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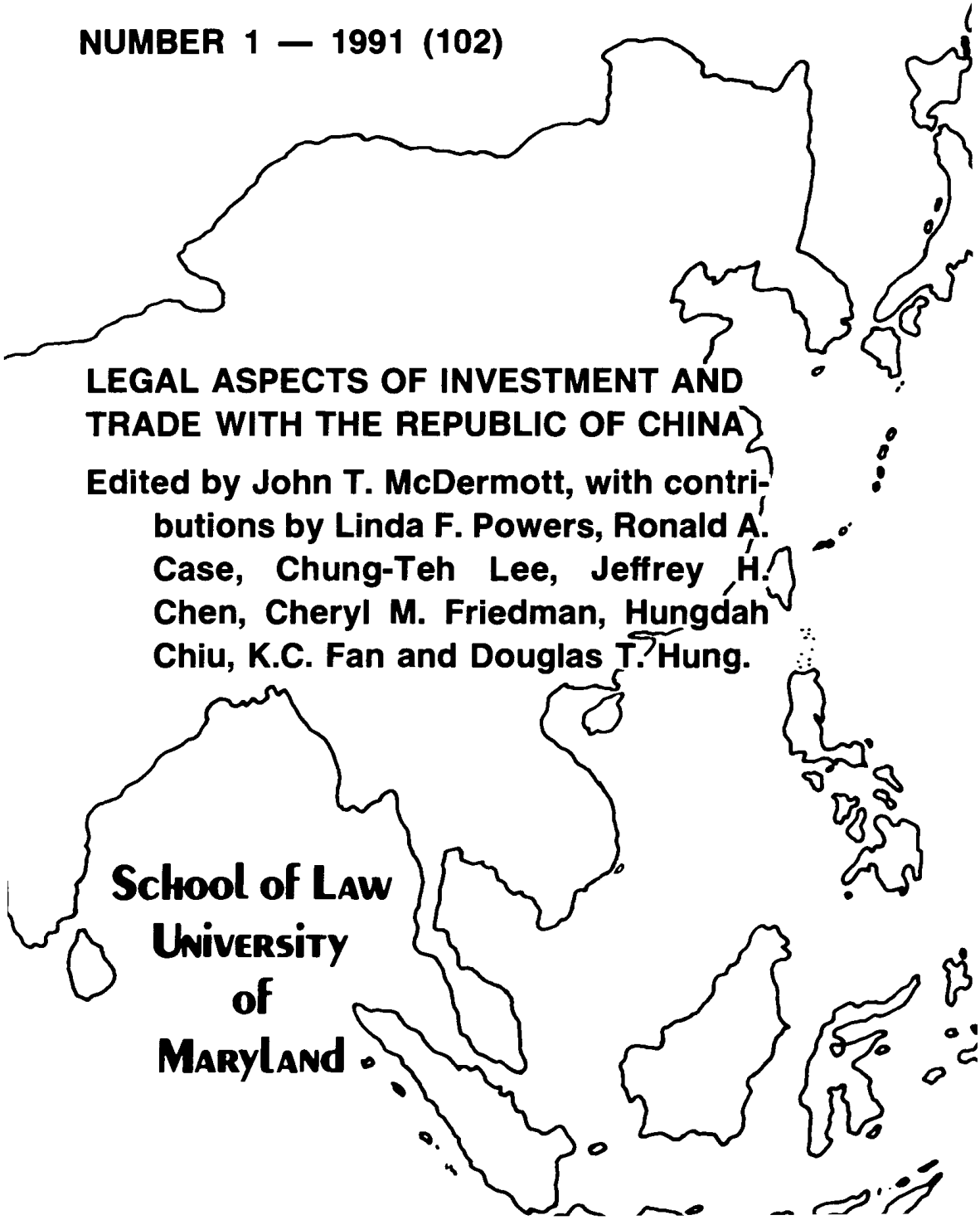

LEGAL ASPECTS OF INVESTMENT AND TRADE WITH THE REPUBLIC OF CHINA

Edited by John T. McDermott, with contributions by Linda F. Powers, Ronald A. Case, Chung-Teh Lee, Jeffrey H. Chen, Cheryl M. Friedman, Hungdah Chiu, K.C. Fan and Douglas T. Hung.

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Perspectives on a Potential United States-Republic of China Free Trade Agreement

INTERNATIONAL BUSINESS LAW CONFERENCE

INVESTMENT AND TRADE WITH THE REPUBLIC OF CHINA

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Introduction

JOHN T. MCDERMOTT*

After successfully sponsoring a conference on trade and investment in the People's Republic of China ("PRC") in March 1989,[1] Loyola Law School decided to hold a second international business law conference on trade and investment with Taiwan, the Republic of China ("ROC"). The ROC was an obvious choice for our second conference. Although the ROC is not a member of the General Agreement on Tariffs and Trade ("GATT"), nor has it been recog-

* Conference Chairman, Professor of Law, Loyola Law School, Los Angeles, California.

1. *See International Business Law Conference: Investment and Trade With the People's Republic of China*, 12 LOY. L.A. INT'L & COMP. L.J. 1 (1989).

nized as a sovereign nation by most of the world,[2] the ROC has rapidly become a world economic power, well on its way to becoming an economic superpower.[3] The ROC's Gross National Product ("GNP") has nearly tripled during the past decade and now exceeds $7,500 per capita, approximately equivalent to that of the United States just fifteen years ago. Its GNP growth is a robust 7.2% compared to Japan's 4.9% and the United States' 2.2%. Its exports—of which nearly half go to the United States—have more than tripled in the past ten years, resulting in a healthy $11 billion trade surplus. With a population of over 20 million and a work force of about 8 million, unemployment is low and productivity high—all this with an inflation rate of only 4.7%.

Restrictions on political freedom have often accompanied rapid economic growth, especially in Asia. Although the ROC still has room to improve, recent changes have brought a greater level of democracy and personal freedom. In 1987, the government finally lifted fifty years of martial law. ROC citizens can now travel to the PRC, but direct trade is still banned. Furthermore, the ROC has eased restrictions on the press. These kinds of political and economic conditions in the ROC contrast sharply with those of the PRC, the focus of last year's trade conference. The PRC's economic growth has stalled, and the democracy movement has been crushed. On the other hand, the economy in the ROC continues to flourish, and dissident voices are now heard on the street and in the Legislative Yuan. The economic success of this little island nation is, by any measure, a modern economic miracle. Given the ROC's emergence in the world economic community, we at Loyola felt it was a timely and appropriate topic for our second international business conference.

The program for this conference paralleled the one used for the earlier PRC conference, notwithstanding the fact that the ROC has become a capital exporting country. The one-day program was divided into five panels: (1) Investment in the ROC, (2) Import and Export with the ROC, (3) Protection of Intellectual Property in the ROC, (4) Contract Management and Dispute Resolution, and (5) The Potential for a United States-ROC Free Trade Agreement.

An impressive array of nationally and internationally known speakers participated in the conference. From the United States we

2. The ROC is recognized by the Republic of Korea and a handful of countries in Latin America and Africa.

3. The ROC has become the twelfth-largest trading country in the world.

welcomed William F. Atkin, an attorney with Baker & McKenzie in San Francisco; Susan Liebeler, current managing partner of the Washington office of Irell & Manella and the former Chairperson of the United States International Trade Commission ("ITC");[4] Ronald A. Cass, then Vice Chairperson, United States International Trade Commission and now the Dean of Boston University School of Law; Cheryl M. Friedman, Trademark Counsel for MCA, Inc.; Francis S. L. Wang, a sole practitioner with offices in San Francisco and Taipei; and Hungdah Chiu, Professor of Law, University of Maryland School of Law and an expert on international law.

Experts from the ROC included Dean Chiang, an attorney with Lee & Li in Taipei; Dr. Chung-Teh Lee, an attorney with Tsar & Tsai in Taipei; Josephine Wang Ho, an attorney in the Taipei office of Baker & McKenzie; K. C. Fan, senior partner of the Formosa Transnational Law Firm and former member of the ROC judiciary; and Douglas T. Hung, the Director of the General Chamber of Commerce of the Republic of China, Liaison Office in San Francisco.

We were especially privileged to have as our keynote speakers C.Y. Chang, Director General of the Coordination Council for North American Affairs ("CCNAA")[5] and Linda F. Powers, Deputy Assistant Secretary for Services, United States Department of Commerce.

Special thanks go to the following members of the conference planning committee who provided guidance, suggestions, and moral support: Daniel M. Kolkey, of Gibson, Dunn & Crutcher; Frankie F. L. Leung, of Carlsmith, Wichman, Case, Mukai & Ichiki; Albert C. Lum, of Lewis, D'Amato, Brisbois & Bisgaard; Michael J. Maloney, of Kindel & Anderson; William Lew Tan, of Tan & Sakiyama; and Karen B. Wong, of Jones, Day, Reavis & Pogue. We are also grateful for the cooperation and assistance we received from the Los Angeles office of the CCNAA for the Republic of China. Last, but certainly not least, we acknowledge the dedicated work of Lynda Engel, who coordinated both the ROC and the PRC conferences; without her help, neither would have been such successful programs.

The selected papers which follow describe the economic strength of the ROC and its efforts to comply with internationally recognized

4. Ms. Liebeler was a member of the Loyola Law School faculty before her appointment by President Reagan to the ITC.

5. The CCNAA serves as the ROC government's representative in the United States. Although not formally an embassy or consulate, at least one federal court has accorded the CCNAA the same "sovereign immunity" as a foreign embassy or consulate.

principles of law, especially regarding intellectual property protection. The ROC has made great political and economic strides, and thus deserves world recognition as a full member of the international community. Membership in the GATT is a logical and necessary first step. The notion of two Chinas may be politically unacceptable in both Taipei and Beijing, but the reality is that there are two Chinas—although only one seems to be moving forward both economically and politically. My hope is that the ROC will remain economically strong, will continue to move toward true participatory democracy, and that the PRC will again begin the slow, painful, but essential journey toward political and economic freedom. Only then can there be "one China."

Keynote Speech

LINDA F. POWERS*

In an effort to help United States firms increase their exports, the United States government is focusing heavily on trade and investment with the Republic of China ("ROC"). To describe this focus, I will first comment on the overall trade picture with the ROC, and then discuss the United States government's concern over the persistent trade imbalance looming over the United States-ROC trade relationship. Finally, I will explore the actions taken by both United States and ROC authorities in an effort to address this persistent trade imbalance. Against this backdrop, I will identify the areas of major trade opportunities that United States government initiatives and programs have focused on to help increase United States exports to the ROC.

The ROC is an economic powerhouse. Its economy developed so rapidly that the ROC is now the United States' fifth-largest trading partner. Unfortunately, the ROC trade surplus and corresponding United States trade deficit ranks second only to the United States' bilateral deficit with Japan. As a result, the United States government places these initiatives to increase exports to the ROC at the top of its agenda.

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* Deputy Assistant Secretary for Services, United States Department of Commerce.

Despite decreases in this trade deficit by several billion dollars each year, the trade imbalance remains a concern. Hopefully, it will be reduced to $13 billion or so by 1990. Although significant, this figure compares well to United States bilateral deficits with countries in other regions of the world. For example, in 1988, the United States trade deficit with the ROC decreased about 17%, while the overall United States trade deficit fell about 21%. Japan aside, the decrease in the United States trade deficit with the ROC surpasses that of any other country in Asia. With the European Community, the United States enjoys the return of a traditional surplus situation.

In its efforts to address and discover solutions for the trade imbalance with the ROC, the United States government focuses on both structural factors and market barriers. Although market barriers tend to receive more attention, the United States government conducts thorough analyses of structural factors as well. The structural factors that contribute to the trade imbalance include the differing character and size of the United States and ROC markets. Given its smaller market, the ROC possesses a very limited capacity to absorb United States exports. More importantly, the ROC cannot readily alter the size or diversity of its markets.

