comparative advantages. Further, preferential treatment against trade liberalization is not an appropriate policy for LDCs in their economic development.[222] There are enough LDC models suggesting that economic development is best realized through the implementation of a more open and liberal trade system. Specifically, the trade between mainland China and Taiwan should follow such a principle. It is not necessary to grant the PRC a preferential arrangement for its developing economy.

V. FUNCTIONS AND LIMITATIONS OF LEGAL ARRANGEMENTS FOR TRADE RELATIONS

Trade relations can be developed by market forces without any legal arrangements. Under certain circumstances, legal arrangements are even purposely avoided.[223] However, legal arrangements serve some functions better than any other instruments. For instance, they can produce a sense of order and long-term predictability of international relations.[224] For trade relations, legal arrangements can be of two types. First, it can provide an institution or forum for policy coordination and discussion, and not for binding the parties with substantial rights

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[222] Hudec, id., at 229.

[223] David C. Mulford, "*Non-Legal Arrangements in International Economic Relations*," 31 Virgin Journal of International Law, (1991), at 437-438. In some instances, legal arrangements have been avoided. For example, a legal arrangement might offend the other party, or cause time-consuming and expensive efforts.

[224] Id., at 445.

and obligations. The OECD is set up for such kind of purposes. Another kind of legal arrangement is to establish concrete rules involving material commitments toward economic integration. The GATT and many other regional trade agreements are cases in point representing this model.[225] Establishment and enforcement of the latter is more difficult due to the limitations arising from international and domestic political-economic situations.

Specifically complex political-economic relations between the PRC and the ROC make conclusion and enforcement of any legal arrangements less hopeful. Those special situations, as discussed in earlier parts of this chapter, include both countries' conflicting political perspectives, discordant security concerns, different economic and trade systems and various stages of economic development. Nevertheless, legal arrangements between them can still, more or less, serve certain functions for the adjustment of their trade relations. Accordingly, this study will further analyze the functions and limitations of substantial legal arrangements between such dissimilar societies for their trade relations.

A. Power or Rule-Oriented Approach

The functions of a trade agreement embodying legal rights and obligations are determined by the contracting parties' attitudes

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[225] John H. Jackson, Restructuring the GATT System (New York: Council on Foreign Relations Press, 1990), at 48-49; H. Edward English, The Political Economy of International Economic Integration: A Brief Synthesis, Occasional Papers, 22 Carlton Univ., (1972), at 2-3.

and commitments, as power- or rule-oriented, toward such an agreement. A power-oriented approach is one in which the contracting parties are less committed to the trade agreement, and thus resolve their disputes according to their respective power status.[226] In contrast, if the contracting parties commit themselves more to a rule-oriented agreement, their disputes can be resolved according to the rules agreed upon, rather than merely power.[227] A rule-oriented approach functions better than that of a power-oriented one, since it places restraints on the political freedom of the contracting parties to deviate from the agreement. The spirit and objective of such an agreement can therefore be realized with fewer exceptions.

A purely power-oriented agreement is not really an agreement by legal nature because it is implemented only when political-economic situations are advantageous to a powerful nation. Real rule-oriented agreements are rare in the current international community. Most trade agreements lie somewhere between the rule- and power-oriented approaches. Legal arrangements among the Third World are probably more "power-oriented". As a result, few have proven successful for purposes of economic integration.[228] The GATT has been described as an agreement based on legally-controlled

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[226] Jackson, id., at 47-48.

[227] Id.

[228] Beverly May Carl, Economic Integration Among Developing Nations (New York: Praeger Pub., 1986), at 102.

pragmatism.[229] During the GATT negotiating process, the contracting parties started following the pragmatic approach in the solution of new problems, and then set up a legal framework for facilitating the negotiations.[230] In order to be realistically implemented, the GATT legal framework provides not only many strict rules, but also a few exceptions to cope with the special circumstances.[231] The results of consultations and the dispute settlement processes have proved that the GATT expects to maintain its strengths by pursuing its goal with flexibility.[232]

In contrast, the European Economic Community ("EEC") serves as a model of a more "rule-oriented" arrangement which is generally based on the rule of law.[233] Several features of the EEC treaty, unlike many other existing trade agreements, are based on the rule-oriented approach. First, the European Commission has been acting

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[229] Oliver Long, Law and its Limitations in the GATT Multilateral Trade System (Dordrecht: M. Nijhoff Pub., 1986), at 62.

[230] Id., at 63.

[231] For example, the general safeguard clause (Article XIX) permits the suspension of GATT obligations and provides exceptions and deviations of GATT rules. *See* id., at 61.

[232] Article XXIII of the General Agreement. General introduction of GATT dispute settlement processes, *see* Robert P. Parker, "*Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement*," 23 Journal of World Trade, (1990), at 83-93; Shaun A. Ingersoll, "*Current Efficacy of the GATT Dispute Settlement Processes*," 22 Texas International Law Journal, (1986), at 87-108; William J. Davey, "*Dispute Settlement in GATT*", 11 Fordham International Law Journal, (1987), at 52-90; Ivo Van Bael, "*The GATT Dispute Settlement Procedure*", 22 Journal of World Trade, (1988), at 67-77.

[233] Scott Crosby, "*The Single Market and the Rule of Law*," European Law Review, (1991), at 451.

independently of any country in the interest of the European Community as a whole. It continues to upgrade the common interest and cultivate the spill-over functions which reduce political and economic barriers among member states.[234] Second, the Court of Justice of the Community has played an important role in enforcing trade liberalization, promoting competition, and determining whether national or community law is to be applied.[235] Third, EC laws are legally enforceable within member states. Because of this, domestic authorities cannot invoke their different domestic legal systems against the enforcement of EC laws.[236]

In sum, it is not always true that developing trade relations always requires a trade agreement. However, if the contracting parties expect trade relations to be developed with legal certainty, signing of a trade agreement should be considered. The functions of such an agreement can be determined by the approach, as power- or rule-oriented, adopted for such an arrangement. A rule-oriented agreement is implemented according to the previously agreed rules with the political commitments of the contracting parties, while a power-oriented one is determined by their power status. Obviously, the legal functions of the former are better than the latter. Through the examination of practices of trade agreements, it can be found that the functions of a trade agreement

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[234] Tranholm-Mikkelsen, supra note 76, at 15; P.S. R. F. Mathijsen, A Guide to European Community Law (London: Sweet and Maxwell, 1990), at 43.

[235] Carl, supra note 228, at 64; Mathijsen, id., at 55.

[236] Id., at 260.

might be strengthened if it embodies thorough constitutional and institutional structures to harmonize the conflict of interests among the contracting parties and to reinforce the objectives of such an agreement.

For PRC-ROC trade relations, if both sides agree to conclude an agreement, its real functions should be determined by the political commitments of both the PRC and ROC governments and the legal structure of such an agreement. If both sides intend to adopt a rule-oriented approach and establish a stronger institution for its implementation, better legal functions would arise than those from a power-oriented one, which would obviously be disadvantageous to the ROC due to its weaker geographical and political power status.

B. Functions of a Legal Arrangement for Trade Relations

Generally speaking, a more "rule-oriented" trade agreement is expected to achieve the following functions. First, it is understood that any legal arrangement in the process of trade liberalization is designed to ensure that the concerned parties' economies are open, and protectionism is avoided or reduced to the minimum. The regime of liberal trade, like a bicycle, is "dynamically unstable" and will collapse if it does not keep on going forward.[237] The concerned parties have to continue to intensify their efforts for trade liberalization; otherwise trade

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[237] Gilpin, supra note 2, at 224; Stephen Gill and David Law, The Global Political Economy: Perspectives, Problems, and Policies (Baltimore, MD.: The John Hopkins Univ. Press, 1988), at 252.

wars and mutual destruction will result.[238] Legal arrangements can reinforce negotiations among parties to avoid such destruction.

Second, a liberal trade regime can simplify conflict management.[239] Generally speaking, a powerful nation is not in an easy position to accept previously agreed upon procedures for settlements of disputes, especially when its government is influenced by domestic pressure groups. However, for its own reputation and to maintain the trust of its trading partners, a nation with great power would tend to avoid violating the legal arrangement directly.[240] As a result, a trade regime would put a strong nation and a small one on an equal footing, and make both governments' actions more predictable.[241]

Third, a liberal trade agreement can help a government resist internal political pressures for the rationalization and liberalization of its trade regime. It is difficult for a government to liberalize its trade by disregarding the pains that the local producers will suffer from foreign competition. However, since a free trade regime is to benefit the economy as a whole, it would help to establish a political counterweight through gaining support from other internal competitive industries which expect to

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[238] Qin, supra note 131, at 71; Jackson, supra note 225, at 55. Professor Jackson stated that participants will be tempted to take actions that will seem to maximize their own return only to learn opposing participants will do so also, with the result that both lose.

[239] Dell, supra note 17, at 85.

[240] Jackson, supra note 225, at 47-50.

[241] Dell, supra note 17, at 85.

get access to foreign markets.[242] Consequently, trade barriers can be reduced more easily through such a process of reciprocal trade liberalization.

The extent of the realization of above-mentioned functions is certainly dependent on the nature, politically or technically, of the structure of such an agreement. For PRC-ROC trade relations, any technical arrangement might be regarded as a political issue concerning both sides. For instance, the PRC government has insisted that the "one-China" policy be included in a technical agreement between the PRC-ROC agencies regarding the notarization of documents. In such a situation, any liberal trade regime would be politically distorted. However, if both sides can change their attitudes and take a more liberal approach, the above objectives could still be achieved in the development of their trade relations.

C. Limitations of a Legal Arrangement for Trade Relations

The primary limitations of a liberal trade regime often lie in international and domestic politics. With respect to international politics, foreign policy is the one area which cannot easily be absorbed into the legal framework because governments are reluctant to put their security concerns second to economic interest.[243]

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[242] W.B. Carmichael, "*National Interest and International Trade Negotiations*," 9 The World Economy, (1986), at 354; Frieder Roessler, "*The Scope, Limits and Functions of the GATT Legal System*," 8 The World Economy, (1985), at 296.

[243] Id., at 294; Dell, supra note 17, at 13.

That is why world trading systems, like the GATT, need to separate trade from politics,[244] and the contracting parties would not expect to resolve their political disputes within such a system.

Further, a liberal trade regime has to intrude upon the sovereignty of the concerned parties.[245] Some nations have resisted limiting their sovereignty, and prefer domestic autonomy and certainty in their economic affairs.[246] They have often hesitated to relinquish their jurisdictions or authorities to international institutions. In actuality, the traditional concept of separating international from domestic jurisdictions is not practical in the current international interdependent community, especially in the fields of international economic relations. Expanding the functions of the international trade system would definitely limit and erode domestic sovereignty and jurisdiction. This explains why EC members have to limit their sovereignty if they intend to have EC laws retain their internal legal effectiveness.[247] It therefore can be concluded that the fate of international institutions and agreements would be determined by the willingness of the concerned parties to limit their sovereignty and jurisdictions.

In addition, a free trade regime also has to deal with the problem of national interests of the concerned parties. Two kinds

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[244] Long, supra note 229, 82.

[245] Jackson, supra note 225, at 47.

[246] Gilpin, supra note 2, at 224.

[247] Carl, supra note 228, at 66.

of domestic interests serve to formulate national policies against trade liberalization. First, pressure groups serving "import-competing industries" have always fought against the import policies, hoping to use their political influence to avoid making adjustment in their industries and laying off a substantial number of workers in uncompetitive industries.[248] For instance, some labour-intensive industries in developed countries have often resorted to political influence, including that from the labour union, to press their governments to protect these "sunset" industries. It is well-known that in the political arena, producer groups have often prevailed over consumers and taxpayers.[249] Hence, an import restriction regime can be easily imposed in the interests of producers at the expense of consumers. As a result, a liberal trade regime would be hindered due to domestic protectionism.[250] Second, governments with the intent to "win" in international trade would invariably intervene in the domestic production to effect domestic comparative advantages[251] and to introduce so-called industrial policy and strategic trade policy to "help" the domestic industries.[252] Governmental subsidy is a well-known tool utilized to reduce the adjustment costs of

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[248] Ernst-Ulrich Petersmann, "*Grey Area Trade Policy and the Rule of Law*," 22 Journal of World Trade, (April 1988), at 24.

[249] Gary Banks and Jan Tumlir, "*The Political Problem of Adjustment*," 9 The World Economy, (1986), at 145.

[250] Carmichael, supra note 242, at 342.

[251] Gilpin, supra note 2, at 21.

[252] Id., at 215.

uncompetitive producers.[253] Such kind of arbitrary comparative advantages present a direct challenge to liberal trade regimes and have made them less functional. Many "grey area" problems in international trade have arisen because of increasing governmental intervention in disregard of the spirit and objectives of a liberal trade regime.[254]

Finally, a liberal legal arrangement may cause socialist states to face more difficulties. The government of a socialist state hopes to intensify its central control on its economic development. However, a liberal trade regime is set up to lessen central controls and to increase the power of the market. The conflicting natures of a socialist system and a liberal trade regime are definitely incompatible. During the 1960s, foreign governments tried to resort to trade agreements to encourage economic reforms in socialist states. However, the experiences of the GATT have proven that such efforts were unsuccessful because the socialist systems were too difficult to change.[255] In the domestic political life of a socialist state, the communist party dominates the political and economic interest of the entire nation.

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[253] Id., at 190.

[254] The so-called "grey area" problems include bilateral "voluntary restraint agreement ("VRA")", "voluntary export restraint ("VER")", and "orderly marketing arrangement ("OMA")". All these measures are against the spirit of GATT system and rules. For detailed discussions of "grey area" problems, *see* Petersmann, supra note 248, at 27; Seymour J. Rubin, "*International Trade Realities: Are There Rules of the Game*," 14 Denver Journal of International Law and Policy, (1986), at 152; Long, supra note 229, at 83.

[255] Long, supra note 229, at 81; Qin, supra note 131, at 79.

Any reform threatening the survival of the communist party would arouse huge resistance. Consequently, the success of a liberal trade regime with a socialist state would depend on whether its government is willing to give up some of its authoritarianism, at least in the economic field.

Many socialist states also have ideological problems in accepting a legal arrangement to bind each other. In the traditional Marxist view, a legal arrangement is only instrumental for promoting class power struggles and protecting the political-economic interests of certain classes.[256] The Marxists believe that law is a repressive tool used against the working class.[257] Hence, they only trust the will of the communist party to prevail over any legal arrangement. In the constitutions of many socialist states, the communist party and Marxist-Leninist ideology are the only forces which guide their nations.[258] Because of such situation, an ME nation would feel uneasy about concluding any liberal trade arrangement with a socialist state.[259]

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[256] David Sugarman, ed., Legality, Ideology and the State (London: Academic Press, 1983), at 112; Roger Cotterrell, The Sociology of Law (London: Butterworths, 1984), at 273.

[257] Cotterrell, id., at 112.

[258] E.g. the preamble of the PRC Constitution provides that China should be guided under the leadership of the Chinese Communist Party and under the thought of Marx, Lenin and Mao Ze-dong.

[259] E.g. It has been difficult for the U.S. government in dealing with the PRC government on international arrangements, including the trade agreement, *see* Roger W. Sullivan, "*Discarding the China Card*," Foreign Policy, (Spring, 1992), at 5; Eleanor Roberts Lewis, "*The United States-Poland Treaty Concerning Business and Economic Relations: New Themes and Variations in the U.S.*

The above-mentioned limitations might also be problems for a possible legal arrangement to be made between the ROC and the PRC. Externally, their governments, for the defense of their security and sovereignty, are not willing to be restrained by any agreement. Domestically, the less competitive industries would apply pressure on their governments to not accept any obligations which might impose heavier competition pressures in the local markets. Ideological conflicts in the application of an international agreement is another major concern. If the Chinese Communist Party ("CCP") insists on its dominant role in setting national economic policy, it would be less willing to agree to a legal arrangement between both sides, which might decrease CCP's position and influence in domestic politics.

D. Summary: The Prospects for a Legal Arrangement for Trade Relations

Internationally, there are reasons to be optimistic about the increasing functions of a legal arrangement. First, many international economic institutions have been revitalized or set up for economic integration. For example, with respect to world trade systems, the institutional structure of the GATT would be strengthened,[260] and a rule-oriented approach for its functions

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Bilateral Investment Treaty Program," 22 Law and Policy in International Business, (1991), at 534.

[260] World Trade Organization ("WTO") would be established after the conclusion of the Uruguay Round negotiation.

would be more acceptable.[261] Many regional trade arrangements either have been or will be concluded to strengthen institutional powers.[262] In the future, the conclusion of many more bilateral or regional legal arrangements will be seen, like GATT rules which prove the necessity for legal arrangements for trade relations.[263] Recently, the GATT forum has also made attempts to strengthen the GATT system. The multilateral trade negotiation of the Uruguay Round has set up a section to enhance surveillance of GATT rules and cohesion of global economic policy-making.[264] Second, the importance of traditional sovereign control has declined.[265] International agreements have substantially limited the so-called full, comprehensive and exclusive sovereignty.[266] A nation or state can no longer enjoy its sovereignty if it expects to pursue economic integration with other nations through an international

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[261] Jackson, supra note 225, at 52-53.

[262] For example, the 1992 Single Market Program would remove the economic borders among EC members. Annabelle Ewing, "*Single Market of 1992: Implications for Banking and Services in the EC*, 13 Hastings International & Comparative Review, (1990), at 453-465. North American Free Trade Agreement ("NAFTA") had been concluded in 1993. Many developing countries also proceed with their integration through arrangement of Free Trade Area. *See* Sharon Bowden, "*The Shadow of 1992: Developing Country Efforts at Economic Integration*," 32 Harvard International Law Journal, (1991), at 537-552.

[263] Gilpin, supra note 2, at 226.

[264] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation, MTN./FA/II-A3, page 1.

[265] Jackson, supra note 225, at 48; Ruth Lapidoth, "*Sovereignty in Transition*," Journal of International Affairs, (1992), at 325-346.

[266] Lapdioth, id., at 334.

legal arrangement. Third, economic reforms of socialist states have led to the improvement of their economic and trade systems, especially those involving the protection of foreign investment and trade. Specifically, in the PRC, a successful market-oriented economy not only has encouraged reformists and pressure groups, but can also speed up its legal reforms for a transition toward a market economy. Consequently, the concept of "rule of law" can be gradually phased in, and international trade-related legal obligations can be expected to be met. Therefore, legal arrangements for trade purposes with such reforming socialist states are becoming more feasible. These issues certainly are applicable to the development of PRC-ROC trade relations as they both need a liberal trade regime for further economic development.

VI. CONCLUDING REMARKS

It is found that a liberal perspective for the development of PRC-ROC trade relations is important for both sides. However, the two governments have difficulty in adopting such a perspective because of their conflicting political attitudes, incompatible nature of trade systems and various levels of economic development. To resolve such a problem, two things could be done. One is to transform the PRC economy to an ME, and another is to arrange a liberal trade regime, multilateral, regional or bilateral, which might accommodate the improving political relations between them.

CHAPTER THREE

LEGAL FRAMEWORK IN RELATION TO TRADE RESTRICTIONS FOR FOREIGN POLICY AND NATIONAL SECURITY REASONS

I. PROBLEMS

In part two of the last chapter, the study has examined various policies of the PRC and ROC governments regarding trade control for national security and foreign policy reasons. This chapter further analyzes related issues of a legal framework provided to implement these political concerns.

Formulating an appropriate legal framework for trade control has been a difficult issue for many nations, and a dilemma which both the ROC and the PRC governments have been facing with their increasing two-way trade and investment. Both governments have vital commercial interests in maintaining their close economic relations on the one hand, and have to restrict reciprocal economic activities that could hinder their security policies on the other.[1] The task of balancing commercial interests with security concerns has constantly been a controversial subject. This chapter attempts to analyze how the ROC and the PRC governments can and should establish an efficient and reasonable trade control system that can

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[1] In addition, the ROC government is especially concerned about its economic security. Because of its comparatively small economy, the ROC government hopes to safeguard its economic security by trying not to rely on trade with mainland China. On the PRC side, its government has attempted to use economic relations as a policy instrument in trying to expand its economic relations with Taiwan.

be used to resolve such a dilemma.[2]

The following discussions comprise three parts. The first part introduces the respective policies and legal systems of the ROC and the PRC, particularly those that concern trade and investment, and delineates the status of trade controls of both governments. The second part further examines the related issues of their trade control system that will be of help for the restructuring of the PRC-ROC legal framework. Concluding remarks are provided in the last part.

II. POLICIES AND LAWS FOR ROC-PRC TRADE AND INVESTMENT

A. ROC Policy and Laws

In general, the ROC government follows the Guidelines for National Reunification ("GNR") in regulating Taiwan's economic activities with mainland China.[3] At the current stage, trade, investment, technology transfer and transportation between the two countries remain indirect.[4] These links would become direct when mutual trust eventually develops between both governments. In Taiwan's point of view, the PRC government should accept at least three prerequisites before Taiwan opens direct links with mainland

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[2] As will be discussed later, this chapter mainly focuses on the ROC trade control system which is more transparent that the PRC system.

[3] Chen-pang Chang, "*The Republic of China's Guidelines for National Unification*," Issues and Studies, (Mar. 1991), at 1-3.

[4] Id., at 1; Ying-jeou Ma, "*The Republic of China's Policy Toward the Chinese Mainland*," Issues and Studies, (Feb. 1992), at 5.

China, i.e., recognizing the ROC government as a political entity, renouncing the use of force against Taiwan, and refraining from relying on the one-China principle in interfering with the ROC's foreign affairs.[5] In spite of this, the ROC government, based on GNR principles, has promulgated rules for regulating its economic activities with mainland China. Recently, a more systematic statute - the Statute Concerning Relations between Mainland China and Taiwan ("SRMT") - has been enacted into law by the ROC Legislative Yuan (legislature) to intensify legislative and administrative controls of PRC-ROC relations.

Currently, indirect imports from mainland China are limited to only those goods which have been approved by the ROC Ministry of Economic Affairs ("MOEA").[6] With the exception of finished goods which are not allowed to be imported into Taiwan,[7] three criteria have been set for reviewing applications to import goods from mainland China: (1) national security will not be jeopardized; (2) the development of related industries will not be adversely affected; and (3) competitiveness of Taiwanese products in the

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[5] Ma, id. These terms have been considered to be part of the ROC's "Statute Concerning Relations Between Mainland China and Taiwan." *See* World Journal [Toronto], 20 Apr. 1992, at 3.

[6] Article 35 of the SRMT. From 1988 to 1991, the ROC authorities approved the indirect importation of 164 categories of herbal medicines and industrial raw materials produced in mainland China. Ma, id., at 5.

[7] As illegal finished goods still have been imported into Taiwan, the ROC authorities have required importers to submit a certificate of origin for goods imported from Hong Kong, which was often falsely designated as the place of origin. *See* World Journal [Toronto], 18 Dec, 1991, at 19.

export market will be enhanced. Among the approved imports are raw materials and semi-processed goods. The list of permissible imports is expected to be expanded to cover all semi-processed goods unless otherwise opposed by domestic trade associations.[8] In contrast, the ROC government has imposed few restrictions on indirect export to the mainland unless such export is seen as affecting Taiwan's economic development and national security,[9] though the ROC is required by an agreement with the U.S. government to prohibit the export of high-technology to certain countries,[10] including mainland China.[11]

As with trade, investment in and technology transfer to mainland China are only permissible via third countries and only specific projects approved by the MOEA can be targets of investment.[12] From 1990 to March 1992, indirect investment was

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[8] *See* World Journal [Toronto], 7 Nov. 1991, at 19; Art. 8 of the ROC's Regulations Concerning the Trade Between Mainland China and Taiwan, promulgated by the Ministry of Economic Affairs on 26 April 1993.

[9] Id.

[10] World Journal [Toronto], 4 May 1992, at 11; Article 13 of the ROC Foreign Trade Law provides similar rules.

[11] For controls over export to the PRC, *see* Stephen J. Grundy-McClosky, "*The Exportation of the Show-How Rather Than Know-How: Discrimination in the Implementation of U.S. Controls on the Export of Technology to the People's Republic of China*," 13 Syracuse Journal of International & Comparative Law (1988), at 479-518; BNA, Int'l Trade Reporter, (20 May 1992), at 875; Yougang Xiao, "*Export to China-Legal and Extra-Legal Aspects*," 12 Loyola L.A. International Comparative Law Journal (1989), at 13; RIEM, Art. 35.

[12] Art. 35 of SRMT.

allowed for a total of 3,679 items.[13] Most of these items were labour-intensive products. Investment in technology-intensive items has generally been prohibited to prevent severe competition with Taiwanese local industries.[14]

Direct transportation between mainland China and Taiwan remains prohibited. Accordingly, vessels and aircraft of neither side may enter each other's jurisdiction.[15] In addition, transactions between Taiwan's and mainland China's financial institutions are forbidden by the Taiwan authorities.[16] Because of this, many Taiwanese investors have to conduct their financial transactions through banks of third countries such as Japan or Hong Kong.

B. PRC Policy and Laws

The PRC government has been actively encouraging economic ties between mainland China and Taiwan, including direct transportation, trade and investment. The Beijing authorities believe that close economic ties with Taiwan can thwart "separatist tendencies" on the island of Taiwan.[17] Under specific PRC policy and laws, Taiwan businessmen are generally treated as foreign businessmen, except for a few preferential measures concerning customs, use of lands,

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[13] *See* World Journal [Toronto], 14 Mar. 1992, at 19.

[14] Id.

[15] Art. 31 of the SRMT.

[16] Art. 36 of the SRMT.

[17] Ma, supra note 4, at 4.

domestic distribution of goods, etc. These preferential treatments have been also granted to businessmen from Hong Kong, Macau and certain foreign nations.[18] In view of this, laws and regulations concerning trade with and investment from Taiwan do not have much difference from those with the above-mentioned areas or nations.[19]

In the area of trade, the PRC government has promulgated regulations for controlling trade activities. On July 1, 1985, the PRC adopted the Foreign Economic Contract Law[20] to codify the basic principles governing the interpretation and enforcement of contracts between Chinese and foreign companies.[21] In addition, the PRC government has also ratified the 1980 United Nations Convention on Contracts for International Sale of Goods ("CISG") which contains a choice of law clause.[22] Moreover, PRC companies have also been relying on the Uniform Customs and Practices for Documentary Credits ("UCPDC") compiled by the International Chamber

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[18] *See* World Journal [Toronto], 26 Mar. 1992, at 35, 15 May 1992, at 35.

[19] Id.

[20] The People's Republic of China's Foreign Economic Contract Law was adopted on 21 May 1985 at the 10th Session of the Standing Committee of the 6th National People's Congress.

[21] Basically, Taiwanese citizens and companies are deemed to be persons having PRC nationality. Accordingly, general principles of the PRC Civil Law should be applicable to trade between Taiwan and mainland China. However, the Foreign Economic Contract Law may be applied if Civil Law is not available. This law addresses issues such as liquidated damages, force majeure, governing law, and arbitration.

[22] Effective 1 January 1988, CISG became the international rules between the PRC and other nations which have ratified the CISG. Xiao, supra note 11, at 11-12.

of Commerce ("ICC") in conducting trade with foreign countries.[23]

Basically, with only a few exceptions[24], there are no major differences in the PRC trading system concerning export and import licensing, commodity inspection and customs duties between Taiwanese and foreign traders.[25] In general, the PRC State Council may enforce export controls for national security concerns or foreign policy purposes.[26] However, it is not clear whether the State Council has adopted any special rules concerning this type of control for Taiwan. Hence, the effect of the PRC's political considerations concerning its trade with Taiwan, especially on the issue of export controls, is difficult to determine.

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[23] The PRC does not officially subscribe to the UCPDC because Taiwan remains a member of the ICC. *See* Michael J. Moser, et. al. China Tax Guide (Hong Kong: Oxford Univ. Press, 1987), at 9-10; Xiao, id., at 11-12.

[24] Taiwanese entrepreneurs only enjoy the following tariff preferences:

(1) Machinery, equipment and vehicles for production and transportation as well as office supplies, in reasonable quantities, shall be exempted from import duties and taxes.

(2) Import licenses shall not be required for any of the above-mentioned goods imported by Taiwan enterprises.

(3) Personal effects and vehicles imported by Taiwan compatriots working for Taiwanese enterprises, in reasonable quantities for their own use, shall be exempted from customs duties and taxes. Article 11 of the PRC State Council Regulations for Encouraging Investment by Taiwanese Compatriots, promulgated 3 July 1988 by the State Council.

[25] Goods directly imported from Taiwan to the mainland are not subject to customs duties. However, because most goods are transported via third countries, such goods are still subject to the customs duties of third countries.

[26] Michael J. Moser, (ed.), Foreign Trade, Investment, and the Law in the People's Republic of China (Hong Kong: Oxford Univ. Press, 1987), at 15; Art. 31 of the PRC's Foreign Trade Law (Draft) which provides the legal basis for enforcement of export controls.

In the area of investment, the PRC State Council has promulgated the Regulations for Encouraging Investment by Taiwanese Compatriots[27] which is comparable to the Regulations for Encouraging Investments by Foreign Enterprises[28]. In addition, the Foreign Enterprises Law,[29] Equity Joint Venture Law[30] and

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[27] The PRC State Council Regulations for Encouraging Investment by Taiwan Compatriots, promulgated on 3 July 1988 by the State Council. Highlights of such regulations include the following:
(1) preferential foreign treatment applicable to Taiwanese investors (Art. 5);
(2) the right to purchase or sell currencies, machinery and intellectual property;
(3) the right to transfer and succeed to the investment, property ownership, intellectual property, and profit;
(4) exemption from nationalization;
(5) the right to remit profit out of mainland China;
(6) exemption from certain customs duties and import licensing;
(7) the right to reject interference in management;
(8) the procedures for resolving disputes; and
(9) other registration and visa procedures.

[28] The Regulations for Encouraging Investment by Foreign Enterprises was promulgated by the PRC State Council on October 11, 1986.

[29] According to Article II of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprise (the "Foreign Enterprises Law", promulgated by the National People's Congress on April 12, 1986), the so-called "foreign enterprise," as applicable to a Taiwanese enterprise, should be established within mainland China according to PRC laws and invested totally by foreign investors. Branches of foreign institutions should not be deemed foreign enterprises. For more detailed discussions of foreign enterprises, *see* Moser, supra note 26, at 126-130; Fred Blaser, etc., Business and Tax Laws of the People's Republic of China (Toronto: CCH Canadian Ltd., 1987), at 33-37.

[30] "Equity joint ventures," governed by the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (The "Equity Joint Venture Law," promulgated by the National People's Congress on July 1, 1979), is defined as enterprises established by foreign companies, enterprises or individuals and Chinese companies, enterprises or other economic institutions. Moser, supra note 26, at 100-126; Blaser, id., at 38-42.

Cooperative Joint Venture Law[31] are likewise applicable to Taiwanese investments.[32] The main differences between most preferential treatments for Taiwan investors and those for foreign enterprises are those that concern the reduction of land use fees and income taxes, which are granted by administrative rulings rather than formal legislation.[33] The unstable PRC administrative control system has caused many Taiwan investors to worry about investment risks. Moreover, restrictions on export-import

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[31] Cooperative joint ventures are the most common form of joint ventures in mainland China and have been regarded as a preferred form of business for joint construction and management of hotels and commercial complexes, the provision of offshore oil field services and the production of manufactured goods. *See* Winston K.T. Zee, "Doing Business in the People's Republic of China," a speech delivered at Baker & McKenzie, Taipei, Taiwan, 18 April 1990, at 27. "Cooperative joint venture," governed by the Law of the People's Republic of China on Chinese-Foreign Cooperative Joint Ventures ("Cooperative joint Ventures Law," promulgated by the National People's Congress on April 13, 1988) is defined as an enterprise jointly established by Chinese and foreign investors, and is also applicable to Taiwanese investment in mainland China. A "pure" form of cooperative joint venture does not involve the establishment of a company or other legal entities. Both contracting parties carry out a cooperative agreement providing terms and conditions of investment, including the method of distributing income, the liability for risks and losses, and the method of management, etc. A hybrid form of cooperative joint venture is a combination of a pure cooperative joint venture and an equity joint venture. In such a case, a separate business entity is established and registered and the parties' liabilities are generally limited to their respective capital contributions. For more details, *see* Moser, id., at 95-126.

[32] Article 5 of the Regulations for Encouraging Investment by Taiwanese Compatriots.

[33] Si-ren Yang, DaLu Jingmao Di Qiugshi Yi Huanjing (Situations and Environments of Mainland's Economy and Trade) (Taipei: Lien-Chin Publishing Co. Ltd., 1990), at 104.

production ratios[34] and investment items[35] have also confined the business activities of Taiwanese enterprises. On the surface, technology transfer to Taiwan is encouraged by the PRC government, but in reality, because technology transfer is still centrally controlled for political considerations, only a few transactions have actually been consummated between the two sides.

In addition to those provided by the State Council, the PRC has also offered incentives to foreign investors to foster investments in five Special Economic Zones ("SEZ"), one in Fujian Province (Xiamen), another in Hainan Island, and three in Guangdong Province (Shenzhen, Zhuhai and Shantou), as well as in a number of other designated open cities.[36] Within these SEZs and designated open cities, foreign and Taiwanese investors can enjoy preferential tax treatments and easier entry and exit procedures. Moreover, each of the designated local authorities has decision-making powers.[37] The Zhuhai authorities, for example, have granted preferential treatment to Taiwanese investors in the following

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[34] According to Article 3 of the Foreign Enterprises Law, goods produced by foreign enterprises should be totally or substantially exported. Based on the Equity Joint Venture Law, export of goods produced by equity joint venture companies is encouraged. In practice, 30% of production is required to be exported. The same provision is provided in the Cooperative Joint Venture Law.

[35] In mainland China, investment in foreign trade enterprises, banks, insurance companies, shipping companies and aviation industrial concerns is not allowed. *See* World Journal [Toronto], 15 May 1992, at 35.

[36] Three SEZs in Guangdong were established in 1979. Xiamen became the fourth SEZ in 1980, while Hainan Island was granted the status of SEZ in 1983. *See* Moser, supra note 26, at 199.

[37] Moser, id.

areas: (1) exemption from local income tax and reduction of state income tax, (2) reduction of land-use fees, and (3) speedier administrative procedures for screening applications for investment, export and import licensing.[38] [39] Nevertheless, special measures by the SEZ governments are not provided merely to encourage Taiwanese investors, but also to bring such activities under their administrative control. Some local governments have promulgated rules to regulate the registration of Taiwanese-invested enterprises[40] and their labour management.[41] Consequently, Taiwanese investors have often been puzzled at the different levels of authorities within the same jurisdiction and with the inconsistent administrative measures imposed by central and local governments.[42]

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[38] Articles 4, 5 and 7 of the Provisions of the Zhuhai Special Economic Zone for Encouraging Taiwan Compatriots to Invest in the Zone, promulgated by the People's Government of Zhuhai City on April 13, 1989.

[39] For preferential treatments in other special investment areas, *see* Yang, supra note 33, at 66-72, 74-79.

[40] E.g., Administrative Measures Governing the Registration of Taiwanese Investment Enterprises in Fujian Province, adopted 3 July 1990 at the 15th Meeting of the Standing Committee of the 7th Fujian Provincial People's Congress and promulgated 7 July 1990 by the Standing Committee of the Fujian Provincial People's Congress.

[41] Labour Management Regulations for Taiwanese-Invested Enterprises in Fujian Province, adopted 3 July 1990 at the 15th Session of the Standing Committee of the 7th Fujian Provincial People's Congress and promulgated 7 July 1990 by the Standing Committee of the Fujian Provincial People's Congress.

[42] For example, both central and local governments have their own registration procedures, and incentives are inconsistent at the central and local levels.

C. Summary

The PRC and ROC economic policies and laws toward each other reflect not only their respective status in the international political arena but also their respective military strengths. The PRC government, without the fear of being politically, economically or militarily suppressed by Taiwan, has followed a more open policy in trying to attract trade and investment from Taiwan. In contrast, due to its weaker status in the international political arena and lesser military strength, the ROC government has to use its economic power cautiously. Hence, its economic policy toward mainland China is more restrictive as compared with its counterpart. The ROC legal system also reflects these political considerations and policies. Accordingly, the examination of legal systems in the next part regarding trade restrictions will mainly focus on ROC policy and laws.

IV. SELECTED ISSUES OF A LEGAL FRAMEWORK WITH RESPECT TO TRADE RESTRICTIONS FOR FOREIGN POLICY AND NATIONAL SECURITY PURPOSES

In devising a legal framework regarding trade control for national security and foreign policy, the following issues, which are related to the ROC legal system, need to be further examined: (1) the legitimacy of its trade control system in light of international norms and the ROC Constitution, (2) the procedural arrangements for a trade control system, and (3) extraterritorial

application of export control rules. In the following discussions, the U.S.[43] and Canadian[44] legal systems in relation to trade

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[43] For details concerning the U.S. export control system, *see* Andreas F. Lowenfeld, Trade Controls for Political Ends (New York: M. Bender, 1983), at 12-15; Stuart MacDonald, Technology and the Tyranny of Export Control (London: The MacMillan Press Ltd., 1990), at 9-27; Ihor Fedorowycz, "*Preventing the Transfer of Military Critical Technology to the Soviet Block: the Case for Strong National Security Export Controls*," 26 Columbia Journal of Transnational Law, (1987), at 55-56; Matthias K. Hentzen, "*United States Export Restrictions for Foreign Policy and National Security Purposes: the 1985 Amendments to the Export Administrations Act and Beyond*," 26 Columbia Journal of Transnational Law, (1987), at 105; 50 U.S.C. App.,Sections 1-44, 1701-1705, 2751-2796, 3201-3282, 2011-2296, 5001-5116 (1988).

The U.S. export control regime of the Export Administration Act ("EAA") of 1969 has been extensively amended in 1972, 1977, 1979, 1985, and 1988. The objectives of the 1972 amendments were to impose time limits on the handling of applications for export licenses, and to allow the Secretary of Defense to review all proposed exports to communist countries before any license could be granted. In the 1977 amendments three major provisions were added: (1) the international fight against terrorism became an explicit goal of the EAA; (2) the authority should bear the burden of proof as to why items should be controlled; and (3) re-export of U.S.-sourced items and exports by U.S. corporations with foreign subsidiaries are restricted within the EAA's jurisdiction. The 1979 Act made a formal distinction between national security and foreign policy controls, assigning separate criteria and procedures to each. In imposing foreign policy controls, the President was obliged to consult with Congress and the affected industries. Moreover, foreign policy controls should be automatically terminated after one year unless such controls have been extended by the President. The 1985 amendments, which insured the expedited granting of licenses for U.S. exports to CoCoM countries, required an annual review of the Control List, and established an Office of Foreign Availability. The 1988 Act was amended to enhance American competitiveness and strengthen the international control of technology flow. For economic competitiveness purposes, this Act reduced the Control List, and allowed industry representatives to be present at CoCoM review of the international commodity control list. For multilateral export control, the Act perpetuated the extraterritorial application of the U.S. law against U.S. allies and their private enterprises.

control will be used as a reference in examining these issues.

A. The Legitimacy of the ROC Trade Control System

i. Consistence with International Norms

The only international norms which would present a challenge to the ROC trade control system are the rules provided in the General Agreement on Tariffs and Trade. Trade control actions imposed against a contracting party are obviously contradictory to GATT rules, such as those provided in Article I (general most-favoured-nation treatment), Article XI (prohibition on import licenses and other measures) and Article XIII (prohibition on discriminatory measures). The ROC government is applying for accession to the GATT. Once it has acceded to the GATT, the ROC government would be restricted from imposing trade controls except for those under escape clauses. Within the GATT framework, Article XXI is the most relevant provision providing an escape clause for national security purposes.[45] In practice, such a provision has

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according to the resolutions of the United Nations Security Council. On the domestic level, specific trade controls have been imposed through enactment of such laws as the Atomic Energy Control Act and the National Energy Board Act. Particularly, the Export and Import Permits Act provides a general framework concerning the enforcement of trade controls and procedures. See J. G. Castel, The Canadian Law and Practice of International Trade (Toronto: Edmond Montgomery Pub., 1991), at 297.

[45] Article XXI of the General Agreement provides as follows:

> Nothing in this Agreement shall be construed:
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential interests.

rarely been invoked[46] for fear of being abused.[47] However, once a contracting party has invoked Article XXI, the GATT would generally not view the trade controls, which are subject to the judgment of each nation for national security purposes, as a violation of GATT.[48] Trade control for foreign policy purposes is another issue in the GATT system.[49] Basically, there is no explicit rule according to which GATT obligations in respect of such kind of trade control can be exempted.[50] However, because most nations have imposed trade control on the pretext of national security which is subject to national judgment, it therefore appears that the GATT forum would not succeed in challenging such

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(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[46] For discussion about the application of Article XXI, *see* John H. Jackson, The World Trading System (Cambridge, MA: MIT Press, 1989), at 205, 372.

[47] Jackson, id., at 204.

[48] In the dispute between Nicaragua and the U.S. government, a GATT panel concluded that the U.S. embargo against Nicaragua did not violate the GATT rules. The U.S. embargo was imposed by Presidential Executive Order No. 12, 513 dated 1 May 1985 (50 Federal Register 18629 (1985)). For discussion of the panel report, *see* BNA, Int'l Trade Reporter, (1986), at 1368.

[49] Donald E. Dekieffer, "*Foreign Policy Trade Controls and the GATT*," 22 Journal of World Trade, (June 1988), at 78-79.

[50] Id, at 79.

trade control. Certainly, the invocation of Article XXI would require the member to inform the other members "to the fullest extent possible of trade measures taken under Article XXI."[51] The target nation could also initiate a complaint under Articles XXII and XXIII of the General Agreement, although it cannot expect to obtain any favorable decision from the Contracting Parties under the GATT dispute settlement processes.[52]

In addition to security exceptions, Article XXXV of the GATT could be another legal basis for avoiding GATT obligations. Under such a provision, the ROC government may announce that it does not consent to the application of the GATT concerning its trade with the PRC, after both have been acceded to the GATT. Accordingly, the ROC government's imposition of trade controls would not be subject to the jurisdiction of GATT rules.[53] Obviously the ROC government would use such a provision to avoid challenges from the PRC government or other GATT members. Accordingly, the ROC trade control system would not be contradictory to GATT norms.

ii. Consistence with Constitutional Provisions

Currently, the ROC trade control system can be challenged in

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[51] GATT Doc. L/5426 (1982).

[52] Several cases which had been raised by target nations for dispute settlement were not favorably decided by the panel, such as Czechoslovakia's challenge to the U.S. export licensing program in 1949. See GATT Doc. CP. 3/SR. 22, at 4-10 (1949).

[53] For U.S. practice with respect to the application of Article XXXV, see ALI, Restatement of the Law, The Foreign Relations Law of the United States (St. Paul: American Law Institute, 1987), at 309.

terms of constitutional theory. Under Article 23 of the ROC Constitution, the freedom and rights of ROC citizens "shall not be restricted by law except by such as may be necessary to prevent infringement upon the freedom of other persons, avert an imminent crisis, maintain social order, or advance public welfare." Since trade activities can be regarded as a right of ROC nationals, trade controls to be imposed by the authorities should be enforced by law.[54]

One issue arising from Article 23 of the ROC Constitution is the necessity of imposing trade controls. Article 23 allows the authorities to restrict the rights of ROC citizens only if such restrictions are deemed necessary.[55] According to such a provision, the authorities bear the burden of proof to show that a measure concerning trade restrictions is "appropriate and proportional" to protect public interests. In examining the ROC trade measures against PRC products, it is not safe to say that they all meet the stipulations provided in Article 23. For instance, some measures, which are mainly devised to protect domestic producers rather than

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[54] Trade should be considered as a right to existence, work or property under Article 15 of the ROC Constitution. The U.S. EAA also regards export as a right of the American people. *See* U.S.C. App., Section 2403(d) (1988); Fenton, "*Reforming the Procedures of the Export Administration Act: A Call for Openness and Administrative Due Process*," 27 Texas International Law Journal, (1992), at 8-10.

[55] For constitutional issues of U.S. law, *see* Homer E. Moyer, Export Control as Instruments of Foreign Policy (Washington, D.C.: International Law Institute, 1985), at 119-131; Spencer L. Kenner, "*The Toshiba Sanctions Provisions: Its Constitutionality and Impact on CoCoM*," Brigham Young University Law Review, (1989), at 623-638.

for national security concerns, are not in the best interests of consumers and importers. Such trade measures might be challenged for being contradictory to constitutional tests. In order to prevent such trouble, it is suggested that the ROC government further examine its trade regime and make it more consistent with constitutional rules.

B. Procedural Arrangements

A trade control program is generally expected to achieve policy concerns efficiently and with the least economic costs. However, these two goals are contradictory in nature. An efficient trade control program usually incurs serious costs and therefore faces enormous challenges. The ROC trade control system regarding trade with mainland China is a fairly extensive program which includes various restrictions on export, import and private financial transactions. Naturally, such a program would sacrifice broad commercial interests and would be confronted by many external pressure and domestic interest groups. To resolve this dilemma, the ROC government needs to revise its trade control system, especially its rules related to procedural arrangements, in order to accommodate the political-economic developments between both parties. Two methods which may be helpful in improving the trade control system and avoiding the arbitrary judgments of the administrative branch are as follows: the establishment of criteria for imposing trade control measures and congressional participation in setting trade control policy.

i. Criteria for Trade Controls for National Security and Foreign Policy Purposes

Export control regimes for national security and foreign policy purposes should be separately established in light of their different natures and objectives. National security controls mostly focus on "dual use" hi-technology products, such as super-computers and telecommunications. Trade control for foreign policy often acts to express disapproval of the policies of a particular nation. In the U.S. legal system, the criteria for trade control for foreign policy purposes are stricter than those for national security purposes. In the area of export control for foreign policy, the government has to consider the following factors: (1) whether such controls are likely to achieve the intended foreign policy purposes, (2) whether the proposed controls are compatible with the national foreign policy objectives, (3) whether the reactions of other countries are likely to render the controls ineffective, (4) whether the export interests exceed the benefit to foreign policy objectives, and (5) whether the government has the ability to enforce the proposed controls effectively.[56] In the ROC trade control regime, controls for national security and foreign policy are separately handled.[57] However, the ROC legal system does not provide clear criteria for imposing trade controls for

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[56] See 50 U.S.C. section 2405 (b) (1988).

[57] In the ROC Foreign Trade Law, trade control for national security and foreign policy reasons are separately provided in Article 11. Accordingly, the import and export of hi-technology products require special permission. (Article 13)

security and foreign policy purposes. The administrative branch is allowed to make arbitrary rules for trade control without clearly indicating the reasons for such policy. In order to formulate a more efficient trade control regime, the legislative branch could learn from the U.S. model which provides clear criteria for foreign policy controls.

ii. Congressional Participation for Implementing Trade Control

In a democratic society, a trade control regime may face many challenges from interest groups represented by members of the congress. The amendments of the U.S. export control regime reflect the struggles between the legislative and executive branches. The results of such struggles have often caused some power to be shifted from the executive branch. For instance, the 1977 amendments of the EAA provide that the Authority should bear the burden of proof as to why items should be controlled[58]. In the 1979 Act, the Congress made a formal distinction between national security and foreign policy controls, assigning separate criteria and process to each.[59] In imposing foreign policy controls, the President is obliged to consult with the Congress and the affected industries.[60]

The evolution of the U.S. legal system can be a good lesson

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[58] EAA 1977, Section 107.

[59] EAA 1979, Sections 5, 6.

[60] Id. Section 6 (e).

for the ROC government because the domestic politics of the ROC has become increasingly complicated and the legislative branch can really bargain with the executive branch on an equal footing. Now the ROC government has to face the problem of balancing policy concerns with commercial interests. For the PRC, the power balance between the legislative and the executive branches has never become an issue in its domestic politics. However, an appropriate procedural arrangement for trade control could make its foreign trade regime more transparent and consistent with GATT rules.

Two opposing arguments may be asserted for or against the participation of legislative power in the formulation of the ROC trade control regime. On the one hand, it may be argued that the legislature should observe the constitutional limits on its participation.[61] Under the ROC Constitution, diplomatic and foreign policies are to be decided by both the President and the Executive Yuan.[62] As ROC relations with the mainland can be interpreted as a quasi-foreign affair, the legislature should therefore not intervene in the powers of the executive branch.[63] Moreover, the separation of the executive and legislative functions

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[61] For more discussions about the U.S. constitutional limits on participation of the Congress, *see* Kenneth W.Abbott, "*Linking Trade to Political Goods: Foreign Policy Export Controls in 1970s and 1980s*," 65 Minnesota Law Review, (1981), at 880-882.

[62] The ROC Constitution, the second paragraph of Articles 38 and 58. Under U.S. law, international affairs are solely administered by the President, United States v. Curtiss-Wright Export Corp., 299 U.S. (1936), 304, 326.

[63] Under Article 57 of the ROC Constitution, the legislature may exercise veto power against the executive branch.

on trade controls can lead to more effective implementation of the mainland policy. In both theory and practice, the legislature cannot replace the executive branch in implementing export controls for either national security or foreign policy purposes.

However, on the other side, in practice, commercial interests of affected industries need to be taken into serious account before export controls can be imposed. In current Taiwanese politics, it is inevitable that legislators and affected industries will be allowed to participate in the formation of regulatory policies and a legal system of trade controls with mainland China. Accordingly, it will be necessary to set up a system for due process for the participation of the legislative branch in the imposition of trade controls. Legislators and interest groups on Taiwan can follow the U.S. model in trying to participate in the implementation of the trade control system in three ways: (1) the legislature can provide clear criteria concerning the enforcement of trade controls,[64] (2) the executive branch can consult with the legislators and affected industries regarding executive actions to be taken,[65] and (3) the executive branch can maximize public input through a notice-and-comment process for its rule-making.[66]

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[64] cf. U.S. EAA, 50 U.S.C. App., Section 2405(b) (1988).

[65] cf. U.S. EAA, 50 U.S.C. App., Section 2405(c)(d)(f) (1988).

[66] The U.S. EAA is exempted from the requirements of the Administrative Procedure Act ("APA"). 5 U.S.C., Sections 551-559 (1988). However, under the EAA, such a notice-and-comment process is still required for imposing certain regulations. 50 U.S.C. App., Section 2412(b) (1988). For more discussions about the improvement of the U.S. rule-making process for export control purposes, *see* Fenton, supra note 54, at 81-86.

C. Extraterritorial Application of Trade Control Rules

i. Issues

Two major issues may arise from the extraterritorial application of the trade control regime. The first issue is how a government determines the extraterritorial application of its own trade controls. Another issue is how a government responds to the extraterritorial application of foreign trade controls. Regarding the first issue, it is generally accepted that the PRC and the ROC legal systems only apply to their respective territories.[67] Accordingly, the real problem for both governments is how they should respond to the extraterritorial application of a foreign export control regime.

The issue of extraterritorial application of trade controls is not only a legal issue, because it may create political tensions and conflicts of economic interests.[68] As to its legal aspect, the

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[67] Cf. the PRC Foreign Trade Law (Draft), Articles 30 and 31; the ROC Foreign Trade Law, Articles 11 and 12. However, the ROC Statute Concerning Mainland-Taiwan Relations provides that Taiwanese citizens shall not trade with individuals and enterprises on the mainland without the approval of the ROC authority. Such a provision may give rise to the issue of whether the ROC trade control regime would be applied "extraterritorially". On the one hand, it can be argued that such a regime cannot be applied "extraterritorially" since, in the view of the ROC government, the mainland is within the ROC territory. However, from a practical viewpoint, since the ROC government has not really extended its jurisdiction over the mainland, such trade control regime is applied "extraterritorially". In the author's view, both governments would actually face jurisdictional conflicts with respect to the application of the ROC trade control regime.

[68] E.g., the Pipeline issue caused political-economic conflicts between the U.S. and Western allies. *See* Henry R. Nau, The Myth of America's Decline (Oxford: Oxford University Press, 1990), at 301-

international legal theory and state practice have provided different answers for such an issue. The U.S. government has been aggressively applying its export control regime extraterritorially. U.S. law provides that its export controls are enforceable not only in the U.S. territory, but also beyond its borders.[69] Under the EAA, persons liable for violation of the export control regime include U.S. residents and citizens, as well as foreign subsidiaries and affiliates of any domestic concerns.[70] Moreover, the U.S. government[71] has relied on contractual stipulations[72] and other methods[73] in imposing export controls extraterritorially. Two doctrines support the U.S. policy. One is the so-called "effects doctrine", which asserts that a state has the need and the right to protect itself and its citizens through extending jurisdiction beyond its borders. Another is the "protective principle" which argues that a state may take protective actions

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[69] Castel, supra note 44, at 302.

[70] 50 U.S.C. App. Section 2415(2) (1988).

[71] The competent authority of the U.S. government is the Office of Export Control under the Secretary of Commerce.

[72] *See* 15 C.F.R. 375 (1988). Under the Export Administration Regulations, the ultimate consignee or purchaser of reexporting products is required to submit a statement concerning their responsibility for the presentations made to the Office of Export Control. *See* Armand L.C. De Mestral, Extraterritorial Application of Export Control Legislation (Dordrecht: Kluwer Academic Publishers, 1990), at 81.

[73] E.g., a foreign firm is required to establish an internal auditing system for the re-exportation of U.S. origin goods. Id., at 82-83.

when its security or other national interests are affected.[74]

Most NATO members have resisted the extraterritorial application of foreign trade controls.[75] For instance, the Canadian government has denied the extraterritorial application of the U.S. export control regime, particularly the items which are not included in the CoCoM lists or which are not of U.S. origin.[76] In many cases of extraterritorial application,[77] the Canadian government has insisted on the principles of non-interference and reciprocity,[78] asserting that enforcement of U.S. export controls within the Canadian territory is a breach of Canadian sovereignty.[79] In order to resist the extraterritorial application of U.S. laws, the Canadian government has established the Foreign Extraterritorial Measures Act,[80] exempting all persons in Canada from complying with the extraterritorial measures of any foreign

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[74] Cecil Hunt, "*The Jurisdictional Reach of Export Controls*," 26 Columbia Journal of Transnational Law, (1987), at 22.

[75] U.K., France and Canada have all resisted the extraterritorial application of U.S. export controls. *See* David A. Baldwin, (ed.) East-West Trade and the Atlantic Alliance (New York: St. Martin's Press, 1990), at 89.

[76] U.S. origin goods are listed on Canada's Control List, Group 5.

[77] For case analysis regarding Canadian reaction to extraterritorial application of U.S. laws, *see* De Mestral, supra note 72, at 155-190; J.G. Castel, Extraterritoriality in International Trade: Canada and United States of America Practices Compared (Toronto & Vancouver: Butterworths, 1988), at 27-48.

[78] Castel, supra note 44, at 304-309.

[79] Id.

[80] R.S.C. 1985, c. F-29.

government "including business carried on in whole or in part in Canada." Export controls are included in these measures.[81] The arguments for these measures have been generally based on the traditional theory of international law, that is, the principles of self-restraint, non-interference and equal sovereignty.[82]

Both the PRC and the ROC governments have been fairly nationalistic in defending their sovereignty against intervention, such as the enforcement of foreign laws within their jurisdictions.[83] The PRC in particular has always insisted on its five-point principle of co-existence in many diplomatic declarations and communiques.[84] The first point of such a principle is the respect for national sovereignty. This explains why the PRC government has strongly rejected the humanitarian concerns raised by other nations which, in the PRC view, are issues of sovereignty in which foreign government should not intervene. If

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[81] Id., s. 5.

[82] For the arguments of Canada, *see* Castel, supra note 44, at 305. Examples of other international authorities against the extraterritorial application of export control regimes include the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. No. 28 at 121 (1971); the Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. No. 31, at 50 (1975).

[83] For instance, the ROC government has rejected the application of the U.S. Internal Revenue Service to dispatch any official to Taiwan to examine the financial statements of U.S. companies in Taiwan.

[84] For instance, in the PRC-U.S.S.R. Communique in May 1989, it provided that both sides would respect their respective sovereignty and territorial integrity. *See* Zhonghua Remin Gongheguo Guowuyuan Gongbao, 1989, No. 6, at 412.

the ROC and PRC governments insist on their own sovereignty, certainly they would not accept the extraterritorial application of a foreign export control regime, as it might create problems for both governments when an affiliate or subsidiary of a U.S. company located within their jurisdictions intends to respect U.S. laws by restricting the export markets. Tensions regarding the extraterritorial application of foreign laws, as has taken place between the U.S. and Canadian governments, might also occur between the U.S. and the ROC or the PRC.

ii. Solutions

To resolve the issue of extraterritorial application of trade controls, three procedures may be considered:

(1) The improvement of a multilateral system, especially the CoCoM, may be the best way of reducing jurisdictional conflicts and confusion over various overlapping control systems.[85] Both the PRC and the ROC governments, which are not members of CoCom, may try to join the CoCom, or establish bilateral arrangements with the U.S. or the EC. Through such arrangements, they would be obligated to obey international export control rules, while they would also benefit from acquiring high-technology from the Western nations.

(2) The establishment of international rules, such as those contained in the Restatement that provided the rule of the so-called two factors of minimum contacts, would be helpful in resolving the conflicts between concerned countries. The general

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[85] Castel, supra note 44, at 307; Hunt, supra note 74, at 25.

rule of the Restatement on minimum contacts is contained in Section 402.[86] In Section 403, unreasonable situations to exercise jurisdiction are provided.[87] Generally speaking, these provisions

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[86] ALI, supra note 53, at 237-244. Section 402 reads:

Subject to section 403, a state has jurisdiction to prescribe law with respect to:

(1) (a) conduct that, wholly or in substantial part, takes place within its territory;

(b) The status of persons, or interest in things, present within its territory;

(c) conduct outside its territory that has or is intended to have effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the state or against a limited class of other state interests.

[87] Section 403(1)(2) provides:

(1) Even when one of the bases for jurisdiction under section 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

are designed to offer an approach to balance the interests among the affected nations.[88] Both the ROC and the PRC should contribute to the establishment of international rules on such an issue through their own domestic application or through an international forum.

(3) The use of arbitration or adjudication by international tribunals is another option in dealing with such issue.[89] In today's extensive proliferation of industrial technology, few technology controls can be effectively implemented without the support of other nations. Accordingly, the availability of other nations' support should be regarded as an important criterion for export controls.[90] As a result, consultation with other countries[91] and cooperation with international control regime become crucial elements when considering the effectiveness of

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(h) the likelihood of conflict with the regulation by another state.

[88] Section 403(3) of the Restatement also provides:

(3) When it would not be unreasonable for each of the two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater. For detailed analysis, *see* Hunt, supra note 74, at 24; P.M. Roth, "*Reasonable Extraterritoriality: Correcting the 'Balance of Interests'*," 41 International and Comparative Law Quarterly, (April 1992), at 255-259.

[89] David A. Baldwin, East-West Trade and the Atlantic Alliance (New York: St. Martin Press, 1990), at 94.

[90] 50 U.S.C. App. Section 2403(c), 2404(f), 2405(h) (1988).

[91] Id., 2405(d) (1988).

export controls or for resolving conflicts between them.

In summary, the legal procedures and rules for the above issue, whether on the multilateral or domestic side, should be established. On the multilateral level, international organizations should establish common rules, and major powers of the world should strengthen their policy coordination. Both the PRC and the ROC can contribute to such tasks through participation in multilateral or bilateral forums. At the domestic level, the PRC and the ROC governments have to adjust their own systems to meet the requirements of international agreements to which they are signatories.

V. CONCLUDING REMARKS

This chapter has focused on trade control systems for national security and foreign policy purposes. Issues of regulatory policy for trade control were discussed in part II of the last chapter. No matter what regulatory policy the PRC and the ROC may adopt, they both have to resolve the difficulty of balancing commercial interests with policy concerns in their trade control systems. This study shows that a systematic and transparent legal framework would be a solution to such a difficulty. One way to establish a systematic framework of trade control is to set up a procedural arrangement which would assist both governments to efficiently implement their respective policies with the least economic costs. The following approaches may be adopted by the PRC and the ROC governments in establishing a systematic framework for trade

control systems:

1. Trade controls can be enforced through the international or the domestic legal system. There are no central international regimes to regulate the trade control disputes between nations. The GATT system also seems unable to provide help in restricting state practices involving arbitrary trade controls. The PRC and the ROC governments, therefore, can only adhere to the system set up by the international regimes they have joined individually. Domestically, however, both governments may establish trade control systems within their own constitutional framework with more formal and transparent legislation.

2. The improvements of procedural arrangements would help implement trade control rules more efficiently and avoid the arbitrary judgements of the administrative branch. Two methods are important to achieve these purposes. One is to provide criteria for imposing trade control measures, and the other is to allow congressional participation in setting trade control policy. Regarding the control criteria, it is suggested that trade controls for national security and foreign policy concerns need to be separately handled due to their different natures and objectives. The criteria for implementing foreign policy concerns should be clearly provided in order to avoid unnecessary trade control actions.

Because setting up a trade control system would involve substantial commercial interests, it would likely be challenged often by the legislative body representing certain interest groups.

Participation of the legislative branch in setting up a trade control system is thus unavoidable in a democratic society. However, it is inappropriate to allow the legislative branch to affect the consistency of foreign policy and the needs of national security. Accordingly, a compromise for such a conflict would be limited participation by the legislature in the drafting of trade control criteria and periodic consultations between the legislative and executive branches.

3. Extraterritorial application of trade control rules has been an issue between a country imposing such rules and a country affected by such rules. Both the PRC and the ROC have been very cautious in responding to the foreign trade control rules applied in their jurisdictions. In international law, there is a conflict between sovereign protection and functional or protective principles. Both governments may either consider establishing a consistent international trade control regime and international rules for jurisdictional conflicts, or they may resolve their conflicts through international arbitration or adjudication.

CHAPTER FOUR

LEGAL MEASURES IN RESPONSE TO TRADE WITH A CENTRALLY-PLANNED ECONOMY

I. PROBLEMS

As described in part III of Chapter Two, the ROC and the PRC governments have different types of economic systems - market economy ("ME") and centrally-planned economy ("CPE"). The incompatibility of the two economies have therefore caused problems in connection with their trade activities.[1] Of those problems, the most important concern for an ME is the flood of low-priced goods from a CPE that causes market disruptions. To cope with this problem, many ME nations have adopted selective unilateral, bilateral or multilateral safeguard measures. Basically, these measures are devised to protect their markets. However, they are a far cry from the spirit of trade liberalization and may cause tensions between an ME and a CPE. This chapter attempts to evaluate the respective positions taken by an ME and a CPE on the problem of market disruption. This discussion is based on the assumption that the ROC economy is an ME while the PRC's is a CPE. In reality, however, this assumption is not altogether true in every aspect. To clarify such an assumption, this study first examines the performance of their market reforms and their trade systems.

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[1] For detailed discussions of the incompatibility of the ME and the CPE, *see* Chapter Two, part III.

II. OVERVIEW OF ROC AND PRC ECONOMIC REFORMS AND TRADE PERFORMANCE

A. Overview of ROC Economic Reforms and Trade Performance

The central issue of the ROC economic system is the role of government in economic development. Some scholars argue that governmental intervention is inevitable in the transition process.[2] On the other hand, most liberals believe that governmental intervention would result in misallocation of resources and would force income to transfer from one class of economic agent to another.[3] Both arguments have been supported by officials and commentators in Taiwan. Nevertheless, in the author's view, the economic system of Taiwan has been generally based on market/price mechanisms and, from the history of the ROC economic reforms, such a system has been structured with minimum governmental intervention and a free market. Its economic success and trade performance are largely the outcome of entrepreneurs' efforts to make their products competitive, rather than due to government support.[4] The following illustration shows how governmental intervention was gradually removed from the ROC economic system.

The transitions of ROC economic development can be classified into three phases, namely, import substitution (1950-1962),

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[2] Kuo-ting Li, The Evolution of Policy Behind Taiwan's Development Success (New Haven, Conn.: Yale University Press, 1988), at 46.

[3] Id., at 16.

[4] Ke-jeng Lan, et. al., "*The Taiwan Experience in Economic Development*," Issues and Studies, (Oct. 1991), at 135-140.

external orientation (1962-80), and, after 1980, a technology-sensitive phase.[5] In the 1950s, several factors dictated the choice of the import-substitution policy. At that time, agricultural products were the primary exports. Capital and technology were in short supply, and the currency was overhauled.[6] In order to develop domestic labour-intensive industries, the ROC government had to impose higher import tariffs, place strict controls on imports,[7] and grant favourable treatment to certain industries.[8] During that time, while the volume of foreign trade was still low, the trade deficit was very high in terms of the total gross national product.[9]

In the 1960s, domestic industries grew at a rapid rate and became more competitive internationally. In addition, the domestic market became saturated and there was little room for industries to expand. Thus, the Taiwan economy was transformed to become export-oriented characterized by export-led growth. The government policy

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[5] Li, supra note 2, at 28; John F. Copper, Taiwan: Nation-State or Province (Boulder, CO: Westview Press, 1990), at 82; Ramon H. Myres, (ed.) Two Societies in Opposition: The Republic of China and the People's Republic of China (Stanford: Hoover Institution Press, 1991), at 97-106.

[6] Li, supra note 2, at 15; Copper, id., at 82.

[7] Li, id., Copper, id., the MOEA, "*The Foreign Trade Regime of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu,*" Submitted by the Republic of China to the General Agreement on Tariffs and Trade (1 Jan. 1990), Chinese Yearbook of International Affairs (1989-1990), at 228-29.

[8] Copper, id.

[9] During the 1950s, the ROC's dependence on foreign trade was less than 30 percent. In the late 1950s, its trade deficit exceeded US$100 million.

also moved ahead towards trade liberalization. In nearly 20 years (1962-1980) of gradual economic reforms, several liberal measures were implemented, including the abolition of a dual exchange-rate system, the depreciation of the currency, and the lifting of import controls.[10] Because of the development of export industries, the value of exports rose nearly 20% annually, causing the GDP to post a more than a 20% increase,[11] and foreign trade dependency to rise over 90%.[12]

From 1980 to the present, the ROC economy has shifted to concentrate more on science and technology which are highly related to research and development ("R&D") activities.[13] During this period, the ROC government has been challenged by such problems as rising labour costs and shortages of workers, imbalances between exports and imports, insufficient R&D investment, deterioration of the environment and quality of life, and gradual de-industrialization.[14] In its efforts to solve these problems, the government was forced to encourage structural adjustment of domestic industries to attain international competitiveness, and to

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[10] Li, supra note 2, at 18-19; the ROC, supra note 7, at 228-229; Copper, supra note 5, at 83.

[11] The average GDP growth during the 1950s was 20.06 %.

[12] Beginning from 1979, the ROC foreign trade dependence exceeded 90 %.

[13] Li, supra note 2, at 10.

[14] Lan, supra note 4, at 140-150.

expand the domestic demand through development plans.[15] The ROC economic system was also further liberalized, including the liberalization of the financial market,[16] the introduction of tax reforms,[17] the reduction of tariffs and non-tariff barriers,[18] and the lifting of foreign exchange controls.[19] Because of these liberalization measures, Taiwan's trade position in 1980 was ranked 23rd in the world, with exports valued at US$19.8 billion, and imports totalling US$19.7 billion. In 1990, the value of its exports reached US$67.2 billion (ranking 12th in the world), while that of imports reached only US$54.7 billion (ranking 16th in the world).[20] The composition of exports was changed from agricultural

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[15] Taiwan has announced a Six-Year National Development Plan which will require approximately US$300 billion in public spending for 755 infrastructural projects from 1990-1996.

[16] With respect to the liberalization of the financial market, the prime rate system was established in 1986, and foreign investment in the Taiwan capital market was allowed in 1983. *See* Li, supra note 2, at 21.

[17] The ROC government established the value-added tax system in 1986. *See* Li, id., at 19-20.

[18] Regarding tariff barriers, the ROC government reduced the tariff rate to 5.4% in 1990, and replaced the old method of assessing the import duties by the GATT customs valuation system in 1986. *See* De-huai Wang, "*The ROC Customs System and Policy*," A Speech Delivered at the ROC Ministry of Justice (May 1992). Regarding non-tariff barriers, import restrictions on a few products, e.g., cigarettes, alcohol and agricultural products, have been gradually lifted.

[19] With respect to foreign exchange controls, the foreign exchange reserve system was partially decentralized, and Taiwan's currency, New Taiwan dollar, was allowed to appreciate from US$1 = NT$40 IN 1972 to US$1 = NT$25.74 in 1989. *See* the MOEA, supra note 7, at 206.

[20] GATT, International Trade 90-91 II (Geneva: GATT, 1992), at 3.

products in the 1950s to industrial products (94.5% in 1988).[21] Along with the change in the composition of exports and imports is the change in the geographical areas of trade. Currently, 50% of Taiwan's exports and imports are conducted with the U.S. and Japan.[22] However, increasing trade with mainland China will undoubtedly diversify the export markets and import sources.

In considering the ROC economic reforms and trade performance, one would ask whether public policies, especially those related to the trade system, have actually helped or hindered economic development. As described earlier, ROC conservatives and liberals have different opinions concerning this issue. Nevertheless, the reasons why more trade liberalization and less government intervention would be required for ROC trade system reform are threefold. First, since Taiwan has applied for accession to GATT, its trade regime would be examined and further reviewed through the GATT policy review mechanism.[23] Consequently, Taiwan would be prevented from adopting any protective measures in violation of GATT rules. Second, since the ROC is a pluralistic and democratic society, the government is expected to proceed cautiously and to avoid intervention in the market system for the protection of one class of economic agent (e.g. the domestic producers) at the

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[21] *See* id.

[22] *See* id.

[23] In 1989, the GATT established the "Trade Policy Review Mechanism", GATT, B.I.S.D., 36S/403.

expense of another (e.g. consumers or importers).[24] Third, in theory, domestic entrepreneurs are more familiar with industrial development than the government is. Because of this, it would be inappropriate for the government to intervene in industrial development by overriding the business judgment of domestic enterprises. The fact is that the government has now restrained its intervention in the economic and trade systems more than it has since 1950. Along with the government's strategy to build up Taiwan as an Asia-Pacific economic and financial centre, it is expected that the government's liberal policies will be continued for decades to come.

B. Overview of PRC Economic Reforms and Trade Performance

The PRC trade system is undergoing a transformation from a CPE system to an ME one. How far this transformation proceeds depends not only on economic factors, but also on the complex political struggles in mainland China. This section provides a brief analysis of past PRC economic reforms, and a prediction of future transformation.

Up until the late 1970s, the PRC economic regime was generally a Stalinist-style CPE,[25] characterized by strict controls on

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[24] Professor Fei of Yale University argued that governmental intervention, e.g., the raising of tariffs, would create the income-transfer effect, which would benefit entrepreneurial groups, but hurt politically weak groups, e.g., the farmers and urban consumers. *See* Myres, et. al., supra note 5, at 101-104.

[25] For detailed illustration of a Stalinist-style economy, *see* Chu-yuan Cheng, "*Mainland China's Modernization and Economic Reform: Processes, Consequences, and Prospects,*" Issues and

industrial production, labour movement, and price fluctuations as well as an emphasis on product quantity, rather than quality.[26] Radical policies were encouraged by Mao Ze-Dong, who sought to combine economic growth with the pursuit of certain political and ideological objectives.[27] Because of Mao's development policies, such as the "Great Leap Forward" and other movements during the "Cultural Revolution",[28] PRC economic performance was totally unstable[29] and imbalanced.[30] With respect to foreign trade, since the PRC government pursued a policy of self-sufficiency, its

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Studies, (Nov. 1991), at 80-81.

[26] Mario Blejer, et. al., China: Economic Reform and Macroeconomic Management (Washington, D.C.: International Monetary Fund, 1991), at 3.

[27] John Wong, "*Integration of China into the Asian-Pacific Region*," 11 The World Economy, (1988), at 336-338.

[28] Because of these political movements, the PRC has at least lost 1.5 times "its capital investment in the first thirty years of communist rule". Cheng, supra note 25, at 92.

[29] From 1953 to 1987, the annual growth of national income was 6.8 %. However, the growth rate has been highly variable over time. During the peak of political movements in the early 1960s, national income sharply decreased. *See* Myres, supra note 5, at 181-182.

[30] The pattern of economic growth in the PRC was unbalanced. Heavy industries had been emphasized, and the production of consumer goods and service industries were ignored. Moreover, because of misallocation of resources and concentration of state-enterprise production, industrial efficiency seriously deteriorated. See Cheng, supra note 25, at 93; Myres, id., at 182-183; UNIDO, China: Towards Sustainable Industrial Growth (Vienna: The United Nations Industrial Development Organization, 1991), at XVIII.

economy was nearly isolated from foreign competition,[31] and trade activities were centrally planned, rather than market oriented. As a result, the PRC's total value of trade in 1978 was only around US$20.6 billion which was less than that of Taiwan.[32]

Economic reforms were launched in late 1978 after the close of the Third Plenary Session of the 11th Central Committee of the Chinese Communist Party.[33] Such reforms were structured to enhance productive and efficient use of resources through the introduction of market-oriented mechanisms.[34] From 1978 to 1992, reforms included: (1) a contractual responsibility system to replace the collective farming system, (2) allowing individual and private enterprises to develop their own businesses, (3) granting of greater authority to state enterprises to improve their management, and (4) allowing the price system to reflect market conditions.[35] At the same time, the PRC trade system was also substantially improved, with measures such as decentralization of controls over trade through the establishment of many trading entities, lesser

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[31] Blejer, supra note 26, at 30. The PRC's poor performance of foreign trade occurred for the following reasons: (1) its self-sufficient policy, (2) the deterioration of foreign relations with Western nations, and (3) the centrally-controlled institutions for trade, which was conducted by few foreign trade corporations.

[32] In 1978, ROC's total value of foreign trade was US$ 23.7 billion. *See* the MOEA, supra note 7, at 270.

[33] The World Bank, China: External Trade and Capital (Washington, D.C.: The World Bank, 1988), at 20.

[34] Blejer, supra note 26, at 3.

[35] Cheng, supra note 25, at 86; Richard E. Feinberg, et. al. Economic Reform in Three Giants (New Brunswick, N.J.: Transaction Books, 1990), at 76.

use of trade plans to mandate trade activities, increasing independent responsibility of foreign trade corporations, and changes in the foreign exchange system.[36] These reforms have had a great impact on the PRC economy and living standards.[37]

As foreign trade increased, the PRC's links with the world economy have also become closer. In 1990, the total value of exports reached US$60.9 billion, thereby elevating the PRC's export ranking from 31st in the world in 1980 to 15th in 1990, with imports totalling US$52.3 billion, but reducing the PRC's import ranking from 22nd in 1980 to 18th in 1990.[38] Exports and imports as a percentage of national income or GDP has also increased substantially.[39] Because of its economic reforms since 1978, the importance of the centrally-planned economic system for production and consumption has declined, and market mechanisms for pricing systems and resource allocation has begun to play a crucial role.[40] However, in the view of most commentators, the PRC is still far from having a market economy.[41] In 1991, the production and

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[36] Blejer, supra note 26, at 81; Feinberg, id., at 86.

[37] Feinberg, id., at 79.

[38] GATT, supra note 20, at 3.

[39] The value of trade accounted for 30.6 % of the national income in 1990. The share of exports in 1991 represented 16 % of GDP, while that of imports was 14.6 %. *See* UNIDO, supra note 30, at 10-11.

[40] Kym Anderson, Changing Comparative Advantages in China (Paris: Development Centre of the Organization for Economic Cooperation and Development, 1989), at 77.

[41] Feinberg, supra note 35, at 74; Myres, supra note 5, at 188-190.

pricing of approximately 30% of products or 40% of the value of total industrial and agricultural output were still centrally controlled.[42] Moreover, state-owned and town-based enterprises and instruments of governmental economic control still dominate the present PRC economy. In 1990, over 90% of gross industrial output came from state-owned and town-based enterprises.[43] Such a contribution was not a result of market-oriented trade, but was related to billions of dollars in subsidies and governmental protection against foreign competition.[44]

With respect to the long-term perspective, it is expected that PRC economic system will become a mixed economy with a combination of central planning and market incentives.[45] Both economic and political forces will lead the PRC economy towards such a direction. In the economic arena, the speedy growth of a macroeconomy and the upgrading of people's living standards will force the government to continue its economic reforms towards a

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[42] The PRC, Working Party on China's Status as a Contracting Party: Communication from China, Spec. (88) 13/Add. 8, (15 Oct. 1991), at 4.

[43] UNIDO, supra note 30, at 67. In 1991, only 9.7 % of gross national output was created through individual-owned enterprises and others.

[44] Feinberg, supra note 35, at 74. In 1988, the government spent about US$12 billion in subsidies to state enterprises.

[45] Cheng, supra note 25, at 100; David M. Lampton, China's Global Presence (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1988), at 73.

market system.[46] In addition, because of its expanding links with the world economy and trade system, especially in the hopes of its future accession to the GATT and of U.S.'s placing pressure on trade liberalization,[47] market reforms would be the only appropriate response. Meanwhile, the PRC one-party political structure would definitely not allow the adoption of a laissez-faire economy.[48] From the viewpoint of the PRC leaders, the central issue of the PRC economic reforms is power, not really ideological considerations about ME or CPE.[49] For the survival of the Chinese Communist Party ("CCP"), its leaders are obligated to strengthen the Party's leadership in improving the economic environment.[50] They argue that socialism and CPE are superior and primary in mobilizing resources and making rapid structural transformations.[51] The maintenance and control of state-owned and

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[46] Lampton, id., at 80. In addition, excellent economic performance of NIEs is another reason to improve the PRC economy. *See* Anderson, supra note 40, at 56.

[47] Several events of PRC-U.S. trade negotiations, which further caused Chinese economic reform, *See* BNA, Int'l Trade Reporter, (27 May 1992), at 928-929.

[48] Cheng, supra note 25, at 100.

[49] Lampton, supra note 45, at 82.

[50] E.g., On 9 November 1989, the CCP adopted a decision on "Further Improving the Economic Environment, Straightening Out the Economic Order, and Deepening the Reforms (the Fifth Plenary Session of the Central Committee of the CCP). In this decision, it emphasized the importance of party leadership for economic readjustment and reform. *See* Almanac of China's Foreign Economic Relations and Trade 1990 (Hong Kong: China's Resources Advertising Co., Ltd.), at 16.

[51] Victor Nee, ed., Remaking the Economic Institutions of Socialism (Stanford: Stanford University Press, 1989), at 117.

town-based enterprises are probably two of the most important means to implement its one-party leadership and prevent the destruction of party structure and power.[52] Given such complex economic and political forces, chaos, conflicts and political struggles cannot be avoided. A compromise between CPE and ME, i.e., a mixed economy, would be one feasible way for the PRC economy to develop in the next decade.