By diversifying ROC export markets, the United States may effect structural changes in the ROC economy. The United States presently stands as the number one export market for the ROC. The trend of companies from third-world countries using the ROC as a base for exporting products to the United States accentuates this problem and the need to diversify ROC export markets. Large expected increases in spending for public infrastructure provide additional avenues for structural change in the ROC economy. Altering the ROC government's domestic policy, which significantly encourages exports and discourages consumption and importation, presents yet another possible means of tearing down the structural barriers to balanced United States-ROC trade.

Already many of these barriers are falling. Domestic demand presently rises faster than external demand. In fact, external demand has recently shrunk. The savings rate dropped from 36% to 30%, signalling an increase in consumption. Of course, 30% remains a healthy savings rate, one that the United States envies. In sum, all of these factors help to improve the trade imbalance.

Of course, structural problems on the United States' side exist as well, such as our budget deficit, our proclivity to consume rather than

save and invest, and our relative lack of skilled labor and technicians. Hence, we include these factors in our analysis as well.

I will now briefly discuss the market barriers to United States exports. Each year the United States Trade Representative publishes an inventory and analysis of trade barriers affecting various foreign countries around the world. The 1989 report identifies six kinds of barriers in the ROC market that create problems for United States firms attempting to export goods to the ROC. The first of these six areas is import policies. The overwhelming majority of complaints by United States companies regarding import policies concern tariffs. Naturally, developments in reducing ROC tariffs significantly facilitate United States exports to the ROC. Other import policies that create problems for United States exporters include bureaucratic hurdles to obtaining import licensing, difficult standards for obtaining those licenses, and lack of transparency. A second category of trade barriers includes the different product standards and testing and certification requirements between the United States and the ROC. United States companies often find it difficult to meet such requirements, particularly with respect to agricultural goods. Third, export subsidies pertaining primarily to agricultural commodities, such as rice and sugar, also constitute trade barriers. However, the impediment to trade created by these subsidies decreased throughout the late 1980s. A fourth category relates to intellectual property protection problems. The piracy issue concerns not only inadequate enforcement but also inadequate coverage of laws. For example, ROC law provides no provision for confiscating infringing goods or protecting trade secrets. In addition, ROC law provides no patent protection for such items as microorganisms, foodstuffs, and semiconductors. Service barriers constitute the fifth category. ROC laws limit the ability of United States companies to set up branches offering financial services. For example, a United States firm may only establish two life insurance companies and two non-life insurance companies in the ROC each year. United States banks can open only a single branch in Taipei and one branch in another city. The sixth and final category of deleterious import policy is a "catch-all" category. This category pertains to monopolies and monopoly taxes, particularly in the area of tobacco and alcohol.

What is being done by United States and ROC authorities about this situation? The structural barriers are presently being studied with particular attention to dismantling market barriers. The ROC

undertook a similarly progressive macroeconomic policy change by allowing its currency exchange rate to rise substantially. Recent treasury reports confirm no evidence of ongoing currency manipulation. This quelled earlier concerns over the possibility that keeping the currency value artificially low would boost the exportability of ROC products.

The 1988 United States Omnibus Trade Act gave the effort to dismantle trade barriers a major boost. Problems in the intellectual property area causing the United States to place the ROC on the Special 301 priority watch list improved, resulting in a downgrade to the regular list. One of the most constructive results of the 1988 Trade Act was the Detailed Action Plan created by the ROC. The plan presented a framework of the ROC's strategy for opening markets and reducing trade barriers. Although another one of today's speakers will discuss this plan in greater detail, I will briefly set forth the plan's four main objectives.

First, set an ambitious goal to annually reduce the bilateral trade surplus by ten percent, thereby expanding domestic demand for imports. Second, expand the ROC's foreign market diversification by spreading out the destinations of its exports. This effort should lessen some of the pressure on the bilateral trade balance with the United States. Again, the ROC aims to reduce exports to the United States to only one-third of its total export volume by 1992. Third, liberalize the internal economy and import measures by reducing tariffs, streamlining licensing procedures, dropping licensing requirements for goods, and only requiring licenses for products that are on a so-called negative list. Finally, seek comprehensive solutions rather than piecemeal resolution of individual difficulties. These were the underlying objectives behind a major part of the 1988 Trade Act, and the Detailed Action Plan represents a new approach to dealing with these problems.

The United States and the ROC made substantial progress this year. As mentioned earlier, the ROC significantly reduced tariffs and streamlined licensing procedures, while the United States effectively utilized the negative list system. The United States and the ROC reached two major milestones in the intellectual property area: a bilateral copyright agreement and a bilateral audio-visual protection agreement. With respect to service barriers, progress consists of a banking law that was presented in the summer of 1989, the drafting of a new insurance law, and liberalized telecommunications. One of the

most pragmatic examples of progress this year has been the implementation of the action plan provisions to improve the information flow between the United States and the ROC. The United States and ROC governments must distribute information to United States companies about market opportunities in the ROC to increase United States exports to the ROC. The United States government will soon publish a book which gives early warning of all procurement and purchasing opportunities. The book will also present actual detailed explanations of unsuccessful export projects by United States companies.

Expanding concessionary financing for United States exporters presents a particularly interesting opportunity. Along with its robust economic growth and opportunity, the ROC possesses huge foreign reserves, second in size only to Japan, that makes financing for exports to the ROC relatively easy compared with other nations. United States companies often run into considerable problems with a lack of aid and mixed credits in other markets. In contrast, concessionary financing greatly facilitates exportation of products to the ROC.

Finally, I would like to mention three areas which represent major trade opportunities. These are: (1) capital equipment and infrastructure items; (2) engineering and technical service relating to those areas; and (3) other financial, transport, and shipping type services. As one of its centerpieces, the Trade Action Plan aims to increase public spending, especially on infrastructure items. The ROC will construct two metro systems and a high speed rail system. The United States is already successfully involved in one of the metro projects. We anticipate further success in other projects as well.

In the environmental area, the ROC is committed to spending over $10 billion for environmental control systems, including systems for management of solid and toxic waste and air pollution control. The ROC government drafted and approved a twenty-year master plan for environmental programs. Since the ROC government decided to forego the construction of several nuclear power generation facilities, opportunities exist for United States participation in a number of other kinds of power generation. A variety of projects under construction covering the entire range of the ROC's infrastructure, including airport expansions and petroleum projects, present bountiful, as well as diverse, opportunities for United States compa-

nies. We shall continue to work hard to help United States companies increase exports to this expanding nation.

IMPORT AND EXPORT WITH THE REPUBLIC OF CHINA

Recent Antidumping and Countervailing Duty Cases Involving the Republic of China: A Harbinger of Things to Come?

RONALD A. CASS*

INTRODUCTION: TRADE CASE FILINGS AGAINST THE ROC

Title VII of the Tariff Act of 1930 allows the United States to impose additional duties on imports from a particular country if certain criteria are met. The country must be either dumping—selling the product at lower prices in the United States than abroad—or subsidizing imports. This practice must cause, or threaten to cause, material injury to a domestic industry, or materially retard the development of a domestic industry.[1] Two federal agencies, the Department of Commerce and the United States International Trade Commission ("ITC" or "Commission") share the authority to make this determination. The Department of Commerce, part of the executive branch of the government, is responsible for determining whether dumping or subsidization has taken place. The ITC is an independent agency that assesses whether the dumping or subsidization has resulted in the requisite injury. The trade law terms those practices that produce injury "unfair trade practices."

The United States has proceeded against nearly all of its major trading partners for dumping and against many of them for subsidizing. Thus, it is not surprising that such cases ocassionally involve products imported from the Republic of China ("ROC"), since it is the fourth largest source of United States imports. The volume of dumping and subsidy cases involving the ROC, however, is surprisingly high despite the amount of trade between the United States and the ROC. During the time I served on the Commission, there were

* Dean, Boston University School of Law, Boston, Massachusetts. Mr. Cass was formerly the Vice Chairperson of the United States International Trade Commission. Thanks are due to Stephen Narkin for his generous assistance in the preparation of this article.

1. 19 U.S.C. §§ 1671, 1673 (1988).

about as many cases involving imports from the ROC as cases involving imports from all of the European Community countries combined.

Recent cases heard by the Commission, on the surface, provide few clues to explain the large volume of cases against the ROC. The cases do not seem to concentrate on any given type of import. Those cases involving products from the ROC cover a wide range of technologies and industries. For example, some of the dumping and subsidy cases involve expensive products embodying relatively advanced technology which are produced by large industries, such as steel pipes and tubes and business telephone systems. Yet other cases involve such products as martial arts uniforms and residential door locks, which are relatively inexpensive, technologically unsophisticated, and are produced by industries that are small by any standard. The variety of cases involving the ROC, in other words, accurately reflects the variety of dumping and subsidy cases against products from all exporting countries.

To understand the large number of cases involving the ROC, it is first necessary to gain a general understanding of what prompts the filing of these unfair trade cases. Although determining why cases are brought is not an easy task, several explanations are discernible.

The simplest explanation is that the number of filings corresponds to the number of cases with merit. Dumping and countervailing duty (subsidy) petitions are filed when there exists a strong basis for believing that products are sold at lower prices in the United States than in the exporting country or are subsidized by foreign governments, and that these practices are injuring competing United States businesses. Under this view, cases should be filed most frequently against products from nations with significant impediments to competition (and/or strong export-promotion programs) and products that most significantly affect competing United States industries. The characteristics likely to describe the set from which dumping and subsidy cases are brought include substantial government involvement in the economy of the exporting country, large shares of the United States market for the particular imported product, and imported products that are quite similar to those made in the United States. Each factor increases the likelihood that the "unfair" practice is, in fact, occurring, or increases the probability that the practice will noticeably affect United States industry. For example, impediments to competition in a foreign country increase the probability that prices

for products sold there will be high, relative to prices for the same products in the United States.

I do not know enough about the ROC's economy as compared to the economies of other United States trading partners to predict whether this straightforward explanation of unfair trade case filings also explains the volume of cases against ROC products. Nonetheless, based on my familiarity with the workings of government, litigation in general, and trade cases in particular, I suspect that things are not quite so simple. Given the assumption that case filings fit some rational expectations model, there surely will be some correlation of filings to expected outcomes. However, outcomes may not be fully derivative of the simple description of merits (a subject addressed more below) and the gains from filing unfair trade cases may not be confined to formal disposition of the immediate case. The very fact that the proportion of cases generating affirmative findings by the ITC varies over time at least suggests that case filings do not conform to a strict monotonic function of the probability of ultimate success on the merits. This would make alternative hypotheses worth pursuing.

Two alternative explanations focus on dynamic factors. These alternatives suggest that dumping and subsidy case filings are a function of *changing* patterns of imports and domestic production, with significant deviations from historic patterns in either country likely to increase filings. If change is the impetus of petitions for relief from the effects of these trade practices, then two explanations for trade cases are possible. Looking at the import-supply side, the countries most rapidly gaining market share in the United States would be the most likely targets of dumping and subsidy investigations. Another explanation is that the petitions may be filed in response to declines in the particular United States industry. Such cases would logically be brought against the principal sources of imports competing with the declining industries, although, as described below, other competing suppliers are apt to be swept into these actions as well. Thus, the countries most subject to complaints would be those that compete more with the declining United States industries than with the growing or stable sectors of the United States economy.

There is some basis for believing this last hypothesis. Antidumping and countervailing duty petitions do seem to correlate, after a slight lag, with economic recessions. Additionally, they seem to be filed disproportionately against products competing with United States businesses that are on the decline. Moreover, the manner in

which some of my former colleagues at the ITC have approached dumping and subsidy cases increases the likelihood that the fortunes of United States industry (without respect for whatever congeries of causes determine those fortunes in a given case), rather than the practices of particular trade partners, will significantly influence case filings. These commissioners have read the statutory instruction under which the ITC decides unfair trade cases—to determine whether the relevant United States industry is suffering "material injury by reason of" the dumped or subsidized imports—as if it contained two separate, independent instructions: (1) to decide whether the complaining United States industry is financially healthy or is in decline, and (2) to determine whether imports have any effect on the industry.[2] As explained further below, this approach allows the changing fortunes of the domestic industry to dominate resolution of trade cases, which might well influence the incidence of case filings.

PREDICTING FUTURE FILINGS: POLITICS, BUSINESS, AND LAW

If United States industry performance, wholly apart from exporters' trade practices, is at least partially responsible for determining which trade cases get filed, what does that suggest about filings against the ROC? When viewed in combination with the two other factors, industry performance does not provide a strong basis for predicting the volume of trade cases. Rather, it merely provides a basis for guessing what to expect of future trade cases against ROC imports to the United States.

Before attempting to specifically predict the future of ITC cases involving the ROC, however, I should provide one caveat. In general, one should view predictions of the future course of United States trade law and policy with skepticism. In the 1980s, for example, we have seen a confluence of economic and political developments few would have predicted. The United States has experienced unprecedented economic expansion during peacetime under a presidential administration more openly committed to free-market principles than any in half a century. Yet, the range of domestic industries enjoying some form of protection against imports expanded considerably over

2. In a number of cases, I have explained why I believe that this approach is fundamentally at odds with United States law and with this country's obligations under the General Agreement on Tariffs and Trade. *See, e.g.*, New Steel Rails from Canada, USITC Pub. 2217, Inv. Nos. 701-TA-297, 731-TA-422 (Final) (Sept. 1989) (dissenting views of Vice Chairperson Cass). For sharply contrasting opinions, see *id.* (views of Commissioners Eckes and Rohr).

this same period under the same administration. Having made some predictions in print before, I am especially uneasy about venturing my guesses in a form that risks later comparison with actual events.

Nevertheless, for the moment, I will try to suppress my customary caution and suggest that the coming years may see more, rather than fewer, antidumping and countervailing duty cases involving imports from the ROC. I do not believe that the recent flurry of such cases is mere happenstance. In my view, two factors have contributed substantially to the proliferation of antidumping and countervailing duty cases against the ROC.

One such factor is that the ROC is part of the emerging family of economic powers known as the "Asian Tigers." The significance here is that the ROC is an Asian nation with a rapidly expanding economy and a sizeable volume of exports, largely to the United States. This statement conflates three related factors: the geographical locus of the ROC, the ROC's economic growth, and its volume of exports. None of these factors correlates directly with the explanation for trade case filings given above. Certainly, I do not profess that any of these factors, alone, principally explains petitions against products from the ROC, but the three taken together describe a set of considerations that is not entirely irrelevant to case filings and outcomes. There has been much recent discussion in the United States of the perceived threat of Asian imports. The main focus of this discussion has centered on Japan, but other Asian exporters, including the ROC, have received attention as well. Imports from Asia have been discussed in strident terms, creating an overall climate in which many members of the United States business community believe that government decision-makers and policy-makers are more inclined to restrict Asian imports than imports from European Community countries or Canada. For this reason alone, some United States businesspersons may conclude that this is a particularly opportune time to attempt to use the dumping and countervailing duty laws to restrict import competition from the ROC.

The second factor likely to keep the number of case filings against ROC products high concerns a technical aspect of United States trade law that makes countries more vulnerable to trade sanctions for even modest and inadvertent trade violations. Such practices include selling products in the United States markets in which the foreign products have already seriously affected United States businesses. Under United States law, an antidumping or countervailing

duty case need not be brought solely against imports from a single country. Such an action is often brought against imports from many countries at the same time. Moreover, in such a multi-country proceeding, the impact of imports from each country is not usually considered in isolation. Imports from all countries subject to investigation are generally considered collectively to determine whether, as a group, they have materially injured domestic industry. The reason for this is that under United States law, in order to determine whether there has been material injury from "unfairly traded" imports, the Commission must cumulatively analyze the volume and effect of imports subject to investigation from two or more countries[3] if such imports "compete with each other and similar products of the domestic industry in the United States market."[4]

The Commission has generally considered the following four factors in determining whether the statutory criterion for competition has been met: (1) the degree of fungibility of imports from different countries, and between imports and the domestic like product, including consideration of specific requirements and other quality related questions; (2) the presence of sales or offers to sell imports from different countries in the same geographical markets as the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market.[5] These four factors do not add to or replace the two basic statutory requirements that imports from different countries are to be subject to investigation and are to compete with each other and with the domestic like product. Rather, these factors are used to assess whether the second statutory requirement is satisfied.

Following this approach, the Commission has found that the statutory criteria for cumulation has been met in almost all recent

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3. 19 U.S.C. § 1677(7)(C)(iv) (1988). Under the statute, however, the Commission is not required to cumulate imports from a particular country if that country's exports to the United States are "negligible" and have "no discernable [sic] adverse impact on the domestic industry." *Id.* § 1677(7)(C)(v).

4. *Id.* § 1677(7)(C)(iv). The Commission may, but is not required to, cumulate the price and volume effects of imports subject to investigation for the purposes of determining whether there is a threat of material injury. *See, e.g.*, Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1171-72 (Ct. Int'l Trade 1988).

5. *See* Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, USITC Pub. 2185, Inv. Nos. 303-TA-19, 20, 731-TA-391-99 61-62 (Final) (May 1989) (views of the Commission).

cases where this issue has been presented. The low threshold for cumulation reflects the statute's suggestion that even a minimal showing of direct competition between imports from different countries, and between those imports and the domestic like product, makes cumulation mandatory. Of course, competition cannot be treated as a binary phenomenon—one that either does or does not exist—but rather is a continuum of consumer choices on expenditure of finite resources. At some point, the consumers' decisions can be seen as sufficiently zero-sum for competition to be deemed "direct," even if the products are only modestly substitutable. At that point, the Commission will cumulate, responding to a statute framed in terms of existence rather than degrees of competition.

The statute's legislative history also significantly colors the Commission's treatment of these cumulation issues. The cumulation provision was added to the statute in 1984[6] to express Congress' view that in multi-country antidumping and countervailing duty investigations, the Commission should not require that each country's imports by themselves cause material injury.[7] While Congress was satisfied that most commissioners were applying the cumulation principle correctly without explicit statutory authorization or direction, it expressed concern that certain commissioners were imposing unjustified conditions on the doctrine's use.[8] In short, Congress made it clear that cumulation was to be the rule, rather than the exception.

With cumulation, it will often be advantageous for a party bringing an antidumping or countervailing duty action against imports of a particular product from one country to also make similar allegations respecting imports of the same product from other exporting countries. This is true even when the volume of those other imports is relatively small. For the reasons previously suggested, such action will increase, even if only marginally, the likelihood of an affirmative determination. Domestic industry will benefit from an affirmative determination if the antidumping or countervailing order covers more countries. Furthermore, the only cost of adding countries to an antidumping or countervailing duty petition is the cost of compiling whatever additional information may be required to support charges against the additional countries.[9]

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6. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 3033 (codified as amended at 19 U.S.C. § 1677 (1988)).

7. H.R. REP. No. 26, 98th Cong. 2d Sess., 27 (1984).

8. *Id.* at 26.

9. This burden may not be as great as it first appears. The courts have held that the

Several cases involving the ROC which have recently come before the Commission appear to reflect this one-sided cost-benefit calculation. Perhaps the best example is the recent decision of *12-Volt Motorcycle Batteries from Taiwan.*[10] Since the 1985 filing of the petition in this case, the Commission has twice reached negative determinations in preliminary investigations.[11] Both times, the Commission determined that the domestic industry producing 12-volt motorcycle batteries was not experiencing or threatened with material injury by reason of unfairly traded imports from the ROC.[12] In both instances, the Court of International Trade, the first-stage reviewing court for such cases, reversed the Commission's finding on the issue of threat of material injury. In an unusual move, the court did not simply remand for further ITC consideration but instead ultimately instructed the Commission to make an affirmative preliminary determination.[13] The Commission then instituted its final investigation. Shortly thereafter, apparently recognizing that the Commission was again likely to rule against it, the petitioner filed an antidumping petition against imports of 12-volt motorcycle batteries from Korea, asserting that the Commission was legally compelled to cumulate the volume and effects of the Korean imports with those associated with the imports from the ROC. While the Commission agreed that it was required to cumulate the Korean and ROC imports for the purposes of its material injury analysis, it again unanimously reached a negative determination. Thus, the petitioner won the battle but lost the war.

Another case involving the ROC and the cumulation doctrine is *Light-Walled Rectangular Pipes and Tubes from Taiwan.*[14] The Com-

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Commission has a duty to conduct an independent investigation of the allegations set forth in an antidumping or subsidy petition, irrespective of the evidence that may, or may not, be advanced by the petitioner. *See* Budd Co. Ry. Div. v. United States, 507 F. Supp. 997 (Ct. Int'l Trade 1980).

10. USITC Pub. 2109, Inv. No. 731-TA-238 (Final) (Aug. 1989).

11. *See* USITC Pub. 1654 (Feb. 1985); *see also* USITC Pub. 2109, Inv. No. 731-TA-238 (Final) (Aug. 1989).

12. In preliminary investigations, the Commission's task under the statute is to determine whether there is a "reasonable indication" that subject imports have materially injured or materially retarded the development of a domestic industry, or threatened such injury. *See* 19 U.S.C. §§ 1671(b), 1673(b) (1988). If the Commission makes an affirmative determination, the petition goes forward to a final investigation. By contrast, in final investigations, the petitioner must persuade the Commission that material injury or retardation, or the threat of material injury in fact exists. *See id.*

13. *See* Yuasa-General Battery Corp. v. United States, 688 F. Supp. 1551 (Ct. Int'l Trade 1988).

14. USITC Pub. 2169, Inv. No. 731-TA-410 (Mar. 1989).

mission reached an affirmative determination by a 4-2 vote in this investigation, as it did in a companion case involving imports of the same product from Argentina.[15] The Commission's decision in the Taiwan case is noteworthy in several respects. Cumulation was critical to the outcome of this case. Chairman Brunsdale and I found that the domestic industry producing the steel pipes and tubes at issue was materially injured by the dumping of the subject imports. Two other commissioners found only the threat of material injury, although one of two commissioners also stated that he believed the record evidence could support a finding of present material injury.[16] While I cannot speak for the two commissioners who made an affirmative determination based on a finding of threat, I can say that the Chairman and I probably would have reached a different conclusion if we had been considering only the imports from the ROC.

Due to the relatively low threshold for mandatory cumulation under the statute, we could not look at the ROC imports in isolation. We were required to assess cumulatively the volume and effect of imports from Argentina and the ROC. Nevertheless, from my standpoint, the case was a close one. The share of the domestic market held by the ROC and Argentine imports was relatively small. However, other evidence in the record indicated that dumping by the two countries had a significant impact on prices and sales of the domestic like product, and hence, on investment and employment returns in the domestic industry producing that product. The dumping margins calculated by the Department of Commerce for the various ROC and Argentine exporters were quite large in some cases, and in context, suggested a significant effect on prices and sales of domestically produced steel pipe and tube. As is the case with most steel products, demand for steel pipes and tubes is quite inelastic and there is a high degree of substitutability between the domestic and imported products. This evidence was sufficient to compel an affirmative determination.

TRADE LAW'S LEANINGS: CUMULATION AND CAUSATION

Pipes and Tubes is worth perusing for another reason. Although the commissioners drew the same conclusion respecting cumulation,

15. Light-Walled Rectangular Pipes and Tubes from Argentina, USITC Pub. 2187, Inv. No. 731-TA-409 (Final) (May 1989).

16. Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Mar. 1989) (views of Commissioners Eckes and Newquist).

the Commission's decision in *Pipes and Tubes* highlights the differences in the commissioners' understandings of the law governing dispositions of the underlying merits, that is, their views respecting the appropriate analysis for determining whether the requisite material injury or threat of material injury exists. Two of the commissioners voting negatively found no material injury because, in their view, various indicators of the performance of the industry, such as the overall level of industry employment, production, and operating income, indicated that the condition of the industry had improved relative to an "already healthy condition" in 1985.[17] The two commissioners who made an affirmative determination based on a finding of threat employed a similar analysis, although they reached a different conclusion respecting the ultimate disposition of the case.[18]

In *Pipes and Tubes*, then, as in many recent ITC cases, a majority of commissioners treated the industry's health as the key issue. Four commissioners made no serious attempt to assess critically the effects that dumping actually had on the domestic industry. Instead, they relied on intuitive assessments of rudimentary data regarding trends in industry performance and product prices.[19]

The Commission's resolution of the substantive issues and its treatment of cumulation may prove important to other ROC cases before the Commission.[20] Two important cases, pending at the time this paper was delivered, involve imports of small business telephone

17. *Id.* (dissenting views of Commissioner Lodwick and additional and dissenting views of Commissioner Rohr).