III. EVALUATION OF ROC AND PRC TRADE SYSTEMS

A. Evaluation of the ROC Trade System

The ROC trade system has been based on a market-oriented policy that has created a liberal environment for exports and imports. Along with the pressure of the "Super Section 301" from the U.S. government, Taiwan's application for accession to the GATT has compelled its foreign trade regime to become further liberalized in the last ten years. In spite of these achievements, some trade barriers still exist in its trade regime and need to be addressed.[53]

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[52] Lampton, supra note 45, at 83; Rogers W. Sullivan, "*Discarding the China Card*," Foreign Policy, (Spring 1992), at 16. According to Mr. Sullivan, "there is no chance that China will take substantial steps toward opening its economy when the country is ruled by a party that considers outside companies to be a threat to the state enterprises that are the very essence of the socialist system."

[53] Because this study only covers merchandise trade, trade barriers relating to commercial services and investment are not discussed here. However, it should be noted that the above issues are currently addressed in the Uruguay Round, and the ROC government has set up many barriers in these fields, especially the insurance, banking, motion picture, and telecommunication industries. Moreover, the U.S. government has criticized the ROC

i. Import Policy

Under the current ROC trade regime, several import measures operate to deviate from the principles of trade liberalization or non-discrimination. First, the ROC government has not accorded most-favoured-nation ("MFN") treatment to all trading partners, including some contracting parties of the GATT.[54] Those nations have not received most-favoured tariff rates, i.e., second-column tariff rates. Not being a member of the GATT, the ROC is not obligated to grant MFN treatment to all GATT members. However, to pave the way for its accession to GATT, it would be in the best interest of Taiwan to actively negotiate with its trading partners to grant reciprocal MFN treatment. In addition, unconditional MFN treatment should be extended to all GATT contracting parties upon Taiwan's accession to the GATT.

Second, the ROC government needs to further improve its import licensing system, particularly that relating to agricultural products, the importation of which has been suspended by the government due to domestic political pressures.[55] Issuance of import licenses for pharmaceutical products is another problem.

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government for not providing enough intellectual property protection for the U.S. industries. *See* United States Trade Representative, Foreign Trade Barriers (Washington, D.C.: USTR, 1992), at 237.

[54] Those contracting parties include Bangladesh, Burma, Chad, Cuba, Czechoslovakia, Gambia, Guyana, Israel, Madagascar, Maldives, Malta, Mauritania, Poland, Romania, Rwanda, Sierra Leone, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe. *See* the MOEA, supra note 7, at 237.

[55] USTR, supra note 53, at 232.

Some U.S. pharmaceutical exporters have complained that the ROC authorities often cease issuing import licenses for certain products that require no special manufacturing technology and can be produced locally.[56]

Third, import bans and quota restrictions need to be removed. The importation of most agricultural products, including rice, is still prohibited by the ROC authorities. Although an "Agricultural Adjustment Program" has been drafted to raise agricultural productivity, it did not do much to help Taiwanese farmers.[57] Nevertheless, pressures from the U.S. government and negotiations over GATT will eventually compel the ROC government to liberalize its agricultural trade. The ROC agricultural sector will have to face massive competition from the U.S. and other Asian nations. At present, there is a quota system in effect for Korean cars and there are bans on the importation of Japanese cars. The aim of such policy is to increase imports from the U.S. and Western Europe. The ROC government should consider removing such discriminatory policies which violate the GATT principles.[58]

Fourth, the commodity tax ("CT") system is another measure which goes against the principle of non-discrimination. The ROC government has imposed CT on specific items and higher tariff rates on certain types of products which are not produced locally. For

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[56] Id., at 233.

[57] MOEA, supra note 7, at 246.

[58] Qin-zong, Yan, Discover the GATT System (Taipei: China Times Pub. Co., 1989), at 130.

example, higher tariff rates are applied on automobiles with engines exceeding 3,600 c.c. compared to those with smaller engines. Because foreign producers often export cars with larger-size engines, they suffer from such a policy.[59] This size difference results in a de-facto additional import duty on large foreign cars.

ii. Non-tariff Barriers

The ROC government has imposed restrictive standards and testing requirements for agricultural goods. These technical barriers have actually operated to discourage importation of foreign agricultural produce.[60] Moreover, complex and lengthy product registration procedures for imported pharmaceuticals, medical devices, and cosmetics have been criticized from time to time.[61] All these non-tariff barriers have been challenged during the ROC application process for its membership in GATT.

iii. Government Procurement

The ROC government prefers that government agencies purchase goods and services from local producers. For example, it has frequently opened "kuo-nei biao" (domestic bids) to exclude foreign

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[59] USTR, supra note 53, at 233; Chung-teh Lee, "*The Republic of China's Response to Charges of Protectionism*," 13 Loyola L.A. International & Comparative Law Journal, (1990), at 29-30.

[60] Id., at 234.

[61] Id.

producers from undertaking domestic infrastructural projects.[62] As long as acceptable substitutes are available locally and prices of local products are not more than five % of the c.i.f. value plus customs duty and harbour taxes, all public enterprises and administrative agencies are obligated to procure locally.[63] These measures thus constitute de-facto discrimination against foreign producers and is a violation of the principle of national treatment.

B. Evaluation of the PRC Trade System

The PRC foreign trade regime is part of a centrally planned economic system which combines trade plans with market regulations.[64] The national foreign trade plan was drafted by the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"), and then approved by the National People's Congress.[65] According to this trade plan, the State Planning Commission and the MOFTEC have the power to impose import quotas, license requirements and other restrictions. Because of such a trade control process, foreign producers more often than not face many trade barriers in exporting to the PRC.

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[62] Yan, supra note 58, at 103.

[63] USTR, supra note 53, at 234.

[64] The PRC, supra note 42, at 8; Michael J. Moser, ed., Foreign Trade, Investment, and the Law in the People's Republic of China (Hong Kong: Oxford University Press, 1987), at 14.

[65] Id.

i. Import Control

In order to foster its export-led growth, the PRC government has been actively adopting several control measures to encourage its export industries and to severely curtail its imports.

First, the PRC government relies on high tariffs in restricting imports, especially for consumer and luxury goods. Recently, although the authority has abolished import regulatory taxes, some tariffs have been raised to compensate for such financial loss.[66] New tariff rates of 1991 ranged from 120 to 170%. However, there is a possibility that these tariff rates will be reduced because of the PRC application for accession to the GATT.[67] It should also be noted that shifts in marginal tariff rates in a CPE do not have the same effect as they do in a market economy. Other administrative controls still can be obstacles to the increase of imports.

Second, the import licensing system, as administered by the PRC government, is another instrument for implementing the state import plan.[68] Issuance of import licenses is controlled by agencies at several levels and arbitrarily lacks transparency.[69]

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[66] BNA, Int'l Trade Reporter ("ITR"), (18 Mar. 1992), at 493.

[67] In a memorandum with the U.S. government, the PRC government committed to reduce tariffs that were raised since 1988 in certain sectors. *See* Art. V of the People's Republic of China-United States: Memorandum of Understanding Concerning Market Access ("PRC-US Memo"), 31 I.L.M. (1992), 1274.

[68] Moser, supra note 64, at 17. For import licensing requirements, *see* the PRC Import Licensing Regulation, adopted by the MOFERT, 15 May 1984.

[69] USTR, supra note 53, at 45.

Oftentimes, denial of import permit applications is either due to incompatibility with PRC development goals, the fear of increasing competition for domestic producers, or that the imports are regarded as wasteful/unnecessary consumer goods.[70] However, since the PRC government has committed itself to reducing by two-thirds the product categories subject to import licensing within two to three years,[71] trade barriers on import licensing might be gradually removed.

Third, the PRC government has implemented a mandatory and guidance plan[72] approved at the annual state planning conference to prohibit or restrict importation of specific products regardless of whether such imports require a license.[73] In recent years, quotas have been imposed on certain major products because of centralization of administrative controls.[74] Such bans and restrictions have often been kept secret and remained unpublished.[75] As a result, foreign producers are sometimes not aware that certain products cannot be exported to the PRC, and thus

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[70] Id.

[71] BNA, ITR, (4 Mar. 1992), at 387. *See* Art. II, para. 1(i) of the PRC-US Memo. In such a provision, the PRC government agreed to eliminate all import restrictions, quotas, licensing requirements and controls on products listed in the Annex.

[72] USTR, supra note 53, at 43.

[73] According to PRC sources, 40 % of the value of total imports are subjected to mandatory or guidance plan in 1990. The PRC, supra note 42, at 14-15.

[74] USTR, supra note 53, at 43.

[75] BNA, ITR, (4 Mar. 1992), at 387.

foreign trade negotiators fail to conduct negotiations to remove these restrictions.

Fourth, the PRC government admitted that it has implemented an "import-substitution" policy to promote the domestic industry and to limit imports whenever domestic alternatives exist. Because of these unpublished "import substitution" regulations, many enterprises have been prevented from obtaining import permits and have to rely on Chinese-produced goods.[76] Furthermore, allocation of foreign exchange and credit is a procedure that can also operate to discourage consumers from purchasing imports. The PRC government argued that such a policy of patronizing locally-made products cannot be treated as import restrictions.[77] In the author's view, such a policy smacks of too much intervention and, in actuality, has seriously suppressed and damaged the interests of foreign exporters. It therefore does not conform to the principle of national treatment provided in the GATT system.

Fifth, technical barriers, such as testing and certification regulations,[78] are other measures of import restrictions. The PRC

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[76] Id., 8 April 1992, at 635.

[77] The PRC, supra note 42, at 16. However, in the PRC-US Memo, the PRC government agreed to eliminate all import substitute regulations, guidance and policies. In the author's view, it is difficult to check if such a provision is implemented.

[78] Testing, standards and certification are provided in the Law of the People's Republic of China on Import and Export Commodity Inspection (adopted at the Sixth Meeting of the Standing Committee of the Seventh National People's Congress on 21 Feb. 1989) and the provisions of the Application for Inspection of Import and Export Commodities (promulgated by the State Administration of Import and Export Commodity Inspection on 21 Aug. 1989).

government either imposes stricter standards on imports or requires that imports meet certain testing requirements or registration procedures which are not being applied to domestic producers.[79] Because of such expensive and complicated procedures, consumers are discouraged from purchasing imports. Similarly, such a policy contradicts the principle of national treatment under the GATT system.

ii. Export Subsidies

The PRC government has been accused of using export subsidies to encourage exports. Although the PRC government has declared the reduction of export subsidies for foreign trade corporations,[80] governmental subsidies relating to export industries are still being granted to foreign trade corporations, state-owned and town-based enterprises receiving billions in financial subsidies from the government. Moreover, Chinese export manufacturers continue to obtain many kinds of indirect subsidies such as low-priced energy, raw materials, and labour supplies as well as tax incentives.[81] As a result of such subsidies, foreign governments have considered whether or not they should impose countervailing duties on Chinese exports.

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[79] USTR, supra note 53, at 47. In the PRC-US Memo, it has been agreed that the PRC government should implement sanitary and phytosanitary standards and testing requirements on a sound scientific basis.

[80] The PRC, supra note 42, at 7.

[81] USTR, supra note 53, at 48.

iii. Transparency

To implement the confidential foreign trade plan, the PRC government has promulgated many internal rules which would restrict the trade practices of its Foreign Trade Corporations ("FTCs"), authorized local agencies and state-owned enterprises. These internal rules seriously restrict imports, but are not available to foreign exporters.[82] Moreover, because of decentralized trade administration, these internal rules are inconsistent with regulations of the central government and vary from region to region.[83] The PRC government has committed itself to the compilation and publishing of all laws, regulations and decrees concerning the trade system.[84] However, it is doubtful that the PRC government will actually announce all of its administrative rules since some of them would be embarrassing[85] and would reveal the details of its state plan.

iv. Foreign Exchange Controls

In order to curtail imports, the PRC government has manipulated the currency exchange rate to build up its trade surplus.[86] In addition, it has used the allocation of foreign

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[82] Id., at 52.

[83] Id.

[84] BNA, ITR, (27 May 1992), at 928-929; The PRC, supra note 42, at 24. In the PRC-US Memo, the PRC government consented to publish trade laws on a regular and prompt basis.

[85] BNA, id., at 928.

[86] BNA, id., at 928.

exchange as a means of import control.[87] A new foreign exchange allocation system has been in place since 1991.[88] Under this system, central and local governments hold more than 5% of foreign exchange, while import industries and FTCs retain less. Foreign exchange has therefore become an instrument for the PRC government to implement its trade plan and resist imports. Although the U.S. government has been critizing the PRC's manipulation on currency, the PRC has initiated its reforms on exchange system, such as the removal of the government-fixed exchange rate from 1 January 1994.

IV. ROC'S ACTIONS TO COPE WITH TRADE WITH THE PRC - THE ISSUES OF MARKET DISRUPTION AND SAFEGUARD MEASURES

In trading with CPEs, most ME governments adopt legal measures different from those applied to trade with other MEs. Fearing that the sharply increased imports from CPEs and CPE's administrative export price controls may cause serious injury to domestic manufacturers, ME governments have often set up selective safeguards against market disruption arising out of exports from CPEs. As described earlier in this chapter, the PRC economy and trade systems are still far away from becoming an ME, nor do they conform to GATT principles and rules in many aspects.[89] Considering the PRC's administrative controls on prices of resources and produced goods, allocation of foreign exchange as

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[87] USTR, supra note 53, at 52.

[88] The PRC, supra note 42, at 15.

[89] USTR, supra note 53, at 44.

well as the operations of foreign trade and state-owned enterprises, it is reasonable that the ROC government has to consider adopting safeguards purported to prevent the import surge of low-priced products from the mainland. However, trade measures against market disruption need to be adopted cautiously so as not to reduce economic efficiency, harm consumer interests or draw retaliation from other exporting countries. Accordingly, the ROC government needs to devise safeguard measures which will have minimal interference in the normal operations of market mechanisms. Among the alternatives, measures that comply with GATT rules or those that are comparable to practices by major Western nations would be less objectionable and would cause less protest from the PRC government. The next section thus analyzes the safeguard measures contained in the GATT which would be useful mechanisms for the ROC government to prevent the problem of market disruption.

A. Safeguard Measures in the GATT

There are two sets of rules that provide escape clauses for contracting parties of GATT against market disruption. One is provided in Article XIX of the GATT. Another exists in the Protocol of the Accession of Hungary,[90] Romania,[91] and Poland.[92] Both rules provide various criteria on safeguards which can be implemented against the surge of imports from CPE nations.

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[90] GATT, B.I.S.D., 20S/14.

[91] GATT, B.I.S.D. 18S/17.

[92] GATT, B.I.S.D. 15S/48.

i. Safeguard Measures under Article XIX

To be able to adopt safeguard measures provided in Article XIX of GATT, several prerequisites have to be met. First, it has to be proved that imports are either absolutely or relatively increasing, and that such an increase results from unforeseeable development and from compliance with GATT obligations.[93] Second, domestic producers of competitive products must be seriously damaged or threatened.[94] Third, except for critical situations, an importing government must consult with the concerned parties having substantial interest as exporters and notify the contracting parties.[95] In the above circumstances, an importing nation will be entitled to suspend the relevant GATT obligations or withdraw/modify the concession on the product from such time as is necessary to prevent or remedy possible damage.[96]

Typically, implementation of safeguards stirs up economic tensions between the importing and exporting countries. Thus, there should be clear and equitable criteria in the application of safeguards. Unfortunately, various prerequisites in Article XIX have vague definitions such as "increasing imports," "causation between imports and injury to domestic products," "the like or competitive products,"[97] and their "necessary remedies." Such vagueness has considerably increased the difficulties in the

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[93] Article XIX, para. 1 of the General Agreement.

[94] Id.

[95] Article XIX, para. 2 of the General Agreement.

[96] Article XIX, para. 1 of the GATT.

[97] John H. Jackson, The World Trading System (Cambridge, MA: MIT Press, 1989), at 155-156.

alleviation of economic tensions between the exporting and the importing countries.

Aside from inadequate interpretations of Article XIX of the GATT documentation,[98] not all such cases have been reported to the contracting parties, with even fewer submitted to the dispute panels.[99] Although some contracting parties have attempted to set up a new Safeguard Code in the Tokyo Round, the attempts have failed due to the lack of consensus between the EC and other nations on the implementation of protective measures against market disruptions.[100] Several working parties have been organized in an effort to clarify the variable concepts of Article XIX.[101] However, the reports of these working parties are not legally binding on the contracting parties, and they sometimes include the opposing views of participants, especially on the "grey area"

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[98] Qin, China and GATT: Toward a Meaningful Participation? Harvard SJD Thesis, (1990), at 294.

[99] From 1949 to 1989, only seven cases concerning sections under Article XIX were subject to dispute settlement in accordance with GATT, Hatters' Fur (Czechoslovakia - U.S., 1951), Dried Figs (Greece - U.S., 1952), Clothespins (Denmark - U.S., 1957), Poultry (U.S. - EEC, 1963), Beef (Australia - Japan, 1974), Textiles (Hong Kong - Norway, 1978), and Fish (Canada - Spain, 1981). *See* Jackson, supra note 97, at 357.

[100] M.C.E.J. Bronckers, Selective Safeguard Measures in Multilateral Trade Relations (Hague: T.M.C. Asser Institute, 1985), at 4.

[101] In 1960, a statement was issued by the Contracting Parties to explain the concept of market disruption. *See* B.I.S.D. 9S/26. In 1988, the Committee on Avoidance of Market Disruption asserted that the safeguard system needed to be improved. B.I.S.D. 27S/63. In 1983, Chairman of Council issued a report addressing the so-called "grey-area" actions. B.I.S.D. 30S/216.

problem.[102] Thus, the device of safeguard clauses in the GATT should be further strengthened in the new GATT negotiations.[103]

ii. Special Safeguard Measures

Another set of safeguard rules against disruptive imports from CPEs was provided in the Protocols for the Accession of East European Nations, i.e., Poland, Romania and Hungary. The protocols allow the Contracting Parties to use two instruments in preventing the flood of imports from these three nations. One instrument is quantitative restrictions and another is special safeguards. In quantitative restrictions, the Contracting Parties may maintain their import restrictions, though they are barred from adding any discriminatory element to the restrictions and are required to remove them progressively.[104] To eliminate such restrictions, target nations are required to consult with other Contracting Parties,[105] and importing parties have to notify the Contracting Parties regarding the specifications of

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[102] B.I.S.D. 31S/136.

[103] Jackson, supra note 97, at 184-187. The Uruguay Round has concluded an agreement to reform safeguard measures. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN/FA II-A-14.

[104] Para. 3(a) of the Protocol for the Accession of Poland ("Protocol of Poland"); para. 3(a) of the Protocol for the Accession of Romania ("Protocol of Romania"); para. 4(a) of the Protocol for the Accession of Hungary ("Protocol of Hungary").

[105] Para. 3(b) of the Protocol of Poland; para. 5 of the Protocol of Romania; para. 6 of the Protocol of Hungary.

restrictions.[106] The Protocols also provide for a deadline to end the quantitative restrictions,[107] which, however, was not realized until recently.[108]

The special safeguard is a measure almost identical to Article XIX of the GATT,[109] but contains a few differences. First, in the Accession Protocols, the importing countries are not required to show that increased imports resulted from unforeseeable developments and the effect of GATT obligations. Second, under Article XIX, imports must be "in such increased quantities and under such conditions as to cause or threaten serious injury" (emphasis added) to domestic producers. In contrast, in the Accession Protocols, imports must be "in such increased quantities or under such conditions on any product being imported" (emphasis added). Obviously, the safeguard requirements in the Protocols are looser than those in Article XIX. Third, procedural arrangements on consultations with concerned parties and service of notice on the Contracting Parties are not mandatory conditions in the Protocols as opposed to Article XIX, in which they are stated as

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[106] Para. 3(b) of the Protocol of Romania; para. 4(c) of the Protocol of Hungary.

[107] Para. 3(a) of the Protocols of Poland and Romania; para. 4(c) of the Protocol of Hungary.

[108] In 1989, discriminatory quantitative restrictions were maintained by the EC. *See* B.I.S.D. 36S/416. However, these restrictions have been removed in the new trade agreements between East European nations and the EC. BNA, Int'l Trade Reporter, (13 May 1992), at 842.

[109] Para. 4 of the Protocols of Poland and Romania; para. 5 of the Protocol of Hungary.

obligations of the importing country. Fourth, unlike the actions under the Accession Protocols which aimed at products of certain origins, i.e., Poland, Romania and Hungary,[110] actions under Article XIX must be taken on a non-discriminatory basis without distinguishing the origins of products.[111]

Both Article XIX and the Accession Protocols are devised to provide safeguard measures against market disruption. But some negative impact has arisen from the implementation of a safeguard measure which may impair the interests of exporting countries and weaken the world trade system.[112] Especially with today's greater economic interdependence, underlying policies for safeguard measures should be given more thought,[113] and the measures have to be exercised with utmost restraint.[114] Thus, in practice, in order to promote economic reforms in former socialist states, such as Romania, Hungary and Poland, safeguard measures under the Accession Protocols should be less employed.[115] As to the legislative policy of Article XIX, its prerequisites and procedural arrangements should be strengthened in order to make them

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[110] Qin, supra note 98, at 290.

[111] It has been suggested in the GATT panel report that safeguard measures should be implemented on a non-discriminatory basis. *See* Norwegian restrictions on Hong Kong textile imports, B.I.S.D. 27S/119. Detailed discussions, *see* Jackson, supra note 97, at 69; Bronckers, supra note 100, at 81.

[112] Chairman's Report on Safeguards, B.I.S.D., 30S/220.

[113] Jackson, supra note 97, at 184.

[114] B.I.S.D., 30S/220.

[115] BNA, supra note 108, at 842.

enforceable, and a new institution for supervising the implementation of safeguard clauses should also be set up.[116] It is expected that these efforts would reduce the tensions between the exporting and the importing countries, and between the developed and the developing countries, and would further enhance the world trade system.

B. Safeguard Measures for the ROC Government

There are two issues with respect to ROC safeguard measures for trade with the PRC. First, the ROC government has to determine whether selective safeguard measures would be necessary to prevent market disruptions due to imports from the PRC. Second, if implementation of safeguards measures is necessary, what types of mechanisms would be appropriate and to what degree to prevent an overflow of PRC products.

i. Policy Considerations

In adopting safeguard measures against products from mainland China, the ROC government may justify its actions on the following grounds. As described in parts II and III of this chapter, traditionally, trade activities in mainland China have been based largely on central planning requirements, rather than commercial considerations.[117] Even after the initiation of its economic

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[116] Jackson, supra note 97, at 186.

[117] Further discussions, *see* Robert E. Herzstein, "*China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*," 18 Law and Policy

reform, the PRC government has still considered itself as a socialist nation, and prices of resources and produced goods remain centrally controlled while state-owned companies maintain a dominant role in the PRC economy. In light of such economic and trade features, it is understandable that the ROC government would worry about possible market disruptions caused by PRC products after its removal of import restrictions. Further, with political and military tensions still existing between the two nations, it is understandable that the ROC government would fear that the flooding in of PRC products could have a political impact. Considering the relatively small size of the Taiwan economy and that it heavily depends on export-led growth,[118] market disruptions would, directly and materially, damage its export industries as well as economic security. To make things worse, it is predicted that such economic turmoil would benefit the PRC government in affecting the political stability of Taiwan. Third, most Western nations have adopted safeguard measures against products of CPEs, setting an example for the ROC government to follow in its efforts to protect its domestic industries.

Nevertheless, unnecessary safeguard measures have their adverse effects and could be challenged by the PRC. It has been argued that trade activities can increase contacts and establish a friendly atmosphere between both sides. Particularly, in terms of

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in International Business, (1986), at 374.

[118] Since 1979, the foreign trade dependence of the ROC has reached more than 90 % of total GNP.

Chinese political culture, symbolic friendly actions are often more favourable than any constructive and reasonable bargaining, and the adoption of safeguard measures could instigate resentment from exporting nations.[119] Accordingly, the ROC government should reconsider its import policies that might cause political concerns to the PRC government. Further, the ROC has enjoyed a great surplus in its trade with the PRC.[120] Such imbalanced trade relations have been ongoing for decade and is not a matter of concern for the PRC government because of its desire to expand relations with Taiwan. However, imbalanced trade relations usually leads to protectionism. No government can permanently tolerate continuous trade deficits without reciprocal treatment on its counter trading partner. If the PRC sees no chance of removal of ROC import restrictions, ROC export interests toward the PRC might be challenged. Another problem of import restrictions is the distortion of normal market functions. If the ROC government continues to restrict imports from the PRC, domestic industries might take advantage of such import relief without making their best efforts to enhance their technological competitiveness. Moreover, people on Taiwan already have a high cost of living.[121] Import restrictions against the PRC would deprive the Taiwanese

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[119] M.M. Kostecki, East-West Trade and the GATT System (New York: St. Martin's Press, 1979), at 120.

[120] In 1990, the ROC enjoyed a trade surplus of US$2,666 million and, in 1991, this surplus reached US$3,541 million.

[121] It has been reported that in the Asian Area, the cost of living in Taipei is second only to that of Tokyo which does not correspond to the per capita GNP of the Taiwanese people.

people of the opportunity to acquire cheaper products from the PRC.

As can be seen from the above, whether it is necessary to impose safeguards against the PRC products would be a dilemma for the ROC government. Even if the ROC has substantially eliminated its trade restrictions towards the ROC, the ROC government might still consider imposing safeguard measures as long as the PRC-ROC political tension remains. Under current PRC-ROC relations, this effort can be realized through multilateral or unilateral mechanisms. In particular, the former one might be regarded as the more appropriate process as it would incur less disputes between both governments.

ii. Multilateral Safeguard Measures

Whether GATT rules would be applicable to trade relations between the PRC and the ROC and what GATT mechanisms would be appropriate in dealing with multilateral safeguard measures are two major issues that need to be addressed.

Concerning the applicability of the GATT rules, it should be noted that neither the ROC or the PRC government is a contracting party to the GATT. As a result, neither government can resort to GATT mechanisms on a de-jure basis. However, it is feasible for both governments to use unilateral mechanisms to follow GATT safeguard clauses on a de-facto basis. On the other hand, since both governments have applied for accession to the GATT and have

been supported by most Contracting Parties,[122] there is a great possibility that both sides would later become Contracting Parties of the GATT. Therefore, the issue of whether GATT rules are applicable to PRC-ROC trade relations would be a challenge for both governments in the long run. From a purely legal analysis, both governments have applied for the accession[123] or resumption[124] on the strengths of separate tariff territories, so it appears that GATT rules can thus be applied to the PRC and the ROC.

If both sides are willing to apply GATT rules to their trade relations without invoking Article XXXV (non-application of GATT rules),[125] the question now becomes what safeguard mechanisms in the GATT would be applicable for the ROC government. As described earlier, there are two sets of safeguard measures in the GATT system. The first one is provided under Article XIX of the Agreement. Under the GATT regime, it is in the best interest of the ROC to use this clause against products from the PRC. However,

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[122] The PRC is supported by all western and third world nations for its accession to the GATT, and the ROC is especially supported by the EC and the U.S. government. Regarding the U.S. support, *see* the President's 1992 Trade Policy Agenda, in BNA, Int'l Trade Reporter, (4 Mar.1992), at 424.

[123] The ROC government applied for accession to the GATT on behalf of the Customs territory of Taiwan, Penghu, Kinmen and Matsu on 1 Jan. 1990; *see* MOEA, supra note 7, at 225.

[124] The PRC requested the GATT to resume its status on 10 July 1986, GATT Document No. L/6017.

[125] Although GATT requires unconditional application of most-favoured-nation treatment among Contracting Parties, Article XXXV permits a signatory to withhold the application of its schedule of tariff concessions, or of the entire agreement, from another contracting party with which it has not entered into tariff negotiations.

since safeguard measures under Article XIX should be applied on a non-discriminatory basis,[126] ROC import restrictions would be challenged because they are devised solely against products from the PRC. Consequently, most of its safeguard measures against the PRC would be required to be removed for they are implemented on a discriminatory basis. However, the ROC government can still rely on another set of safeguard measures in the GATT which can be applied on a discriminatory basis, i.e., selective safeguard clauses in the future Accession/Resumption Protocol of the PRC.

With respect to the selective safeguards clauses in the future Accession/Resumption Protocol of the PRC, Western nations and the PRC take adversary positions. The PRC government opposes any discriminatory measures against its accession/resumption,[127] but major Western nations anticipate that the PRC would be subject to a special safeguards clause pending completion of its market reforms.[128] Several arguments would be resorted to by the PRC government against application of such a selective safeguard clause. First of all, such selective safeguard clause would be made on a discriminatory basis which obviously does not conform to

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[126] Bronckers, supra note 100, at 54, 61, 81.

[127] Penelope Hartland-Thunberg, China, Hong Kong, Taiwan and the World Trading System (Basingstoke & London: MacMillan, 1990), at 95.

[128] E.g., the USTR official insisted that a safeguard clause would be necessary to push for Chinese economic reform. USGAO, GATT Treatment for Nonmarket Countries (Washington, D.C.: U.S. General Accounting Office, 1990), at 15.

the rules and spirit of the GATT system.[129] Second, Contracting Parties have been utilizing and can use other mechanisms in the GATT to prevent the market disruption caused by PRC products, including anti-dumping and countervailing measures.[130] Further, Western nations have been using VERs and MFAs against products from the PRC, although they are not consistent with GATT's spirit. Moreover, other "exception clauses" would also be available for importing countries to prevent the flow of imports. Even if there are still some disputes about "market disruption" issues, contracting parties can still take advantage of the consultation and dispute settlement mechanisms to stop the surge of low-priced products. Third, as a developing country, the PRC government may rely on Article XVIII of the GATT and the Declaration of Tokyo Round[131] which opposes any special safeguard measures that might hinder its economic development. Fourth, under current bilateral arrangements between the PRC and most Western nations,[132] selective safeguard clauses have not been included. Consequently, if the PRC government accepts such a clause in the

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[129] Qin, supra note 98, at 301.

[130] Anti-dumping and countervailing measures are provided in Articles VI and XVI of the General Agreement.

[131] In the Tokyo Round, Contracting Parties passed a resolution regarding "Safeguard Action for Development Purposes." *See* The Tokyo Round of Multilateral Trade Negotiations II - Supplement Report (1980), at 16-17.

[132] For instance, the trade agreement between the PRC and Japan, 13 I.L.M. (1974), 872, the trade agreement between the PRC and Australia, Aust. T.S., No. 21, (1973), and the trade agreement between the PRC and Canada, Can. T.S., No. 31, (1973).

Accession/Resumption Protocol, it would impair its rights under some of its current bilateral arrangements.[133]

On the other side, Western nations would strongly assert their position as follows: (1) PRC exports have been increasing rapidly in the last decade, and will continue to expand in the future. Given its potential influence on the world economy, it could cause turmoil if the PRC trade system does not conform to the GATT rules. Unfortunately, the current PRC economy is a socialist economy with features of central administrative control, non-transparency regime and many trade barriers.[134] Although these features would not necessarily cause market disruptions, there are certain psychological obstacles for Western nations to open their markets without adopting safeguard measures.[135] Second, if a selective safeguard clause cannot be provided in the PRC Accession/Resumption Protocol, an importing country would, on a general level, invoke Article XIX against a certain product from all nations.[136] Such a situation would be unfair for certain countries when the injury can be identified to have been caused or threatened by the exports of one or a few countries, especially some socialist states.[137] Further, without selective safeguard measures on a multilateral level, an importing country might be reluctant to fully liberalize

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[133] Qin, supra note 98, at 315.

[134] USGAO, supra note 128, at 15.

[135] Qin, supra note 98, at 307.

[136] Id.

[137] Id.

its trade system towards CPE nations. Hence, it would lead to more unilateral mechanisms against products from the PRC for fear of possible market disruptions.

Concluding from the above, it can be predicted that the PRC government has to compromise on safeguard issues. A feasible solution would be to set up a transitional period to gradually remove safeguard measures. During this period, GATT members would meet annually to review problems arising from the PRC trade regime.[138] With this kind of compromise, the GATT system and the PRC trade regime can be adjusted to become more consistent. If a selective safeguard measure can be provided in the PRC's Accession/Resumption Protocol, and if the ROC becomes a member of the GATT, without invoking Article XXXV against the PRC, the ROC government would be able to apply safeguard measures in the Protocol to protect its domestic market. It should be noted that a selective safeguard measure is only an optional device for contracting parties who may enforce it on a discretionary basis. Accordingly, the extent and period of enforcement of such a measure would still be subject to national judgement.

iii. Unilateral Safeguard Measures

Implementation by the ROC of unilateral safeguard measures would be necessary for it to meet its international obligations, i.e., restraint under GATT rules. Nevertheless, the following discussion is based on the assumption that the ROC government can

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[138] Jackson, supra note 97, at 899.

freely implement unilateral safeguard measures without international restraints.

The first issue concerning safeguard measures is whether the ROC import restrictions against the PRC are appropriate. Currently, importation of products from the PRC is subject to governmental approval.[139] In general, the ROC authority approves an application from a particular trade association. As described earlier, import restrictions against PRC products could have adverse political and economic results. Especially on the economic side, such a regime would create imbalanced trade, excessive protection for domestic industries, and, most seriously, harm the interests of consumers. Accordingly, current extensive import restrictions should be gradually phased out, at least on a long-term basis. It is also problematic to allow domestic industries to determine whether certain products should be imported. At the current stage, domestic industries would not be opposed to allowing the importation of semi-finished products or raw materials which are essential items for the production of their goods. However, to allow domestic industries to determine whether certain imports are allowable is not reasonable because domestic producers would always oppose imports from abroad, especially processed products. Such a policy would further be detrimental to the consumer and would hinder industrial upgrading. Thus, the ROC authorities need to work out a plan for the full liberalization of imports from the

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[139] Article 5 of the ROC Regulations Concerning Management of Mainland Products (9 July 1989).

mainland based on the needs of industrial adjustments and consumer welfare.

The second issue is what safeguard measures should be employed by the ROC government to replace the current mechanisms. First of all, the ROC government may devise three sets of rules to protect itself against PRC products in line with three concerns: unfair trade practices, national security, and market disruption.[140] With respect to the "market disruption" concern, the ROC government has enacted a Foreign Trade Law which provides remedies for such a concern.[141] On a long-term basis, it would be more appropriate to utilize such a regime against the surge of imports from the PRC on a non-discriminatory basis. Prior to complete normalization of its trading relations with the PRC, the ROC government can follow the EC system in providing a transitional mechanism in response to PRC market reforms and other political considerations.

The EC has unilaterally promulgated certain internal rules to restrict imports from CPEs.[142] Council Regulation No. 1766/82 of 30 June 1982 provided that all products listed in Annex "A" may be imported without quantitative restrictions.[143] The list of

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[140] Compared with U.S.law, it provides clearer systems for such various concerns. *See* discussions of part IV(c) of this chapter.

[141] Article 18 of this law provides an escape clause for imposing import restrictions.

[142] In addition to safeguard measures against CPEs, Regulation 1765/82 of June 30, 1982 provided a negative list to restrict imports from all countries. *See* O.J. L 195/21, (1982).

[143] O.J. L 195/21, (1982).

products has been expanded since 1982.[144] In contrast, products not listed in the Annex are subject to import quotas.[145] Under such a mechanism, a positive list of products without restrictions would need to be compiled. Other products would be subject to quota restrictions. On a gradual basis, controlled products would be converted into permissible ones. Consequently, the number of controlled products would be reduced, and trade liberalization can be realized. Such a device is of course a compromise between the current regime and the liberal system and may have some disadvantageous impacts during the transitional period. Nevertheless, it would be more acceptable as a second-best solution for various interested groups in Taiwan.

V. CONCLUDING REMARKS

Based on the above discussions, we can appropriately conclude the following:

1. Judging from the past PRC and ROC economic performance, it is fair to say that the success of their economic reforms depends upon the implementation of their liberal economic and trade policies. Since 1950, the economic strength of Taiwan has increased as its economic policy has progressively been liberalized. The economic growth of the PRC before 1978, on the other hand, has not been as successful as that of the ROC because

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[144] Commission Notice 84/C 180/03 (O.J. No. C 181/21 (1984).

[145] O.J. L 28/34, (1985).

of the enormous government interventions in economic activities. In order to survive in a competitive global economy, both sides need to adopt a more liberal policy. However, because the PRC economy is centrally-planned, its government would need to devise a mixed economy rather than a liberal one.

2. Certain aspects of trade policies and systems of both sides have been inconsistent with GATT norms. For the ROC, a restrictive import policy, non-tariff barriers, and government procurement practices have been seriously challenged during bilateral negotiations between the ROC and other Western nations. For the PRC, import controls, export subsidies, transparency of trade rules, and foreign exchange controls have been criticized by foreign exporters. All these problems will be further examined in their applications for GATT membership.

3. In comparing the trade regimes of the PRC and the ROC, it can be found that PRC administrative controls on prices, allocation of foreign exchange, and the operations of foreign trade and state-owned enterprises are never wholly market-oriented. In order to protect its domestic market, the ROC government may consider adopting safeguard measures against the surge of low-priced products from the PRC. Nevertheless, such a measure would have negative political and economic impacts on their relations. Accordingly, the ROC government has to devise safeguard measures which can balance various political and economic interests.

4. Safeguard measures can be adopted through multilateral and unilateral mechanisms. On the multilateral level, if both sides

can participate in GATT without invoking Article XXXV, safeguard measures provided in Article XIX may be applicable for PRC-ROC trade relations. However, since such a clause can only be applied on a non-discriminatory basis, the ROC government may not adopt safeguard measures that are aimed only at products from the PRC. Another option for the ROC may be a selective safeguard measure, which authorizes Contracting Parties to adopt a discriminatory safeguard and quantitative restrictions against the PRC. This is subject to whether such a clause can be accepted in the PRC accession/resumption protocol for GATT.

5. Subject to its multilateral obligations, the ROC may implement unilateral safeguard measures against products from the PRC. In constructing its unilateral regime, the ROC government needs to devise a safeguard regime based on the needs of industrial adjustment and consumer welfare. A moderately liberal plan which sets up an increasing positive list of products open to trade without restrictions may be more acceptable to the ROC government in its progressive trade liberalization with the PRC.

CHAPTER FIVE

LEGAL ARRANGEMENTS FOR ROC-PRC ECONOMIC INTEGRATION

I. PROBLEMS

As supported by the liberalists' theory, trade liberalization is the best policy to achieve market efficiency and economic growth.[1] With trade liberalization, economic integration and interdependence can be formed. Trade relations between Taiwan and mainland China have attested to the effect of trade liberalization leading to a certain degree of economic integration between both sides.[2] In the future, economic integration between them would be further intensified if certain legal arrangements can be made to promote trade liberalization and reduce trade barriers.[3] Of course trade relations can be developed merely through market forces. However, without any formal legal arrangements, economic integration might move backwards[4] and trade disputes might not be smoothly resolved. Hence, in order to

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[1] Robert Gilpin, The Political Economy of International Relations (Princeton: Princeton University Press, 1987), at 171.

[2] In 1990, the volume of PRC-ROC trade accounted for 3.3% of the total ROC foreign trade, and 3.4% of the total PRC foreign trade.

[3] *See* H. Edward English, "*The Political Economy of International Economic Integration,*" Occasional Papers 22, School of International Affairs, (1972), at 2-3.