18. *Id.* As previously noted, Commissioner Eckes suggested that the evidence "could support" a finding of material injury. *See id.* (views of Commissioners Eckes and Newquist). Commissioner Newquist's findings on this issue, if any, were left unclear. *Id.*

19. With the possible exception of Commissioner Lodwick, these commissioners are generally hostile to using economic analysis in antidumping and subsidy cases.

20. It should also be noted that in two other recent cases, the Commission reached negative determinations respecting unfairly traded imports from the ROC. This occurred even though the Commission cumulated the volume and effects of those imports with those associated with imports from several other countries for the purposes of analyzing the existence of actual material injury. In Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, the United Kingdom, and West Germany, USITC Pub. 2194, Inv. Nos. 701-TA-293, 731-TA-412-19 (May 1989), the Commission decided by a 4-2 vote that dumped imports of industrial belts from the ROC were not causing or threatening material injury to any domestic industry. (By a 3-3 vote, however, the Commission rendered affirmative determinations with respect to many of the other subject countries. I voted in the negative as to all subject countries.) In Thermostatically Controlled Appliance Plugs and Internal Probe Thermostats Therefor from Canada, Japan, Malaysia and Taiwan, USITC Pub. 2152, Inv. Nos. 701-TA-292, 731-TA-400, 402-04 (Final) (Jan. 1989), the Commission made a unanimous negative determination respecting all of the subject countries.

systems and system subassemblies from Japan, Korea, and the ROC,[21] and imports of sweaters made of man-made fibers from Hong Kong, Korea, and the ROC.[22] These cases now have been decided, and a few comments on them may be in order. Both illustrate the interplay of cumulation with the alternative substantive approaches to dumping and subsidy cases.

The *Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan* case is one of the most important to come before the Commission in recent years.[23] The volume of trade affected by this publicly visible case is great. The domestic market for small business telephone systems is huge, with total sales of equipment for such systems approaching or exceeding $2 billion annually.

Although the outcome may be affected by the analytical approach adopted by the Commission, the effect of cumulation in *Telephone* is unambiguously negative to ROC exporters to the United States no matter which approach is followed. First, if one attempts to assess actual economic effects of dumping, cumulation changes two analytical inputs. Importantly, the volume of imports changes sharply. Total imports of equipment for these small business telephone systems from all countries that were examined amounted to several hundred million dollars, even though imports from the ROC have consistently accounted for only a very small proportion of these subject imports.

A second parameter affected by cumulation also worked to the detriment of ROC exporters in *Telephone*, but its interaction with cumulation does not *on average* affect the outcome in unfair trade cases. This parameter is the "dumping margin" (percentage by which the foreign market price, or its surrogate, exceeds the United States price for the imports) calculated by the Department of Commerce. In *Telephone*, the Department of Commerce found that there was dumping

21. Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan, USITC Pub. 2237, Inv. Nos. 731-TA-426, 428 (Final) (Nov. 1989); Certain Telephone Systems and Subassemblies Thereof from Korea, USITC Pub. 2254, Inv. No. 731-TA-427 (Final) (Feb. 1990).

22. Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan, USITC Pub. 2234, Inv. Nos. 731-TA-448-50 (Preliminary).

23. The only other case that may be comparable from this standpoint is Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, USITC Pub. 2185, Inv. Nos. 303-TA-19-20 and 731-TA-391-99 61-62 (Final) (May 1989).

of the subject imports from all three subject countries.[24] A wide range of dumping margins was calculated for the various respondents. For Japanese companies, the dumping margins averaged more than 150%. Because the Japanese respondents elected to withdraw from the Department of Commerce's investigation, these margins were derived from information provided by the petitioner, AT&T,[25] under the statutory provision allowing the Department of Commerce to treat AT&T's allegations as the "best information available."[26] The dumping margins assigned to the Korean respondents were much lower, amounting in each case to less than 10%.[27] ROC respondent, Sun Moon Star, Inc., was able to persuade the Department that it was not guilty of dumping at all. Another ROC respondent, Taiwan Nitsuko Co., Ltd., however, was assigned a huge margin of 129.73%. Because Nitsuko failed to provide the Department of Commerce with certain essential information, the Department also derived the "best information available" from the petitioner's data.[28]

The high margins for several respondents significantly affected the evaluation of economic effects of dumping by the cumulated class of respondents. It was not dispositive of the *Telephone* case for any of the participating commissioners, but for those commissioners who saw critical analysis of economic effects as central to the determination, the margins were of considerable importance. Together with other information respecting the United States and foreign markets, the margins suggested that the ability to price differently in the United States and the foreign (home) markets greatly altered the price charged for the imported components of telephone systems.[29] Even though the companies with low margins had little impact on the competing United States industry, the high margin companies arguably did have an impact. In the end, three commissioners decided that other information concerning the nature of the competition between the United States-produced and imported systems reduced the effect of the lower import prices on the United States industry to a level too

24. *See* 54 Fed. Reg. 31,978, 31,980, 31,987 (1989) (Japan, Korea, and the ROC, respectively).

25. *Id.* at 31,980 (1989).

26. 19 U.S.C. § 1677e(C) (1988).

27. 54 Fed. Reg. 53,141-53 (1989).

28. *See id.* at 31,989-90.

29. *See* Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan, USITC Pub. 2237, Inv. Nos. 731-TA-426, 428 at 270-80 (Final) (Nov. 1989).

low to be deemed "material injury."[30] These commissioners made it clear, however, that this was a close judgment.

Even if these commissioners had ruled the other way, the result could not be ascribed simply to the cumulative assessment of effects of imports from several nations. Their decision would rest on the combination of: high margins for several companies with high market share in the United States; conditions that cause those margins to translate to substantial price declines for the import; competition between the imported products and the United States-produced products so intense that the lowered import prices significantly affect the sales and prices of United States-produced products; and the cumulation of several smaller effects into an effect sufficient to be material.

Nonetheless, the cumulative assessment of effects moved the dumped ROC products from the position of clearly not causing material injury to the position of very nearly causing material injury along with other, cumulated products. Further, cases could arise in which cumulation increased the perceived effects of dumping from less than material to more than material injury because it jointly assessed the effects of a small volume of low margin imports from one country with the effects of a large volume of high margin imports from another. This could be especially problematic as individual companies' decisions not to participate in the Department of Commerce investigation could be dispositive, as the decision of the Japanese respondents in *Telephone* almost was for half the Commission.

This is troubling in no small measure because it allows strategic considerations to play a serious role in the disposition of trade cases. The non-participating Japanese respondents, which consequently received high constructed margins, assertedly were planning to establish production facilities for telephone equipment in the United States. If so, those companies could have decided that a course of conduct likely to produce high margins would be advantageous, as it increased the probability that duties would be placed on other imports with which their (prospectively United States-produced) products would be competing.

One should note that the relation between cumulation and the votes of the three commissioners who comprised the plurality in *Telephone* is less certain. Those commissioners appear to view the assessment of economic effects of the unfair trade practices at issue to be

30. *See id.* at 101-41 (Chairperson Brunsdale, dissenting), 143-315 (Vice Chairperson Cass, dissenting), 317-51 (Commissioner Lodwick, dissenting).

less central to the ultimate judgment. They clearly do not regard the cumulation of volumes of imports from various countries as irrelevant to the decision of the case and are sensitive to the increased probability of material harm that follows from greater import volumes. Their disposition of trade cases, however, does not show any clear relation between the outcome and the volume of imports. And they expressly do not concern themselves with the unfair trade practice itself, eschewing consideration of the magnitude of dumping or subsidy in most cases. Indeed, in many cases these commissioners do not even assess the effects of the unfair trade practice or the imports with which it is associated; they dispose of cases, instead, on the basis of the current condition (or trend in condition) of the domestic United States industry, apart from the effects of dumping or subsidization on that industry.[31] Under these commissioners' approach, cumulation may often be of no consequence.

The other important, recent case where cumulation played a significant role is *Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan*.[32] In *Sweaters*, the Commission placed duties on imports totalling about one billion dollars in 1989. Again, the finding of material injury from dumped imports was based on the effects of dumped imports from all three nations. The final decision represented the view of only two commissioners. One commissioner dissented, one was recused, and two seats were vacant.

The industry in this case is typical of ones that might frequently generate trade cases, and also is typical of cases in which cumulation is likely. The United States industry has long been in decline, making it likely that commissioners who do not carefully analyze the economic effects will find the domestic industry injured. The extensive system of quotas and related restraints assure that no one country is likely to dominate the market. This raises the probability of complaints against imports from several nations.

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31. For discussion of the approach taken by these commissioners, *see* R. CASS, ECONOMICS IN THE ADMINISTRATION OF U.S. INTERNATIONAL TRADE LAW, (Ontario Centre for International Business Working Paper No. 16, 1989); Cass & Schwartz, *Causality, Coherence, and Transparency in the Implementation of International Trade Laws*, in M. TREBILCOCK & R. YORK, REFORMING TRADE REMEDY LAWS (1990); Kaplan, Injury and Causation in USITC Antidumping Determinations (March 1990) (unpublished); Morkre & Kruth, 2 DETERMINING WHETHER DUMPED OR SUBSIDIZED IMPORTS INJURE DOMESTIC INDUSTRIES: INTERNATIONAL TRADE COMMISSION APPROACH, CONTEMPORARY POLICY ISSUES 7 (1989).

32. USITC Pub. 2234, Inv. Nos. 731-TA-448-50 (Preliminary) (Nov. 1989); the Commission rendered its final decision in September 1990.

The most significant, visible restraints are those of the Multifiber Arrangement ("MFA")[33] which restricts trade in product categories covering the sweaters under investigation in that case. The MFA, originally signed in 1973 by the United States and about 50 other countries,[34] and subsequently extended three times,[35] establishes a structure under which countries may reach bilateral agreements for country-specific quotas regulating trade in textiles and apparel to avoid "market disruption" in the importing nation. Under the MFA, the United States has negotiated bilateral agreements with more than 40 exporting countries, including the ROC.[36]

As one might expect in markets not characterized by highly differentiated products and substantial economies of scale, but which do allow efficient production through large inputs of relatively low-skilled labor, country-specific quotas have led to considerable dispersion of imports across countries. This is visible simply from history. In the late 1950s, industry concern over imports of cotton fabrics and blouses from Japan prompted the United States government to press Japan to establish a five-year "voluntary" program of export controls.[37] Imports from other areas, such as Hong Kong, increased substantially during the time that program was in effect, and the United States then sought broader controls.[38] In 1961, the United States convened a conference of exporting and importing nations which agreed on controls under the so-called Short-Term Arrangement Regarding International Trade in Cotton Textiles.[39] A "Long-Term Arrangement" was reached shortly thereafter, and was subsequently extended twice.[40] While cotton import constraints were being expanded "horizontally," imports of textiles and apparel made of fabric other than cotton had begun to increase. The United States then sought to expand textile constraints "vertically," and in 1971, the United States reached bilateral agreements with its larger Asian suppliers (including Japan, Hong Kong, the ROC, and South Korea) to restrict trade in

33. The text of the MFA is set forth at 25 U.S.T. 1001, T.I.A.S. No. 7840.

34. The Economic Effects of Significant U.S. Import Restraints, Phase I: Manufacturing, USITC Pub. 2222, Inv. No. 332-262, 4-4 (Oct. 1989).

35. *Id.* at 4-1. A protocol recently extended the MFA from July 1986 to July 1991 and expanded the MFA's coverage to include silk blend and non-cotton vegetable fiber products. *Id.* at 4-4.

36. *Id.* at 4-1, 4-2.

37. *Id.* at 4-3.

38. *Id.*

39. *Id.*

40. *Id.* at 4-4.

textiles and apparel made of wool and man-made fibers.[41] These agreements were viewed as a stop-gap measure, and the MFA soon followed.

The expansion of MFA-linked restraints—both as to the scope of coverage and number of countries—illustrates the economic advantage enjoyed by countries with relatively low wage rates in the production of textiles and apparel. This story also suggests the strength of the political forces supporting restrictions on imports of textiles and apparel into the United States and other industrialized nations. At some point, the cost of restrictions on such imports to consumers in industrialized nations may become so great as to tip the political balance away from such restrictions. Estimates of the current cost of these restrictions to United States consumers put the figure as high as $30 billion, and a recent study estimates the overall gain to the United States economy from elimination of these restrictions as at least $2 billion per year.[42] The United States government supports some modification of the current system, but is not willing to act unilaterally.

One final case which merits discussion is *Martial Arts Uniforms from Taiwan*.[43] Sales of martial arts uniforms in the United States at any given time are strongly affected by the extent to which martial arts movies currently are popular. Because United States interest in the martial arts has declined over the past several years,[44] domestic consumption of martial arts paraphernalia has declined. Consequently, the performance of the domestic martial arts uniform industry has weakened considerably.

At the same time, the evidence in the *Martial Arts Uniforms* case showed conclusively that dumping had very little, if any, effect on prices of the subject imports. Similarly, it had little, if any, effect on prices or sales of domestically produced martial arts uniforms, or investment and employment in the domestic industry producing that

41. *Id.*

42. *Id.* at 4-19. These estimates take into account the gains to domestic consumers that would result from lower prices for textiles and apparel, losses to domestic producers and employees in the domestic industry, and lost tariff revenues. *Id.* at 4-6.

43. USITC Pub. 2216, Inv. No. 731-TA-424 (Final) (Aug. 1989).

44. With all due respect to Chuck Norris, my own view is that martial arts movies just have not been the same since Bruce Lee passed away. In any event, the level of mass interest in martial arts clearly has declined somewhat over the past few years and there is nothing at the moment like the seemingly inexplicable Ninja craze that we experienced several years ago. The current popularity of the Teenage Mutant Ninja Turtles does not appear to have the same impact on the martial arts uniform market, although I believe it has boosted sales of Turtle Wax considerably.

product. In fact, the real source of the difficulties being experienced by the domestic martial arts uniforms industry can be found in factors unrelated to ROC imports. In light of this evidence, the Commission concluded that lower-priced ROC martial arts uniforms did not materially injure the competing domestic United States industry.

The surprise in this case was not the conclusion, but the tally that produced it. The Commission rejected duties in that investigation by only a 4-2 vote, the narrowest of margins by which a negative vote can be sustained by the ITC when fully conditioned with six participating commissioners.[45] The outcome of the case is noteworthy, primarily because it confirms that, in most antidumping and countervailing duty cases, an ailing domestic industry can count on support from at lease some comissioners without respect to the record evidence on actual effects of unfairly traded imports.

For businesses that export to the United States and compete principally on the basis of price, this cannot be seen as a favorable straw in the wind. These businesses may find their susceptibility to an antidumping or countervailing duty case more dependent on the health of the domestic United States industry than on any specific action of the businesses. This approach to deciding international trade cases reflects a protectionist viewpoint on the part of some of the commissioners, and contradicts United States objectives of reducing barriers to trade. It is my hope that the commissioners apply a more even-handed approach to deciding antidumping and countervailing duty cases in the future, so that ROC and United States businesses can compete on an even footing.

45. Under United States law, an evenly decided vote is treated as an affirmative vote by the Commission. 19 U.S.C. § 1677(11) (1988).

The Republic of China's Response to Charges of Protectionism

CHUNG-TEH LEE*
JEFFREY H. CHEN**

INTRODUCTION

As a result of its large foreign trade deficit, the United States is attempting to open up international markets for its goods. Taiwan, the Republic of China ("ROC"), is an obvious target for such United States endeavors, since it enjoys a very sizeable trade surplus with the United States. However, United States efforts to open up trade with the ROC have been frustrated by governmental controls over the ROC's economy. This has led the United States to charge the ROC with protectionism.

The United States Omnibus Trade and Competitiveness Act of 1988 is considered an anti-protectionist measure and has been used to force open foreign markets. Since the ROC relies heavily on the United States market, it cannot ignore the challenge of the new United States trade legislation. In March 1989, the ROC Executive Yuan promulgated a four-year plan entitled Detailed Action Plan for Strengthening Economic and Trade Ties with the United States ("Action Plan").[1] The Action Plan purports to respond to the United States' enactment of the Omnibus Trade and Competitiveness Act.[2] The Plan's contents may provide the best and most recent indication of the ROC's official response to charges of protectionism. This paper will highlight and discuss the main points of the Action Plan.

REPUBLIC OF CHINA-UNITED STATES TRADE IMBALANCE

The ROC's large trade surplus with the United States is often pointed to as evidence of ROC protectionism. However, the surplus

* Attorney at Law, Tsar & Tsai Law Offices, Taipei, ROC.
** Associate Attorney at Law, Tsar & Tsai Law Offices, Taipei, ROC.

1. COUNCIL FOR ECONOMIC PLANNING AND DEVELOPMENT, DETAILED ACTION PLAN FOR STRENGTHENING ECONOMIC AND TRADE TIES WITH THE UNITED STATES (Executive Yuan, Republic of China, March 1989) [hereinafter ACTION PLAN]. The Action Plan was prepared in Chinese; however, the Council for Economic Planning and Development ("CEPD") prepared and publicly distributed an English version. All references to the Action Plan in this article will be to the English version.

2. *Id.* at 1.

has decreased in recent years. The surplus was US $19 billion in 1987, while in 1988, the surplus was reduced to US $14.1 billion. Further, as of the end of September 1989, the surplus slightly exceeded US $9 billion,[3] resulting in a projected figure of US $12 billion for 1989.

The Action Plan states four objectives for balancing the ROC's trade with the United States:[4] (1) taking "effective measures to expand domestic demand and increase imports" so as to reduce the ROC-United States trade surplus by 10% annually;[5] (2) diversifying the ROC's export market so as to reduce dependence on the United States market to one third of its total export volume in 1992;[6] (3) setting up a schedule to be followed by government ministries and agencies "to implement the policy to liberalize and internationalize [the ROC's] economy;"[7] and (4) seeking "comprehensive solutions to bilateral trade problems" with the United States "rather than piecemeal resolution of individual difficulties."[8]

The Action Plan proposes to expand domestic demand by adjusting the ROC's overall economic development strategy. Government expenditures for education, medical care, social security, public health, and environmental protection are to be increased.[9] State-owned industries will be required to increase their investment in capital equipment, antipollution controls, and expansion of energy facilities.[10] Private industries will be encouraged to increase their investment in building new schools, pollution control, research and development, and high technology.[11] Through these measures, trade-related industries will redirect a part of their resources into non-trade-related sectors of the ROC's economy.[12]

The Action Plan also contemplates increasing imports by encouraging public and private enterprises to expand their "buy American" and other trade missions to the United States. The ROC

3. The precise figure as of the end of September 1989 is US $9,045,700,000, as reported by the Directorate General of Budget, Accounting & Statistics of the ROC Executive Yuan.

4. ACTION PLAN, *supra* note 1, at 1.

5. *Id.*

6. *Id.*

7. *Id.* at 1-2. The Tariff Reduction Schedule is presently undergoing discussion in the ROC Ministry of Interior.

8. *Id.* at 2.

9. *Id.* at 7-8.

10. *Id.* at 7.

11. *Id.* at 8.

12. *Id.* at 5.

government will also continue to assist United States promotional activities in the ROC. The government will sponsor United States Product Shows and provide free rentals at the Taipei World Trade Center for trade representative offices of U.S. state governments.

The ROC Ministry of Economic Affairs has formulated a plan entitled the Five-Year Plan to Diversify Markets and Balance Trade, which the Action Plan will "most seriously enforce" in order to lessen ROC dependence on the United States market.[13] The Overseas Economic Cooperation and Development Fund, with a budget of NT $30 billion[14] was also recently established.[15] The Action Plan contemplates that this fund will be used for United States-ROC coordinated investment projects in developing countries.[16]

Import Duties and Commodity Tax

High import tariffs have been viewed as the ROC's principal import barrier. Therefore, the Action Plan contains a Tariff Reduction Schedule.[17] This schedule specifies a graduated reduction of the average effective duty rate from 5.66% in 1988 to 3.50% by 1992, and a graduated reduction of the average nominal duty rate for all products from 12.57% in 1988 to 7.00% by 1992.[18] If the Tariff Reduction Schedule is implemented, import tariffs will basically be at a par with those of major industrialized nations by 1992.

On the other hand, the ROC imposes a domestic commodity tax on specified items. This tax has a discriminatory effect on imported goods of a similar nature, most notably automobiles and cosmetics. For example, the commodity tax on imported cars ranges from 25% for cars with engines of less than 2,000 cubic centimeters to 60% for cars with engines above 3,600 cubic centimeters. The largest car man-

13. *Id.* at 6. The ROC Ministry of Economic Affairs has been implementing various strategies to diversify its export markets since 1980. At present, the Five-Year Plan referred to in the Action Plan is still under discussion in the Ministry of Economic Affairs.

14. The notation "NT" refers to New Taiwan dollar.

15. ACTION PLAN, *supra* note 1, at 6. At present, the bill to establish this Fund, as proposed by the ROC Executive Yuan, is undergoing its first reading by the ROC Legislative Yuan.

16. *Id.* Recently, the United States Treasury Department proposed that the ROC participate in the "Brady Plan" to help reduce Third World debt through voluntary debt reduction by commercial banks. ROC Central Bank of China Governor Samuel Shieh conditioned any such participation, however, on United States support for the ROC's bid to join the General Agreement on Tariffs and Trade. *See* Yang, Bennett & Javetski, *The Other China Is Starting To Soar*, U.S. BUS. WEEK, Nov. 6, 1989, at 62.

17. ACTION PLAN, *supra* note 1, at 12.

18. *Id.*

ufactured locally has a 3,600 cubic centimeter engine, whereas a substantial proportion of foreign-made cars have engine sizes larger than 3,600 cubic centimeters. This size differential results in a de facto additional import duty on larger foreign cars. The Action Plan does not address this issue.

IMPORT CONTROLS AND RESTRICTIONS

The United States has criticized the ROC's non-tariff barriers. Particularly cumbersome is the ROC's extensive and bureaucratic import licensing system which frequently requires approvals by more than one government agency and provides occasion for discriminatory treatment. The Action Plan purports to "simplify" import procedures.[19] In particular, the government is to introduce a "negative list" where import licenses will be required only for those items listed.[20]

Agriculture

Although the ROC government has come under intense pressure from local farmers, the agricultural sector is exempt from the government's overall liberalization program. The Tariff Reduction Schedule in the Action Plan specifies a graduated reduction of the average nominal duty rate for agricultural products from 25.99% in 1988 to 19.82% by 1992.[21] The Action Plan also states that the ROC will continue to review the proposal to liberalize importation of agricultural products.[22] It states in general terms that investments will be made to "improve [the ROC's] agricultural infrastructure," and that production will be adjusted so as to improve the market for ROC agricultural products.[23]

However, the Action Plan does not mention United States criticisms of the ROC's restrictive standards and testing requirements for agricultural imports. These include the ROC's amino nitrogen test for determining the purity of imported fruit juices as well as other registration and labelling requirements for imported products. Nor does the Action Plan address the ROC's indirect subsidies of local crops through incentives, such as the government's purchase guaran-

19. *Id.* at 3.

20. EXECUTIVE YUAN, NEGATIVE LIST FOR INVESTMENT BY OVERSEAS NATIONALS, DECREE NO.TAI (77) CHING 9141 (1988) [hereinafter NEGATIVE LIST].