[4] Id., at 2.

further strengthen the legal structure of their trade relations,[5] both governments should consider using multilateral, regional and bilateral trade mechanisms. This chapter will analyze how these mechanisms can serve to strengthen ROC-PRC relations.

II. APPLYING GATT RULES TO PRC-ROC TRADE RELATIONS

The General Agreement on Tariffs and Trade ("GATT") is a multilateral mechanism which provides extensive and stable legal norms for regulating trade relations.[6] In order to apply the GATT rules to PRC-ROC trade relations, it is necessary to first determine whether the GATT rules are applicable to PRC-ROC trade relations. Only when certain prerequisites are duly met can both governments weigh the functions and limitations of the GATT rules. This section will be divided into three portions in addressing the above issues: the applicability, the functions, and the specific problems of the GATT rules in the promotion of PRC-ROC trade relations.

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[5] In the ROC government, the expansion of PRC-ROC trade relations is not supported by some officials who assert that such expansion would lead to economic dependence and a decrease in bargaining chips. However, most officials do not oppose the improvement of PRC-ROC trade relations through market forces.

[6] General Agreement on Tariffs and Trade, 30 Oct. 1947, TIAS 1700, 55 U.N.T.S. 187. For more information about the basic structure of the GATT, *see* John H. Jackson, World Trade and the Law of GATT (Indianapolis: The Bobbs-Merrill Co., Inc., 1969), at 29-32.

A. Applicability of GATT Rules to PRC-ROC Trade Relations

For the application of GATT rules, one has to first consider whether the PRC and the ROC can accede to the GATT, and whether both governments will invoke Article XXXV of the General Agreement to avoid the application of GATT rules to their trade relations. With respect to the first problem, both procedural and substantive issues may occur during their accession negotiations within GATT. Procedural issues will be discussed in the next chapter. Substantive issues, i.e., the consistency of their trade regimes with GATT rules, are the most critical obstacles for the accession of both governments, especially on the PRC side.

i. The Likelihood of Entering into the GATT

With respect to PRC's and ROC's applications for GATT membership, most Western nations respond positively. On the ROC side, Western nations welcome such an important trading partner to be actively involved in GATT activities and to be bound by GATT norms.[7] On the PRC side, Western nations also believe that its accession would meet the spirit of universality of the GATT,[8] and would be in their economic and political interests in dealing with

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[7] BNA, Int'l Trade Reporter, (1 Apr. 1992), at 599; (19 Feb. 1992), at 313-314.

[8] Id.; Jackson, infra note 36, at 898.

mainland China.[9] Most Western nations believe that PRC GATT status would encourage the PRC's continuing economic reforms and would help stabilize world trade relations through the enforcement of GATT regulations.[10] Nevertheless, Western nations would accept the ROC's and the PRC's accession or resumption with certain reservations. Concerning the ROC's application, it is understood that the ROC could not become a GATT member if the PRC continues to boycott such an application. Hence, the ROC's accession is subject to the consent sensitivities of the PRC government.[11] On the PRC side, Western nations are mostly concerned about the PRC's trade system and "human rights" record.[12] Especially on the "trade system" aspect, their concern is that the nature of the PRC economy, a centrally-planned economy, would further erode the GATT rules,[13] which are premised on the theory that trade activities are determined by market mechanisms. Such erosion would result in another "free rider" in the international trade system enabling the PRC to explore market opportunities abroad while its domestic markets are protected from foreign competition.[14]

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[9] Michael A. Bezney, "*GATT Membership for China: Implications for United States Trade and Foreign Policy*," 11 University of Pennsylvania Journal of International Business Law (1989), at 225.

[10] Id.

[11] BNA, supra note 7, at 599.

[12] Id., at 313.

[13] Bezney, supra note 9, at 197.

[14] I.M. Destler, American Trade Politics (Washington, D.C.: Institute for International Economics, 1992), at 52.

Two major issues have been highlighted at the negotiating table between the PRC and Western nations. The first issue is how Western nations can ensure that they will gain access to the PRC market.[15] Since import commitment has been opposed by the PRC government[16] and has proved unsuccessful following the accession of some East European nations,[17] Western nations might expect other measures, including tariff concessions, improvement on import licensing processes, and removal of import quotas and bans,[18] to gain access to the Chinese market. With respect to the issue of "market disruption", as described in chapter four, selective safeguard measures would be insisted upon by Western nations to prevent the surge of imports from the PRC.[19]

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[15] BNA, Int'l Trade Reporter, (18 Mar. 1992), at 479.

[16] Qin, "*China and GATT*," Harvard SJD Thesis, (1990), at 22 and accompanying footnote 22, statement of Mr. Shen Juren, Vice-Minister of Foreign Economic Relations and Trade, Head of Chinese Delegation at the Third Session of the GATT Working Party on China (Geneva, 26 Apr. 1988).

[17] Among all East European nations, Poland and Romania have made an import commitment. Annex B of the Polish Accession Protocol provides that Poland "shall undertake to increase the total value of its imports from the territories of Contracting Parties by not less than 7% per annum." B.I.S..D. 15S/52. Annex B of the Romania Accession Protocol also provides that "Romania, on the basis of mutual advantage which is inherent in the General Agreement, will develop and diversify its trade with Contracting Parties as a whole, and firmly intends to increase its imports from the Contracting Parties as a whole at a rate not smaller than the growth of total Romania imports provided for in its Five-Year Plans." B.I.S.D. 18S/10. In spite of such provisions, neither Poland nor Romania has honored its commitment. *See* Qin, supra note 16, at 37.

[18] These issues are also main topics of the PRC-U.S. trade negotiations. BNA, Int'l Trade Reporter, (8 Apr. 1992), at 635.

[19] *See* Chapter Four, part IV D.

In order to benefit from GATT as soon as possible, the PRC government has attempted to urge Western and some third-world nations to speed up its accession/resumption application screening process.[20] Nevertheless, Western nations insist that the PRC government should speed up its market reforms.[21] For example, the U.S. government has established a five-point framework as a condition precedent to the PRC's accession to the GATT: (1) the PRC government should set up a uniform trade regime to be applied throughout the PRC; (2) the PRC's non-conforming non-tariff barriers should be eliminated; (3) the PRC's trade system should reach a much greater degree of transparency; (4) the PRC government should specify its intentions concerning economic reforms; and (5) safeguard measures should be established under the GATT against PRC's exports.[22] It is obvious that Western nations expect to use the PRC's application as a leverage to push the PRC to improve its trade regime. In the author's view, such "leverage" process would be the best way to prevent the erosion of the GATT system, as well as to encourage market reforms in the PRC. Considering the PRC's current trade system, market reform

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[20] BNA, Int'l Trade Reporter, (1 Apr. 1992), at 598. The PRC expects to join GATT before the end of the Uruguay Round. After the Uruguay Round, a multilateral trade organization ("MTO") will be created and the process to join the MTO will become more complicated.

[21] Id.

[22] USGAO, GATT Treatment with Nonmarket Countries (Washington, D.C.: United States General Accounting Office, 1990), at 15.

would most probably take a much longer time than the PRC government expects before its application for accession or resumption is approved. Such delay would further hinder the ROC's application since the PRC government would not allow the ROC to accede to the GATT earlier than its accession/resumption.

Nevertheless, for the following reasons, the PRC and the ROC are likely to gain their GATT memberships in the long run. First, the PRC and the ROC governments have been exercising their respective political influences to gain support from other nations for their accession/resumption. Most responses from Western nations have been positive. Second, since early 1992, the PRC reformists have obviously won their political struggle against the conservatives in intensifying their need for market reforms.[23] Such a position has been further supported at the 14th Chinese Communist Party ("CCP") Conference.[24] Hence, in spite of little progress in the promotion of Chinese democracy, implementation of market economic reforms will be continued. Further, the PRC's increasing trade surplus with the EC and the U.S. will exert more pressures on the PRC government to open its market.[25] These elements at least can help the PRC government to build up a more "market-type" trade regime and specify its intention for economic

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[23] BNA, supra note 7, at 599.

[24] United Daily News [Taipei], 15 Oct. 1992, at 2.

[25] For example, because of its enormous trade imbalance with the PRC, the EC has urged the PRC government to improve its market accessibility. BNA, Int'l Trade Reporter, (18 Mar. 1992), at 479.

reforms. Other problems as highlighted in the U.S.'s five-point framework have also been gradually diminished during the U.S.-PRC trade negotiations. For instance, the U.S. and the PRC governments have concluded a memorandum concerning market access.[26] In such a memorandum, the PRC government has committed to improve its trade regimes respecting transparency, quantitative restrictions on imports, import substitution, standards and testing, as well as tariff reduction. The U.S. government has also consented to support the PRC's rapid attainment of GATT contracting party status. Accordingly, in the long term, the PRC's application for GATT membership will be accepted by Western nations. Further, ROC's accession will also occur upon the PRC accession/resumption.

ii. The Invocation of Article XXXV

Once the PRC and the ROC have become GATT members, they have to determine whether it would be in their interest for them to apply GATT rules in promoting their trade relations. If both governments believe that GATT norms will serve their political and economic interests, it would not be necessary to invoke Article XXXV of the General Agreement, i.e., to exempt their trade relations from GATT rules. There are two prerequisites for invoking Article XXXV: (1) the parties have not entered into tariff negotiations with each other; and (2) one of the contracting parties does not consent to the application of GATT.

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26 People's Republic of China-United States: Memorandum of Understanding Concerning Market Access, 31 I.L.M. (1992), 1274.

As to the first prerequisite, it is clear that the PRC and the ROC governments have never engaged in any official negotiations, including tariff negotiations.[27] With respect to the second prerequisite, if both governments intend to invoke such a provision, they may send a notice to the Secretariat of the GATT to specify their intentions to invoke Article XXXV.[28] It should be noted that such a provision can be invoked only upon the accession of a new Contracting Party to the GATT.[29] As a result, if the PRC becomes a GATT member by "resumption", rather than "accession", other governments cannot invoke such a provision towards the PRC.[30] In contrast, however, the ROC is to accede to the GATT rather than resume its GATT membership, hence, both the ROC and the PRC governments can invoke Article XXXV towards each other upon ROC's accession. In short, it can be concluded that there would be no critical legal issues concerning the invocation of Article XXXV upon ROC's accession.

Since Article XXXV is applicable, the next issue would be whether both governments should invoke such provision. In the view of both governments, the GATT rules would have various

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[27] For more detailed discussions on the first prerequisite, *see* John H. Jackson, World Trade and the Law of GATT (Indianapolis: The Bobbs-Merrill Co. Ltd., 1969), at 101.

[28] Id.

[29] Id.

[30] Qin, supra note 16, at 319.

impacts.[31] On the PRC side, the advantages of applying the GATT rules would be : (1) the PRC government may take advantage of the GATT norms to compel the ROC government to remove its trade barriers; (2) GATT can be a forum for the PRC government to negotiate trade activities with the ROC government which are not available because of their political tensions; (3) trade rules and dispute settlement mechanisms of the GATT would be appropriate instruments for the PRC government to arrange trade relations with the ROC government. Meanwhile, the ROC government can also take advantage of the GATT rules and the dispute settlement process in arranging trade relations with the PRC. It is worth noting that the rule-oriented approach of the GATT norms is especially advantageous to small countries in trying to resist political influences of a major trading power.[32] Since the ROC is weaker and smaller than the PRC in terms of its population, size and political power in the international arena, it might need the collective pressure of an international organization like the GATT to deal with the PRC government on a more fair and equal basis.

The disadvantages of applying the GATT rules to ROC-PRC trade relations mainly lie on the ROC side. The ROC government will

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[31] Generally speaking, four functions can be served through GATT mechanisms: (1) tariff negotiations, (2) codification of trade activities, (3) trade negotiation and dispute resolution, and (4) rule-making process. *See* J.G. Castel, et. al, The Canadian Law and Practice of International Trade (Toronto: Edmond Montgomery Publications, 1991), at 17.

[32] John H. Jackson, Restructuring the GATT System (New York: Council on Foreign Relations Press, 1990), at 48.

face challenges because of its trade restrictions against the PRC which do not conform to the GATT rules.[33] To cope with these challenges, the ROC government may invoke Article XXXV or apply exception clauses to justify its trade restrictions. The invocation of Article XXXV may prevent any challenges from the PRC government because of non-application of GATT rules. But, the ROC government will also be deprived of opportunities to arrange its trade relations with the PRC through the extensive and far-reaching GATT norms. Since normalization and legalization are long-term goals for the ROC government in its relations with the PRC,[34] it would be unwise not to take advantage of GATT rules to serve its long-term objectives. Nevertheless, if the ROC government still decides to invoke Article XXXV against the PRC upon its accession to the GATT, it may withdraw its invocation afterwards.[35] The rules under the General Agreement are always available for use in PRC-ROC trade relations. On a long-term basis, the ROC government should take advantage of the GATT rules to legalize and normalize its trade relations with mainland China.

iii. The Exception Clauses

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[33] For example, ROC's import restrictions against PRC products.

[34] According to "The Republic of China's Guideline for National Unification", the ROC government will allow direct trade and flights with the PRC. *See* Cheng-pang Chang, "*The Republic of China's Guideline for National Unification,*" Issues and Studies, (Mar. 1991), at 2.

[35] Jackson, supra note 27, at 102.

Exception clauses of the GATT provide another shelter for ROC trade restrictions against PRC's products. Articles XX and XXI of the General Agreement contain major exception clauses for national security concerns.[36] In practice, many economic sanctions have been justified by these clauses.[37] The dispute settlement panel under the GATT is also reluctant to intervene in trade disputes arising from security concerns.[38] Thus, based on Articles XX and XXI, the ROC government may maintain its trade restrictions against the PRC. However, it should be noted that the invocation of exception clauses is not a guarantee for removing any challenge to ROC's trade restrictions. The PRC government can still file a complaint with the GATT to bring international pressure to bear on the ROC government. Such a challenge would not necessarily be successful

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[36] Article XX, para. (f) of the General Agreement provides that a Contracting Party may ignore GATT rules to acquire or distribute products in general or local short supply. However, such measure should not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." In contrast to Article XX, exception clauses under Article XXI are subject to national judgment with similar restrictions. For more detailed discussions of exception clauses, *see* Jackson, supra note 27, at 741-752; John H. Jackson, The World Trading System (Cambridge, MA.: MIT Press, 1989), at 203-205.

[37] Jackson, supra note 27, at 205 and accompanying note 5, at 372. With regard to international economic sanctions, the U.S. government's position is that since Article XXI is subject to national judgment about national security, GATT rules will not be applicable to such matter.

[38] A preliminary panel report upheld the U.S.'s view and asserted that GATT's mandate did not allow the panel to consider whether an embargo conformed to the GATT rules. BNA, Int'l Trade Reporter, (1986), at 1368; GATT, GATT Activities 1987 (Geneva: GATT, 1988), at 69-70.

before a GATT panel. However, it might be an instrument which the PRC government will employ to arouse public discussion in the international business community concerning ROC's trade restrictions against PRC products. Moreover, the PRC government may argue that the current ROC trade restrictions are not all devised for security or external policy concerns. Some are provided to protect ROC domestic industries.[39] Consequently, the ROC's trade restrictions would not be totally exempted from challenges for being not totally conforming to the GATT rules.

In this author's view, trade liberalization should be a long-term approach to improve PRC-ROC trade relations. Any restriction solely for economic purposes[40] would certainly be challenged and cannot last long, particularly when an enormous trade surplus on the ROC side becomes an excuse for the PRC government to either restrict its market against ROC products or request the ROC to open its market on a reciprocal or fair basis. To avoid such tensions, the ROC government needs to consider removing its restrictions against PRC products on an extensive basis, especially those imposed merely for protecting its own industries.

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[39] For example, the PRC government can assert that the ROC government prohibits the importation of PRC consumer products, which is not relevant to security concerns.

[40] In general, GATT rules prohibit devices employed by states to gain economic advantages for their products over the products of the states. ALI, Restatement of the Law, the Foreign Relations Law of the United States (St. Paul: American Law Institute, 1987), at 307-308.

The GATT rules have provided a reasonable basis for both the PRC and the ROC to arrange their trade relations. Concerning its special security concerns, the ROC government can resort to Articles XX and XXI in trying to maintain its certain trade restrictions. In particular, Article XXI of the agreement, which is the most broad, ambiguous, and self-judging provision, can be employed by the ROC government in defending its restrictions against PRC products.[41] In sum, to some extent, the ROC trade regime concerning its trade with the PRC has to be restructured if the ROC desires to accede to the GATT without invoking Article XXXV, but with only invoking exception clauses for trade restrictions. Nevertheless, it should also be regarded as a good opportunity for the ROC government to restructure its mainland policies and regulations on a more liberal and normal basis if only exception clauses are invoked.

B. Effects of GATT Rules on a Centrally-Planned Economy

How the GATT rules can actually help reform the PRC toward a market-type economy would be another concern for the ROC government. If the PRC economy cannot be restructured and administrative controls cannot be reduced in order to conform to GATT norms, the ROC government might need to maintain certain trade restrictions on PRC products so as to avoid its own market

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[41] Jackson, supra note 36, at 204.

disruption. Understandably, any impact of the GATT rules on the PRC economy can only be speculation, especially in consideration of potential political developments within the PRC. Nevertheless, the author still predicts, on the basis of the experience of East European nations concerning their GATT activities, that the GATT rules would have a positive impact on the PRC economy.

i. Experiences of East European Nations as Members of GATT

The performance of East European countries as members of GATT is not necessarily a means for us to predict the future participation of the PRC because of their different domestic political situations. However, because of their similar natures of centrally-planned economies, to a certain extent, the problems of integrating East European economies into the world economy will most probably be repeated with the PRC.

The General Agreement is a formal arrangement for economic integration among the contracting parties.[42] Mechanisms of the GATT are devised to support liberal trade through minimizing the amount of governmental interventions in trade flows crossing national borders.[43] Centrally-planned economies, as those existing in past East European nations and current mainland China, are based on administrative controls in breach of the spirit and rules

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[42] English, supra note 3, at 2.

[43] Jackson, supra note 36, at 8.

of the General Agreement. Nevertheless, because of the relatively small size of their economies, the accession of some East European nations has been tolerated by Western nations.[44] Specific terms have been provided in their Accession Protocols.[45] With respect to the issues of market access, East European countries have agreed to either import commitment[46] or tariff reductions.[47] Such devices have been proved unsuccessful in the adjustment of their economies toward market ones. Import commitments have not been honored[48] or calculations of an accurate figure of the imports committed turned out to be difficult. The trade volumes between the East European and West European countries have not substantially increased.[49] Trade regimes of these CPEs have not been reformed thoroughly to conform to the GATT.[50] The strategic aims of Western nations to

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[44] John H. Jackson, "*State Trading and Non-market Economies,*" 23 The International Lawyer, (1989), at 894.

[45] Protocol for the Accession of Poland, B.I.S.D., 15S/46; Protocol for the Accession of Romania, B.I.S.D., 18S/5; and Protocol for the Accession of Hungary, B.I.S.D., 20S/3.

[46] *See* Qin, supra note 16,at 37.

[47] *See* Protocol for the Accession of Hungary, B.I.S.D., 20S/3.

[48] *See* Qin, supra note 16, at 37.

[49] For example, from 1966 to 1984, U.S.'s trade with East Europe has never exceeded 2% of its total trade. In 1966, export and import with the East was 0.7% of its total trade. In 1984, export to East Europe was only 1.9% of its total export, and import was 0.7% of its total import. Henry R. Nau, The Myths of America's Decline (Oxford: Oxford University Press, 1990), at 296.

[50] This can be proved by the recent extensive market reforms of the East European nations. EEC, The European Community and its Eastern Neighbours (Luxembourg: Office for Official Publications of the European Community, 1990), at 19.

break up the Eastern bloc merely through GATT arrangements have not been realized, although international economies may have played a part in the breakup of Eastern Europe. Experiences of the East European countries as members of the GATT do not provide successful examples of transforming a CPE to an ME, at least prior to their political reforms in the early 1990s.

ii. Chances of Success for GATT Rules to Transform PRC's Economy

Experiences of the East European nations tell us that there does not seem much hope for the GATT norms to transform the PRC's economy successfully. Moreover, the PRC's political and economic structures, characterized by domination by the communist party and state enterprises[51], make the transformation more difficult. Nevertheless, there also exist counter-arguments which are optimistic about Chinese reforms. First of all, market reforms of the East European nations after their accession to the GATT have never been actually implemented. As a result, GATT rules cannot be sensibly applied to their economies. In contrast, economic reforms in China since 1979 have proved successful in the removal of controls on prices, foreign exchange and foreign trade.[52]

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[51] In the PRC Constitution, the Communist Party is placed as the dominating party of the PRC. *See* the Preamble of the PRC 1982 Constitution.

[52] Mario Blejer, China:Economic Reform and Macroeconomic Management (Washington, D.C.: International Monetary Fund, 1991), at 2-11.

Combined with Chinese leaders' willingness to deepen the economic reform, the GATT rules would have a more extensive impact on the PRC than those on the East European nations. Second, GATT rules have often been relied upon by Western nations in negotiating with the PRC government to remove trade barriers. Recently, in line with standards under the GATT rules, the U.S. government has obtained the PRC's commitment to the removal of the two-third import licensing requirement, the establishment of transparent trade rules and disclosure of its import quotas and bans.[53] The GATT rules have been instrumental in forcing the opening of the PRC market.

To deal with a transforming CPE, like the PRC, it would be unwise to be too optimistic or too pessimistic. The GATT norms would have an impact on the transformation of the PRC economy. Nevertheless, PRC's full compliance with GATT principles and regulations would require a long period of time. In such a situation, the ROC government needs a plan to gradually remove its own trade restrictions on PRC products subject to PRC reforms and join the efforts of the Western nations to force the transformation of the PRC economy into a market one.

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[53] BNA, Int'l Trade Reporter, (4 Mar. 1992), at 386-388.

C. Specific Issues of Applying GATT Rules to PRC-ROC Trade Relations

Upon the accession to the GATT or resumption of GATT membership, the PRC and the ROC will face challenges on the trade barriers toward each other. On the ROC side, its trade restrictions against the PRC need to be justified under GATT exception clauses. Since exception clauses for security concerns are subject to national judgment, the ROC government would not be impelled to change its trade restrictions. On the PRC side, its trade regime with strong administrative controls is more problematic. Because of the nature of its economy as a CPE, the PRC would encounter many challenges, touching on areas such as import monopoly,[54] quantitative restrictions,[55] monopoly of state enterprises,[56] foreign exchange control,[57] price control on imported goods,[58] import licensing requirements and bans,[59] import substitution,[60] technical standards,[61] insufficient transparency of trade regulations,[62] and unfair trade practices.[63] To resolve these

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[54] Qin, supra note 16, at 215.

[55] Id., at 220.

[56] Id., at 236.

[57] Id., at 233.

[58] Id., at 255.

[59] Id., at 225.

[60] Id., at 257.

[61] Id., at 258.

[62] Id.,at 272.

problems, the Western nations would encourage the PRC government to strengthen its trade regime as a prerequisite of its resumption or accession to the GATT. Moreover, the gradual process of its accession or resumption would maximize the PRC's efforts for further reforms.[64] Upon its formal accession/resumption, an annual policy review would be necessary for negotiations between the PRC and other contracting parties.[65]

Two specific issues arising out of the application of GATT rules to PRC-ROC trade relations involve their special political relations. The first issue concerns the tariff treatments of both governments toward each other's products. Under the PRC's policy, imports from Taiwan are not subject to customs duties because, in the PRC's view, Taiwan is only a province of the PRC, and products transported domestically are not subject to customs duties.[66] In the ROC's view, although its government also agrees with the one-China policy, products from the PRC are still subject to customs duties. It asserts that goods transported across the Taiwan Strait would also be deemed goods crossing a national border. In

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[63] Id., at 327.

[64] Jackson, supra note 44, at 899.

[65] Such a device has been employed for Hungary's, Poland's and Romania's accessions into the GATT. *See* supra note 45.

[66] Under the PRC legal system, products directly transported from Taiwan are not subject to customs duties, but are subject to a special adjustment tax. Products indirectly transported from Taiwan are subject to customs duties. *See* China Taxation Research Association, ("CTRA"), Mainland Tax Affairs Reporters (Taipei, CTRA, 1991), at 180.

the author's view, the ROC's position can be justified under the GATT rules. Within the General Agreement, Contracting Party is a basic unit of the GATT members, and what a Contracting Party represents is a customs territory, rather than a nation.[67] Further, a Contracting Party is an effective government representing such customs territory, rather than a nation.[68] Since the PRC and the ROC governments are de-facto separate and represent individual customs territories, there is no reason why one of the governments cannot impose customs duties on products from the other. In actual practice, customs duties are a major means for an ME to protect its domestic industries. The ROC government would not want to change its tariff treatment with respect to PRC's products solely for political or ideological reasons.

The second issue is related to the first one, i.e., whether a most-favoured-nation treatment clause should be applied to PRC-ROC trade relations. Under the PRC trade regime, ROC products have been granted preferential treatment without having customs duties imposed. These measures have been criticized by certain Western commentators. If the PRC-ROC trade is regarded as domestic trade, any privilege, immunity or other preferential treatment imposed by

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[67] Cf. Article XXXIII and XXIV of the General Agreement. Jackson, supra note 27, at 87. In Art. XXIV, para. 2, a customs territory is interpreted as "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories."

[68] Id. Hong Kong, which is not a state, acceded into the GATT on 23 April 1986. Accession of Hong Kong Succession, GATT Doc. L/5976, see B.I.S.D. 34b/27.

the PRC or the ROC government towards each other's products would not necessarily be granted to products from the territories of all other contracting parties.[69] However, according to the above-mentioned theory, the PRC and the ROC should be treated as separate territories. As a result, neither the PRC or the ROC government should grant preferential treatment to each other's products without invoking exception clauses in the GATT,[70] since most-favoured "nation" treatment, as a non-discriminatory measure, should be applied universally not only to any "country", but also to any "territory"[71] of the GATT.

III. REGIONAL MECHANISMS FOR PROMOTING PRC-ROC TRADE RELATIONS

Regional mechanisms have been used as supplementary instruments for promoting economic integration among nations with geographic proximity.[72] Considering the rapidly increasing intra-Asia trade and the establishment of economic institutions among trans-Pacific nations, there is a great potential for regional mechanisms to be established to promote economic integration among

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[69] Cf. Article I of the General Agreement.

[70] In order to be exempted from GATT rules for granting certain preferential treatment to a Contracting Party, it is necessary to justify such treatment to conform to Article XXIV or to obtain a waiver from the GATT.

[71] *See* supra note 67.

[72] For most countries, particularly North American and Asian nations, regional integration mechanism is only a supplementary mechanism for promoting their global trading activities. See BNA, Int'l Trade Reporter, (20 May 1992), at 903.

Asian nations. Since both the PRC and the ROC are major trading nations in this area, the formation of a regional trade bloc and its mechanisms would affect their economies and trade relations. To cope with such challenges, both governments need to consider how regional trade activities and mechanisms for the expansion of their export-led growth can be established and carried out in their best interests. The following discussions will focus on three relevant issues: (1) the development of Asian-Pacific economic cooperation, (2) the feasibility of establishing a regional mechanism for the economic integration of East Asia, and (3) the impacts of regional mechanisms on PRC and ROC trading activities.

A. Developments of Economic Cooperation in the Asia-Pacific Region

In spite of rapidly increasing intra-Asian trade, formal arrangements for economic cooperation in the Asian-Pacific region have lagged behind other areas. Early proposals for Pacific cooperation date back to the 1960s. Responding to European integration, in 1967, the Japanese Prime Minister Miki suggested the establishment of a "Pacific Free Trade Area" or "Pacific Economic Community."[73] However, considering the economic and political diversities within this region, the general opinion was

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[73] See Fu-chen Lo and Kamal Salih, The Challenge of Asia-Pacific Cooperation (Kuala Lumpur, Malaysia: the Association of Development Research and Training Institute of Asia and Pacific, 1987), at 25.

that such an organization should be nongovernmental in form. Consequently, the Pacific Basin Economic Council ("PBEC"),[74] a self-financing business-based group, and the Pacific Trade and Development Conference ("PAFTAD"),[75] an academic professional organization, were separately set up in 1967 and 1968 respectively. In the 1980s, Japanese Prime Minister Ohira initiated the concept of "Pan-Pacific solidarity" to formulate a "Pacific OECD" for drawing the U.S. attention from the Atlantic to the Pacific, resolving the conflicts between Japan and North America, and coordinating the actions of regional demands.[76] The Pacific Economic Cooperation Conference ("PECC"), attended by the U.S., Japan, Canada, Australia, New Zealand, NIEs, ASEAN members and three South American nations, was the first of its kind to be held and attended by governmental representatives in an informal capacity, along with those from private business and academicians, toward the mode of the OECD.[77]

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[74] For more information about the activities of PBEC, see H. Edward English, "*An O.E.C.D. of the Pacific? A Canadian Perspective*," Working Paper of the Asian Pacific Research and Resource Centre, (1990), at 7.

[75] Id, at 7-10; Richard Higgott, "*Cooperation-Building in the Asia-Pacific Region: APEC and the New Institutionalism*," Australian-Japan Research Paper, (September 1991), at 8; Donald Crone, "*The Politics of Emerging Pacific Cooperation*," Pacific Affairs (1992), at 69.

[76] Higgott, id, at 9; H. Edward English, Tomorrow the Pacific (Toronto: C. D. Howe Institute, 1991), at 10-13; English, id, at 11-14.

[77] Crone, supra note 75, at 70.

The first real inter-governmental arrangement among Asian-Pacific nations was initiated by the Australian Prime Minster Hawke with the assistance of Australian National PECC Committee.[78] Five Pacific industrial nations plus ASEAN members began their regional economic consultations in Canberra in 1989[79] and in Singapore in 1990.[80] Three Chinese economic entities, the PRC, the ROC, and Hong Kong, later joined this regime at the Seoul meeting in 1991.[81] In 1993, the U.S. President, William Clinton, also

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[78] Dick K. Nanto, Asia-Pacific Economic Cooperation and U.S.-Japan Relations in Economic Cooperation in the Asia-Pacific Region, ed. by John P. Hardt and Young C. Kim (Boulder, Co.: Westview Press, 1990), at 58.

[79] On the agenda of the 1989 consultations were such major issues as regional cooperation, development and liberalization. A loose joint-statement was issued to support the Uruguay Round talks. See Higgott, supra note 75, at 10-11.

[80] At the Singapore meeting, the talks were on such issues as the new members and specific projects for cooperation. See Higgott, id, at 12.

[81] At the 1991 Seoul meeting, attending ministers issued two joint-statements. One was to emphasize the importance of the success of the Uruguay Round talks. Another one was to address new membership issues, which had to be resolved by all members unanimously. With respect to the future activities of the APEC, four principles were consented to. First, members agreed to continue consultations and exchange information. Second, members agreed to reduce trade barriers in order to facilitate movement of goods and services. Third, trade, investment, human resource development and technology transfer within the Asia-Pacific region will be encouraged. Fourth, members will cooperate in specific areas, like energy, environment, fishery, transportation, tourism, and telecommunications. World Journal [Toronto], 15 Nov. 1991, at 2; After the Seoul meeting, ten working groups were organized, namely trade promotion, expansion of investment and technology transfers, human resource development, regional energy cooperation, marine resource conservation, telecommunications, transportation, data, tourism and fishery. James A. Baker, III, "*America in Asia: Emerging Architecture for a Pacific Community*," Foreign Affairs, (Spring 1992), at 6.

initiated an informal summit meeting in Seattle. The agenda and purposes of the Asia Pacific Economic Conference are limited to only economic consultation for promoting project-based cooperation. The U.S. government strongly opposed the formulation of such a regime to become a regional economic bloc.[82] As a result, the APEC did not put the regional integration programs and institutional arrangements on the negotiating table. Partially because of the unsatisfactory progress of the APEC developments, the Malaysian government suggested the establishment of the East Asian Economic Grouping ("EAEG") to strengthen the integration process among East Asian nations, but excluding the U.S., Canada, Australia and New Zealand.[83] Since such an initiative was purported to counter the Western regional bloc, the U.S. government brought heavy pressure to bear on the Japanese government to reject the sugges73tion. Although the EAEG was apparently eliminated, the Malaysian government still encouraged its ASEAN neighbors and Japan to accept a pure East-Asian arrangement as a lever against other trade blocs in the world.[84]

ASEAN members later proposed economic cooperation among themselves. At the ASEAN leaders' meeting in Singapore in 1992, ASEAN members agreed to set up a "free trade area" scheme within

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[82] Baker, id, at 6-7.

[83] Crone, supra note 75, at 77 .

[84] World Journal [Toronto], 24 Oct. 1991, at 39. Another proposal which has been raised to encourage East Asian Economic Cooperation is the East Asia Economic Caucus.

Southeast Asia from 1993 and to complete the set-up within fifteen years.[85] Since the purpose of this program did not directly impair U.S. interests, the U.S. government did not oppose it and, in contrast, welcomed such arrangement to strengthen ASEAN cooperation and to reinforce U.S.-ASEAN economic relations.[86]

B. Feasibility of Establishing A Regional Integration Program in the Asia-Pacific Region

Economic cooperation in the Asia-Pacific region has been advocated for decades. Considering the polarization of the world economy, the task of strengthening cooperative programs and cultivating their collective power in Asia is becoming more urgent. Asian-Pacific economic programs can be formulated in two kinds of schemes: OECD-type or integration program. APEC was designed in an OECD mode to serve the following purposes: (1) to create a forum for members to conduct consultations and coordination, (2) to propose projects in any specific field for cooperation, and (3) to establish an institution to monitor the macro-economic policy of member states and to compile and circulate economic information.[87] Such type of arrangement has

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[85] Id, 20 July 1992, at 5.

[86] Baker, supra note 81, at 8.

[87] Cf. Art.3 of the Convention on the Organization for Economic Cooperation and Development, 88 U. N. T. S. (14 Dec. 1960), 179.

its limitations. Because of its loose structure and institutional arrangement, it can only serve the informal advisory function, and does not have the authority to force member states to adopt certain economic policies, or to reduce certain trade barriers, let alone to limit their sovereignty concerning a specific trade measure. Since no coherent policy was adopted, exercise of collective power through such an arrangement was not expected. Accordingly, economic integration among member states will rely on market forces rather than such a coordination scheme.

An OECD-type of economic program cannot satisfy the needs of certain East Asian nations which hope to integrate Asian economies more closely to cope with the polarization of world economies. However, a substantial integration program among the East Asian nations will involve many economic and political variables. The following discussions attempt to present arguments for and against an integration program among the nations of East Asia.

i. Pros for an Integration Program

A regional program for promoting economic integration among the East Asian nations can reflect the regional interests and become complementary to the world trade system.

First of all, increasing intra-regional trade and investment would connect East Asian economies more closely and would require certain arrangements to strengthen such connections. In 1990, intra-Asian merchandise export reached 45.5% of Asia's total exports. In contrast, exports to North America only accounted for

26.5%. From 1985-1990, the average annual increase in intra-Asian exports was 16.21%, and exports from Asia to North America, 9.5%.[88] Intra-Asia investment has also increased in recent years. For example, from 1986 to 1989, investment from Japan and the NIEs to the Southeast Asian nations accounted for about 60 percent of their approved investments.[89] Such data show that intra-Asia trade volume is increasing and that their economies will become less dependent on the North American market. To cope with such changes, the East Asian nations need to consider structuring a new arrangement that reflects their common concerns and that helps each East Asian nation in carrying out their economic adjustment. For example, a "free trade area" arrangement can accelerate the process of trade liberalization among the members and, accordingly, every nation can develop its own economy more efficiently if its comparative advantages can be put to use in the best interest the nation.

Second, to cope with the tripolarization of the world economy, the East Asian nations need a counter arrangement as a bargaining chip to expand their market to other trade blocs.[90] It has become more and more clear that North America and West Europe

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[88] GATT, International Trade, 90-91 (Geneva: GATT,1992), at 30.

[89] James Riedel, "*Intra-Asian Trade and Foreign Direct Investment*," 9 Asian Development Review (1991), at 141; ADB, Asian Development Outlook 1991 (Manila: Asian Development Bank, 1991), at 46.

[90] Crone, supra note 75, at 73.

have relied on non-tariff, discriminatory trade restrictions to protect their domestic markets and have resorted increasingly to bilateral and regional arrangements to promote trade liberalization.[91] The prospects of Asian exports to the Western market have therefore become more and more difficult to predict, although the Western market generates two-thirds of the world's gross domestic product. Under such a situation, the East Asian nations have to expand their own markets and accelerate the integration process. Only when a preferential arrangement among these nations is made can intra-regional trade and investment be promoted and their economic development and market potentials enhanced, thereby contributing to their collective economic prosperity. Further, such an arrangement can be used as a lever to bargain with the Western nations to reduce trade barriers simultaneously. In other words, such an arrangement can not only benefit the East Asian nations by their economic integration, but also expand liberal trade globally.

Third, a regional arrangement can liberalize trade more efficiently and, therefore, can be complementary to the GATT system. The General Agreement has been very successful in reducing tariff barriers and promoting world trade. However, in recent years, GATT negotiations have faced difficulties in attempts to liberalize world trade, especially in the area of non-tariff

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[91] Riedel, supra note 89, at 146.

barriers and among certain sectors of products,[92] e.g., agricultural produce and textiles. The U.S. government has been reluctant to play a leadership role at the GATT, and the EC and Japan are not very willing to liberalize their domestic markets globally. In light of all these troubles in the world trade system, the East Asian nations do not expect the GATT to expand the world economy efficiently. Instead, they are facing more and more import restrictions on their products. A regional arrangement can be complementary to the GATT system. The East Asian nations can liberalize their trade regionally with fewer conflicts and more benefits. This is especially true when most of the East Asian nations, as developing countries, have been exempted from GATT obligations. With a regional arrangement, their trade regimes can be restructured on a more reciprocal and liberal basis. Failure of the GATT system will most probably provide an opportunity for the East Asian nations to liberalize their trade systems more efficiently.

Fourth, a regional arrangement may operate to avoid military conflicts in the East Asian region. In this area, military tensions may erupt because of ideological conflicts and territorial controversies such as the political tensions in the Korean Peninsula[93] and the Taiwan Strait as well as the territorial

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[92] Destler, supra note 14, at 53; Jeffrey J. Schott, The Global Trade Negotiation: What Can Be Achieved? (Washington D. C.: The Institute for International Economics, 1990), at 5.

[93] For further discussions about the security issues of Asia-Pacific region, *see* Gerald Segeal, "*North-East Asia: Common Security or A La Carte?*" International Affairs (1991), at 6-9:

issues in the South China Sea.[94] Following the retreat of the U.S. military from Asia and the reduction of its defense budget,[95] the Asia-Pacific security structure badly needs to be strengthened through a collective process. It seems too early to build up a regional institution, like NATO, to deal with the security issues. However, the experiences of West Europe tell us that regional economic integration programs may operate to create positive bonds among the members, and hence, regional security can be further enhanced.[96] Regional economic integration in East Asia can especially awaken the interest among the East Asian nations for pursuing common interests through peaceful means. At least, it can provide Asian nations with a forum for consulting each other and for resolving regional conflicts. Moreover, economic cooperation may be expanded to defense consultation. A case in point is the ASEAN which recently started to address their security issues collectively.[97] The Asia-Pacific region has been suffering from military confrontations for centuries. A functional approach for addressing economic issues will be to provide the area with security and peace.