21. ACTION PLAN, *supra* note 1, at 12.

22. *Id.* at 3.

23. *Id.* at 7.

tees for portions of local produce and packaging and storage and shipping assistance, provided through marketing cooperatives and farm associations.[24]

Services

The Action Plan pledges that there will be a "gradual opening" to foreign investment in the services sector of the ROC market, namely in the areas of transportation, banking, insurance, and securities.[25] The ROC Ministry of Communications has agreed "in principle" to allow air cargo terminals outside airports,[26] to amend regulations pertaining to inland transportation so as to allow licensing of United States truck trailers,[27] and to revise the ROC Highway Act to permit foreigners to engage in the inland trucking business.[28]

In the area of banking, the Plan states that the ROC Banking Law is being amended to permit foreign bank branches to take savings deposits.[29] Currently, foreign banks may only establish one branch each in Taipei and Kaohsiung. The Action Plan does not improve this situation much, however, stating only that establishment of branches in other places in the ROC by foreign banks "will be considered . . . when Republic of China nationals are allowed under [ROC] law to incorporate new banks."[30]

Currently, two United States life insurance company branches

24. Historically, the ROC government has negotiated annually with local farm cooperatives and associations on matters such as purchase guarantees and marketing of ROC-produced agricultural goods.

25. ACTION PLAN, *supra* note 1, at 4-5.

26. *Id.* at 4. Even though the Plan set August 1989 as the target date, the ROC Ministry of Communications reportedly stated that Regulations Governing Air Cargo Terminals (which would allow foreigners to establish air cargo terminals in the ROC) would be promulgated by early November 1989.

27. *Id.* The ROC Ministry of Communications reportedly decided to allow ROC branch offices of United States commercial carriers to apply for inland truck trailer licenses. To date, however, no ruling or order to this effect has been reported in the ROC Ministry of Communications Bulletin.

28. *Id.* Representatives of the ROC Ministry of Communications agreed to submit a proposal to the ROC Legislative Yuan to amend the ROC Highway Law, in order to open for one year the inland trucking business in the ROC to United States ocean carriers for continued transportation of goods over land. To date, however, no proposal to this effect has been reported in the ROC Legislative Yuan Bulletin.

29. *Id.* Actually, in order for foreign banks to take savings deposits in the ROC, the ROC Banking Law must be amended. Regulations promulgated by the ROC Ministry of Finance applicable to foreign banks, which currently do not include savings deposits within the scope of businesses in which foreign banks may engage, must then be revised to give effect to the Banking Law amendment.

30. *Id.*

and two property insurance branches can be established in the ROC per year. No branches of United States mutuals are allowed.[31] United States insurance companies are also prohibited from establishing subsidiaries and joint ventures with ROC noninsurance enterprises. Here as well, the Action Plan merely states that the ROC government "will consider" permitting United States firms to establish subsidiaries and joint ventures "when Republic of China nationals are allowed under [ROC] law to establish new insurance companies."[32]

At present, foreign entities may not participate directly in local securities transactions. They may act only through the purchase or sale of securities by way of mutual funds.[33] The Action Plan states only that the ROC will "gradually open" its securities industry and alludes to an increase in channels for the ROC's own investment in foreign securities.[34]

INVESTMENT IN GENERAL

Currently, some 55 industries are prohibited from foreign investment on the basis of a negative list which includes most agricultural activities, national defense industries, real estate, and public utilities.[35] The negative list restricts foreign investments in other industries, such as mining, pharmaceuticals, and medical services.[36] In addition, foreign investments seeking favored treatment require prior approvals by relevant agencies of the ROC government.[37] Tax incentives are provided for investments in high technology and large-scale capital-intensive industrial sectors.[38] The Action Plan leaves these areas untouched.

The Action Plan does state however, that a bilateral agreement

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31. *Id.* at 5. The quota is an internal policy guideline of the ROC Ministry of Finance.

32. *Id.* This prohibition is also an internal policy guideline of the ROC Ministry of Finance.

33. *See* ROC EXECUTIVE YUAN, REGULATIONS GOVERNING INVESTMENTS IN SECURITIES BY OVERSEAS CHINESE AND FOREIGN NATIONALS, DECREE NO. TAI (72) TSAI 9642 (1983).

34. ACTION PLAN, *supra* note 1, at 5.

35. NEGATIVE LIST, *supra* note 20.

36. *Id.*

37. *See generally* INDUSTRIAL DEVELOPMENT AND INVESTMENT CENTER, TAIPEI, STATUTE FOR INVESTMENT BY FOREIGN NATIONALS (ROC) (1989).

38. *See generally* INDUSTRIAL DEVELOPMENT AND INVESTMENT CENTER, TAIPEI, ENFORCEMENT RULES OF THE STATUTE FOR ENCOURAGEMENT OF INVESTMENT (ROC) (1989).

on investments and technology transfer with the United States "merits serious study" and that a working draft will be prepared by the ROC government for discussions with the United States.[39] Also, as part of its overall adjustment of economic strategy, the Action Plan states that the ROC will invite foreign participation in public construction projects in the ROC and will increase importation of foreign construction equipment, materials, and engineering consulting services.[40]

INTELLECTUAL PROPERTY

There has been long-standing criticism of rampant intellectual property pirating in the ROC and the inadequacy of both ROC law and enforcement measures for protecting United States intellectual property rights holders. Recent attention has focused on infringement of United States copyrights by proprietors of the ROC's "MTV" parlors and videotape rental shops. The Action Plan states that the ROC government "will investigate all allegations of infringement of intellectual property rights asserted by United States businesses" and "will maintain close contacts with private anti-counterfeiting organizations."[41]

In the area of copyrights, the Action Plan advocates multifaceted remedies.[42] It states the ROC soon will conclude talks with the United States on a copyright protection agreement.[43] The ROC Ministry of Interior will prepare a draft bill by June 30, 1990, amending the ROC Copyright Law. Thereafter, the copyright enforcement rules will also be amended.[44] The ROC Ministry of Interior Organization Act will also be amended to establish a Department of Copy-

39. ACTION PLAN, *supra* note 1, at 6. As far as the authors are able to ascertain, there has been no movement to date within ROC government circles toward preparing a working draft for a bilateral agreement with the United States on investment and technology transfer.

40. *Id.* at 8.

41. *Id.* at 7.

42. *Id.* at 10-11.

43. *Id.* at 10.

44. *Id.* At present, the ROC Ministry of Interior has completed a working draft bill amending the ROC Copyright Law. Over the ensuing months, comment will be invited from legal scholars and interested persons. The Ministry of Interior plans to forward the working draft to the ROC Executive Yuan before June 30, 1990, for proposal to the ROC Legislative Yuan for enactment. As to enforcement rules, ROC legal scholars have expressed the view that amendment to the enforcement rules, promulgated pursuant to the ROC Copyright Law itself, without first amending the ROC Copyright Law, would constitute a violation of the people's democratic rights, insofar as the people's elected representatives would not have the opportunity to review any such amendments made.

right which will be responsible for copyright protection.[45] A court specializing in protection and enforcement of intellectual property rights also will be established.[46] Furthermore, an awareness program will be launched to educate both college students and police officers on the importance of copyright protection.[47]

With respect to movies and videotapes, the Action Plan specifies that procedures will be improved for examining whether movies and films are being shown in an authorized manner. Movie distributors will be required to produce certificates of authorization from original producers when applying for licenses. Furthermore, funding will be provided to the Taipei Motion Pictures Dealers Association's Anti-Counterfeit Committee.[48] In this regard, the Action Plan also mentions that radio and television stations will produce anti-counterfeiting programs to raise public awareness of such issues.[49] Police will periodically inspect manufacturers and retailers to search for illegal videotapes.[50]

The Action Plan mentions that "[n]ecessary amendments to the ROC Patent Law and the ROC Trademark Law are being contemplated."[51] In particular, article 62-3 of the ROC Trademark Law will be amended so that counterfeit goods will be subject to confiscation whether or not such goods are the property of the infringer.[52] Computerization will improve examination of trademark and patent applications.[53] Regulations will be formulated whereby companies exporting goods bearing unlicensed trademarks registered outside of

45. *Id.* As far as the authors have been able to ascertain, there has been no movement to date within ROC government circles toward establishing a Department of Copyright within the ROC Ministry of Interior by way of amendment to the ROC Ministry of Interior Organization Law. On the other hand, funds have been allocated for certain reorganizations of government anti-counterfeiting committees. For example, the ROC Executive Yuan recently expanded the Anti-Counterfeiting Committee for the National Industrial Convention to form the ROC Committee for Protection of Intellectual Property Rights, allocating NT $16,000,000 for use by various ROC government organs, including the ROC Ministry of Interior.

46. *Id.* at 11. As far as the authors have been able to ascertain, there has been no movement to date within ROC government circles toward establishing a court specializing in protection and enforcement of intellectual property rights.

47. *Id.* at 10-11.

48. *Id.* at 11.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The proposed amendment to article 62-3 of the ROC Trademark Law was enacted into law as of May 28, 1989.

53. *Id.*

the ROC may lose their export rights.[54] The Action Plan also states that government anti-counterfeiting committees will be strengthened and that the government will "vigorously prosecute" patent and trademark infringements.[55]

CONCLUSION

The Action Plan is, of course, only a plan, and its successful implementation over four years remains to be tested. Although multifaceted, the Action Plan is by no means comprehensive. It does not address many trade issues and only addresses in general terms other issues which will require precise definition over the course of time. Finally, the Action Plan does not, as a matter of law, bind any government agency.

Nevertheless, the Action Plan remains significant as an officially-promulgated, overall policy statement by the ROC government. It covers and sets the direction for all organs of the Executive Yuan for the ROC-United States trade over the next four years. As such, its terms, however general, are worth spelling out in an ordered fashion, particularly as a way to respond to United States charges of protectionism.

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54. *Id.* at 11-12. As far as the authors can ascertain, the ROC Board of Foreign Trade of the Ministry of Economic Affairs has not taken any measures to date to formulate or draft regulations concerning forfeiture of export rights for attempted export of goods bearing unlicensed, foreign-registered trademarks.

55. *Id.* at 12.

PROTECTION OF INTELLECTUAL PROPERTY IN THE REPUBLIC OF CHINA

Trademark Protection of Motion Pictures, Merchandising Items, and Television Programs in the Republic of China

CHERYL M. FRIEDMAN*

I. INTRODUCTION

Trademarks and service marks are valuable intellectual property rights which must be protected against unauthorized use. For example, a world-famous mark such as *E.T.* is capable of generating millions of dollars for its owner. However, the *E.T.* mark would have little or no value if any company were allowed to use it on any product of any quality without the owner's consent.

Unfortunately, trademark infringements, or unauthorized uses of marks, are common throughout the world. Therefore, trademark owners, such as motion picture studios, must adopt the most cost-effective and efficient procedures and policies in order to protect their marks and eliminate infringements. This paper discusses the protection of trademarks and service marks as they relate to motion pictures, merchandising items, and television programs in the Republic of China ("ROC").

II. DEFINING THE PRODUCT

A trademark or service mark is a word, drawing, symbol, or combination thereof, which is used on a product (or in connection with a service) to identify and distinguish that product (or service) from those products (or services) which are manufactured (or provided) by others.[1] In the entertainment industry, a trademark or ser-

* Ms. Friedman is currently Trademark Counsel to MCA, Inc. The views expressed herein are solely those of the author. The author wishes to thank Frank Wang for his valuable advice in the area of Republic of China trademark law.

1. TRADEMARK LAW art. 4 (ROC) (1985) (English translation).

vice mark may be anything from an item of merchandise sold in connection with a feature film or television show, to the name of the film or show itself. For example, "Miami Vice" is both a service mark and a trademark. The title "Miami Vice," which is the name of the television series, is a service mark, registrable in the ROC as an entertainment service in Class 1.[2] The words "Miami Vice," in their stylized logotype, are also trademarks, registrable in the ROC for items of merchandising, such as clothing and toys.