Young Koo Cha, "*The Changing International Order and Northeast Asia in the 21st Century,*" Korea and World Affairs, (Winter 1991), at 650-656.

[94] Baker, supra note 81, at 2.

[95] Kim, supra note 78, at 647-650.

[96] Lo, supra note 73, at 23-24.

[97] World Journal (Toronto), 20 July 1992, at 5.

A regional economic program need not necessarily be in the form of a free trade area or common market. However, a preferential arrangement for this area can help to quicken its trade liberalization and economic integration. A real Asian community should therefore be established to ease regional concerns and to promote stability in a more efficient manner.

ii. Cons for an Integration Program

The prospects of organizing a regional integration program heavily hinge on the attitudes and interests of member states of the regional community.[98] It is clear that the Asia-Pacific nations have yet to reach any consensus on their regional identity and how the issues of their region can be tackled. For the following reasons, it would be premature to implement an integration program at the current stage.

First of all, in this region, enormous economic disparities and political diversities still prevail.[99] The per capita GNP of the haves is more than three hundred times higher than that of the have-nots. Political pluralism and democracy only exist in a few nations, and most of the Asia-Pacific nations are still being controlled by authoritarian regimes. Within such political-economic environments, regional consensus for the establishment of an integration arrangement is difficult to reach.

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[98] English, supra note 76, at 8.

[99] Crone, supra note 75 at 69.

Further, a regional integration program or trade bloc is opposed by the U.S.[100] Since most of the East Asian nations maintain close economic relations with the U.S., the establishment of such a program without the involvement of the U.S. is expected to face substantial political pressures. Third, an integration program has to be built up in a liberal trade environment. Unfortunately, most of the East Asian nations have not sufficiently liberalized their trade regimes.[101] The trade regimes of some of the nations are still centrally controlled, and other market-type economies remain insulated from foreign competition. It will take at least decades before these trade barriers can be torn down, not to mention the problem of impairing the sovereignty of many nations.

In short, the economic integration of East Asia will mostly rely on market forces. A formal arrangement among the East Asian nations would be unsuccessful without the strong political support and sacrifice of sovereignty by its members.

iii. Prospects for an Integration Program

The first and foremost choice for the East Asian nations to explore their economic future would be to join a multilateral arrangement,[102] as it would help them expand their economies and

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[100] Hardt, supra note 78, at 118.

[101] Lo, supra note 73, at 16.

[102] English, supra note 74, at 5-6.

boost their exports. However, in light of their current export destinations[103] and pluralistic cultures and development conditions, there does not seem to be any prospects for a regional trade bloc to be soon established. Nevertheless, should the world trade system break down, the East Asian nations will certainly face a more inward-looking West Europe. Under such circumstances, the second best choice would be to strengthen an Asia-Pacific economic group.[104] Considering the increasing trade between North America and East Asia[105] and the latest APEC performance, an Asia-Pacific economic group or arrangement should be able to match the trade powers of an expanding European group.

Nevertheless, should the economy of North America move inwards or should it proceed to integrate Latin America through any preferential arrangement, the importance of trans-Pacific trade would be reduced. Under such a situation, the third best choice would be to make a preferential arrangement among the East Asian nations to counter other trade blocs. Naturally, it would be not an easy job to integrate East Asian economies in different stages of economic developments and facing complicated political situations. However, the East Asian nations can initiate their

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[103] In 1990, 45.5% of Asian products were exported to Western Europe and North America. See GATT, International Trade, 90-91 (Geneva: GATT, 1992), at 30.

[104] BNA, Int'l Trade Reporter, (20 May 1992), at 903.

[105] The volume of trans-Atlantic trade accounted for 7.3% of the world trade, while intra-Pacific trade accounted for 9.8% of the world trade in 1990. GATT, supra note 103, at 10.

economic integration within a limited scope and long transitional period. For example, a free trade area agreement focusing on the reduction of tariffs would offer less intrusion on the sovereignty of member states and its institutional arrangement would be much simpler.

Both the PRC and ROC should take advantage of their successful accession to the GATT, once realized, to diversify their export markets, or rely on an enlarged Asia-Pacific economic group in tapping their major export markets in the U.S. and East Asia. If such expectations fail , they would have to make more efforts to integrate their economics with their Asian neighbors. Under such circumstances, they would have to weigh the impact of a regional integration program on their economies.

C. Impacts of a Regional Integration Program

Understandably, a regional integration program or a preferential arrangement among the East Asian nations would produce economic and political impacts on both the PRC and the ROC. Economically, both countries would need to adjust their trade and investment objectives. For the PRC, its exports to other Asian nations account for two-thirds of its total exports,[106] while, for the ROC, products exported to Asian nations are less

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[106] In 1989, PRC exports to Asia accounted for 64.49 % of its total exports. See Almanac of China's Foreign Economic Relations and Trade (Hong Kong: the Editorial Board of the Almanac of China's Foreign Economic Relations and Trade, 1991), at 351.

than 50% of its total exports.[107] Since the East Asian nations cannot consume all the products of both nations, the formation of regional trade arrangements would exert substantial negative impacts on the economies of both the PRC and the ROC. However, on the other side, a preferential arrangement among the East Asian nations would also have its positive effects. First, such an arrangement would encourage trade liberalization in the region, and in particular the PRC economy would be so transformed as to become more market-oriented. In short, the Asian economy would be expanded. Second, both the PRC and the ROC would be able to take advantage of such an agreement to secure their respective access to the East Asian market. Third, a regional arrangement can be complementary to the GATT system. It can modernize and revitalize the world trade system, and fulfil certain special regional needs.

Politically, a regional arrangement can operate to place economic pragmatisms into political negotiations, thereby reducing ideological conflicts, which would benefit the ROC in the sense that it would create a peaceful atmosphere in the Taiwan Strait. In contrast, absence of a regional arrangement would increase the opportunities of confrontations between the PRC and the ROC, which would not only cripple their own economic strength, but would also greatly concern their neighbors. Therefore, a

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[107] In 1990, ROC exports to Asia only accounted for 49.4% of its total exports. Central Bank, Central Bank Yearbook (Taipei: Central Bank, 1991), at 68.

regional economic integration program can be said to have the benefit of drawing the attention of the East Asian nations to the importance of promoting their regional security and common economic interests. Secondly, through a regional cooperative program, both the PRC and the ROC can exercise their regional influence in a more efficient manner. More specifically, the PRC can use it as a lever to counter balance the U.S. influences in the region, whereas the ROC can cooperate with the ASEAN nations to play the part of a middle power to counter balance the PRC and Japanese influences. As a result, the Asia-Pacific region can maintain peace and security through a balance of powers. To the extreme, the East Asian nations can expand the regional program to harmonize the Asian community politically, economically and socially in the future.

IV. BILATERAL AGREEMENTS FOR PRC-ROC TRADE RELATIONS

A. Theories of Bilateral Economic Treaties

i. Practices of Bilateral Trade Agreements

Commercial treaties have been used to develop bilateral commercial relations for centuries.[108] Between two market economy ("ME") nations, friendship-commerce-navigation ("FCN") treaties have been the most important commercial treaties since the 1930s.[109] Postwar FCN treaties are different from the old ones

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[108] *See* John H. Jackson, World Trade and the Law of the GATT (Indianapolis: The Bobbs-Merrill Co., Inc., 1969), at 250-251.

[109] *See* John H. Jackson, Legal Problems of International Economic Relations (St. Paul Minn.: West Pub. Co., 1986), at 230.

which aimed at the promotion of trade and shipping[110]. The newer ones recognize the rights to establish companies in one country of the contracting parties and encourages foreign private investment.[111] In general, such FCN treaties provide the rights of entry for business and residence, protection and rights of individuals and companies, and trade dispute resolution.[112] With the establishment of the GATT in 1948, a multilateral arrangement served major functions of liberalizing world trade and provided a forum and principles for trade negotiations. Nevertheless, the importance of bilateralism has never diminished because of the creation of multilateralism. Many nations have concluded preferential agreements for promoting economic integration, including the bilateral Free Trade Area Agreement and Customs Union.[113] With respect to encouragement and protection of

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[110] Id, at 232.

[111] Id.

[112] Id, at 258.

[113] Since 1948, many preferential trade arrangements have been reported to the GATT. The first case is the France-Italy Customs Union Interim Agreement, GATT/CP.3/9. In the early history of preferential arrangements, they were mostly concluded within West Europe. Recently, North American, Oceanic and developing nations have also engaged in close economic integration. For example, Canada-United States Free Trade Agreement (FTA), H.R. Doc. No. 216, 100th Cong., 2nd Sess. 297 (1988), reprinted in 27 I.L.M. (1988), 28; Australia-New Zealand Economic Relations Trade Agreement, reprinted in 22 I.L.M. (1983), 945-1016; United States-Israel Free Trade Area Agreement, reprinted in 24 I.L.M. (1985),657. For further discussions, see Jeffrey J. Schott, More Free Trade Areas (Washington D.C.: Institute for International Economics, 1989), at 63-69.

investment, the U.S. and West European nations have entered into bilateral investment treaties ("BITs") with developing countries to set up a free and open international investment climate without governmental distortions.[114]

So far only a negligible few trade agreements with a loose framework for promoting trade have been concluded between a market economy and a centrally-planned one.[115] Before 1990, such agreements generally followed the GATT principles in granting most-favoured-nation status for each of the Contracting Parties, though some safeguards for protecting the markets of the ME have been provided.[116] In the wake of democratic reforms in the East European nations, the U.S. and the West European nations have made more active efforts to develop economic relations with the East European nations. The West European nations have taken strong interest in developing close links with their Eastern neighbors and went beyond normalization to assist them in "rejoining

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[114] Eleanor Roberts Lewis, "*The United States-Poland Treaty Concerning Business and Economic Relations: New Themes and Variations in the U.S. Bilateral Investment Treaty Program,* " 22 Law & Policy in International Business, (1991), at 528-529; for instance, United States-Poland, S. Treaty Doc. No. 18, 101st Cong., 2nd Sess. (1990), reprinted in 29 I.L.M.(1990), 1194.

[115] For example, People's Republic of China - United States: Accord on Industrial and Technological Cooperation, reprinted in 23 I.L.M. (1984), 144.

[116] For example, EEC-China Trade Agreement, O.J. No. L123 of 11.5.78; EEC-China Trade and Economic Cooperation Agreement, O.J. No. L1250 of 19.9.85.

Europe".[117] Accordingly, both the East and West European nations have concluded preferential treatments to establish a free trade area for up to ten years.[118] These agreements dealt with economic affairs, as well as political dialogue and cultural cooperation,[119] and aimed at the possible integration of the central European nations into the European Economic Community.[120] Meanwhile, the U.S. has revised its old BIT program to expand investment protection and to influence the economic reforms of the developing countries as the Contracting Parties.[121] In addition, the U.S. government has also signed certain trade agreements with ex-communist nations to provide for reciprocal MFN and non-discriminatory treatment, market access, expansion of trade and protection of intellectual property.[122]

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[117] *See* Commission of the European Communities, Association Agreements with Poland, Czechoslovakia and Hungary, Background Brief (Feb. 1992), at 1.

[118] For example, Article 1(1) of the Interim Agreement on Trade and Trade-related Matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Poland, of the other part, O.J. No. L 114/1 of 30.4.92.

[119] Commission of the European Communities, supra note 117, at 2.

[120] Id.

[121] Nancy J. Goodman, "*International Agreement: Poland Bilateral Investment Treaty - A Reflection of United States Efforts to Shape the Economic Development of Eastern Europe,*" 32 Harvard International Law Journal, (1991), at 262-263.

[122] For example, Agreement on Trade Relations Between the Government of the United States of America and the Government of the Mongolian People's Republic, reprinted in 30 I.L.M. (1991), 515.

ii. Bilateral Agreements for PRC-ROC Trade Relations

With respect to the trade relations between the PRC and the ROC, it seems improbable that a formal bilateral legal arrangement can be concluded between the two governments. In terms of formalities, both governments need to determine whether they have the capacity to conclude a trade agreement. If both sides can resolve the issue of formalities, the question then would be whether a trade agreement with practical substance could be drafted. Based on the development of commercial treaties, several options need to be considered by both governments, such as a declaratory agreement, a liberal arrangement or a preferential program. First of all, both governments could sign a trade agreement with a loose framework, which provides for a general declaration of their willingness to promote economic cooperation.[123] With respect to the specific projects to be covered by such an agreement, a protocol or side letter focusing on sectoral cooperation, such as technological transfer, agricultural research or energy exploration, could be signed.[124] The benefits of such kind of agreement are multifold. First,

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[123] For the U.S.-China Trade Agreement, see supra note 115.

[124] As the example of the Treaty for Economic Integration and Cooperation between the Argentina Republic and the Federal Republic of Brazil, reprinted in Ambito Financiero, 30 July 1986. For further discussion, see Robert M. Plehn, "*International Trade: Economic Integration of the Argentina Republic and the Federal Republic of Brazil,* " 28 Harvard International Law Journal, (1987), at 186-195.

since such agreement is based on a functional approach, it would provide more opportunities for the peoples of both countries to develop communication and cooperation on a substantial and mutual basis. Furthermore, such an agreement would be implemented on a gradual and flexible basis to only deal with economic affairs without imposing heavy obligations on both governments.[125] It would not require that both governments dramatically adjust their policies toward each other, and, as a result, it would not excite so many political concerns from both sides. Moreover, the final goals of such an agreement would be open-ended and determined by the needs of the two societies. An agreement so structured should win the support of different interest groups on both sides.

Eventually, however, both sides would have to face the issues of how their trade relations can be normalized. Normal trade relations mean economic relations totally or substantially determined by market forces without improper governmental support or restrictions.[126] Regarding PRC-ROC trade relations, the problem mainly comes from the fact that the PRC is a CPE, and to a lesser degree, the problem of political controls of both sides. In fact, a successful transformation of the PRC economy into a market economy would require unilateral devices, or bilateral and multilateral arrangements between the PRC and the ROC. PRC's

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[125] Id, at 186.

[126] David Kennedy, "*Turning to Market Democracy: A Tale of Two Architectures,* " 32 Harvard International Law Journal, (1991), at 379-380.

negotiations with the GATT concerning the PRC's accession/resumption have actually forced the PRC government to reform its trade regime to a considerable extent.[127] Bilateral negotiations between the U.S. and the PRC government focusing on market access, transparency and other issues have also substantially improved PRC's trade system.[128] In addition, PRC's unilateral efforts to reform its economy in order to promote export-led growth have won more support for lesser governmental interventions. A trade agreement between the PRC and the ROC should be able to assist the PRC in strengthening its market reforms. The ROC government could take advantage of its economic power and urge the PRC government to open its market through the elimination of many import restrictions. However, this does not imply that the ROC should directly confront the PRC to push for market reforms in the way that the U.S. has done in its negotiations with the PRC.[129] Nevertheless, any negotiations for an effective PRC-ROC trade agreement definitely need to put such issues on the agenda,[130] which will not only benefit ROC exports, but also integrate the two economies in a more efficient manner.

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[127] See BNA, Int'l Trade Reporter (17 June 1992), at 1057-58.

[128] Id.

[129] The U.S. government often threatens to use "Super 301" to punish the PRC for failing to conclude an agreement with the U.S. For instance, because of unsuccessful negotiation on protection of intellectual property, the U.S. U.S.T.R. threatened to impose high tariffs on PRC products. Id., (4 Dec. 1991), at 1754.

[130] As an example of the Trade Agreement between the U.S. and the Mongolian People's Republic. *See* supra note 122.

It seems difficult for a bilateral trade agreement to address issues respecting trade restrictions for external policy or national security concerns. Unilateral efforts would be more efficient in reducing such trade barriers as they have often been resorted to in resolving controversies over sovereignty issues and disputes over political autonomy. That is why the GATT and most trade agreements have to be separated from politics. It is impossible for a trade agreement to be used to resolve political antagonisms.[131] Accordingly, it is overly optimistic to expect a trade agreement between the PRC and the ROC to ease political concerns.

A preferential arrangement between the PRC and the ROC has long been proposed and discussed by scholars. Such a proposal is controversial in that substantial political and economic impacts may be involved. The following is a comprehensive analysis of the pros and cons of such a proposal.

B. Preferential Trade Agreements for Promoting PRC-ROC Trade Relations

It has been suggested that the economies of the PRC and the ROC be integrated through a preferential arrangement.[132] The establishment of a customs union or a common market would appear

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[131] Oliver Long, Law and its Limitations in the GATT Multilateral Trade System (Dordrecht: M. Nijhoff, 1987) at 46.

[132] *See* World Journal [Toronto], 7 Dec. 1991, at 11.

to be unlikely under current PRC-ROC political relations because it would involve substantial political commitments and sovereignty restructure.[133] A free trade agreement aiming at the mutual reduction of tariffs over a transitional period would seem more acceptable to both sides. Nevertheless, such an arrangement may involve many economic and political issues which are discussed below.

i. Pros for a Preferential Trade Agreement

A bilateral free trade agreement is generally designed for the integration of two economies through trade liberalization measures ranging from reduction of tariffs on goods[134] to elimination of all trade barriers[135] on goods and services, and protection of investment and intellectual property rights. A moderate free trade plan for the PRC and ROC should first aim at the reduction of tariffs which itself would have a substantial economic impact on both sides. In theory, free trade can create trade activities, enhance the scale of economies and industrial specialization, and secure market access for each other.[136] It is

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[133] Note, "*One Europe, One World*, " Journal of World Trade, (April 1986), at 13-20.

[134] Earlier free trade agreements, like the European Free Trade Association, involved only reduction of tariffs, 370 U.N.T.S. (1960).

[135] For example, Canada-U.S. Free Trade Agreement. *See* supra note 113.

[136] El-Agraa, The Theory and Measurement of International Economic Integration (Hampshire: The MacMillan Press Ltd., 1989), at 26-37.

also considered as a powerful instrument signalling the willingness for trade liberalization and against protectionism. With free trade, both sides would refrain from reintroducing their trade barriers under either political or economic pressures. Moreover, elimination of tariff barriers would create a more competitive economic environment which will assist both economies in effecting their structural adjustments and productivity improvements.[137] The ROC in particular may take advantage of cheaper imports from the mainland to enhance the competitiveness of Taiwanese exports.

In light of the eroding GATT system and the build-up of regional trade blocs,[138] the PRC and the ROC economies particularly need to cooperate together to secure their economic future. A free trade agreement can be used for both positive and defensive purposes. On the one hand, it can provide more thorough obligations on the contracting parties for closer integration[139] which could not otherwise be easily realized in a multilateral or regional arrangement due to its complex negotiating processes. On the other hand, with such an arrangement, both sides can collectively bargain with other trade blocs in a more efficient

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[137] Donald W. Campbell, "*Canada, the GATT and the North American Free Trade Negotiations*," Speaking Notes Confederation of British Industry, London, (10 Oct. 1991), at 7.

[138] Destler, supra note 14, at 53.

[139] Campbell, supra note 137, at 6.

manner.[140] In addition, the ROC government can use a liberal trade regime to force the PRC government to continue its market reforms and to resist the resurgence of conservatism.

In terms of political impacts, closer economic relations certainly would improve bilateral relations.[141] Implementation of economic cooperation would serve to reduce political tensions and ideological conflicts between both sides. Mutual trust could be gradually cultivated as economic integration has effects both politically and socially. A free trade agreement does not necessarily mean that the sovereignty of the contracting parties has to be sacrificed.[142] Such an arrangement is based on the voluntary reduction of tariffs and reciprocal treatment of products. Moreover, institutional arrangements can be substantially simplified because implementation of the agreement is totally under the control of both contracting parties to the agreement. Integration of the respective political-legal systems of both sides to cope with such preferential arrangement can be avoided. Therefore, the loss of sovereignty should not be a big concern for both sides.

ii. Cons for a Preferential Agreement

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[140] Dean C. Alexander, "*The North American Free Trade Area: Potential Framework of an Agreement,* " 14 Houston Journal of International Law, (1991), at 92.

[141] Id.

[142] Victoria Price Curzon, Free Trade Areas, The European Experience (Toronto: C.D. Howe Institute, 1987), at 50.

It has been argued that certain political and economic gaps are still existing between both sides, thereby making any preferential arrangements difficult. More particularly, their economic disparities, low two-way trade and economic dependence between them[143] indicate that a formal arrangement for the promotion of their current economic relations is unwanted. It is also interesting to note that both sides now heavily rely on the U.S. market for their exports.[144] It is possible and predictable that some of the Taiwanese export industries may move their manufacturing facilities to the mainland but keep their exports focused on the U.S. market. Thus, a preferential arrangement may not necessarily boost their two-way trade. If such is the case, the effect of trade diversion would be greater than that of trade creation, which certainly contradicts the original purposes of a preferential arrangement. Moreover, the trade regimes of both sides are not compatible with each other in many aspects. The PRC trade system is deemed a typical CPE, which is not in accord with the GATT principles.[145] A preferential arrangement purports to reduce tariffs and eliminate other trade barriers. In a CPE, reduction of tariffs does not necessarily imply the opening of the

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[143] In 1991, trade between the PRC and the ROC did not exceed 10% of their total trade. For a detailed analysis, see Chapter One, part 2.

[144] In 1990, exports to the U.S. accounted for 32.4% of the ROC total exports. *See* Central Bank, Central Bank of China Yearbook (Taipei: Central Bank of China, 1991), at 68.

[145] For a detailed analysis of the PRC trade system, *see* Chapter Four, part II(B).

market. Elimination of other trade barriers also contradicts its central-control trade regime. As a result, a preferential arrangement with a CPE is not necessarily designed to achieve economic integration, and, by its nature, it is difficult to implement on a fair basis.

In addition, a bilateral preferential arrangement may ignite frictions because of discriminatory treatment, thereby kindling resentment and breeding distrust in non-member nations.[146] Both the PRC and the ROC cannot afford to be regarded as rival blocs since they both heavily rely on foreign markets for their export-led growth. In particular, on the ROC side, its foreign trade occupies a high proportional part of its GDP. Any closer relations between Taiwan and the mainland would likely result in more strained relations between Taiwan and its major trading partners, such as the U.S., Japan, and the ASEAN nations, and therefore hinder the outlets for its exports. Such a development certainly would be a disaster, rather than a benefit for its economy.

Politically, a formal preferential arrangement with the PRC is a particularly sensitive issue for people on Taiwan. The politicians who advocate an independent Taiwan probably would regard such integration arrangement as a secret deal between the Kuomintang (Taiwan's ruling party) and the Chinese communists for further political integration. Consequently, reaching political

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[146] C. Michael Aho, "*More Bilateral Trade Agreements Would Be a Blunder: What the New President Should Do,*" 25 Cornell International Law Journal, (1989), at 31-32.

consensus for a preferential arrangement in Taiwan would not be very easy at present.

iii. Prospects for a Preferential Agreement

As described earlier, a preferential bilateral agreement is only the third best choice for promotion of PRC-ROC trade relations. For both countries, they should explore their export opportunities within a multilateral framework to achieve optimal economic efficiency and avoid concentration on a certain market. A regional arrangement is only a defensive scheme against other trade blocs, if multilateral arrangements were to breakdown. A bilateral arrangement is worth serious consideration if both world and regional arrangements fail. For PRC-ROC trade relations, the time is not ripe for the establishment of a bilateral preferential arrangement, especially given the incompatibility of their political and economic systems. At the current stage, what both nations need to do is to normalize their trade relations through available multilateral and unilateral instruments. Trade restrictions due to political and security concerns should be gradually removed and market reforms in the mainland need to be continued and expanded. In the long term, if their political tensions and economic disparities substantially decrease, a bilateral preferential arrangement might be necessary for their further economic integration.

C. Main Issues of a Feasible Preferential Trade Agreements for PRC-ROC Trade Relations

In this part, the study will examine the main issues of a preferential trade agreement between the PRC and the ROC. The discussions are based on the assumption the two parties decided that they wish to have a preferential trade agreement or that political circumstances have changed to make such an agreement feasible.

i. Legitimacy of a Preferential Agreements under the GATT System

The GATT is a system based on the principle of most-favoured-nation or nondiscriminatory treatment among all the contracting parties. A free trade area or a customs union trade agreement for granting preferential treatment to one or a few of the parties thereto obviously does not conform to the GATT principles.[147] In spite of this, the GATT allows contracting parties to formulate preferential trade arrangements. As provided in paragraph 4 of Article XXIV, "...the contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries as parties to such agreements."

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[147] Youri Devuyst, "*GATT Customs Union Provisions and the Uruguay Round: The Experience*, " 26 Journal of World Trade, (1992), at 18.

A preferential trade arrangement under the GATT should attempt to facilitate free trade rather than build trade barriers to third parties.[148] Accordingly, a free trade area ("FTA") arrangement should meet the following requirements in order to be consistent with the GATT: (1) All trade restrictions should be substantially abolished. (2) Only products originating from the parties to the FTA agreement are entitled to FTA benefits. (3) An FTA agreement should be implemented for a reasonable period of time.[149] The language defining such requirements is far from being clear and specific. For instance, the first requirement about "substantially all trade" has never been well defined in GATT documents. Some scholars view it as "including both qualitative and quantitative trade between FTA participants,"[150] while others have interpreted it as meaning that "a sufficient amount of products is included."[151] The European Community has suggested that when "80% percent of the total trade was liberalized that this was 'substantially all'."[152] A GATT Working Party tried in vain to interpret Article XXIV because a consensus could not be reached.[153]

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[148] *See* Article XXIV, para.4 of the General Agreement.

[149] *See* Article XXIV para.8(b) of the General Agreement.

[150] Alexander, supra note 140, at 88-89.

[151] Sandra Ward, "*The U.S.-Israel Free Trade Area: Is It GATT Legal?* " 19 George Washington Journal of International Law & Economics, (1985),at 205.

[152] Jackson, supra note 27, at 608.

[153] Id, at 610.

This makes the article more vague and less useful in trying to curb the formulation of trade blocs.

An FTA arrangement plan has to be submitted to the contracting parties to determine whether it is in accord with GATT rules. If the requirements of the GATT cannot be duly met, the participants would be required to obtain the consent of at least two-thirds of the contracting parties for the waiver of the requirement.[154] As of 1991, a total of 69 FTAs, preferential trade agreements, and subsequent amendments, have been submitted to the GATT for examination in accordance with Article XXIV.[155] However, only four agreements - the South Africa-Rhodesia Customs Union, the Nicaragua-El Salvador FTA, Nicaraguan participation in the Central American FTA, and the Caribbean Community-Common Market- have been deemed compatible with GATT requirements. No GATT decisions have been made on the other agreements.[156]

It is obvious that preferential trade arrangements have seriously eroded the GATT system.[157] Many nations have been especially concerned that regional arrangements have not been subject to effective discipline or surveillance.[158] In light of

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[154] *See* Article XXIV, paragraphs 6 and 10 of the General Agreement.

[155] Jeffrey J. Schott, More Free Trade Areas (Washington D.C.: Institute for International Economics, 1989), at 27.

[156] Id.

[157] Destler, supra note 14, at 53.

[158] In particular, the Japanese delegation to the GATT has criticized the inefficiency of Article XXIV. *See* Devuyst, supra note 147, at 16.

this, the Contracting Parties in the Uruguay Round talks have therefore organized a Working Party to draft an understanding to strengthen the application of Article XXIV. In actuality, the Uruguay Round talks have provided, more effective rules for clarifying the vague terms of the GATT provision.[159] In the author's view, clarification of Article XXIV is not likely to curb the formulation of trade blocs which have been devised not only for fostering economic interests, but also for handling regional politics and macroeconomics. Participants in a trade bloc would not adhere to an eroding system at the expense of their regional interests. What should be done instead is to clarify certain GATT rules concerning the compensation for the third party whose interests are impaired when a preferential arrangement is formulated.

Article XXIV should be chosen to govern PRC-ROC trade relations only when the following prerequisites are duly met: (1) both countries have acceded to the GATT, (2) both governments have agreed to conclude a preferential trade arrangement. As discussed in part II of this chapter, the application of the GATT rules to PRC-ROC trade relations depends on whether the PRC and the ROC are regarded as separate members of the GATT. In the author's view, since the GATT system is applied to each contracting party or customs territory, rather than a nation or

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[159] Id, at 26-31. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, MTW/FA II-AIA-(d).

state, both the PRC and the ROC, whether considered as one nation or two, should be deemed separate contracting parties of the GATT. Any preferential trade arrangement between them will be subject to the GATT rules and need to meet the GATT requirements. Regarding the application of Article XXIV, political considerations often outweigh legal interpretations because a majority of the GATT members have participated in such an arrangement.[160] Accordingly, Article XXIV should not be brought to impede the establishment of a preferential trade arrangement between the PRC and the ROC.

ii. Scope of a Preferential Trade Agreement

Once PRC-ROC trade relations have been normalized and preferential arrangements become more feasible, the scope of such arrangement would need to be considered. The experiences of the European Free Trade Association ("EFTA") seem to be worth considering by both the PRC and the ROC. At the EFTA, members are allowed to retain their autonomy, i.e., the agreement is applicable only to trade relating to industrial goods. Agricultural products and services are exempted, and free movement of labor and rights to establish companies are not included. Industrial policies are covered by the EFTA only when they are purported to lessen negative effects on trade relations. In sum, the scope of the EFTA is extremely limited.[161] For PRC-ROC

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[160] Alexander, supra note 140, at 90-91.

[161] Articles 3,4,16,20-30 of the EFTA, see Convention Establishing the European Free Trade Association ("EFTA"), 370 U.N.T.S.(4 January 1960), 5.

relations, political autonomy and sovereignty are sensitive issues which cannot be easily compromised. Accordingly, a trade agreement between them would have to avoid political issues. In actuality, trade in industrial goods has been less restricted in Taiwan, and will be more liberalized in the mainland. Establishment of a preferential trade agreement will only require both governments to lift their trade restrictions against each other, and to further reduce tariffs during a transitional period. A limited-scope trade agreement would less involve the loss of sovereignty and can be easily implemented.[162]

iii. Institutional Arrangement for a Preferential Agreement

A free trade agreement is different from an arrangement for a customs union. An FTA is largely self-governing and does not require the establishment of common institutions to enforce the agreement.[163] For instance, under the FTA between Canada and the U.S., only a secretariat office has been established for

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[162] Price Curzon, supra note 142, at 50.

[163] Id.

information collection and communication and is not authorized to handle the enforcement of the agreement.[164] Also, under the associate agreements between the EEC and Eastern European nations, only a simple committee for interpretation and dispute resolution of the agreement has been created.[165] In the case of the PRC and the ROC, their integration should be based on market forces, rather than on any institution.[166] Politically, both governments should avoid establishing an institution under the FTA as it may involve political negotiations and exchanges which should not be appropriately conducted in an economic arrangement. In short, since enforcement of an FTA does not require establishment of an institution, at least not during the preliminary stage of integration, an institutional arrangement in any prospective FTA between the PRC and the ROC should therefore be avoided or simplified.

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[164] According to the FTA, the Parties should establish the Canada-U.S. Trade Commission (the Commission) to supervise the implementation of the FTA and to resolve trade disputes. However, the Commission is not so active to perform these functions. In actuality, the U.S. and Canadian governments often resort to the processes of political negotiation and consultation instead of such a mechanism to resolve disputes between them. See Chapter 18 of the U.S.-Canada FTA; Richard Bilder, et. al., "*The Canada-U.S. Free Trade Agreement: New Directions in Dispute Settlement,*" American Society of International Law, Proceedings of the 3rd Annual Meeting, (1989), at 259. Differing from the institutions within the European Community, the Secretariat of the FTA does not have the authority to enforce the FTA or to promulgate any ruling for the FTA.

[165] For example, Article 37 of the EEC-Poland Trade Agreement, see supra note 118.

[166] Price Curzon, supra note 142, at 49.

V. CONCLUDING REMARKS

The central theme of this chapter concerns the legal mechanisms for arranging PRC-ROC trade relations. The main arguments are summarized as follows:

First, among the multilateral, regional and bilateral arrangements, this study finds that multilateral arrangement is the best solution for arranging trade relations given the respective economies of the PRC and the ROC. The General Agreement on Tariffs and Trade has been an efficient trade regime in liberalizing the world economy and trade relations. Since PRC-ROC trade relations have to be liberalized and legalized, the GATT regime could provide a legal framework to achieve such a long-term policy. Through such a mechanism, both sides may continue to explore the global market, rather than restricting themselves to a domestic and regional one. If both sides choose to become members of GATT, they may invoke Article XXXV or the exceptional clauses to exempt their GATT obligations toward one another. Otherwise, they would have to adjust their legal systems in order to liberalize their trade relations. In order to transform the PRC economy, the PRC must comply with GATT's principles and regulations which may involve a long reform process before they are realized.

Second, if the GATT system breaks down, a second option which the PRC and the ROC may consider, is a regional program, established for integrating Asian-Pacific economies. A negative

impact of a regional program on Asian-Pacific economies and PRC-ROC trade relations is that it will restrict their global trade interests. Moreover, the political and economic disparities among Asian nations would make it difficult to structure such a program. On the other hand, the program has its advantages. It can liberalize intra-regional trade more efficiently, and can be further developed to reduce political and military tensions within the region. Furthermore, a regional program among Asian-Pacific nations could harmonize their economic-political-legal systems which would then function like an "Asian-Pacific Community".

Third, a bilateral program between the PRC and the ROC could be established to accommodate various levels of their trade relations. A trade agreement with a loose framework may be considered initially as a general declaration of their willingness to promote economic cooperation. An arrangement to liberalize their trade relations and reform their trade regimes may be a next step to remove trade barriers against one another and thus integrate the two economies in a more efficient manner. As preferential arrangements may cause negative political-economic impacts, this should only be considered when both multilateral and regional arrangements fail. However, in the long term, as the PRC and ROC political and economic disparities decrease substantially,

such a bilateral preferential arrangement could become eventually a necessary step to remove remaining trade barriers between both sides.

CHAPTER SIX

LEGAL PROCEDURES FOR THE CONCLUSION OF A MULTILATERAL OR BILATERAL AGREEMENT CONCERNING ROC-PRC TRADE RELATIONS

I. PROBLEMS

The conclusion of a multilateral or bilateral agreement for PRC-ROC trade relations gives rise to many complex issues in international law, such as both parties' legal capacities to enter into a trade agreement. In traditional international law, a nation-state is the sole or principal subject of international law which has full international personality. Mainland China and Taiwan, having been deemed two separate governments (areas) of a divided or multi-system nation, do not easily fit into the traditional concept of "nation" or "state." As a result, their legal capacities, especially that of the ROC, to enter into an "international agreement" or treaty is a challenging issue in international law. The following problems are especially related to such an issue.

(1) Is Taiwan a nation-state?

(2) If Taiwan is not considered a nation-state internationally, is there any legal basis to enable its government to conclude an "international" agreement?

(3) Specifically what would be the proper procedures for the ROC and the PRC to enter into a multilateral or regional trade regime, such as the General Agreement on

Tariffs and Trade?

(4) Is it feasible for the ROC and the PRC to conclude a bilateral trade agreement? What will be the legal procedures for the conclusion of such an agreement?

II. DETERMINATION OF STATEHOOD

A nation-state is generally regarded as an entity qualified to act on international society.[1] In contrast, an entity not recognized as a nation-state is incapable of representing peoples under international law. For a multi-system or divided nation-state, it is difficult to determine whether each part of such a nation is a qualified entity possessing full international personality.[2] To respond to such an issue, one has to first consider the character of the entity in the international legal system. If such an entity can be regarded as a nation-state, it will then possess international personality and may enter into international agreements. However, if it cannot be treated as a nation-state, one has to further analyze the feasibility of granting its personality through certain international procedures.[3]

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[1] Louis Henkin, et al., International Law (St. Paul: West Pub. Co, 1987), at 228.

[2] James Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 1979), at 271-287.

[3] As described by Prof. Henkin, "the widening of the concept of international legal personality beyond the state is one of the more significant features of contemporary international law." See Henkin, supra note 1, at 229. To grant the personality for a new entity other than a nation-state is a challenge for modern international law. New political entities which are recognized as possessing personality include many international organizations

Concerning the PRC-ROC situation, the determination of statehood of both sides has been a sensitive issue in international politics and law.[4] Before the PRC was widely recognized, the issue of its statehood was bitterly disputed in the United Nations and on the domestic political stages of many nations.[5] After the PRC was admitted to the United Nations[6] and established diplomatic relations with the United States,[7] the statehood issue rested with the ROC. In recent years, because of the adoption of pragmatic diplomacy by the ROC government[8] and the breakup of the Communist

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and regional institutions. With respect to individual entities, divisions of multi-system nations and the PLO are recognized as having international personalities for most situations.

[4] After the ROC government moved its seat to Taipei, the issue of which government represents China has been widely discussed in academic camps and in international political circles. For more detailed discussions, see Poelin Dai, "*Canada and the Two-China Formula at the United Nations*," The Canadian Yearbook of International Law, (1967), at 217-228; L. C. Green, "*Representation versus Membership: The Chinese Precedent in the United Nations*," The Canadian Yearbook of International Law, (1972), at 102-136; Edward G. Lee, Q.C., etc., "*Canadian Practice in International Law*," The Canadian Yearbook of International Law, (1965 & 1966), at 327-331; D. Barry Kirkham, "*The International Status of Formosa*," The Canadian Yearbook of International Law, (1968), at 144-163.

[5] Lee, id.

[6] At the 26th session of the U.N. General Assembly, the PRC was supported to resume its seat in the U.N. and recognized as the sole representative of China. *See* 10 U.N. Monthly Chronicle, (Nov. 1971), at 61.

[7] *See* Department of State Bulletin 79, no. 2022 (Jan. 1979), 25.

[8] For detailed analyses of the ROC pragmatic approach, *see* Frederick F. Chien, "*A View From Taipei*," Foreign Affairs, (Winter 1992), at 96-99.

empire, the statehood of the ROC has again become a crucial issue in international politics.[9] In order to clarify such an issue, this study will provide a theoretical analysis based on applicable international law. Through such discussions, the issue of whether Taiwan can possess statehood and personality can therefore be better understood.

The main difficulty surrounding the issue of Taiwan's statehood arises from the conflict between objective criteria and subjective judgment for its statehood. Based on customary rules of international law, Taiwan is qualified to be regarded as a state. However, for policy considerations of most nations, Taiwan has not been recognized as a state. Such a conflict between objective criteria and subjective judgment makes the determination of its international personality more difficult. In theory, several issues are especially important regarding the determination of statehood for Taiwan. The first issue concerns the application of objective criteria for recognizing Taiwan. The key point of such an issue is whether an entity which does not claim itself to be a state should be regarded as a state. If Taiwan meets the full requirements of a nation-state, the second issue is whether it should be recognized or treated as a nation-state. The most important concern of such an issue is whether the act of recognition should involve a value judgment with respect to

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[9] For instance, in the U.S. Congress, the one-China issue has been discussed for Taiwan's accession into the GATT and human rights concerns for Tibetan people. *See* World Journal [Toronto], 15 March 1992, at 2.

such an entity or whether it should be totally determined by objective requirements. Third, since Taiwan is not recognized by most Western nations, does this therefore preclude Taiwan from being regarded as a state? Such an issue is related to whether recognition has a constitutive or declaratory effect. It is expected that analyses of the above issues will be helpful to determine the statehood of Taiwan.

A. Requirements of Statehood

Either in theory or practice of international law, a nation-state is generally accepted as a political entity which "has a defined territory and a permanent population, under control of its own government, and that engages in, or has that capacity to engage in, formal relations with other such entities."[10] Such a definition of a nation-state is generally based on an objective assessment of a political entity and has been accepted as a customary rule in the practice of international law.[11] What becomes difficult for the application of such definition is whether an entity, which conforms to the objective requirements, still needs to claim itself to be a state. Specifically the authorities in

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[10] See ALI, "*Restatement of the Law,*" The Foreign Relations Law of The United States (St. Paul: American Law Institute, 1987), at 72; such definition is identical to that in Article 1 of the Montevideo Convention on the Rights and Duties of States, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. (1933), 19.

[11] For instance , in Canada, the objective requirements are major concerns for the Canadian government to recognize a foreign entity. *See* Canadian Practice in International Law, 1971, The Canadian Yearbook of International Law (1973), at 308-09.

Taiwan do not claim Taiwan as a state, but only as a part of another state. Under such a situation, should Taiwan be regarded as a state?

This issue was first raised when some nations considered the "one-China, one-Taiwan" policy for the resolution of the problem regarding who should represent of the Chinese government in the United Nations.[12] In theory, since both the PRC and the ROC governments claim that there is only one China and Taiwan is a part of China, a foreign government then has to determine which government represents China.[13] In most situations, a foreign government will bow to international politics and recognize the PRC government, rather than the ROC government. It is impossible for a foreign government to recognize two governments simultaneously representing a state with a specific territory. Since the authorities on Taiwan have claimed the territory of Taiwan as a part of China, there is no way for a foreign government to recognize it as an independent state with a separate territory. A foreign government is also not willing to proceed with dual recognitions which are not favoured by both sides and can be regarded as interference in Chinese domestic affairs.[14]

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[12] Hungdah Chiu, China and the Question of Taiwan (New York: Praeger Publishers, 1973), at 154.

[13] *See* ALI, supra note 10, at 86. According to the Restatement, "a state derecognizes a regime when it recognizes another regime as the government."

[14] Id, at 84. According to the Restatement, " a state has an obligation not to recognize or treat a regime as the government of another state if its control has been affected by the threat or use of armed force in violation of the United Nations Charter."

Based on these considerations, the Restatement provided by the American Law Institute adds a requirement for a nation-state: "An entity is not a state if it does not claim to be a state."[15] Such a view has also been confirmed by some treatises.[16] For instance, a commentary has pointed out that a government is only recognized for what it claims to be.[17] Statehood, in such a theory, is therefore subject to the claim of an entity, not to its pure objective existence.

A contrary view emphasizes that, in order to be a state, the objective existence of a political entity should prevail over its subjective claim.[18] In the case of FRG-GDR relations, although the Germanys were regarded as one German nation, they both possessed separate statehood and personality in the international community.[19] The claim of one German nation and territory, however,

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[15] Id, at 76. It provides: "As of 1986, since the authorities on Taiwan do not claim that Taiwan is a state of which they are the government, the issue of its statehood has not arisen...If Taiwan should claim statehood, it would in effect be purporting to secede from China." Based on the Restatement, the claim of statehood is a prerequisite for other nations to recognize Taiwan as a nation-state.

[16] See Lung-chu Chen, An Introduction to Contemporary International Law (New Haven: Yale Univ. Press, 1989), at 48-49.

[17] James Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 1979), at 151.

[18] Id, at 286.

[19] Jochen Abr. Frowein,"*Legal Problems of the German Ostpolitik*," 23 International and Comparative Law Quarterly (1973), at 114-115. In the view of the FRG, the GDR, though possessing all attributes of statehood, still cannot be deemed a foreign country in terms of the FRG internal legal system.

did not hinder the establishment of their separate statehoods. The difference in China-Taiwan relations from the FRG-GDR relations is that both the PRC and ROC governments claim that they represent the other. However, the Taiwanese government has changed its attitude recently. Although it still insists on representing the whole of China, it asserts that the mainland and Taiwan are two territories of China and their governments are separate ones within the territory of China.[20] It further argues that both entities should act separately in the international community and should allow foreign governments to recognize both the mainland and Taiwan simultaneously.[21] This new policy suggests that the Taiwanese government has tried to rationalize its own claim and is seeking a breakthrough. Most recently, it also consented to join the United Nations. This implies that the Taiwanese government starts to recognize itself as a state, at least an equivalent entity as that of China. The subjective claim of Taiwan should not affect the requirement in the determination of the statehood of Taiwan.

B. Policy Considerations in the Determination of Statehood

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[20] Ying-jeou Ma, "The Republic of China's Policy Toward the Chinese Mainland," Issues and Studies, (February 1992), at 4.

[21] Id.

There are two opposite views concerning the determination of statehood. One view holds that recognition is purely legal in nature and should not be used as a political instrument.[22] An opposite view asserts that "the act of recognition is a political act by the recognizing state and depends on the exercise of discretion by that state."[23] Based on the former view, Taiwan, as an entity meeting the objective requirements of statehood, should be regarded as a nation-state. However, according to the latter view, a nation-state should be free to determine whether it wishes to recognize Taiwan in conformity with its own policy considerations.

In the practice of international law, the act of recognition is at the full discretion of an individual state, except for certain collective decisions concerning accession to an international institution. As a result, the application of international rules regarding recognition is mostly decentralized and controlled by respective governments.[24] To recognize a foreign government, the recognizing state has to take into serious consideration the legal policies and political interests involved, including the interests of different parties as well as regional

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22 *See "Canadian Practice in International Law, 1971,"* The Canadian Yearbook of International Law (1972), at 309.

23 L.G. Green, International Law (Edmond: University of Alberta Press, 1981), at 106.

24 Hungdah Chiu, *"The International Status of the Republic of China,"* Chinese Yearbook and International Affairs (1990), at 3.

and world public order.[25] Several cases illustrate how the act of recognition is political in nature. Before 1972, only a few Western nations recognized East Germany because West Germany insisted that only its government can legally represent the whole of Germany.[26] Nevertheless, the Basic Treaty concluded between the two Germanys in 1972 provided a legal base for them to respectively act in the international community in their own names and not to represent the other internationally.[27] Consequently, Western nations started to recognize East Germany and to accept it as an independent state.[28] The same situation occurred during the independence movements of the Baltic nations. Before the end of 1991, almost no nation was willing to recognize the Baltic nations as independent nations since the Western nations, especially in light of political pressures from the U.S.S.R., were not willing to risk worsening their relations with such a big political giant. In the case of Taiwan, policy consideration is obviously the main reason for not recognizing it as an independent state. It is almost impossible for Western nations to disregard political pressures from the PRC to recognize Taiwan totally based on the

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[25] Chen, supra note 16, at 49.

[26] Ryszard W. Piotrowicz, "*The Status of Germany in International Law: Deutschland Ueber Deutschland?*" 38 International and Comparative Law Quarterly, (1989), at 616.

[27] Article 4 of the Basic Treaty (Grundvertrag) provides that neither of the two states can represent each other. 17 I.L.M. (1973), 16.

[28] Piotrowiz, supra note 26, at 626.

objective situation.[29] In summary, recognition can be regarded as an act mainly subject to the political discretion of the recognizing state.

In the past, the policy of Western governments, especially the U.S., has often required that, to qualify for recognition, a state has to be a democratic society.[30] However, in recent years, such policy tended not to involve the approval or disapproval of the recognized state, but merely the willingness of a recognizing state to conduct affairs with other states.[31] As indicated by the U.S. Department of State, "In today's interdependent world, effective contacts with other governments are of ever-increasing importance."[32] Accordingly, although political discretion is important in the practice of recognition, it also has to be consistent with the objective situation and meet the needs of the actual situation. Such a change in policy considerations explains why the U.S. chose to recognize the PRC, a huge nation with substantial political influence, in spite of its notorious "human rights" record. For the same reason, Taiwan, as a de-facto

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[29] Chiu, supra note 24, at 18-19.

[30] The former U.S. Secretary of State, Mr. John Foster Dulles, said: "...But diplomatic recognition gives the recognized regime valuable rights and privileges, and, in today's world, recognition by the United States gives the recipient much added prestige and influence at home and abroad..." Whiteman, Digest, II, (addressed on 28 June 1957), at 13.

[31] For more discussions of this change in practice, see ALI, supra note 10, at 86-87.

[32] 77 U.S. Dept. of State Bulletin (1977), at 462.

political entity, deserves the respect given to its existence and in fact has been officially or unofficially in contact with international organizations and other governments. Political discretion for the recognition of Taiwan should take into account its objective existence.[33]

C. Constitutive or Declaratory Effect of Recognition

For policy reasons, most nations cannot recognize Taiwan as an independent state. Whether such non-recognition status should be interpreted as a denial of Taiwan's statehood or only a diplomatic expression of the recognizing state is a long-debated issue in international law. Two opposing theories interpret the effect of recognition in different ways. The "declaratory" theory asserts that an entity meeting the requirements of objective criteria of statehood will have all corresponding capacities, rights and duties, and other states have the duty to treat it as such. In contrast, the "constitutive" theory holds that an entity is not a state in international law unless it is generally recognized as such by other states.[34] According to the former theory, Taiwan is a state and possesses such capacity and duties

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[33] As described in the Restatement, " a state... is required to treat as the government of another state a regime that is in effective control of that state..." *See* ALI, supra note 10, at 84.

[34] For more detailed discussions of both theories, see ALI, id, at 79-80; Ian Brownlie, Recognition in Theory and Practice, The Structure and Process of International Law, ed. by R.S.T.J. MacDonald and D.M. Johnson (Boston: M. Nijhoff Pub., 1983), at 634-36.

with even though only a few nations recognize it, while, under the latter theory, Taiwan is not a state because it is not generally recognized as such by other states.

Although both theories are conflicting in nature, they are less different in practice.[35] The actual effect of recognition lies between both theories. Recognition is declaratory in that most rights and duties would often be extended even to a non-recognized entity. It is constitutive when most states use recognition as a lever to express or obtain political interests in international relations. Hence, the legal and objective existence of a non-recognized entity might be disregarded. Since neither theory really conform to the practice of international law, recognition is therefore not a reliable standard to determine the statehood of a political entity. In the case of Taiwan, recognition or non-recognition is only a diplomatic tool to reflect political interests of the recognizing state. The statehood of Taiwan therefore should not be totally determined by the act of recognition.

D. Summary

This chapter has focused on the capacities of the PRC and the ROC to engage in international agreements. The first problem of this issue is whether both sides can be regarded as a nation-state which possesses international personality. Difficulties for

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35 ALI, id, at 80.

other nations, there is no easy answer to determine the statehood of Taiwan. They do not directly claim Taiwan as a state. Nevertheless, they treat it as a political entity, equivalent to a nation-state. It is also difficult to determine the statehood of Taiwan according to the traditional theories regarding statehood and recognition. Under such conflicting theories and practices, the capacity of the ROC for concluding an international agreement cannot be determined by its statehood. In the next part, this study will further analyze other legal bases in order to determine the international personality of the ROC.

III. DETERMINATON OF INTERNATIONAL PERSONALITY

Since the statehood of Taiwan is an unresolved issue in international law, its international personality and capacity for concluding an international agreement is also uncertain. Two legal issues are especially related to the determination of the international personality of Taiwan: first, whether the government of Taiwan, as an unrecognized government, can possess a personality in international society, and, second, if Taiwan is regarded as a part of China, whether it, as a unit or division of a nation-state, can possess its own personality. If the answers to the above issues are in the affirmative, Taiwan should be deemed to possess its capacity to conclude an international agreement, whether bilateral or multilateral.

A. Legal Personality of an Unrecognized Government

According to traditional theory of international law, a nation-state, as a legal person, can acquire all the privileges, rights and duties of statehood in the international community.[36] There is no doubt that an entity recognized by most nations can have its legal personality and capacity based on its recognized statehood. However, an entity meeting the objective qualifications of a nation-state, but not recognized by most nations, may have its international personality challenged. Taiwan's status is probably one of the most difficult cases concerning the determination of its legal personality. In the view of the PRC, Taiwan is only a province of China which in no way possesses international personality and capacity for the conclusion of international agreements.[37] The strategy of the PRC government is to press other governments to derecognize Taiwan and to cut off its relations with the outside world. In the view of the ROC government, Taiwan, as a political entity, should have its own personality and related capacity in spite of not being recognized. Consequently, Taiwan should be able to continue

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[36] S.A. Williams & A.L.C. de Mestral, An Introduction to International Law (Toronto & Vancouver: Butterworth, 1987), at 86; Hugh M. Kindred, International Law (Toronto: Casewell, 1987), at 279; ALI, supra note 10, at 93-94.

[37] Zhang Hongzeng, "*Cong Guoji Fa Kan Meiguo De Taiwan Guanxi Fa*" (Comment on the U.S. Taiwan Relations Act According to International Law), Zhong Guo Guo Ji Fa Nian Kan (The Chinese Yearbook of International Law), (1981), at 201.

substantive relations with nations having no diplomatic relations with Taiwan. Countries not recognizing Taiwan do not formally declare that Taiwan is an entity possessing international personality or capacity for the conclusion of a treaty. However, through available international processes, most of which are informal, those countries are willing to establish substantive relations with Taiwan. Such confusing practices make the determination of legal personality and capacity of Taiwan more difficult.

It appears that there are no direct relevant theories which can be applied for the resolution of such an issue. As described in part II of this chapter, both constitutive and declaratory theories cannot perfectly reflect the practice of international law regarding the effect of recognition. Accordingly, an entity that is not recognized does not necessarily disqualified from having the capacity to act in international society. In the author's view, the act of recognition is political in nature. The effect of recognition and the determination of legal personality is never purely based on legal analysis. The scope of legal personality and capacity which an unrecognized entity can possess is also subject to policy considerations of the involved parties. Generally speaking, for the reasons discussed below, an unrecognized entity, especially Taiwan, is more and more able to possess its full legal personality and capacity. Recent trends in the theories and practices of international law support such a view.

Since the end of the cold war, many scholars of international law are convinced that theories of international law need to be restructured to respond to old and new problems.[38] The persuasive concept of functionalism provides new thoughts on these problems. The basic theory of functionalism is to maximize the use of functional concepts, techniques and institutions, as well as to minimize the dependency on legal abstractions and doctrines that lack any operational utility.[39] In essence, functionalism is anti-state, in that it views old international law which overemphasized state sovereignty and territorial boundaries as causing many national conflicts, without being able to resolve borderless social and economic problems.[40] Considering the principle of the functional approach, the scope of the international personality of Taiwan should be broadly interpreted. Objectively, Taiwan is a self-governing territory and, politically and economically, separated from mainland China for four decades. It is therefore impractical to allow the legal personality of Taiwan to be swayed by that of mainland China. Subjectively, Taiwan, as well as other nations, hope to develop various kinds of relations with each other. To treat Taiwan as an entity having its full personality

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[38] David Kennedy, "*Turning to Market Democracy: A Tale of Two Architectures,*" 32 Harvard International Law Journal (1991), at 375.

[39] Douglas M. Johnston, "*Functionalism in the Theory of International Law,* " The Canadian Yearbook of International Law, (1988), at 55.

[40] Samuel S. Kim, "*Mainland China and a New World Order,*" Issues and Studies, (Nov. 1991), at 14.

and capacity is consistent with such expectations. Traditional concepts concerning the effect of recognition appear only to please the PRC government in its reunification plan and, in actuality, do not contribute to the welfare of Chinese people or the rest of the world. In summary, the granting to Taiwan of a legal personality under international law is necessary in order to facilitate the economic-political relations between Taiwan and other nations.

Further, the dominant role of a nation-state as a principal subject of international law has now faded. As described by Professor Henkin, "the widening of the concept of international legal personality beyond the state is one of the more significant features of contemporary international law."[41] International and regional institutions have gradually become significant actors in the international community. One of the most well-known cases is the European Economic Community which has played a significant role in many international forums.[42] Certain unrecognized entities, because of their international influence, have also been accepted by a few conventions, such as the Palestine Liberation

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[41] Henkin, supra note 1, at 229.

[42] Philippe Manin, "*The European Communities and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*," 24 Common Market Law Review, (1987), at 457-481. The conclusion of the Vienna Convention on the Law of Treaties of 1986 provided the legal base for the international activities of the EEC. *See* 25 I.L.M., (1986) 543. Accordingly, the EEC is now a party to many conventions.

Organization ("PLO")[43] and native American tribes.[44] The expansion of the subjects of international law and their legal personality again verifies the necessity of a functional approach to restructure the order of international community. Any entity which can be expected to both represent its own interest and contribute to the benefit of the world should be regarded as a significantly independent unit of international society. Taiwan, as an important self-governing entity, should not be limited in its personality and capacity concerning its international activities, regardless of the issue of its statehood.

As accepted by practices of international law, non-recognition does not necessarily affect the rights and duties of an unrecognized government.[45] For instance, a state must be held liable for the torts of its government regardless of whether it has been recognized by the claimant state.[46] Such a principle again proves that, under certain circumstances, non-recognition does not affect the existence of the international personality of

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[43] The PLO has been accepted by many nations as the representative of the Palestinian people and has also obtained observer status in the United Nations. *See* ALI, supra note 10, at 84.

[44] The independent status of the Indians has been supported by constitutions of certain nations, for instance, the U.S. Constitution, Art. II, section 8, C.1.2. For further discussions, see F. Henry Ellis, III, "*Indian Tribal Sovereignty and the Tribal Courts: The Myth and the Reality*," 13 Suffolk Transnational Law Journal, (1990), at 714-729.

[45] Kindred, supra note 36, at 279; (Tinoco case), Great Britain v. Costa Rica, 1 R.International Arb. Awards (1923), 370.

[46] ALI, supra note 10, at 97; Henkin, supra note 1, at 252-53.

the state. If such a principle is applicable, the legal personality of Taiwan would not be totally ignored when it acts of its own responsibility.

Moreover, in international practice, Taiwan has also been treated by certain nations as an entity possessing legal personality. Many nations, though not recognizing Taiwan, have relied on unofficial means in maintaining official relations with Taiwan. Such means include the conclusion of an international agreement and the establishment of a representative office, functionally equivalent to an embassy. The enactment of the U.S.-Taiwan Relations Act ("TRA") is proof that Taiwan enjoys a legal personality in spite of its non-recognition status.[47] According to Senator Glenn, acting as the floor manager for the TRA legislation, "the bill treats Taiwan as a country for purposes of U.S. domestic law."[48] With respect to Taiwan's capacity to conclude international agreements, the TRA authorizes the American Institute in Taiwan ("AIT") to enter into agreements with Taiwan.[49] The TRA also declares that agreements concluded by the U.S. and Taiwan before 31 December 1978 shall continue to be in force and

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[47] 22 U.S.C.3301 et.seq. (1988). For further discussions, see J. Terry Emerson, "*The Taiwan Relations Act: Legislative Recognition of the Republic of China,*" Issues and Studies, (1988), at 56-69; Jefferson Gray, "*International Agreement: United States-Taiwan Relations,* " 22 Harvard International Law Journal, (1981), at 451-57.

[48] *See* Cong. Rec. 125 (March 7, 1979), at 4090.

[49] *See* 22 U.S.C. (1988), at 3305.

effect without being affected by the non-recognition status.[50] The legitimacy of such a legislative approach is further affirmed by the judicial branch.[51] As a result, the fact that Taiwan has legal personality and capacity is wholly supported by U.S. laws and practices. In addition to the U.S., many other nations have also followed such an approach to conclude agreements with the government of Taiwan, such as tax and investment protection agreements. Many international institutions, such as the Asian Development Bank, also accept such practices by allowing Taiwan to become a member.

The above analysis is based on new trends in international law, especially those related to the functional approach and the widening concept of international personality. Certain international practices have also gradually accepted that Taiwan should be capable of entering into both official and unofficial international agreements, such as the General Agreement on Tariffs and Trade. However, this does not mean that every nation recognizes such a theory and practice. On the bilateral level, most nations, when confronted with political pressures from the

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[50] *See* 22 U.S.C. (1988), at 3304.

[51] Chang v. Northwest Memorial Hospital, 506 F. Supp.,975-978 (N.D.III, 1980); in addition to this case, an appellate court also affirmed recently the validity of an international agreement between Taiwan and the United States. *See* BNA, Int'l Trade Reporter, (1992), at 268; New York Chinese TV Programs, Inc. v. V.E. Enterprises, Inc. No. 91-7694, Slip Op. (2d Cir. Jan. 24, 1992); for further discussions, see Virginia K. DeMarchi, "*United States-Taiwan Relations,*" 33 Harvard International Law Journal (1992), at 631.

PRC, are reluctant to forsake the traditional concept of "recognition" and thus are not willing to officially conclude international agreements with Taiwan. Accordingly, although in theory Taiwan is deemed capable of possessing its international personality, actual practices substantiating an capacity to conclude international agreements are not so certain.

B. Legal Personality of a Subdivision of a Nation-State

As described in part II of this chapter, Taiwan's status as a part of China has been accepted by many foreign countries and, from the viewpoint of the PRC government, it is an undebatable political and legal fact. The ROC government also believes that Taiwan is part of China, although it claims itself to be the only legitimate government of China. If the fact that Taiwan is a part of China is widely accepted, the issue of how it, as a subdivision of a nation-state, i.e., China, can conclude international agreements needs to be further analyzed.

The subdivision of a nation-state can be classified into two types. First, for the FRG and the GDR, both belonged to a German nation. However, they were separate states.[52] In such a case, either subdivision of the German nation possessed its own legal personality and capacity to conclude international agreements with other nations or between each other. Obviously, under current

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[52] Lin Yu-fang, "*The German Unification Model: Applicable to China and Korea*," Issues and Studies (May 1992), at 93.

international politics, the German model is not generally applicable to the resolution of the China-Taiwan problem, especially since the PRC government will not allow Taiwan to enjoy an independent status, like West or East Germany.

Another type of subdivision of a nation-state is the constituent of a federal state or an equivalent entity. Whether such a constituent has the personality to conclude an international agreement has been a long-debated issue not only in international law, but also in domestic constitutional law. Arguments against the treaty-making power for units of a nation-state are that "...international affairs are too crucial and complex to permit nations speaking with more than one voice in matters of international significance...."[53] To allow the constituent units of a state to establish direct contacts with a foreign government "could be a major step towards the breakup of the federation itself."[54] The opposite view defends the necessity of granting treaty-making power to the constituents of a nation-state. In times of diversified politics, the constituents of a federal nation need to engage in specific programs with foreign governments for their own common economic and cultural interests. Basically, the issue of granting treaty-making power to the constituent units is a constitutional problem, rather than an international one. The challenges against the treaty-making power

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[53] G.L. Morris, "*The Treaty-Making Power: A Canadian Dilemma,*" 45 Canadian Bar Review (1967), at 478.

[54] Williams, supra note 36, at 43.

for a constituent often come from the dominating federal government rather than a foreign government. Accordingly, if the dominating government allows its subdivision to conclude an international agreement with a foreign government, such a constituent would thus be capable of acting on its own account. During the negotiations of the codification of the draft Law of the Treaties, the International Law Commission of the United Nations suggested that "...state members of a federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits they laid down..."[55] However, such a proposal was rejected by attending nations.[56] Since there is no uniform rule to deal with the above issue, whether a constituent possesses its own treaty-making power is therefore subject to state practice.[57]

Major federal states usually require their subordinate entities to obtain approval from the central government for contacts with a foreign government. For instance, according to Article 32(3) of the German Constitution, with the approval of the

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[55] Yearbook of International Law Commission, 1966, II, 114-15. For further discussions, see M. N. Shaw, International Law (Dyfed: Grotius Pub. Ltd., 1986), at 140.

[56] Henkin, supra note 1, at 388; Shaw, id; Williams, supra note 36, at 44; A/Conf.39/SR.8, 28 April 1969.

[57] U.N. Convention on the Law of the Sea provides most extensive legal bases for the accession of non-state legal entities to such a convention. According to Article 305 of the Convention, any and all self-governing associated states, territories enjoying full internal self-government, and international organizations can be contracting parties. For further analysis, see Henkin, id, at 404-05.

Federal government, the states ("Laender") are allowed to conclude treaties with foreign states.[58] The U.S. Constitution provides that the states have to receive the approval of the Congress before entering into any agreement or compact with another state.[59] The former U.S.S.R. Constitution was probably the most extensive system which recognizes that a member of the Union can be a subject of international law.[60] Based on such a Constitution, the Ukrainian S.S.R. and the Byelorussian S.S.R. were allowed to become members of the United Nations.[61] The Constitution of Switzerland enables its constituent units to conclude treaties with foreign states concerning public economy, frontier relations and police, on the sole condition that the Federal Council acts as the intermediary.[62]

The PRC, a unitary nation rather than a federal state, has only one central political authority that represents the state in both international and national arenas.[63] As provided in the PRC

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[58] For a detailed analysis, *see* Henkin, id, at 400-401.

[59] For a detailed analysis, *see* Louis Henkin, Foreign Affairs and the Constitution (New York: The Foundation Press, 1972), 227-48; Henkin, supra note 1, at 401-03. Some U.S. states have entered into agreements with Canada for the construction and maintenance of international highway.

[60] *See* Henkin, supra note 1, at 403.

[61] *See* ALI, supra note 10, at 83.

[62] *See* Shaw, supra note 55, at 140; Lopper, "*The Treaties Power in Switzerland,*" 7 American Journal of Comparative Law, (1958), at 178.

[63] Id, at 42.

Constitution, the State Council is the only authority with powers to manage external affairs and to conclude international agreements with foreign governments.[64] In spite of this, for the purposes of integrating Hong Kong into China, the PRC government has set an exceptional model by establishing the Hong Kong Basic Law.[65] Article 151 of the Basic Law provides that Hong Kong can use the name "Hong Kong, China" to maintain and develop relations and to conclude international agreements with foreign governments for economic, trade, financial, monetary, shipping, communication, tourism, cultural and sports affairs. Further, according to Article 152 of the law, Hong Kong can join international organizations and attend conferences of at which members are not limited a nation-state. With respect to the international organizations of which Hong Kong is a member, Hong Kong may still maintain its membership after 1997.[66] Such a legal system has essentially been devised to protect the international status of Hong Kong to ensure that its prosperity can be maintained and shall not be affected by political integration with China. The "Hong Kong" model, which was created for a specific political

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[64] Article 89, para. 9 of The Constitution of The People's Republic of China, promulgated on 4 December 1982 by the 5th Session of the 5th National People's Congress.

[65] The Hong Kong Special Administrative Region Basic Law of The People's Republic of China was promulgated on 4 April 1990 by the 3rd Session of the 7th National People's Congress. *See* 7 Zhonghua Remin Gongheguo Guowuyuan, (1990), at 230-57.

[66] For more detailed analyses, see Anthony Neoh, "*Hong Kong's Future: the View of a Hong Kong Lawyer,*" 22 California Western International Law Journal, (1992), at 351-52.

purpose,[67] cannot be used as a general principle to interpret the PRC legal system concerning the treaty-making power of its constituent units.

Regarding the political relations between the mainland and Taiwan, clearly Taiwan cannot be considered as a subdivision of the PRC. "Two political entities" and "one-nation-and-two-states" models have been proposed to determine the current and future status of Taiwan. However, even if Taiwan were regarded as a subdivision of China, as has been claimed by the PRC, Taiwan can still have its international personality to conclude treaties with foreign governments. First, as described earlier, the constituent units of a nation-state can directly have contacts with foreign governments if it is permissible according to the constitution of the dominating government. Second, what the PRC has offered for Hong Kong could also be applicable to Taiwan. Both entities would enjoy their international personality to conclude treaties, and join international organizations and attend conferences. Following such an approach, even if Taiwan were treated as a subdivision of the PRC, it still might maintain its legal personality.

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[67] *See* Lawrence A. Castle, "*The Reversion of Hong Kong to China: Legal and Political Questions,*" 21 Willamette Law Review, (1985), at 333-37.

C. Summary

From the above, it can be concluded that the statehood of Taiwan is still a debatable issue in the theory and practice of international law. However, according to the above analysis, the legal personality of Taiwan, especially concerning its capacity to conclude a treaty, could be internationally recognized.[68]

IV. LEGAL ISSUES REGARDING THE ACCESSION OF THE PRC AND THE ROC TO MULTILATERAL TRADE AGREEMENTS

A. Introduction

The General Agreement on Tariffs and Trade ("GATT")[69] is the only international agreement which provides substantial rights and obligations on trade-related matters on a global scale.[70] Increasing regional arrangements have become complimentary to the GATT.[71] Nevertheless, it is still arguable whether Asia-Pacific nations can collectively develop any solid program for their own economic integration before the end of this century.[72]

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[68] For arguments for the international personality of Hong Kong, see Roda Mushkat, "*Hong Kong as an International Legal Person*, " 6 Emory International Law Review, (1992), at 105-170.

[69] The General Agreement on Tariffs and Trade, TIAS No.1700, 55 U.N.T.S. (30 Oct. 1947), 187.

[70] John H. Jackson, Restructuring the GATT System (London: Pinter Pub. Ltd., 1990), at 48-49.

[71] BNA, Int'l Trade Reporter, 8 Sept. 1992, at 654.

[72] At the 1992 annual meeting of the Asia Pacific Economic Conference ("APEC"), members failed to agree on the functions of the APEC. As a result, no substantial resolutions concerning regional integration were adopted. China Times [Taipei], 11 Sept.1992, at 6.

Specifically, after their accession to the GATT which may occur in 1994,[73] the trade systems of the PRC and the ROC will be mostly bound by the GATT rules, rather than by other uncertain regional programs. Thus, in this part, the study will focus on the procedural arrangements of the GATT concerning the accession of both "Chinas". With respect to this subject, both sides belong to one China in the views of most nations. However, because they have submitted separate applications for accession to the GATT, discussions regarding procedural issues of their applications have been separately provided in accordance with their special status.

B. Procedural Issues Concerning the PRC's Application for Accession to GATT

i. Historical Background[74]

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[73] Taiwan expects to accede to the GATT a year after the Working Party has been established, while the PRC asserts that it will accede to the GATT in 1994. In spite of their respective expectations, it would be in the interests of both sides to join the GATT before the establishment of the International Trade Organization ("ITO"), which will replace the GATT and provide complicated procedures for the accession of new members. *See* BNA, supra note 74, 23 Sept. 1992, at 1658.

[74] For detailed illustration of the PRC participation in GATT, see Hungdah Chiu, "*Taiwan's Membership in the General Agreement on Tariffs and Trade*," A Paper Prepared for the Columbia Law School "Taiwan and GATT Conference" at Columbia University on 20 December 1991; Robert E. Herzstein, " *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trades*, " 18 Law and Policy in International Business, (1986), at 402--04; Qin Ya, China and GATT: Toward a Meaningful Participation? Harvard SJD Thesis, (1990), at 365; Wenguo Cai, "*China's GATT Membership: Selected Legal and Political Issues*, " 26 Journal of World Trade, (1992), at 36-37; Chung-chou Li, "*Resumption of China's GATT Membership*," 21 Journal of World Trade, (1987), at 25-27.

Originally, the GATT was drafted as a subsidiary agreement for the International Trade Organization ("ITO").[75] Unfortunately, the Charter of the ITO and GATT have never come into force.[76] As a result, a "Protocol of Provisional Application" ("PPA") executed among 22 nations became the sole legitimate document for enforcing the GATT provisions.[77] The ROC government, then in control of mainland China, was one of the originators of the PPA.[78] Shortly after its retreat from mainland China to Taiwan, the ROC government notified the Secretary-General of the United Nations of its decision to withdraw from the GATT membership on 6 March 1950.[79] From 1950 to 1982, the PRC government never attempted to establish any relations with the GATT, not even after it had been admitted to the United Nations.[80] In 1982, the PRC expressed an interest in attending the 38th session of the contracting parties

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[75] John Jackson, World Trade and the Law of GATT (Indianapolis: Bobbs-Merrill, 1969), at 91.

[76] The GATT has only only accepted by the governments of Haiti and Liberia. Thus, according to Art. XXVI:6 of the General Agreement, it has not met the criteria of the above provision and therefore has not yet come into force in accordance with Article XXVI. Id, at 61-61.

[77] 55 U.N.T.S.(1947), at 308.

[78] The ROC government deposited its Instrument of Acceptance of the PPA on 21 April 1948 and the provisional application of the General Agreement to China took effect on 21 May 1948. *See* GATT Analytical Index, Contracting Parties-1.

[79] GATT Doc. GATT/CP/54, (8 March 1950).

[80] Resolution on Representation of China, U.N.G.A. Res.2758, 26 GAOR Supp. 29 (A/8429), at 2; U.N. Monthly Chronicle, Vol. VIII, No. 10 (Nov. 1971), at 61.

as an observer.[81] Its request was later approved by the Council.[82] Accordingly, the PRC government has since been deemed capable of regularly attending GATT meetings as an observer. On 10 July 1986, the PRC government officially sent to the GATT a memorandum for its resumption of its GATT membership.[83] A GATT working party was therefore set up by the Contracting Parties to review the Chinese application on 4 March 1987.[84] However, the Tiananmen Square massacre in June 1989 deferred the progress of negotiations between the PRC and the working party.[85] The negotiations were not resumed until early 1992. However, progress appears to have been stalled as Western nations have been concerned about the non-market nature of the PRC economy.[86]

ii. Resumption or Accession

In its communication to the GATT Director-General, the PRC government stated that: "... China is prepared to enter negotiations with GATT contracting parties on the resumption of its status as a contracting party..."[87] This statement indicates

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[81] GATT L/5344 (5 July 1982).

[82] GATT L/5712 (26 October 1984).

[83] GATT L/6017 (10 July 1986).

[84] GATT Focus, No. 44 (March 1987).

[85] Cai, supra note 74, at 37.

[86] BNA, supra note 71, (19 Feb. 1992), at 313.

[87] GATT L/6017 (14 July 1986).

that the PRC government intends to resume its seat, instead of seeking accession to GATT as a new member. In GATT practice, there has never been a nation applying for resumption of its membership and GATT has no rules to deal with such a situation. Resumption, in nature, is different from accession of GATT membership which is based on Article XXXIII of the General Agreement.[88] During the course of accession, an applicant and the contracting parties have to negotiate the terms and conditions of the accession. However, the resumption of membership would mean that the contracting parties would have to forefeit the right to determine the terms for restoring the rights and obligations of the applicant. Since the PRC, potentially a highly competitive trading nation, is still far from a market economy, the contracting parties will not easily let the PRC resume its seat at GATT without setting up certain restrictions. The assertion of the PRC government is purely based on its international status for resuming its seat. However, it would also substantially involve the rights and obligations of other contracting parties. For these reasons, the contracting parties need to consider whether the Chinese application should be treated as that of accession or resumption. The following illustrations will discuss relevant issues regarding the resumption of the PRC application.

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[88] Article XXXIII of the General Agreement provides:
"A government not a party to this Agreement, or a government acting on behalf of a separate customs territory ..., may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the Contracting Parties..."

The PRC government has asserted that it is the sole legitimate representative of China since the founding of the PRC. In spite of opposing views from the ROC government, in international community it is widely accepted that the PRC government succeeded the ROC government in controlling and representing China which arguably includes Taiwan.[89] Thus, the PRC government has the right to join international organizations, including the GATT, on behalf of China. The U.N. 2758 resolution attests to the view of most U.N. members who agreed to "expel the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it."[90] The recognition of the PRC government as the legitimate representative of China retroactively effected from the date of the government succession on 1 October 1949.[91] Accordingly, the ROC government no longer has the right to represent China from that date. Hence, legally speaking, the withdrawal of the ROC government from the GATT on 5 March 1950 was invalid and the PRC, who represents China internationally, is qualified to resume its seat at GATT.

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[89] For instance, the PRC was recognized as the representative of China in the IMF on 17 April 1980. See 35 IMF, Summary Proceedings 90-103 (1980).

[90] U.N.G.A. Res. 2758, supra note 80.

[91] It is generally accepted by states that recognition of a new government has retroactive effect, see M. Whiteman, 2 Digest of International Law , Sections 4 and 61-65 (1963).

Although legally the PRC can resume its status even after three decades of inactivity at GATT, it is impractical for both Contracting Parties and the PRC to resume the terms of the PPA. More precisely, what the PRC may request for resumption is the operation of PPA between itself and the other original PPA signatories. The PPA, however, is much different from the current GATT system. First of all, the PPA grants the contracting parties the right to apply Part II of the GATT only "to the fullest extent not inconsistent with existing legislation."[92] Thus, Part II of the GATT would not be applicable for the PRC. Second, after the execution of the PPA, many nations entered the GATT through the conclusion of respective Accession Protocols which were not covered by the PPA. Hence, how trade relations between the PRC and those members can be regulated are also not covered by the PPA. Third, after seven rounds of GATT negotiations,[93] the GATT system has substantially been amended and is quite different from its original context of 1947. It is thus difficult to interpret how these newly added rules can bind the government of mainland China. Understandably, it is practically impossible to resume the operation of the PPA without resolving the difficulties of how

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[92] Paragraph 5 of the PPA. The text of the PPA, see 55 U.N.T.S.(1947), at 308; B.I.S.D. Vol. IV (1969), at 77-78.

[93] The Tokyo Round is the seventh round of GATT negotiations. The first round began in Geneva in 1973 and was concluded in 1979. See Henkin, supra note 1, at 1166. The Uruguay Round is expected to be concluded in 1993 and both Chinas are observers at the negotiations of this round.

additional GATT rules, different from the PPA, can be applied to the PRC.

In spite of this, the PRC has insisted on its resumption, rather than accession, of GATT status. The reasons for its insistence are multi-fold. First, the PRC is very concerned about its international status as the sole representative of China. Resumption of its GATT status would reflect its sovereignty on mainland China. Second, through the process of resumption, de jure, and accession, de facto, the PRC government expects to invoke the "existing legislation" clause and avoid being subject to the non-application clause. Accordingly, the PRC can enjoy more rights and bear less obligations of GATT. Because of PRC insistence on this approach, Contracting Parties have to devise a Protocol that accommodates the interests of China and resolves problems that occur from the resumption of Chinese GATT status.

C. Procedural Issues Concerning the ROC Application for Accession to GATT

i. Historical Background[94]

As described earlier, the ROC government, on behalf of China, signed the PPA on 30 October 1947, and therefore China applied

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[94] For a detailed illustration of the ROC participation in GATT, see Qin, supra note 74, at 365-70; Wang, "*Separate Customs Territory in GATT and Taiwan's Request for GATT Membership,*" Journal of World Trade, (1991), at 5-7; Yu-shu Feng, "*Taiwan and GATT: The Political, Legal and Economic Issues Raised by the Possibility of Taiwan Joining GATT,* " 13 The World Economy, (1990), at 129-31.

provisionally the General Agreement from 21 May 1948 in accordance with paragraph 3 of the PPA.[95] Shortly after the ROC government retreated to Taiwan, the U.S. government proposed suspending the rights and obligations of the ROC government on behalf of China. After negotiations between the ROC and the U.S. government, the ROC, in consideration of its few expected benefits from the GATT, notified the Secretary-General of the United Nations of its intention to withdraw from the GATT in March 1950.[96]

The ROC government tried to rejoin the GATT in 1965. It has requested the GATT to grant an observer status in the name of the Republic of China.[97] Certain contracting parties raised the issue of whether the ROC government could represent China, especially those not recognizing Taiwan. However, the GATT, in accordance with the opinion of the legal department of the United Nations, granted Taiwan an observer status in the GATT.[98] Unfortunately, the ROC government did not maintain its observer status very long. In November 1971, after the PRC government replaced the ROC government in the United Nations, the chairman of the Contracting Parties decided to follow the U.N. decisions and initiated a

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[95] GATT: Statute of Legal Instrument, GATT/LEG/1, Supplement No. 13, (April 1988), at 1-2.3.