When a trademark is used to identify merchandising items, it is typically licensed by the trademark owner to the merchandiser pursuant to a license agreement. This license agreement should define the licensed product and its territory. However, the licensed trademark remains, at all times, the property of the trademark owner as licensor.

Another category of trademarks, closely related to marks for a television series, consists of trademarks for motion pictures or for a motion picture series, such as the trademark *Jaws*. The title of the motion picture *Jaws*, together with its distinctive shark logo, may be registered as a trademark and merchandised in the same manner as the title of a television series.

Finally, perhaps the most valuable type of trademark in the entertainment industry is the name and logo of the movie studio itself. For example, the famous name and globe design logo "Universal Studios" appears on every film and television series which that studio produces, as well as on all advertising for such films and series. In addition, the "Universal Studios" name and logo may be marketed in association with various consumer goods. Accordingly, the registration of this type of mark and logo is essential, and every effort must be made to protect and preserve the exclusive ownership rights in these valuable trademarks and service marks. The procedure for protecting these marks is discussed below.

III. METHODOLOGY—PROTECTING AND PRESERVING RIGHTS IN TRADEMARKS AND SERVICE MARKS IN THE ROC

Protecting and maintaining the exclusive right to utilize a trademark or service mark in the ROC is a two-step process. First, the mark must be registered. Second, the mark must actually be used on the goods or services for which its registration is obtained.

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2. Under ROC Trademark Law, goods and services are separately classified. Specifically, goods are placed into 95 classes, and services into 12 classes. 3 E. HORWITZ, WORLD TRADEMARK LAW AND PRACTICES, app. at 5-7 (2d ed. 1990).

A. Registration

ROC trademark law is similar to the laws of most other countries in that it does not impose a requirement that a trademark or service mark be "used" prior to either filing an application to register the mark or prior to obtaining the actual registration.[3] An ROC trademark or service mark registration confers upon the owner the exclusive right to use the mark as of the date of the registration.[4] The exclusive right to use the mark, however, is limited to the matter which is actually registered. The exclusive right to use the mark is also limited to those same goods or services, or goods or services which are in the same class as those for which the mark is registered.[5] For example, the mark "Miami Vice" may be registered for certain articles of clothing which are categorized as Class 40 under ROC trademark law.[6] However, if the mark is not also registered for toys and games, which are categorized as Class 78,[7] then the exclusive right to use the mark only applies to the registered articles of clothing, and *not* to the toys and games. Therefore, if economically feasible, trademark and service mark registrations should always be obtained for all goods and services which the owner intends to manufacture, distribute, or otherwise use in the ROC.

Thus, ROC trademark law provides an advantage to those companies which have the capacity to file applications for every class of goods on which their marks will be used. Also, because there is no prerequisite that the marks be used prior to their registration, the law provides an incentive for trademark owners to protect their marks well in advance of their actual use.

Although obtaining an ROC registration is costly,[8] once obtained, a registration enables the trademark owner to enter into licensing agreements and otherwise use the registered mark with some degree of security against infringers.

In light of the above, applications to register trademarks and ser-

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3. The ROC law has no provisions which require use. *See id.* §§ 3.01-.07; A. JACOBS, TRADEMARKS THROUGHOUT THE WORLD C-29 (4th ed. 1989).

4. A. JACOBS, *supra* note 3, at C-29.

5. *Id.*

6. E. HORWITZ, *supra* note 2, app. at 4.

7. *Id.* app. at 5.

8. An ROC registration costs approximately $1,800. Wang & Wang, U.S.A., Fee Schedule for Handling Patent, Trademark and Copyright Matters in Taiwan, R.O.C. (effective Aug. 1, 1989).

vice marks should be filed, at a minimum, in all of the following categories of goods and services:

1. Toys and games (Class 78);[9]
2. Clothing and wearing apparel (Class 40);[10]
3. Movie films and video tapes (Class 93);[11] and
4. Education and entertainment services (Class 1).[12]

If a trademark or service mark registration is not obtained either prior to the initial release of a film or television series in the United States, or prior to its distribution in the ROC, then any unlicensed or otherwise unauthorized third party may seek to register the mark. For example, if after the release in the United States of the film *The Land Before Time*, but prior to its release in the ROC, the owner of the trademark has not yet registered the mark *The Land Before Time*, any unauthorized third party with knowledge of the film may file an application to register the mark for the sale of merchandising items. In the ROC, such registration would preclude the United States owner from licensing the mark in the ROC. Under this scenario, the trademark owner will be forced to oppose registration of the infringer's mark without the benefit of the true owner's own ROC registration.

B. Use of Trademarks and Service Marks

Registration, alone, however, is not enough to protect a trademark or service mark in the ROC. Rather, once the trademark or service mark is registered, it must actually be used on the goods or services for which it is registered.[13] For example, if the mark *E.T.* has been registered for merchandising items, such as clothing and toy dolls, then the trademark owner must enter into licensing agreements for the actual manufacture or sale of those goods in the ROC. A new television series, such as "Knight Rider," must be distributed to local ROC television stations for actual airing in the ROC. Likewise, motion pictures, such as *E.T.* and *Jaws*, must be distributed either initially in ROC theaters, or later on videocassette. These recommendations are acknowledged to be based upon optimal market conditions. For example, it may not always be economically feasible to

9. E. HORWITZ, *supra*, note 2, app. at 5.
10. *Id.* app. at 4.
11. *Id.* app. at 6.
12. *Id.* app. at 7.
13. One cannot prevail in an infringement opposition or enforce one's rights without evidence of use.

market or sell certain films or television series in the ROC, even if they are successful in the United States. Moreover, even if the series or film is to be aired or released in the ROC, there may be a lag time between the initial release in the United States and the subsequent distribution in the ROC. The United States owner should be aware, however, that this situation will often leave the trademark vulnerable to unwanted infringements.

IV. CONSEQUENCES OF FAILURE TO REGISTER OR USE MARKS

A. Opposition Proceedings Against Unauthorized Applications to Register the Mark

It is likely that unauthorized third parties will attempt to register well known United States trademarks, such as *Jaws* or *E.T.*, in the ROC in order to exploit their fame. If the owner of the United States trademark has not registered the mark in the ROC, or has only registered the mark for a limited number of goods or services, then the owner will be forced to enter into a potentially lengthy and costly "opposition proceeding" to preserve his or her rights.

In order to guard against such unauthorized registrations, trademark owners frequently subscribe to outside "watching" services. These services notify the owner when a mark which is confusingly similar to, or identical with, the owner's mark, has been approved for registration by the trademark office of a foreign country.[14] The United States trademark owner, as an interested party, must then file an "opposition" to the registration of the mark. The opposition proceeding must be initiated in the ROC within three months of the mark's publication date.[15]

The grounds upon which the United States trademark owner may base his or her opposition are limited. Generally, the owner may only oppose registration of the mark on the basis that the mark is likely to deceive the public, or on the ground that the mark is identical with or similar to the owner's own famous mark.[16] Substantial

14. The ROC Trademark Office, for example, will approve a third party's trademark application if there are no conflicting registered marks. TRADEMARK LAW art. 37(12) (ROC) (1985) (English translation).

15. *Id.* art. 41.

16. More specifically, the United States trademark owner may base his or her opposition upon any one of three grounds.

1. The mark is likely to deceive the public or to cause the public to form a mistaken belief. *Id.* art. 37(6).

evidence is necessary to prevail based on these grounds. Examples of the type of evidence sufficient to prevail include:

1. Certificates of registration of the mark in all other classes;
2. Receipts and invoices for advertising expenditures;
3. Accounting records confirming profits;
4. Receipts and invoices for promotional expenditures;
5. Examples of advertisements and publicity, such as the actual advertisements in newspapers, magazines or catalogs, or receipts for those advertisements, or for television and radio commercial advertisements;
6. Copies of schedules documenting the time a motion picture is released or dates a television series is aired;
7. Accounting records, invoices or shipping documents showing the importation of the product bearing the trademark into the ROC;
8. The identity of an ROC agent used for selling or distributing the series, film or product; and,
9. If a product is to be manufactured in the ROC for export only, then the trademark owner must provide evidence of the manufacture and exportation of the product, including sales documents.

Moreover, it may be necessary to bolster the evidence listed above with copies of worldwide trademark registrations, as well as with evidence of worldwide advertising, publicity, distribution, and sales.

However, if the mark has been registered in the ROC for goods or services similar to those for which the infringer has filed his or her application, two outcomes are possible. One possibility is that the infringer's application will be refused registration by the ROC Trademark Office. On the other hand, if the trademark office mistakenly allows the application, then the owner will be able to definitively base his or her opposition upon the exclusive registration provisions of the ROC trademark law and to cite his or her exclusive rights to use the mark.

B. Cancellation Proceedings—When a Registered Trademark or Service Mark Is Not Used

A registered trademark or service mark is subject to cancellation if it is not actually used on the goods or services for which it is regis-

2. The mark is identical with or similar to a famous mark of another person used on the same goods or goods in the same class. *Id.* art. 37(7).
3. The mark is identical with or similar to another person's registered trademark used for the same goods or for goods in the same class, or identical with or similar to a registered trademark which has expired within two years. *Id.* art. 37(12).

tered within two years of the registration date.[17] ROC trademark law provides that the right of exclusive use of a trademark or service mark may be cancelled in either of two ways. First, the ROC government may cancel the right on its own initiative. Second, the government may cancel the right upon application by an interested party if, without good cause, the trademark has not been used for two years after its registration or has not been used for any consecutive two year period after registration.[18] Moreover, once a trademark or service mark has been cancelled pursuant to article 31(2) of the ROC Trademark Law, the owner faces several repercussions. He or she is not eligible to re-apply for registration, or to acquire by assignment, or to use under license, a trademark identical with or similar to the originally registered trademark for the same goods or goods in the same class for a period of three years from the date of cancellation.[19]

Thus, failure to use a registered mark results in severe penalties for the trademark owner. In order to successfully defend against cancellation of a registered mark and avoid the resultant penalties, the trademark owner must provide evidence of the following:

1. Examples of continued use of the mark as a trademark on either the products themselves (such as T-shirts) or on packages or containers containing the products;
2. Evidence of sales of the trademarked product (dollar figures and amount of goods sold) either in the ROC, or of goods which were manufactured in the ROC solely for export. Such evidence should indicate the dates of the sales and the names of the marks. Evidence of the sales may be in the form of sales receipts, invoices, certificates for importing goods into the ROC, sales notes, bills of lading, or accounting records; and
3. Evidence of release of a television series or motion picture film, such as newspaper or magazine advertisements, or documents from local ROC television stations which show the length of time the series has been aired, the ratings achieved, or the amount of advertising and publicity dollars spent.

V. CONCLUSION

Established ROC trademark law does provide the mechanism for protecting trademarks. However, compliance with the letter of the law must be total and complete in order for a United States trademark

17. *Id.* art. 31(2).
18. *Id.*
19. *Id.* art. 37(4).

owner to protect its trademarks. Although the procedures for registration and subsequent use are often lengthy and expensive, it is essential that all efforts be made to comply with these procedures in order to fend off unauthorized exploitation of one's valuable trademark and service mark rights.

CONTRACT MANAGEMENT AND DISPUTE RESOLUTION

The Legal System of the Republic of China

HUNGDAH CHIU*

I. INTRODUCTION

United States businesspeople entering the Republic of China ("ROC") should consider a number of questions concerning how the ROC's legal system will affect their business interests. The following information provides answers to some of these questions.[1] First, this Article describes the nature of Chinese law to provide a historical perspective for the current situation. Businesspeople becoming resident aliens within the ROC should study this section to familiarize themselves with the foundations of the present legal system. The next section provides a general description of the current judicial system, methods of alternative dispute resolution, the legal profession, and the administration of justice in the ROC, with special emphasis on aspects which differ from the United States legal system. The final section focuses on aliens in the ROC. First, it examines the status of aliens in the ROC. Second, it discusses the special relationship between the United States and the ROC as outlined in the major treaties between these two countries pertaining to the status of citizens inside the other's jurisdiction.