[96] GATT/CP/54, (8 March 1950).

[97] GATT/SR.22/3 (16 March 1965).

[98] The Chairman of the Contracting Parties said: "the question of representation in an international organization was distinct from the question of recognition of a government by other members of that organization." Id.

proposal to cancel the observer status of the ROC in the GATT, which was further approved in 1971.[99]

After nearly two decades of separation from the GATT, the ROC government applied for accession on 1 January 1990 in the name of "The Customs Territory of Taiwan, Penghu, Kinmen and Matsu".[100] The application was objected to by the PRC government which declared that such an application was illegal.[101] The position of the PRC government was: first, the PRC should enter into the GATT prior to Taiwan, second, Taiwan could only accede into GATT through the sponsorship of the PRC government, and, third, Taiwan could only join GATT in the name of "Taiwan, China."[102] Because of political pressures from the PRC, the Taiwanese application to the GATT has been delayed for two years. Some progress on this application was made when the U.S. government formally declared that it would support Taiwan's accession to the GATT.[103] Many other

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[99] GATT Doc. SR. 27/1, (19 November 1971), at 1-3.

[100] *See* Memorandum on Foreign Trade Regime of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu, the ROC Ministry of Economic Affairs, 1 January 1990.

[101] The Globe and Mail [Toronto], 17 Dec. 1990, at 1.

[102] See World Journal [Toronto], 2 Jan. 1991, at 25.

[103] The Bush Administration was not willing to support the Taiwanese application because of political pressures from the PRC. However, members of the U.S. Congress, especially Senator Bacous, urged the Bush Administration to change its position. Thus, the Bush Administration, expecting to get support from the Congress regarding MFN treatment for China, agreed to assist the ROC to enter the GATT in late 1991. *See* World Journal [Toronto], 2 August 1991, at 2.

nations also agreed to assist Taiwan in joining the GATT.[104] After long political negotiations between the PRC and other nations which support the Taiwanese application, the Council of the GATT finally accepted the Taiwanese application on 29 September 1992 and agreed to set up a working party to review this application. In the meantime, Taiwan has been given an observer status in the GATT.[105]

ii. Legal Basis for Accession to GATT

Basically, there are three ways for a government to acquire a contracting party status. First, a government who signed the PPA may become an original contracting party of the GATT. Second, an applicant which meets the requirements of Article XXXIII of the GATT may negotiate with the contracting parties to accede to GATT. Third, pursuant to Article XXVI: 5(c), a customs territory, after obtaining its full independence in its external economic relations, may be deemed to be a contracting party through the sponsorship of the responsible contracting party. For Taiwan, all three ways pose problems regarding its accession.

With respect to the first one, assuming Taiwan is regarded as a part of China, the Taiwanese government therefore may argue that its withdrawal from the GATT was illegal for it cannot represent

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[104] For instance, the Canadian government declared that it would actively assist Taiwan to accede into GATT. *See* World Journal [Toronto], 27 March 1992, at 27.

[105] United News [Taipei], 30 September 1992, at 1.

the whole of China. Thus, it should be allowed to resume its seat as the PRC so claims. Logically, it is feasible for the ROC government to apply for its resumption in GATT, but practically, it would not do so because the ROC government asserts that it is the only legitimate government of China, and therefore would not acknowledge that its withdrawal in 1950 from the GATT was illegal. In addition, as mentioned, the resumption of the PPA is not a solution to the problems of the ROC status. In contrast, it would create more issues on the application of GATT rules after its resumption. Furthermore, from a legal point of view, the ROC government was effectively in control of Taiwan when it sent its notification of withdraw to the Secretary-General of the United Nations. Although not recognized as the government of the whole of China, the ROC still has its personality for international acts. Thus, though its withdrawal may be deemed illegal for not representing the whole of China, it is still effective for the part of Taiwan. Based on these reasons, it is impractical to allow Taiwan to resume its seat in GATT.

Another way for Taiwan to enter GATT is comparable to the Hong Kong situation, that is in accordance with Article XXVI-5(a) of the GATT.[106] The PRC government asserts that Taiwan's position should be equivalent to Hong Kong's and therefore requires the sponsorship of the PRC government. The legal rationale of the PRC government on Article XXVI-5(a) of the GATT is that:

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[106] Accession of Hong Kong, Succession, GATT Doc. L/6957, see B.I.S.D. 34/S27.

> "Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territory as it shall notify to the Executive Secretary to the Contracting Parties at the time of its own acceptance."

The argument of the PRC government might be based on traditional concepts of international law and practice of GATT rules. In the PRC's view, an international treaty can only be concluded by a sovereign state. The GATT is also an international treaty governed by the principles of international law.[107] Thus, members of the GATT should be sovereign states or other entities sponsored by a sovereign state. Since Taiwan is recognized as a part of China and not a sovereign state, it would not be qualified to be a member of the GATT unless it is sponsored by a sovereign state.[108] Further, in GATT practice, the governments that accede to GATT under Article XXXIII are all representatives of states. Taiwan should not be an exceptional case in the application of Article XXXIII.[109] Hence, the only way for Taiwan's accession to GATT would be through the sponsorship of the PRC government.

The PRC point of view is obviously contrary to the spirit and practice of the GATT rules. First, Article XXVI provides opportunities for a colony or a dependent state, which was formerly controlled by the suzerain or responsible state, to accede to GATT on behalf of a customs territory. Many contracting

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[107] Wang, supra note 94, at 18-19.

[108] Id.

[109] Wang, id, at 10-14; Qin, supra note 74, at 425.

parties have acquired their memberships through this procedure.[110] However, because Taiwan and Hong Kong are not former colonies or dependent states of the PRC, it is thus inappropriate to allow the PRC to sponsor Taiwan in its accession. Second, since the economies of mainland China and Taiwan are different, it is impossible for the PRC government to conduct trade negotiations, including tariff schedules, on behalf of Taiwan for its accession. Other contracting parties would also not permit Taiwan to acquire its membership through the Chinese entrance ticket without substantial concessions.[111] Based on these reasons, the only route for Taiwan to enter into GATT is through the application of Article XXXIII.

Article XXXIII provides two opportunities for governments to accede to GATT. One is for a government not a party to the agreement and another is for a "government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this agreement."[112] The second method was devised for the accession of Burma, Ceylon and Southern Rhodesia. However, for various reasons, such a model has never been used since its

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[110] As of 1990, 38 members obtained their seats under Article XXV, see Feng Yushu, " *An Inquiry to the Political, Economic and Legal Problems Arising from Taiwan's Accession to the General Agreement on Tariffs and Trade,* " Taiwan Yanjiu (Taiwan Studies), (1990), at 54.

[111] Feng, id; Qin, supra note 74, at 424-25.

[112] *See* Article XXXIII of the General Agreement.

creation.[113] From the PRC's view, the application of Article XXXIII should not only be determined by the entity's separate tariff system, but also by its international status, and that a government which accedes to GATT under Article XXXIII should be a sovereign state with full international personality.[114] This view is obviously contradictory to the literature on GATT rules. First, an entity that could be qualified as a member of GATT under Article XXXIII need not be a "sovereign state", but a "government" on behalf of a "customs territory", possessing the autonomy of external economic relations. This rule is to allow a government with less than complete sovereignty to become a contracting party of the GATT.[115] Based on this rule, Taiwan, though not being recognized as a sovereign state internationally, may still be qualified as a member of the GATT. Second, the ROC government has carefully chosen the name "The Customs Territory of Taiwan, Penghu, Kinmen, and Matsu" ("TPKM") in its application for accession. It did not use the name "Republic of China" to avoid the issue of whether the PRC or the ROC government will represent China. The name "Taiwan" is intentionally not adopted for it would imply that Taiwan is an independent country. The use of TPKM aims to avoid the political issue of the United Nations' one-China principle.[116] Third, according to the legal department of the

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[113] Wang, supra note 94, at 16.

[114] Id, at 17.

[115] Feng, supra note 110, at 140.

[116] Chiu, supra note 74, at 4.

United Nations, a member of an international organization may vote to accept a representative of a government with which it does not have any diplomatic relations.[117] Based on this principle, other contracting parties which do not recognize Taiwan could still vote for the accession of Taiwan to GATT.

It therefore can be concluded that the procedure under Article XXXIII is a legally and politically sound solution that Taiwan can adopt to enter GATT. As a matter of fact, such an accession procedure has already been approved by the Council of GATT on 29 September 1992.[118]

D. Summary

In this part, the study analyzed the procedural issues of PRC-ROC applications for GATT memberships. Legal bases for such accession or resumption have been difficult to establish. On the PRC side, whether it should enter into GATT through the process of accession or resumption has not yet been resolved in the GATT forum. On the ROC side, which provision would be applied for its accession is another political and legal issue among contracting parties. In spite of these difficulties, GATT contracting parties

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[117] *See* GATT/SR.22/3 (16 March 1965).

[118] United News [Taipei], 30 September 1992, at 3.

have found acceptable legal solutions for these issues. As a result, there is a great possibility that both sides would enter GATT in the near future.

IV. LEGAL ISSUES REGARDING THE CONCLUSION OF A BILATERAL AGREEMENT BETWEEN THE PRC AND THE ROC

A. Governmental Trade Agreements Between the ROC and the PRC

i. The Likelihood of Concluding Governmental Agreements

The likelihood of the conclusion of a governmental agreement between the PRC and the ROC depends mostly on policy considerations of both governments. Legal theories do not provide definite answers in determining whether both sides could conclude a governmental agreement. Both governments can invoke different theories to support their own positions. On the PRC side, it may assert that because Taiwan is internationally accepted as a part of China, there is no way for both governments, as one central and one regional, to conclude an agreement on an equal footing. Legal treatises supporting this argument include the Restatement edited by the American Law Institute,[119] and the Vienna Convention on the Law of Treaties[120] approved by many nations. Both documents

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[119] ALI, supra note 10, at 149-150.

[120] There are two international agreements dealing with the law of treaties: Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, (1969), 63 A.J.I.L. (1969), 875 and Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, A/CONF.129/15, (1986), 25 I.L.M. (1986), 543.

define a treaty as an international agreement concluded between states, rather than between parts of a nation-state, or between central and regional governments. On the ROC side, it may argue that both sides are de-facto political entities that possess international personalities. Hence, legally, there exists some room for them to consider concluding a feasible governmental agreement.[121] Experiences in the two-Germany and two-Korea situations may support this argument.

Since 1991, relations between North Korea and South Korea have been greatly upgraded, especially when the "Agreement on Reconciliation, Non-Aggression, and Exchanges and Cooperation between the South and the North" ("Basic Agreement")[122] was concluded on February 19, 1992. This agreement laid the foundation for substantially institutionalizing the process toward peaceful existence.[123] Obviously, the Basic Agreement was not a treaty concluded between states that recognize each other, but rather a written agreement concluded between the authorities of two political entities under the names of the Republic of Korea and the Democratic People's Republic of Korea which comprise a divided

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[121] For detailed analyses, see part III of this chapter.

[122] World Journal [Toronto], 13 December 1991, at 1; Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between the South and the North, Put into the Force at the Sixth Round of the Inter-Korean High-Level Talks, Pyongyang, February 19, 1992. For full text, *See* Korea and World Affairs (Spring 1992), at 145-148.

[123] Se-hyun Jeong, "*Legal Status and Political Meaning of the Basic Agreement Between the South and North,*" Korea and World Affairs, (Spring 1992), at 5.

state.[124] As mentioned, the Basic Agreement recognized that the relations between the North and the South, not a relationship between states, constitute a special interim relationship toward peaceful reunification.[125] Based on this description, a divided state can conclude a binding agreement, whether or not such an agreement is called or regarded as a treaty in international law.

The Federal Republic of Germany ("FRG") and the German Democratic Republic ("GDR") concluded the "Grundvertrag" (the Treaty on the basis of their relations, hereinafter "Basic Treaty") on December 21, 1972.[126] Legal scholars of West Germany developed the theory of "stabilized de-facto-regime" to support the conclusion of the Basic Treaty. This theory described the international legal statutes of all entities exercising effective control over a certain territory without being recognized de jure and without having to strain the traditional civil war scenario.[127] Based on this theory, both Germanys were no longer a representative of the German nation in international affairs.[128] In contrast, the Basic Treaty recognized that both Germanys were

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[124] Id, at 7.

[125] Id, at 8.

[126] 12 I.L.M. (1973) 16.

[127] *See* Bruno Simma, "*Legal Aspects of Intra-(East West) German Relations,*" 4 Chinese Yearbook of International Law and Affairs, (1984), at 151.

[128] Ryszard W. Piotrowicz, "*The Status of Germany in International Law: Deutchland Ueber Deutchland,*" 38 International and Comparative Law Quarterly, (1989), at 619, see Article 4 of the Basic Treaty.

separate states that belong to a German nation.[129] In light of this, neither side represented the other or acted in the other's name[130] internationally. Both sides respected the other's independence and autonomy in internal and external affairs.[131] But domestically, the Federal Republic declared openly that it did not wish to establish diplomatic relations with East Germany which, in the eyes of the Federal Republic, was not a foreign nation.[132] Nevertheless, the Basic Treaty served as a model of how a divided state can conclude an agreement which, formally, does not differ from a treaty. Since the Basic Treaty, both governments have also concluded other agreements concerning trade, post, telecommunications and environmental protection[133] which substantially improved the relations between them.

As described earlier, the conclusion of an agreement between Taiwan and mainland China largely depends on policy considerations of their governments. Legal theories and practices in the two-Germany and two-Korea situations can be used as arguments if both governments wish to conclude a governmental agreement. In reality, relations between a divided state differ greatly from normal

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[129] Id, at 619.

[130] See Article 4 of the Basic Treaty.

[131] Article 6 of the Basic Treaty.

[132] Jochen Arb. Frowein, "*Legal Problems of the German Ostpolitik*," 23 International and Comparative Law Quarterly, (Jan. 1974), at 115.

[133] For detailed analyses, see Guenter Doeker, et. al., The Federal Republic of Germany and the German Democratic Republic in International Relations (Dobbs Ferry, N.Y.: Oceana Pub., 1979), at 371-400.

"international" relations. Hence, it is still necessary to create a special legal order that allows these political entities to conclude an agreement.

ii. Selecting Appropriate Governmental Bodies for Concluding Agreements

If both governments agree to conclude an agreement through official means, there are several models that can be considered.

a. Agreement concluded by political parties

Based on the remark of PRC Foreign Minister, Qian Qicheng, negotiations and conclusion of an agreement between the ROC and the PRC will have to be carried out through the KMT and the CCP.[134] The reason for such an attitude is to avoid the political issue of who will be the central or the regional government. Prior to the formal negotiations between both parties, the CCP and the KMT may consult with the other local parties, and in such a way other parties may express their opinion on issues regarding negotiations or conclusion of agreements.[135]

Based on the latest Gallup poll of Taiwanese citizens, 60.4% of the ROC adult citizens approved of the negotiations between the ROC and the PRC governments, while 51.4% supported negotiations between the CCP and the KMT if the negotiations between both governments are not feasible. Such a result reveals that ROC

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[134] World Journal [Toronto], 5 May 1991, at 1.

[135] Id.

citizens are concerned about the PRC's influence on the ROC's future and that most ROC citizens favor some kind of negotiation.[136]

However, in spite of political considerations, there will be no legal grounds to uphold negotiations between the CCP and the KMT. First, any treaty, whether an international agreement or other binding official agreement, needs to be concluded either by the state, subdivisions of states or de facto governments. The political parties do not possess any authority to conclude international agreements to bind the states.[137] Second, under domestic treaty-making procedures, the CCP may represent the PRC in negotiating treaties or international agreements because, according to the PRC Constitution, the PRC is under the leadership of the CCP.[138] However, in the ROC Constitution, there is no legal ground to authorize the KMT to negotiate or enter into an agreement with the CCP. Moreover, considering the political situation in the ROC, the Democratic Progressive Party, a major opposition party, would firmly oppose such types of negotiations or conclusion of agreements.

b. Agreements concluded by provinces

In some states, their constitutions permit the making of certain agreements by their subdivisions, such as the states of the

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[136] World Journal [Toronto], 6 April 1991, at 4.

[137] ALI, supra note 10, at 150-52.

[138] See the PRC Constitution, Preamble.

U.S., German Laender, Canadian Provinces, or Swiss Cantons.[139] Some of those agreements are viewed as international agreements with binding effects. Some politicians in the ROC believe that agreements and negotiations made between the ROC and the PRC should be carried out by provincial governments. Such an argument attempts to avoid the political complications between the ROC and the PRC governments. However, neither the ROC nor the PRC Constitution provide treaty-making power for provinces. Therefore, provinces do not have the authority to conclude any agreement with other subdivisions of state. Moreover, agreements concluded between the provinces cannot bind other provinces, or central governments. Thus, there seems to be no legal grounds to support such a scheme.

c. Agreements concluded by the ROC and the PRC central governments

The negotiations and agreements carried out through both central governments can be a legitimate model. First, not only states, but also de facto governments, can conclude a treaty or international agreement. Traditional international law concepts cannot satisfy the special situation of the multi-system nation, especially in the PRC-ROC case. As illustrated earlier, the two-Koreas and former two-Germanys have established models of how divisions of the multi-system nation can conclude governmental agreements. It also attested the legitimacy and the possibility of

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[139] Id.

concluding a governmental agreement between independent entities of multi-system nations.

Second, from the PRC's point of view, the ROC on Taiwan is only a local province of China, thus, there is no legal ground to support a central and a regional government in concluding a treaty on the same level. But this argument has overlooked the actual independent entity of the ROC which can be constituted as a state under the definition of international law. In spite of political differences, the PRC needs to recognize the reality that ROC is in fact an independent entity that can exercise its sovereignty without any permission from the PRC government. If both entities remove their subjective political notions, and realistically arrange their reciprocal relations, there will exist some possibility for the conclusion of a governmental agreement between them.

B. Nongovernmental Trade Agreements Between the ROC and the PRC

i. The Nature of Nongovernmental Trade Agreements

In general, nongovernmental trade agreements are normal trade practices of the ROC and the PRC in dealing with countries that do not have diplomatic relations with them. Based on this practice, the PRC and the ROC may simply disregard their political situations and instead conclude trade agreements.

One issue that could be raised by the PRC is whether the conclusion of such agreements would lead to the implied recognition

of both regimes.

Situations which constitute implied recognition include: (1) exchanging embassies; (2) dispatching consuls; (3) concluding treaties; and (4) attending the same international organizations.[140] From the PRC's point of view, the conclusion of an official commercial treaty and economic agreement could possibly constitute implied recognition of the ROC.[141] However, to the ROC, such nongovernmental agreements, a usual practice among governments which do not have diplomatic relations, are regarded as purely unofficial. If the PRC government wishes to avoid political issues in the trade agreement with the ROC, it can declare such, i.e., that the conclusion of a trade agreement with the ROC does not alter its political attitude toward the ROC. Hence, political issues regarding the conclusion of a nongovernmental agreement can be avoided.

ii. Selecting Appropriate Nongovernmental Organizations

The Red Cross Society of the PRC and of the ROC recently began negotiations for the return of PRC criminals and fishermen.[142] However, such organization does not possess

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[140] *See* Hungdah Chiu, et. al., Modern International Law (Taipei: Shan Min Pub. Co., 1987), at 212.

[141] *See* J.A. Cohen, et. al., People's China and International Law: A Documentary Study, Vol. I, (Princeton: Princeton University Press, 1974), at 208.

[142] The exchange of criminals is carried out through the Red Cross Society on the midway between Jinmen and Xiamen of Fujian Province. *See* World Journal [Toronto], 10 Oct. 1991, at 5.

sufficient authority to deal with the trade relations between the ROC and the PRC.

The ROC government has formed a "Straits Affairs Foundation" under the authorization of the Executive Yuan to negotiate with PRC agencies. In PRC trade practices, unofficial trade agreements are generally concluded by the China Council for the Promotion of International Trade ("CCPIT").[143] This organization has extensive experience in negotiating and concluding unofficial trade agreements with countries that do not have diplomatic relations with the PRC.[144] On 16 December 1991, the Beijing government, in response to the ROC policy, has established the "Association for Relations Across the Taiwan Straits" ("ARATS"), a non-governmental agency of the PRC.[145] It is expected that the ARATS can play a role as an intermediary organization to expand contacts with people and related agencies in Taiwan. Following the U.S.-Taiwan model which maintains official relations through AIT and CCCNA, two non-governmental institutions of the U.S. and Taiwan, one may suggest that the ROC and the PRC conclude trade agreements through the ROC "Straits Affairs Foundation" and a PRC authorized organization, such as CCPIT or the

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[143] *See* Economic and Social Commission for Asia and the Pacific, the United Nations, Guidebook on Trading with the People's Republic of China (London: Graham & Trotman, Ltd., 1984), at 91.

[144] *See* A.R. Dicks, "The People's Republic of China" in East-West Business Transactions (New York: Praeger Pub., 1974), at 393.

[145] Arthur S. Ding, "*On Peking's "Association for Relations Across the Taiwan Straits,*" Issues and Studies (Jan. 1992), at 121-23.

ARATS. Through such institutions, both sides may initiate negotiations on economic, transportation and other substantial matters.

C. Summary

Based on theories and practices of international law, it is found that, in spite of unresolved political differences, a governmental agreement could be reached between the governments of the PRC and the ROC. However, at the current stage, a non-governmental agreement between their authorized agencies, involving less political and legal issues, would be more acceptable.

V. CONCLUDING REMARKS

With the increasing trade activities between the mainland and Taiwan, a trade agreement between both sides is becoming more and more necessary. In addition to the substantive issue analyzed in chapter six, this chapter focused on the procedural arrangements for concluding an international agreement between the PRC and the ROC. Based on this discussion, the following conclusions can be drawn:

1. According to state practices and applicable rules in international law, the statehood of Taiwan is a complex issue which cannot be resolved easily. Consequently, the capacity of the ROC government in concluding an international agreement cannot be determined totally by its statehood.

2. Although state practices are not always coherent, there are

strong reasons to argue that Taiwan, while not being recognized by most nations, is still a political entity qualified to possess an international personality. Assuming that such a theory is valid, Taiwan should be able to conclude such an international agreement.

3. The possible accession of both governments to GATT this year may prove the above assumption correct. However, the legal basis for their accession is still a difficult issue because of their complex historical backgrounds. It is thus clear that GATT will have to devise a precedent in their Protocols to accommodate the interests and political situations of the PRC and the ROC.

4. The conclusion of a bilateral agreement between both sides is politically arguable. Despite the unresolved issues concerning the statehood and international personality of Taiwan, examples of international practices such as those which occurred in the two Koreas and in the former two Germanys support the possibility of the conclusion of official agreements between the PRC and the ROC. At the current moment, however, an unofficial agreement concluded by their respective authorized agents may be more acceptable to both governments.

CONCLUSIONS

THE EMERGENT ORDER OF ROC-PRC TRADE RELATIONS

I. INCOMPATIBILITIES OF POLITICAL PERSPECTIVES AND TRADE REGIMES IN DEVELOPING PRC-ROC TRADE RELATIONS

For nearly a century (1895-1990), from the Japanese occupation to the era of nationalist administration, Taiwan has not had close political or economic relations with mainland China. Interestingly, the only important connection between these two areas is the nationalist government which moved its seat of power from mainland China to Taiwan in 1949. However, because of political and military conflicts between the nationalist and the communist governments, the trade relations of these two societies have not been normalized and liberalized.

Since the late 1980s, the policies of both governments towards one another have become more pragmatic. The trade relationship between the PRC and the ROC has evolved from a more cautious approach to a very prosperous one. The questions of how to regulate such trade relations are intriguing considering the incompatibility of the two trade regimes, the various stages of their economic development as well as their diverse political perspectives on trade relations and legal arrangements.

Specifically, both governments believe that national security and foreign policy concerns should prevail over economic interests. Hence, economic costs arising from governmental

restrictions on trade activities need to be tolerated.[1] Second, the centrally-planned economy in mainland China hinders the market accessibility of foreign and Taiwanese investors and exporters. To allay fears of such a politically dominated economy, an open economy such as that of Taiwan must establish safeguards to protect its own market. Third, trade relations between developing and developed economies, such as the mainland and Taiwan, have often been regarded as unfair and unequal. Thus, an under-developed economy should be entitled to obtain preferential treatment on a non-reciprocal basis. Fourth, national interests, sovereignty concerns and ideological stubbornness of the two governments make the establishment and realization of a liberal trade regime difficult. Overcoming such political disparities in the quest for economic integration is never an easy task.[2]

II. SOLUTIONS FOR THE INCOMPATIBILITIES

For the resolution of the above difficulties and the restructuring of trade policies and trade regimes of the PRC and the ROC in order to provide normal economic integration, the strategies listed below should be considered:

1. A central theme of this study is that the liberal view regarding the role of market and price mechanisms for PRC-ROC

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[1] Such a view is an example of the nationalist perspective, see Edmund Dell, The Politics of Economic Interdependence (London: The MacMillan Press Ltd., 1987), at 13.

[2] For the problems of economic integration between Taiwan and mainland China, see Chapter Two.

trade relations can maximize the economic efficiency and welfare of the mainland and Taiwan.[3] In the meantime, there is a need for protective measures to maintain market functions, and to quell the concerns over national security and foreign policy.[4] However, these should not be misused or abused by disregarding their economic costs.

2. Economics and politics can have an impact on one another. In other words, the market can affect the political environment and politics can change the operation of the economic system.[5] Trade relations between the PRC and the ROC certainly can and eventually will have an impact on their political relations. However, the political and social aspects of trade relations should not be exaggerated. The development of trade relations, for instance, is not necessarily a way to ensure the transfer of sovereignty between two countries.[6] Thus, close trade relations between the PRC and the ROC will not necessarily lead to political reunification. Furthermore, trade control for national security or foreign policy purposes is difficult to implement

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[3] Regarding the importance of markets and a liberal trade regime, see Robert Gilpin, the Political Economy of International Relations (Princeton: Princeton University Press, 1987), at 15-20.

[4] See CED, Breaking New Ground in U.S. Trade Policy (Boulder, Co.: Westview Press, 1991), at 15.

[5] Gilpin, supra note 3, 21-23.

[6] For detailed analyses, see Chapter Two, part II (A).

effectively. Hence, a systematic legal regime leads to be devised.[7]

3. An ME and a CPE are at odds with one another.[8] In a CPE, exports and imports activities are fully or partially controlled by the government, while an ME advocates free trade to decrease or eliminate governmental intervention in trade activities.[9] With respect to the principle of non-discrimination, a CPE tends to discriminate against foreign goods, while an ME would generally treat foreign and domestic goods equally.[10] Further, in a CPE, the concept of reciprocity is almost inapplicable as its trade barriers are mostly administrative measures which cannot be reduced on a reciprocal basis.[11] The "fair competition" rule in an ME, which is based on market mechanisms, is also difficult to apply to products from a CPE which in turn either totally or partially disallows production based on the market.[12] The CPE is also criticized for its secret rules controlling exports and imports which make it difficult for foreign companies to gain access to its markets.[13] Capital movement is restricted in a CPE,

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[7] For detailed analyses, see Chapter Two, part II (B).

[8] *See* Qin Ya, China and GATT: Toward a Meaningful Participation? Harvard unpublished thesis, (1990), at 31; for detailed analyses, see Chapter Two, part III (B).

[9] *See* Chapter Two, part III(B)(i).

[10] *See* Chapter Two, part III(B)(ii).

[11] *See* Chapter Two, part III(B)(iii).

[12] *See* Chapter Two, part III(B)(iv).

[13] *See* Chapter Two, part III(B)(v).

thus, its government may take advantage of foreign exchange controls to suppress imports and encourage exports.[14]

Because of the above incompatibilities, it is difficult to achieve economic integration between an ME and a CPE, such as Taiwan and mainland China. For a meaningful integration to take place, the PRC will have to transform itself from a CPE to an ME.

4. The disparities between developed and developing economies, such as Taiwan and mainland China, have been regarded as another obstacle to smooth integration of both economies. Accordingly, in many international and domestic systems, countries with developing economies have been treated preferentially.[15] At the same time, the governments of countries with developed economies have established special measures against the flow of imports from countries with developing economies.[16]

In this study, it has been seen that both such measures are inconsistent with the principle of trade liberalization and are not sufficient grounds for adopting special rules.[17] However, in the face of political pressures and psychological barriers, both governments need establish preferential and safeguard measures in

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[14] *See* Chapter Two, part III(B)(vi).

[15] *See* Chapter Two, part IV(B).

[16] *See* Chapter Two, part IV(A).

[17] Id.

the development of their trade relations.[18] These arrangements should only be transitional and would change upon the progress of market reforms in mainland China.

5. The people of Taiwan and mainland China have vital commercial interests in promoting trade and investment between themselves. However, their governments have serious concerns about national security and foreign policy which force them to impose trade controls on one another. The line between a liberal and a nationalist perspective on trade control is difficult to determine.[19] A halfway resolution on this issue might be a systematic framework which could help the two governments achieve their policy objectives more efficiently but would generate the least economic cost.[20]

Such a legal framework needs to provide gaols for domestic legislation which would be consistent with international norms and constitutional provisions. In order to balance political concerns and commercial interests, procedural arrangements concerning control criteria and congressional participation for implementing trade restrictions need to be strengthened.[21] The resolution of the legal issue in relation to extraterritorial application of

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[18] Fritz Lentwier et. al., Trade Policies for a Better Future: Proposals for Actions, The Leutwiler Report (Geneva: GATT Secretariat, 1985), at 44.

[19] Barry Clark, Political Economy: A Comparative Approach (New York: Praeger, 1991), at 100.

[20] *See* Chapter Three, part III.

[21] *See* Chapter Three, part III(B).

trade control system requires the streamlining of both international obligations and domestic rules, as well as policy coordination or arbitration between governments.[22]

6. The ROC might expect to adopt certain safeguard measures against the influx of imports from mainland China. To prevent the problem of market disruption, certain mechanisms could be applied to PRC-ROC trade relations.[23] The ROC government may apply Article XIX of the General Agreement, and special safeguard measures in the PRC Resumption/Accession Protocol, to protect its domestic industries if both sides became members of GATT without invoking Article XXXV regarding the non-application of GATT rules.[24] In addition, at the national level, the EC system could be a good model for the ROC in implementing safeguard measures.[25] Under that model, the government could devise a positive list of products without restrictions which otherwise would be imported with quota restrictions, and therefore the number of controlled products would gradually be reduced and trade liberalization would be realized.[26]

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[22] *See* Chapter Three, part III(C).

[23] *See* Chapter Four, part IV.

[24] *See* Chapter Four, part IV(A).

[25] *See* Chapter Four, part IV(C).

[26] *See* Chapter Four, part IV(D).

III. PROSPECTS: PLANNING FOR THE FUTURE

Because of the incompatibility of the trade systems and conflicting political perspectives on trade relations of the PRC and the ROC, this study supports a legal arrangement to gradually liberalize their trade relations with the hopeful result of improved political relations.

In theory, a legal arrangement involving material commitments for trade liberalization has the following advantages: (1) It can be used to avoid trade wars because it can reinforce negotiations among parties; (2) It can simplify the management of trade disputes because it would put a strong nation and a weaker nation on an equal footing, and force government action to be consistent with previously agreed rules; (3) It can assist governments to resist internal political pressures against the rationalization and liberalization of its trade regime as it will establish a political counterweight by gaining support from other internal competitive industries which expect to gain access to foreign markets. In order to achieve the above objectives, it is suggested that both governments consider setting up trade mechanisms to handle their complex trade relations.

However, the promotion of such a legal arrangement is not an easy job because both sides have a great interest in protecting their domestic industries. The trend of the world economy is to support the legalization and institutionalization of trade relations toward market economies which would limit the exercise of national sovereignty and governmental control on trade matters.

More specifically, with regards to PRC-ROC trade relations, and in line with market reforms in mainland China, it is obvious that the concept of the "rule of law" is becoming more acceptable to both governments as a way to regulate their trade relations.[27]

The substantive and procedural arrangements for such mechanisms involve controversial political, economic and legal issues which have to be dealt with. Based on the examination and analysis of the theory and the practice of international trade law, this study comes to the following conclusions:

A. Procedural Arrangements

Regarding procedural arrangements for the conclusion of trade agreements, the issues of Taiwan's statehood and personality need to be determined. If Taiwan is accepted as a nation-state, it would possess a personality that would enable it to act in the international community, including the capacity to conclude international agreements. However, in this study it has been shown that, in accordance with the theories and the practices of international law, the question of whether Taiwan possesses that capacity for statehood is not easily determined. In spite of this, this study, based on the theories and the practice of international law, concluded that Taiwan, as a political entity, meets the requirements of statehood and is an entity with legal

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[27] For the above discussions, *see* Chapter Two, part V.

personality. Therefore, it would possess the capacity to conclude an international agreement with mainland China.[28]

The acceptance of the PRC and the ROC applications to GATT verifies the above analyses. However, procedural arrangements for their accession or resumption to GATT remain troublesome. The PRC may enter into GATT through resumption of its membership. However, with respect to its substantial rights and obligations in GATT, it would be treated as a new accession. For the ROC, it has been accepted as an observer and will be qualified as a new member as a separate customs territory consistent with Article XXXIII of the General Agreement.[29] Regarding the concluding of bilateral agreements between the PRC and the ROC, this study has argued that both legal theory and practice supports the feasibility of the conclusion of governmental agreements between factions of a divided state, such as the PRC and the ROC. Non-governmental agreements between both parties could be arranged and such procedural arrangement would involve fewer political issues.[30]

B. Substantive Arrangements

For the improvement of PRC-ROC trade relations, both parties have to first deal with their conflicting political perspectives on trade relations. At the current stage, because of their

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[28] For the above discussions, *see* Chapter Six, part II.

[29] For the above discussions, *see* Chapter Six, part IV.

[30] For the above discussions, *see* Chapter Six, part V.

conflicting political views and incompatible trading systems, it appears to be very difficult to force them to lift their trade barriers toward one another. However, on a long-term basis, if both parties could gradually resolve their opposing views on trade systems and sovereignty issues, their trade relations could be further liberalized and legalized. For this purpose, both parties need to resort to certain trade regimes in handling their trade relations. With respect to the types of trade agreements, both parties could use multilateral, regional and bilateral mechanisms as legal bases for their relations.

On the multilateral level, both sides have a great interest in joining GATT, and generally their applications have been supported by many contracting parties. Hence, it is possible that both parties will enter GATT in the near future. Once both parties have joined GATT, they then have to determine whether they could apply GATT rules to regulate their trade relations. If both sides intend to maintain restrictions on trade, they may invoke Article XXXV or XXI of the General Agreement to avoid the applications of GATT rules. However, it is this author's view that since, on a long term basis, trade relations between them need to be normalized and legalized, the GATT system could help improve their trade relations by providing internationally recognized rules to liberalize trade activities and put members on an equal footing. For this purpose, both governments need to

adjust their respective trade measures in order to comply with GATT obligations.[31]

The formation of regional trading blocs is another major trend in the world economy. In the Asian-Pacific area, regional economic forums have been established, and regional integration programs have been seriously considered since the completion of the European internal market and the execution of the North American Free Trade Agreement ("NAFTA"). Regional economic programs have their economic advantages, such as trade creation and dynamic effects.[32] However, they also have disadvantageous effects on the development of economic benefits in that they limit international trading activities through discriminatory measures toward non-members. For this reason, a regional integration program is not the best solution for Asian-Pacific nations, especially because both Taiwan and mainland China cannot be isolated from the North American and European markets. However, if the world trade system fails and regional trading blocs are intensified, Asian-Pacific nations would then have to plan their own integration program. Generally speaking, under this

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[31] For the above discussions, *see* Chapter Five, part II.

[32] A regional program aiming at reducing trade barriers might enhance the economies of scale and reduce production cost. Thus, investors would increase their investments to expand their markets. Further, with the removal of trade barriers, domestic producers would concentrate and specialize their production which would speed up the structural adjustment of an economy. These impacts are regarded as "dynamic effects". *See* H. Edward English, The Political Economy of International Economic Integration: A Brief Analysis, Occasional Paper 22, Carlton Univ., (1972), at 13.

situation, such a program could have political and economic impacts on the PRC and the ROC. For the Asian nations, such an integration program could be a basis on which to create an Asian community with political, economic and social harmonization in the future.[33]

With respect to a bilateral trade agreement, both parties first have to deal with the procedural arrangements for a trade agreement, which is related to the issues of the statehood and the international personality of Taiwan. Once they have resolved such issues, they can then consider the benefits of a trade agreement between themselves. Considering the economic and political disparities between the two parties, a trade agreement comprising substantial rights and obligations is not feasible at the current stage. Both parties could set up a trade agreement with a loose framework, which would provide a general declaration supporting economic cooperation between them, and would further provide concrete projects focusing on sector cooperation. The time is not ripe for a preferential agreement between them, considering the incompatibility of their political and economic systems. However, on a long term basis, if the multilateral trade system and regional programs fail, or if both parties wish to further remove the trade barriers between themselves, a preferential arrangement may be considered as an option as a next step in their economic integration.[34]

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[33] For the above discussions, *see* Chapter Five, part III.

[34] For the above discussions, *see* Chapter Five, part IV.

BIBLIOGRAPHY

I. BOOKS AND ARTICLES

A. BOOKS

ALI. Restatement of the Law, The Foreign Relations Law of the United States (St. Paul: American Law Institute, 1987).

Anderson, Kym. Changing Comparative Advantages in China (Paris: Development Center of the OECD, 1989).

Baldwin, David A. (ed.) East-West Trade and the Atlantic Alliance (New York: St. Martin's Press, 1990).

Barnett, A. Doak. U.S. Arm Sales: The China-Taiwan Tangle (Washington, D.C.: The Brookings Institution, 1982).

Bhagwati, Jagdish N. The New International Economic Order (Cambridge: MIT Press, 1977).

Blaser, Fred, et. al. Business and Tax Laws of the People's Republic of China (Toronto: CCH Canadian Ltd., 1987).

Blejer, Mario. et. al. China: Economic Reform and Macroeconomic Management (Washington, D.C.: International Monetary Fund, 1991).

Bronckers, M.C.E.J. Selective Safeguard Measures in Multilateral Trade Relations (Hague: T.M.C. Asser Institute, 1985).

Brownlie, Ian. Recognition in Theory and Practice, The Structure and Process of International Law, (ed.) R.S.T.J. MacDonald and D.M. Johnson (Boston: M. Nijhoff Pub., 1983).

Carl, Beverly May. Economic Integration Among Developing Nations (New York: Praeger Pub., 1986).

Carter, Barry. International Economic Sanctions (Cambridge: Cambridge University Press, 1988).

Castel, J.G. The Canadian Law and Practice of International Trade (Toronto: Edmond Montgomery Pub., 1991).

Castel, J.G. Extraterritoriality in International Trade: Canada and United States of America Practices Compared (Toronto & Vancouver: Butterworths Canada Ltd., 1988).

Central Bank. Central Bank Yearbook (Taipei: Central Bank, 1991).

CED. Breaking New Ground in U.S. Trade Policy (Boulder, CO: Westview Press, 1991).

Chang, Fu-me. (ed.) Taiwan Wenti Taolun Ji (The Essays on the Discussions of Taiwan Problem) (Taipei: Qianwei Pub. Co., 1990).

Chen, Lung-chu. An Introduction to Contemporary International Law (New Haven: Yale Univ. Press, 1989).

Chiang, Ching-kuo. The Republic of China's Basic Position and Current Issues (Taipei: The Government Printing Office, Jan. 1982).

China Taxation Research Association. Mainland Tax Affairs Reporters (Taipei: CTRA, 1991).

Chiu, Hungdah. Essays Regarding the Problems of Chinese International Law (Taipei: Taiwan Commercial Printing Co., 1972).

Chiu, Hungdah. China and the Taiwan Issue (New York: Praeger Publishers, 1979).

Chiu, Hungdah. China and the Question of Taiwan (New York: Praeger Publishers, 1973).

Chiu, Hungdah, et. al. Modern International Law (Taipei: Shan Min Pub. Co., 1987).

Chow, Hong-Qiun. Guo-ji Fa Lun (International Law) (Shanghai: Tong Gjid Daxue, 1991).

Clark, Barry. Political Economy: A Comparative Approach (New York: Praeger, 1991).

Cohen, J.A., et. al. People's China and International Law: A Documentary Study, V. I (Princeton: Princeton University Press, 1974).

Cooper, Taiwan: Nation-State or Province (Boulder, CO: Westview Press, 1990).

Cotterrell, Roger. The Sociology of Law (London: Butterworths, 1984).

Crawford, James. The Creation of States in International Law (Oxford: Clarendon Press, 1979).

De Mestral, A.L.C., et. al. Extraterritorial Application of Export Control Legislation: Canada and the U.S.A. (Dordrech, Netherlands: M. Nijhoff Pub., 1990).

Dell, Edmund. The Politics of Economic Interdependence (London: The MacMillan Press Ltd., 1987).

Destler, I.M. American Trade Politics (Washington, D.C.: Institute for International Economics, 1992).

Dicks, A.R. "The People's Republic of China" in East-West Business Transactions (New York: Praeger Pub., 1974).

Doeker, Guenter, et. al. The Federal Republic of Germany and the German Democratic Republic in International Relations (Dobbs Ferry, N.Y.: Oceana Pub., 1979).

Economic and Social Commission for Asia and the Pacific, the United Nations. Guidebook on Trading with the People's Republic of China (London: Graham & Trotman, Ltd., 1984).

English, H. Edward. Tomorrow the Pacific (Toronto: C.D. Howe Institute, 1991).

Falk, Richard A. "*The Interplay of Westphalia and Charter Conception of International Legal Order in Trends and Pattern,*" The Future of International Legal Order, ed. Richard A. Falk and Cyrns E. Black (Princeton, N.J.: Princeton University Press, 1969).

Feinberg, Richard E. et. al. Economic Reform in Three Giants (New Brunswick, N.J.: Transaction Books, 1990).

Funigiello, Philip J. American-Soviet Trade in the Cold War (Chapel Hill and London: The Univ. of North Carolina Press, 1988).

Gill, Stephen and David Law. The Global Political Economy: Perspectives, Problems, and Policies (Baltimore, MD: The John Hopkins Univ. Press, 1988).

Gilpin, Robert. The Political Economy of International Relations (Princeton: Princeton University Press, 1987).

Gordon, Smith B. The Politics of East-West Trade (London: Westview Press, 1984).

Green, L.G. International Law (Edmond: University of Alberta Press, 1981).

Hartland-Thunberg, Penelope. China, Hong Kong, Taiwan and the World Trading System (New York: St. Martin's Press, 1990).

Haus, Leak A. Globalizing the GATT: The Soviet Union's Successor States, East Europe and the International Trading System (Washington, D.C.: The Brookings Institution, 1992).

Henkin, Louis, et. al. International Law (St. Paul: West Pub. Co., 1987).

Henkin, Louis. Foreign Affairs and the Constitution (New York: The Foundation Press, 1972).

Hudec, Robert E. Developing Countries in the GATT Legal System (London: Gower Pub. Ltd. Co., 1987).

Issak, Robert A. International Political Economy (Englewood Cliffs, N.J.: Prentice Hall, 1991).

Jackson, John H. Legal Problems of International Economic Relations (St. Paul, Minn.: West Pub. Co., 1986).

Jackson, John H. The World Trade System (Cambridge, MA: MIT Press, 1989).

Jackson, John H. World Trade and the Law of GATT (Indianapolis: Bobbs-Merrill, 1969).

Jackson, John H. Restructuring the GATT System (New York: Council on Foreign Relations Press, 1990).

Kindred, Hugh M. International Law (Toronto: Casewell, 1987).

Kostecki, M.M. East-West Trade and the GATT System (New York: St. Martin's Press, 1979).

Lampton, David M. China's Global Presence (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1988).

Langhammer, Rolf J. Economic Impact of Generalized Tariff Preference (Hampshire, U.K.: Gower Publishing Co., Ltd., 1987).

Lasater, Martin L. U.S. Policy Toward Chinese Reunification (Washington, D.C.: The Heritage Foundation, 1988).

Lentwiler, Frtiz et. al. Trade Policies for a Better Future: Proposals for Action, The Leutwiler Report (Geneva: GATT Secretariat, 1985).

Li, Kuo-ting. The Evolution of Policy Behind Taiwan's Development success (New Haven, Conn.: Yale University Press, 1988).

Lo, Fu-chen and Kamal Salih. The Challenge of Asia-Pacific Cooperation (Kuala Lumpur, Malaysia: The Association of Development Research and Training Institute of Asia and Pacific, 1987).

Long, Oliver. Law and its Implications in the GATT Multilateral Trade System (Dordrecht, Netherlands: M. Nijhoff Pub., 1985).

Long, Oliver. Law and its Limitations in the GATT Multilateral Trade System (Dordrecht: M. Nijhoff Pub., 1986).

Long, Simon. Taiwan: China's Last Frontier (London: The MacMillan Press, Ltd., 1991).

Lowenfeld, Andreas F. Trade Control for Political Ends (New York: M. Bender, 1983).

Marsceau, Marc. (ed.) The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe (Dordrech, Netherlands: Martinus Nijhoff Publishers, 1989).

Mathijsen, R.F. A Guide to European Community Law (London: Sweet and Maxwell, 1990).

MacDonald, Stuart. Technology and the Tyranny of Export Control (London: The MacMillan Press, Ltd. 1990).

Moser, Michael J., et. al. China Tax Guide (Hong Kong: Oxford Univ. Press, 1987).

Moser, Michael J. (ed.) Foreign Trade, Investment, and the Law in the People's Republic of China (Hong Kong: Oxford Univ. Press, 1987).

Moyer, Homer E. Export Control As Instruments of Foreign Policy (Washington, D.C.: International Law Institute, 1985).

Myres, Ramon H. (ed.) Two Societies in Opposition: The Republic of China and the People's Republic of China (Stanford: Hoover Institution Press, 1991).

Nanto, Dick K. Asia-Pacific Econc ic Cooperation and U.S.-Japan Relations, in Economic Cooperation in the Asia Pacific Region (ed.) John P. Hardt and Young C. Kim (Boulder, CO: Westview Press, 1990).

Nau, Henry R. The Myth of America's Decline (Oxford: Oxford University Press, 1990).

Nee, Victor. (ed.) Remaking the Economic Institutions of Socialism (Stanford: Stanford University Press, 1989).

Petersmann, Ernst-Ulrich and Meinhard Hilb. (ed.) The New GATT Round of Multilateral Trade Negotiation: Legal and Economic Problems (Boston: Kluwer, 1989).

Price Curzon, Victoria. Free Trade Areas, The European Experience (Toronto: C.D. Howe Institute, 1987).

Qin, Ya. China and GATT: Toward a Meaningful Participation? Harvard unpublished S.J.D. Thesis (1990).

Sandler, Michael. International Commercial Law (Seattle: Univ. of Washington, 1990).

Schott, Jeffrey J. The Global Trade Negotiation: What Can Be Achieved? (Washington, D.C.: The Institute for International Economics, 1990).

Schott, Jeffrey J. More Free Trade Areas (Washington, D.C.: Institute for International Economics, 1989).

Shaw, M.N. International Law (Dyfed: Grotius Pub. Ltd., 1986).

Selden, Mark. The Political Economy of Chinese Socialism (Armonk, NY: M.E. Sharpe, Inc., 1990).

Snape, R.H. (ed.) Issues in World Trade Policy: GATT at the Crossroads (New York: St. Martin's Press, 1986).

Streifford, David M. Economic Perspective (Boston, MA: Richard D. Irwin, Inc., 1990).

Sugarman, David. (ed.) Legality, Ideology and the State (London: Academic Press, 1983).

USGAO. GATT Treatment for Nonmarket Countries (Washington, D.C.: U.S. General Accounting Office, 1990).

Vernon, Raymond, et. al. Beyond Globalism: Remaking American Foreign Economic Policy (New York, NY: The Free Press, 1989).

Waldwann, Raymont J. Managed Trade (Cambridge, MA: Ballinger Pub. Co., 1986).

Wang, Yu San. (ed.) Foreign Policy of the Republic of China on Taiwan (New York: Praeger Publisher, 1990).

Weber, Max. Economy and Society (New York: Bedminster Press, 1968).

Whitman, Marina V.N. Reflections of Interdependence: Issues for Economic Theory and U.S. Policy (Pittsburgh: University of Pittsburgh Press, 1979).

Williams, Sharon A. and A.L.C. de Mestral. An Introduction to International Law (Toronto & Vancouver: Butterworth, 1987).

Williams, Sharon A. Introduction to International Law (Toronto: Butterworth, 1979).

Yan, Qin-zong. Discover the GATT System (Taipei: China Times Pub. Co., 1989).

Yang, Si-ren. DaLu Jingmao Di Qiuqshi Yi Huanjing (Situations and Environments of Mainland's Economy and Trade) (Taipei: Lien-Chin Pub. Co. Ltd., 1990).

B. ARTICLES

Abbott, Kenneth W. "*Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s,*" 65 Minnesota Law Review (1981), 798.

Aho, C. Michael. "The Uruguay Round: Will it Revitalize the Trading System?" 11 Fletcher Forum (Winter 1987), 1.

Aho, C. Michael. "*More Bilateral Trade Agreements Would be a Blunder: What the New President Should Do,*" 25 Cornell International Law Journal (1989), at 31.

Ai, Wei. "*The Development and Limitations of Taiwan-Mainland Economic and Trade Relations,*" Issues and Studies (May 1991), 46.

Alexander, Dean C. "*The North American Free Trade Area: Potential Framework of an Agreement,*" 14 Houston Journal of International Law (1991), 92.

Baker, James A. III. "*America in Asia: Emerging Architecture for a Pacific Community,*" Foreign Affairs (Spring 1992), 16.

Baldwin, David A. "*Interdependence and Power: A Conceptual Analysis,*" 34 International Organization (Autumn 1980), 488.

Banks, Gary and Jan Tumlir. "*The Political Problem of Adjustment,*" 9 The World Economy (1986), 145.

Bilder, Richard, et. al. "*The Canada-U.S. Free Trade Agreement: New Directions in Dispute Settlement,*" American Society of International Law, Proceedings of the 3rd Annual Meeting (1989), 259.

Bowden, Sharon. "*The Shadow of 1992: Developing Country Efforts at Economic Integration,*" 32 Harvard International Law Journal (1991), 537.

Cai, Wenguo. "*Canadian and U.S. Antidumping Laws and Chinese Exports,*" 14 World Competition (Sept. 1990), 126.

Cai, Wenguo. "*China's GATT Membership: Selected Legal and Political Issues.,*" 26 Journal of World Trade (1992), 36.

Campbell, Donald W. "*Canada, the GATT and the North American Free Trade Negotiations,*" Speaking Notes Confederation of British Industry, London (10 Oct. 1991), 7.

Carmichael, W.B. "*National Interest and International Trade Negotiations,*" 9 The World Economy (1986), 354.

Castle, Lawrence A. "*The Reversion of Hong Kong to China: Legal and Practical Questions,*" 21 Willamette Law Review (Spring 1985), 327.

Chang, Dennis. "*Towards a Jurisprudence of a Third Kind - "One Country, Two Systems" (Hong Kong: Transfer of Sovereignty),*" 20 Case Western Reserve Journal of International Law (Winter 1988), 99.

Chang, Chen-pang. "*The Republic of China's Guidelines for National Unification,*" Issues and Studies (Mar. 1991), 1.

Chen, Tian-zhi. "*Taiwan He Dalu Changye Shi Jingzheng Huo Hubu,*" (Are Industries of Taiwan and Mainland Competitive or Complementary?) 19 Jinggi Qianzhan (July 1990), 12.

Chen, Tung-pi. "*Are the Antidumping Laws of Canada and Other Western Countries Keeping Pace with China's Structural Reform,*" 19 Law and Policy in International Business (1987), 717.

Cheng, Chu-yuan. "*Mainland China's Modernization and Economic Reform: Processes, Consequences, and Prospect,*" Issues and Studies (Nov. 1991), 80.

Cheng, Jing-zhong. "*Zhonggong Duitai Zhengce Di Kishixue Fazhan Ziqi Quxiang,*" (Historical Evolution and Trend: CCP's Taiwan Policy) Taiwan Studies (Jan. 1989), 1.

Chien, Frederick F. "*The Role of the Coordination Council for North American Affairs in the Context of the United States-Republic of China Relationship,*" 6 N.Y. Law School Journal of International and Comparative Law (1984), 127.

Chiu, Hungdah. "*The International Status of the Republic of China,*" Chinese Yearbook and International Affairs (1990), 3.

Chiu, Hungdah. "*Introduction (Hong Kong: Transfer of Sovereignty),*" 20 Case Western Reserve Journal of International Law (Winter 1988), 1.

Chiu, Hungdah. "*Taiwan's Membership in the General Agreement on Tariffs and Trade,*" A Paper Prepared for the Columbia Law School "Taiwan and GATT Conference" at Columbia University on 20 December 1991.

Chiu, Thomas C.W. "*China and GATT: Implications of International Norms for China,*" 26 Journal of World Trade (Dec. 1992), 5.

Clark, Cal et. al. "*ROC-PRC (Non) Relations: Groping Toward the German Model,*" Issues and Studies (Oct. 1991), 62.

Crone, Donald. "*The Politics of Emerging Pacific Cooperation,*" Pacific Affairs (1992), 69.

Crosby, Scott. "*The Single Market and the Rule of Law,*" European Law Review (1991), 451.

Dai, Poelin. "*Canada and the Two-China Formula at the United Nations,*" The Canadian Yearbook of International Law (1967), 217.

Davey, William J. "*Dispute Settlement in GATT,*" 11 Fordham International Law Journal (1987), 52.

Dekieffer, Donald E. "*Foreign Policy Trade Controls and the GATT,*" 22 Journal of World Trade (June 1988), 78.

DeMarchi, Virginia K. "*United States-Taiwan Relation,*" 33 Harvard International Law Journal (1992), 631.

Devuyst, Youri. "*GATT Customs Union Provisions and the Uruguay Round: The Experience,*" 26 Journal of World Trade (1992), 18.

Ding, Arthur S. "*On Peking's Association for Relations Across the Taiwan Straits,*" Issues and Studies (Jan. 1992), 121.

Ellis, Henry III. "*Indian Tribal Sovereignty and the Tribal Courts: The Myth and the Reality,*" 13 Suffolk Transnational Law Journal (1990), 714.

Emerson, J. Terry. "*The Taiwan Relations Act: Legislative Recognition of the Republic of China,*" Issues and Studies (1988), 56.

English, H. Edward. "*The Political Economy of International Economic Integration: A Brief Synthesis,*" Occasional Papers 22, Carlton University, School of International Affairs (1972), 2.

English, H. Edward. "*An O.E.C.D. of the Pacific? A Canadian Perspective,*" Working Paper of the Asian Pacific Research and Resource Centre (1990), 7.

English, H. Edward. "*International Economic Integration and National Policy Diversity,*" Occasional Papers in International Trade Law and Policy, Center for Trade Policy and Law (1990), 2.

Erwing, Annabelle. "*Single Market of 1992: Implications for Banking and Services in the EC,*" 13 Hasting International & Comp. Review (1990), 453.

Fedorowycz, Ihor. "*Preventing the Transfer of Military Critical Technology to the Soviet Blick: the Case for Strong National Security Export Controls,*" 26 Columbia Journal of Transnational Law (1987), 55.

Feng, Yu-shu. "*China's Membership of GATT: A Practical Proposal,*" 22 Journal of World Trade (Dec. 1988), 55.

Feng, Yu-shu. "*Taiwan and the GATT: The Political, Legal and Economic Issues Raised by the Possibility of Taiwan Joining GATT,*" 13 The World Economy (1990), 129.

Feng, Yu-shu. "*An Inquiry to the Political, Economic and Legal Problems Arising from Taiwan's Accession to the General Agreement on Tariffs and Trade,*" Taiwan Yanjiu (Taiwan Studies) (1990), 54.

Fenton, Howard N. III "*Reforming the Procedures of the Export Administration Act: A Call for Openness and Administrative Due Process,*" 27 Texas International Law Journal (1992), 8.

Frowein, Jochen Abr. "*Legal Problems of the German Ostpolitik,*" 23 International and Comparative Law Quarterly (1973), 114.

Fu, Feng-cheng. "*Technology Transfers from Chinese Mainland to Taiwan,*" Issues and Studies (Sept. 1991), 143.

Goodman, Nancy J. "*International Agreement: Poland Bilateral Investment Treaty - A Reflection of United States Efforts to Shape the Economic Development of Eastern Europe,*" 32 Harvard International Law Journal (1991), 255.

Gray, Jefferson. "*International Agreement: United States-Taiwan Relations,*" 22 Harvard International Law Journal (1981), 451.

Green, L.C. "*Representation versus Membership: The Chinese Precedent in the United Nations,*" The Canadian Yearbook of International Law (1972), 102.

Grundy-McClosky, Stephen J. "*The Exportation of the Show-How Rather Than Know-How: Discrimination in the Implementation of U.S.-Controls on the Export of Technology to the People's Republic of China,*" 13 Syracuse Journal of International & Com. (1988), 479.

Gryzbowski, K. "*Socialist Countries in GATT,*" 28 The American Journal of Comparative Law (1980), 551.

Haendel, Dan. "*The Shifting Focus of Dual Use Export Controls: An Overview of Recent Developments and a Forecast for the Future,*" 25 The International Lawyer (Spring, 1991), 273.

Hentzen, Matthias K. "*United States Export Restrictions for Foreign Policy and National Security Purposes" the 1985 Amendments to the Export Administrations Act and Beyond,*" 26 Columbia Journal of Transnational law (1987), 105.

Herzstein, Robert E. "*China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade,*" 18 Law and Policy in International Business (1986), 396.

Higgott, Richard. "*Cooperation-Building in the Asia-Pacific Region: APEC and the New Institutionalism,*" Australian-Japan Research Paper (Sept. 1991), 8.

Hunt, Cecil. "*The Jurisdictional Reach of Export Controls,*" 26 Columbia Journal of Transnational Law (1987), 22.

Ingersoll, Shaun A. "*Current Efficacy of the GATT Dispute Settlement Processes,*" 22 Texas International Law Journal (1986), 87.

Jackson, John H. "*State Trading and Non-Market Economies,*" 23 The International Lawyer (Winter, 1989), 894.

Jackson, John H. "*Status of Treaties in Domestic Legal System: A Policy Analysis,*" 86 The American Journal of International Law (1992), 310.

Jeong, Se-hyun. "*Legal Status and Political Meaning of the Basic Agreement Between the South and North,*" Korea and World Affairs (Spring 1992), 5.

Johnston, Douglas M. "*Functionalism in the Theory of International Law,*" The Canadian Yearbook of International Law (1988), 55.

Kennedy, David. "*Turning to Market Democracy: A Tale of Two Architectures,*" 32 Harvard International Law Journal (1991), 379.

Kenner, Spencer L. "*The Toshiba Sanctions Provisions: Its Constitutionality and Impact on CoCoM,*" Brigham Young University Law Review (1989), 623.

Kihwan, Kim. "*Trade Negotiations and Developing Countries in the Asian and Pacific Region,*" 4 Asian Development Review (1986), 52.

Kim, Samuel S. "*Mainland China and a New World Order,*" Issues and Studies (Nov. 1991), 14.

Kirkham, D. Barry. "*The International Status of Formosa,*" The Canadian Yearbook of International Law (1968), 144.

Lai, Yan-he. "*Zhong Gong Jinggi Fagui Zhi Yanjiu,*" (Research on the Economic Regulations of Mainland China) 39 Chengta' Faxue Pinglun (June 1989), 67.

Lan, Ke-jeng, et. al. "*The Taiwan Experience in Economic Development,*" Issues and Studies (Oct. 1991), 135.

Lapidoth, Ruth. "*Sovereignty in Transition,*" Journal of International Affairs (1992), 325.

Lasater, Martin L. "*Ruhe Xianzu Zhonggon Dui Tai Dongwu,*" (The Means to Prevent Chinese Communist From Using Force Against Taiwan) Zhonguang Ribao (Central Daily) (22 Feb. 1992), 1.

Lee, Edward G., et. al. "*Canadian Practice in International Law,*" The Canadian Yearbook of International Law (1965 & 1966), 327.

Lee, Chung-teh. "*The Republic of China's Response to Charges of Protectionism,*" 13 Loyola Los Angeles International & Comp. Law Journal (1990), 29.

Lewis, Eleanor Roberts. "*The United States-Poland Treaty Concerning Business and Economic Relations: New Themes and Variations in the U.S. Bilateral Investment Treaty Program,*" 22 Law and Policy in International Business (1991), 534.

Li, Chung-chou. "*Resumption of China's GATT Membership,*" 21 Journal of World Trade (1987), 25.

Lin, Yu-fang. "*The German Unification Model: Applicable to China and Korea,*" Issues and Studies (May 1992), 93.

Lutz, James M. "*GATT Reform or Regime Maintenance: Differing Solution to World Trade Problems,*" 25 Journal of World Trade (Apr. 1991), 19.

Ma, Ying-jeou. "*The Republic of China's Policy Toward the Chinese Mainland,*" Issues and Studies (Feb. 1992), 9.

Manin, Philippe. "*The European Communities and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations,*" 24 Common Market Law Review (1987), 457.

Martyn, Will. "*International Trade: the General Agreement on Tariff and Trade,*" 29 Harvard International Law Journal (1991), 199.

McDonald, Susan A. "*the Problem of Treaty-Making and Treaty Implementation in Canada,*" 19 Alberta Law Review (1981), 297.

McKenzie, Paul D. "*China's Application to the GATT: State Trading and the Problem of Market Access,*" 24 Journal of World Trade (Dec. 1990), 136.

MOEA. "*The Foreign Trade Regime of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu,*" Chinese Yearbook of International Affairs (1989-1990), 228.

Morris, G.L. "*The Treaty-Making Power: A Canadian Dilemma,*" 45 Canadian Bar Review (1967), 478.

Motyl, Alexander J. "*The Modernity of Nationalism: Nations, States and Nation-States in the Contemporary World,*" Journal of International Affairs (Winter 1992), 320.

Mulford, David C. "*Non-Legal Arrangements in International Economic Relations,*" 31 Virgin Journal of International Law (1991), 437.

Nicolaides, P. "*Preferences for Developing Countries: A Critique,*" 19 Journal of World Law (1985), 381.

Neoh, Anthony. "*Hong Kong's Future: The View of a Hong Kong Lawyer,*" 22 California Western International Law Journal (1992), 351.

Note. "*One Europe, One World,*" Journal of World Trade (Apr. 1986), 13.

Note. "*Europe and the Global Crisis,*" Journal of World Economy (April 1986), 7.

Note. "*Basic Issues in Cross-Strait Relations,*" Issues and Studies (Mar. 1991), 21.

Parker, Robert P. "*Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement,*" 23 Journal of World Trade (1990), 83.

Patterson, Eliza R. "*Improving GATT Rules for Non-Market Economy,*" 20 Journal of World Trade Law (Mar.-Apr. 1986), 187.

Petersmann, Ernst-Ulrich. "*Grey Area Trade Policy and the Rule of Law,*" 22 Journal of World Trade (April 1988), 24.

Piotrowicz, Ryszard. "*The Status of Germany in International Law: Deutschland Ueber Deutschland?*" 38 International and Comparative Law Quarterly (1989), 616.

Plehn, Robert M. "*Economic Integration of the Argentina Republic and the Federal Republic of Brazil,*" 28 Harvard International Law Journal (1987), 186.

Preg, Ernest H. "*The U.S. Leadership Role in World Trade: Past, Present, and Future,* " The Washington Quarterly (Spring 1992), 81.

Riedel, James. "*Intra-Asian Trade and Foreign Direct Investment,*" 9 Asian Development Review (1991), 141.

Roessler, Frieder. "*The Competence of GATT,*" 21 Journal of World Trade Law (June 1987), 73.

Roessler, Frieder. "*The Scope, Limits and Functions of the GATT Legal System,*" 8 The World Economy (1985), 296.

Roth, P.M. "*Reasonable Extraterritoriality: Correcting the 'Balance of Interest',*" 41 International and Comparative Law Quarterly (Apr. 1992), 255.

Rubin, Seymour J. "*International Trade Realities: Are There Rules of the Game?*" 14 Denver J. International Law and Policy (1986), 152.

Scalapino, Robert A. "*The United States and Asia: Future Prospects,*" Foreign Affairs (Spring 1992), at 20.

Segeal, Gerald. "*North-East Asia: Common Security or A La Carte?*" International Affairs (1991), 6.

Simma, Bruno. "*Legal Aspects of Intra-(East West) German Relations,*" 4 Chinese Yearbook of International Law and Affairs (1984), 151.

Solomon, Richard H. "*China and MFN: Engagement, Not Isolation, In Catalyst for Change,*" U.S. Department of State, Bureau of Public Affairs (1990), 2.

Sullivan, Roger W. "*Trade, Investment, and the Fear of "Peaceful Evolution",*" Issues and Studies (Feb. 1992), 54.

Sullivan, Roger W. "*Discarding the China Card,*" Foreign Policy (Spring 1992), 16.

Sung, Yun-wing. "*The Economic Integration of Hong Kong, Taiwan and South Korea with Mainland China,*" A Paper Prepared for the 19th Pacific Trade and Development Conference on Economic Reforms and Internationalization: China and Pacific Region, Beijing (May 27-30, 1991), 3.

Tranmholm-Mikkelsen, Jeppe. "*New-Functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC,*" 20 Millennium (1991), 1.

Tung, Ricky. "*Mainland China in Taiwan's Economic Future,*" Issues and Studies (May 1990), 56.

Van Bael, Ivo. "*The GATT Dispute Settlement Procedure,*" 22 Journal of World Trade (1988), 67.

Wang, De-huai. "*The ROC Customs System and Policy,*" A Speech Delivered at the ROC Ministry of Justice (May 1992), 18.

Wang, Lei. "*Separate Customs Territory in GATT and Taiwan's Request for GATT Membership,*" Journal of World Trade (1991), 5.

Ward, Sandra. "*The U.S.-Israel Free Trade Area: Is It GATT Legal?*" 19 George Washington Journal of International Law & Economics (1985), 205.

Wolfgang, Nicolai. "*German Unification as a Special Case of Transition from Centrally Planned Economy to Market Economy,*" Korea and World Affairs (Winter 1991), 722.

Wong, John. "*Integration of China into the Asian-Pacific Region,*" 11 The World Economy (1988), 342.

Wonnacott, Ronald J. "*Canada and the U.S.-Mexico Free Trade Negotiation,*" Commentary, C.D. Howe Institute (Sept. 1990), 4.

Woo, Sik Kee. "*The Path Towards A Unified Korea Economy,*" Korea and World Affairs (Spring 1991), 32.

Xiao, Yougang. "*Export to China-Legal and Extra-Legal Aspects,*" 12 Loyola Los Angeles International Comp. Law Journal (1989), 13.

Young, Koo Cha. "*The Changing International Order and Northeast Asia in the 21st Century,*" Korea and World Affairs (Winter 1991), 650.

Yue, Xiao-zhi. "*EEC-China: Ten Years After the First Trade Agreement,*" 12 Journal of World Trade (1989), 9.

Zee, Winston K.T. "*Doing Business in the People's Republic of China,*" a speech delivered at Baker & McKenzie, Taipei, Taiwan, (18 April 1990), 27.

Zhang, Hongzeng. "*Cong Guoji Fa Kan Meiguo De Taiwan Guanxi Fa,*" (Comment on the U.S. Taiwan Relations Act According to International Law) Zhong Guo Guo Ji Fa Nian Kan (The Chinese Yearbook of International Law) (1981), 201.

II. DOCUMENTS

A. GATT

L Series

L/5344 (5 July 1982) PRC attendance at thirty-eighth session of the Contracting Parties as observer.

L/5426 (1982) Chairman's Report on Safeguards.

L/5712 (26 October 1984) China - Request for Observer Status.

L/5986 (April 1986) Succession of Hong Kong.

L/5987 (24 April 1986) Communication from the PRC concerning admission of Hong Kong as a Contracting Party.

L/6004 (10 June 1986) Communication from the EC: Consultation with Poland under Paragraph 4 of the Protocol of Accession.

L/6017 (14 July 1986) Communication from the PRC: China's status as a Contracting Party (request for resumption of China's Contracting Party status).

L/6125 (18 February 1987) Memorandum from the Chinese Government to GATT Contracting Parties on China's Foreign Trade Regime.

L/6270 (27 November 1987) Working Party on China's status as a Contracting Party: Questions and Replies concerning the Memorandum on China's Foreign Trade Regime.

Other Series

Spec (88) 13/Add. 2 (20 July 1988) Working Party on China's Status as a Contracting Party: Examination of the Foreign Trade Regime, Supplementary Information.

Spec (88) 13/Add. 4 (9 December 1988) Working Party on China's Status as a Contracting Party: China's Foreign Trade Regime (Note by the Secretariat).

Spec (88) 13/Add. 5 (9 June 1989) Working Party on China's Status as a Contracting Party: Annotated Checklist of Issues (Note by the Secretariat).

Trade Policy Review Mechanism, B.I.S.D., 36S/403 (1989).

GATT Doc. Working Party on China's Status as a Contracting Party, "Replies by China to Questions Raised by Members of the Working Party" (Note by the Secretariat) Informal Paper/Revision, 14 September 1988.

Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation, MTN/TNC/W/FA, Y.3.

Other GATT Publications

GATT: Basic Instruments and Selected Documents (Volumes & Annual Supplements) (Geneva).

GATT: Analytical Index. Notes on the drafting, interpretation and application of the articles of the General Agreement (Geneva, 1986).

GATT: International Trade 90-91 (Geneva, 1992).

B. UNITED NATIONS & OTHER INTERNATIONAL ORGANIZATIONS

U.N. Doc. E/Conf.2/78; U.N. Doc. ICITO 1/8 (1948) (Havana Charter for an International Trade Organization).

U.N.G.A. Res. 2758, Resolution on Representation of China, 26 G.A.O.R. Supp. 29 (A/8429), at 2.

U.N.G.A. Res. 2768, Approval on a List of LDCs for Development Planning, G.A.O.R. Supp. 29, at 52.

IMF: Direction of Trade Statistics (Washington, D.C.).

IMF: Annual Report 1980 (Washington, D.C.).

UNIDO: China: Towards Sustainable Industrial Growth (Vienna: The United Nations Industrial Development Organization, 1991).

United States Trade Representative: Foreign Trade Barriers (Washington, D.C.: USTR, 1992).

World Bank: China:External Trade and Capital (A World Bank Country Study) (Washington, D.C.: World Bank, 1988).

Asian Development Bank: Annual Report (Manila: Asian Development Bank, 1986, 1987, 1988, 1989, 1990).

C. TREATIES & COMPILATION OF TREATIES

Agreement Between the European Economic Community and the Czechoslovakia Socialist Republic on Trade in Industrial Products, O.J. C7/3 (1988).

Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, 31 U.S.T. (1979), 4652.

Agreement on Trade Relations Between the Government of the United States of America and the Government of the Mongolian People's Republic, 1991, 30 I.L.M. (1991), 515.

Agreement on Trade and Economic Cooperation Between the European Economic Community and the People's Republic of China (1985), O.J. EUR. COMM. NO. 1 250/2 (1985).

Australia-New Zealand Closer Economic Relations - Trade Agreement (Done at Conderra, 28 Mar. 1983; entered into force, 1 Jan. 1983), 22 I.L.M.(1983), 945-1016.

Canada-United States Free Trade Agreement. H.R. DOC. NO. 216, 100th Cong., 2nd Sess. 297 (1988), 27 I.L.M. (1988), 281.

Convention Establishing the European Free Trade Association, (4 January 1960), 370 U.N.T.S. (1960), 5.

The Interim Agreement on Trade and Trade-Related Matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Poland, of the other part, O.J. No. L. 114/1 (1992).

Joint Declaration Between the Government of the People's Republic of China and the Government of Portugal on the Question of Macao, signed in Beijing on April 13, 1987, 16 PRC STATE COUNCIL BULLETIN (1987), 549.

People's Republic of China-United States: Memorandum of Understanding Concerning Market Access, 31 I.L.M. (1992), 1274.

People's Republic of China-United States: Accord on Industrial and Technological Cooperation, 23 I.L.M. (1984), 144.

Trade Agreement Between Japan and the People's Republic of China (1974), 13 I.L.M. (1974), 872.

Trade Agreement Between the Government of Canada and the Government of the People's Republic of China (1973), 31 Can. T.S. (1974).

United States-Israel Free Trade Area Agreement, 24 I.L.M. (1985), 653.

United States-Poland Investment Treaty, 29 I.L.M. (1990), 1194.

The Vienna Convention on the Law of Treaties (1969), U.N. Doc. No. A/Conf. 39/27; 8 I.L.M. (1969), 679.

The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, U.N. Doc. No. A/Conf.129/15; 25 I.L.M. (1986), 543.

D. PUBLICATIONS OF NATIONAL LAWS & ADMINISTRATIONS

China

PRC Bulletin of State Council (Guowuyuan Gongbac, Beijing, State Council of the PRC).

The Customs Regulations of the People's Republic of China (Customs General Administration ed., 2nd ed. Beijing, 1987).

China Laws for Foreign Business, CCH Australia (CCH Australia Ltd.).

Code of Civil Procedure of the People's Republic of China Adopted 8 March 1982 by the 22nd Session of the Standing Committee of the 5th National People's Congress. Effective for trial implementation from 1 October 1982. Amended in 1991.

Customs Entry and Exit Regulations for Control of Baggage and Articles Accompanying Taiwanese Compatriots, promulgated on October 13, 1987.

Economic Contract Law of the People's Republic of China. Adopted 13 December 1981 by the 4th Session of the 5th National People's Congress.

Foreign Economic Contract Law of the People's Republic of China. Adopted 1985 by the Standing Committee of the 6th Session of National People's Congress.

General Principles of Civil Law of People's Republic of China. Adopted 12 April 1986 by the 4th Session of the 6th National People's Congress.

Individual Income Tax of the People's Republic of China. Adopted by the Session of the 5th National People's Congress and Promulgated 10 September 1980.

Law of the People's Republic of China on Technology Contracts, Adopted 23 June 1987 by the 21st Session of the Standing Committee of the 6th National People's Congress.

Laws of the Republic of China on the Control of Foreigners Entering and Leaving the Country, Adopted 22 November 1985 at the 13th Session of the Standing Committee of the 6th National People's Congress.

Provisional Regulations of the People's Republic of China on Private Enterprise Income Tax, Promulgated 25 June 1988 by the State Council.

Provisional Regulations for Notarization of People's Republic of China, Promulgated 13 April 1982 by the State Council.

Arbitration Commission of the China Council for the Promotion of International Trade, Adopted 31 March 1956 at the 4th Session of the China Council for the Promotion of International Trade.

Regulations of the People's Republic of China for Arbitration over Economic Contracts, Promulgated 22 August 1983 by the State Council.

State Council Regulations for Encouraging Investment by Taiwanese Compatriot, promulgated on July 3, 1988.

The Constitution of the People's Republic of China. Adopted 4 December 1982 by the 5th Session of the 5th National People's Congress.

The Foreign Enterprise Income Tax Law of the People's Republic of China,Adopted 13 December 1981 at the 4th Session of the 5th National People's Congress.

The Income Tax Law of the People's Republic of China Concerning Joint Venture with Chinese and Foreign Investment. Adopted by the 3rd Session of the 5th National People's Congress and promulgated 10 September 1980. Amended 2 September 1983 by 2nd Session of the Standing Committee of the 6th National People's Congress.

Taiwan

Civil Code, Promulgated on May 23, 1929, Effective from October 10, 1929, as amended.

Commercial Arbitration Act, Promulgated and Effective on January 20, 1961.

Customs Act, Promulgated and Effective on August 8, 1967, as Amended.

Income Tax Law, Promulgated and Effective on February 17, 1943, as Amended.

Interpretation Rules of Grand Justice Committee of Judicial Yuan, especially on No. 31, 68, 242.

Law Governing the Application of Law to Civil Matters Involving Foreign Elements, Promulgated and Effective from June 6, 1953.

Law Governing Extension of Assistance to Foreign Courts, Promulgated and Effective on April 25, 1963.

Law Governing Non-Litigations Matters, Promulgated and Effective on May 28, 1964.

Nationality Act, Promulgated on May 5, 1929.

The Constitution of the Republic of China, Adopted by National Assembly on December 25, 1946. Promulgated by National Government on January 1, 1947, Effective from December 25, 1947.

United States

The Atomic Energy Act, 42 U.S.C. Secs. 2011-2296 (1988).

The Arms Export Control Act, 22 U.S.C. Secs. 2751-2796 (1988).

The Comprehensive Anti-Apartheid Act, 42 U.S.C. Secs. 5001-5116 (1988).

The Export Administration Act, 50 U.S.C. Sec. 6(a)(2) (1988).

The International Emergency Act, 50 U.S.C. Secs. 1701-1705 (1988).

The Nuclear Non-Proliferation Act, 22 U.S.C. Secs. 3201-3282 (1988).

The Omnibus Trade and Competitive Act, 19 U.S.C. Secs. 1677 (1988).

The Trade with the Enemy Act, 50 U.S.C. Secs. 1-44 (1988).

European Community

Council Regulation (EEC) No. 3420/83 of 14 November 1983 on import arrangements for products originating in State-trading countries, not liberalized at Community level. O.J. EUR. COMM. No. L 346/6, 8.12.83.

Council Regulation (EEC) No. 3421/83 of 14 November 1983 on detailed rules for the implementation of the 1978 EEC-China Trade Agreement. O.J. EUR. COMM. No. L 346/9, 8.12.83.

Council Regulation (EEC) No. 1765/82 of 30 June 1982 on common rules for imports from state-trading countries. O.J. EUR. OMM. No. L 195/1 (1982).

Council Regulation (EEC) No. 946/78 of 2 May 1979. O.J. EUR. COMM. No. L 123 (1978) on China-EEC Trade Agreement of 1978.

Canada

The Exports and Imports Permits Act. R.S.C. 1985, c. E-19.

F. STATISTICS

Statistical Yearbook of China (Beijing, State Statistical Bureau of the PRC).

Almanac of China's Foreign Economic Relations and Trade 1990 (Hong Kong: China's Resources Advertising Co., Ltd.).

Statistical Yearbook of the Republic of China (Taipei).

GATT, International Trade 87-88, 88-89, 89-90, 90-91 (Geneva: GATT, 1989, 1990, 1991, 1992).

IMF, International Financial Statistics (Washington, D.C.).

Monthly Statistics of Exports & Imports (Taipei: Dept. of Statistics, The ROC Ministry of Finance, 1991).