II. THE NATURE OF CHINESE LAW AND MAJOR LEGISLATION

A. The Traditional Legal System

Traditional Chinese concepts of law differ from fundamental legal concepts of the West. Chinese law rests on the order of nature and the necessity for human actions to harmonize with the natural order. A ruler's basic function was to maintain this harmony. Confucius and his followers considered law necessary to the preservation of

* Professor of Law, University of Maryland School of Law, Baltimore, Maryland.

1. For a detailed discussion of the ROC legal system, see Hungdah Chiu & Jyh-pin Fa, *The Legal System of the Republic of China in Taiwan*, 2 MODERN LEGAL SYSTEM CYCLOPEDIA, 602-62 (1984).

harmony, but secondary to virtuous conduct and morality among rulers and officials. The family, not the individual, constituted the unit of the social and political community and served as a model for government.

Under the Chinese legal system, punishment could be mitigated or aggravated depending on the social relationship of the parties involved.[2] For example, parents and elders command the most respect, and thus, stricter legal obligations are attached to these relationships.[3] As a result, law in China did not develop to protect the individual, either politically or economically. This is very different from Roman law, the origin of modern Western law, which contained elaborate provisions for protecting individuals' personal and economic rights.

The Chinese code was chiefly penal and administrative. It consisted mainly of public law. Civil matters were either ignored by legislation entirely or were given limited treatment within the penal system. Law was not considered an independent specialty, but instead was part of the general administration. Law served the interest of the state and society in maintaining the Confucian hierarchy of relationships and social order.

Under the traditional Chinese concept of law, private law remained undeveloped. Law was primarily designed to govern an isolated agricultural society and neither capitalism nor an independent business class was encouraged. As a result, conflicts between people were resolved through unofficial channels. Disputes arising out of business deals and contracts were often settled according to the customs of the craft or merchant guilds. Disputes between individuals or families were often mediated by village elders, neighborhood organizations, or gentry members. Business relations were considered part of friendship, kinship, and personal relationships rather than cold, impersonal, legal matters. In traditional China, the concept of limited liability for a juristic person, or corporation, conducting business, never developed.

Chinese law, therefore, was part of the government administration, designed to serve state rather than individual interests. It is thus not surprising that no independent judiciary nor separate procuracy

2. JYH-PIN FA, A COMPARATIVE STUDY OF JUDICIAL REVIEW UNDER NATIONALIST CHINESE AND AMERICAN CONSTITUTIONAL LAW 16-17 (School of Law, University of Maryland, Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 4-1980 (33), 1980).

3. *Id.*

and police developed in traditional China. For similar reasons, there was no rationale for recognizing defense lawyers, as there were few economic or civil rights to be protected.[4] This does not mean, however, that the officials had complete discretion in applying the law. Traditional China developed an elaborate system to prevent abuse or miscarriage of justice by officials. The Chinese drafted their legal code in very specific and rigid terms to prevent official manipulation of the laws. This approach failed to address many unforeseen criminal offenses. To remedy this situation, the code allowed analogies to be used in applying code provisions, but stipulated that a higher authority was required to approve each of these decisions.[5]

In its procedural aspects, the code provided an automatic appeal in most cases. A prisoner could be executed only after personal approval by the Emperor.[6] In addition, an independent censorate organ was employed to receive complaints from the people concerning official corruption or abuse.[7]

B. Contemporary Legal Reform

Despite its long tradition, the weaknesses of Chinese law became apparent in the nineteenth century after China came in contact with Western countries. China was forced to grant extraterritorial rights to foreigners and to foreign governments for their enclaves along China's coasts because the foreigners claimed that Chinese law was primitive. Reformers believed that modernizing the law would assist China in overcoming its weaknesses and would eliminate the demand for extraterritoriality. This idea gained added impetus in the late nineteenth century from the Japanese legal reforms and their successful abolition of extraterritoriality.

Moreover, as China opened up to the world, the intrusion of Western economic power and commercial ideas, including corporations, negotiable instruments, and insurance, made it clear that traditional Chinese law simply lacked the tools for conflict resolution. There was a growing need for comprehensive civil and commercial laws. Further, many foreign states promised to abolish extraterritori-

4. Underground, illegal lawyers did exist and there are code provisions punishing these so-called "litigation tricksters" (*sung kun*, meaning "litigation sticks"). *See* D. BODDE & C. MORRIS, LAW IN IMPERIAL CHINA, 413-17 (1973).

5. *Id.* at 32, 175-78.

6. *Id.* at 113-22.

7. *Id.* at 121.

ality as soon as China modernized its legal system.[8]

China, in modernizing its legal system, borrowed heavily from Japan, which had successfully modernized its system. The Japanese patterned their legal system after the systems of countries such as Germany and France. As a result, the Chinese also adopted a civil law system. The fragmentation of the common law systems prevented easy borrowing from such a system.[9]

After the fall of the Ch'ing dynasty (1644-1911) and the turmoil of the early Republican period, the Kuomintang (Nationalist Party) established the Nationalist government which unified the country in 1928. The government began a series of legal reforms which continued until the outbreak of the Sino-Japanese War in 1937. During this period, the Nationalists codified all the major civil, criminal, and commercial laws of China. Although many of these laws were patterned after the codes of Germany, Switzerland, France, and Japan, the Nationalists tried to retain traditional values which they believed were consonant with the goal of modernization. For example, a suspect who voluntarily surrendered to the authorities before the crime was discovered would automatically receive a reduction in sentence.

The Nationalist government continued legal reform during the years of the Sino-Japanese War. The highlight of these efforts was the abrogation of foreign extraterritoriality in China in 1943. In 1947, China adopted a new constitution based on democratic principles. Unfortunately, the Nationalist army was defeated by Communist forces in late 1949, and the Nationalist government moved to Taiwan.

C. The Taiwan Period (1949-Present)

When the Nationalist government moved to Taiwan in late 1949, it brought with it all of the current codes. Additionally, the ROC government was very active in enacting special legislation to implement its social and economic policies. In this respect it has followed one supreme guiding concept: Dr. Sun Yat-sen's Principle of People's Livelihood, one of the Three Principles of the People on which the Nationalist Party was built. Under this concept, a government's social and economic policies should respond to the six major requirements of the people—food, clothing, housing, communications,

8. 2 G. KEETON, THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA, 2 (1928).

9. Keeton, *The Progress of Law Reform in China—II*, 20 J. COMP. LEGIS. AND INT'L LAW 210, 220 (1938); *see also* Chung-hui Wang, *Revision of the Chinese Criminal Code*, 13 ILL. L. REV. 77 (1918).

education, and recreation. To that end, the Nationalist government enacted new labor legislation which included the Labor Insurance Statute (1958), the Vocational Training Fund Statute (1972), the Law Governing Labor Safety and Health (1974), and the Basic Labor Standards Law (1985).

Since the mid-1950s, the ROC has been actively soliciting overseas Chinese and foreign investment to strengthen the ROC's economy and to advance technological development. Several important laws were enacted to implement this policy.[10] In addition, many of the existing laws, such as the Negotiable Instrument Law, were revised to facilitate foreign trade and investment.

The influence of United States law has increased since the 1950s with the growth of trade and investment from the United States. When the ROC amended the commercial law, both United States theory and practice were studied to aid in modernizing four commercial statutes: Company Law, Law of Negotiable Instruments, Maritime Law, and Insurance Law. Additionally, the Chattel Secured Transactions Act, an important appendix to the Civil Code, is said to be based on the United States model. Certain United States rules of criminal procedure were also incorporated into the Chinese Code of Criminal Procedure after the 1966 revision.

Although formal diplomatic relations were terminated between the ROC and the United States on January 1, 1979, the countries retain most of the substance of their relations prior to 1979, under the United States-Taiwan Relations Act of 1979.[11] Thus, it is likely that United States law will continue to impact legal development in the ROC.

III. THE CURRENT JUDICIAL SYSTEM, PROCEDURE, BAR, AND ADMINISTRATION OF JUSTICE

A. Council of Grand Justices

The Council of Grand Justices is one of the government's most important organs. The Council is the only part of the government with the authority to interpret the Constitution and render a uniform interpretation of laws and regulations. The President appoints each of

10. These include the Statute for Investment by Foreign Nationals (1954), the Statute for Investment by Overseas Chinese (1955), the Statute for Encouragement of Investment (1960), the Statute for Technical Cooperation (1962), and the Statute on Management of Export Processing Zones (1965).

11. The 1979 United States-Taiwan Relations Act § 4(c), 22 U.S.C. § 3301 (1979).

the Council's seventeen members, subject first to the Control Yuan's approval. Justices serve nine-year terms and can be reappointed without restriction. The Council's jurisdiction includes issues of the constitutionality of statutes or regulations, and the application of the Constitution. Since 1958, anyone whose constitutional rights have been violated has standing to challenge the constitutionality of the statute or regulation in question. However, all other legal remedies must first be exhausted.

B. Administrative Court

Following the French model, administrative adjudication is separate from the regular courts. Any individual who feels that his or her rights have been injured through an unlawful or improper administrative order, may file a petition with the issuing authority's immediate supervising authority.[12] If that ruling is unsatisfactory, the petitioner may appeal to the next highest authority. If dissatisfied with the decision on appeal, the Administrative Court is the petitioner's last resort. This court is divided into several divisions, with each division having judges from both judicial and civil service experience. All judges have life tenure.

C. Commission on the Discipline of Public Functionaries

In addition to the administrative remedies, a misbehaving public official can be dismissed or suspended from public office for one year. This order can be issued by the Commission on the Discipline of Public Functionaries, created to hear impeachment cases brought by the Control Yuan against offending officials. However, this procedure is often overshadowed by regular criminal charges filed in the ordinary courts.

D. Ordinary Courts

1. The District Courts

Most people enter the court system through the District Court, the court of original jurisdiction for most civil and criminal cases.[13] Almost every city and county has its own District Court. There are seventeen of these in the ROC, plus two more for the offshore islands of Quemoy and Matsu. In addition to the usual civil and criminal

12. ADMINISTRATIVE PETITION LAW art. 2 (ROC).
13. LAW OF ORGANIZATION OF THE COURT [L. ORG. CT.] art. 10 (ROC).

divisions, several new divisions have been established in recent years including the Traffic Division, the Tax Division, the Family Division, and the Juvenile Delinquency Division.

At the District Court level, cases are usually tried before a single judge without a jury. However, three judges sit as a panel to hear cases deemed "important," including cases of murder, robbery, kidnapping, rape, and those crimes that pose a serious threat to the social order.[14]

2. The High Court

Above the District Court is the Taiwan High Court, sitting in Taipei. The High Court has three branches located in the central (Taichung), southern (Tainan) and eastern (Hualien) parts of the island. The offshore islands of Quemoy and Matsu are served by the Fukien High Court, Hsiamen Branch.

The High Court serves as the major court of appeal in almost all civil and criminal cases. Criminal cases relating to internal or external security or foreign relations are tried originally in the High Court.[15] Usually, three judges sit in council to hear cases. One judge may be assigned to conduct the preliminary proceedings and carry out investigation of evidence.[16] Oral arguments are conducted as in the lower courts, and questions of both fact and law may be fully reconsidered.

3. The Supreme Court

The Supreme Court is divided into several divisions. Each division is composed of five judges, including one chief judge.[17] Three or five judges, depending on the nature of the case, are legally required to hear cases in the Supreme Court.[18] Unlike the lower courts which can review questions of fact and law, the Supreme Court is limited only to reviewing questions of law.[19]

The Supreme Court's function is to hear civil and criminal cases appealed from the lower courts.[20] Although the jurisdictional scope

14. *Id.* art. 3, para. 1.

15. CRIMINAL CODE [CRIM. C.] arts. 100-19 (ROC).

16. L. ORG. CT. art. 3, para. 2 (ROC).

17. *See id.* art. 24.

18. *Id.* art. 3, para. 3.

19. CODE OF CIVIL PROCEDURE [C. CIV. PROC.] art. 467 (ROC); CODE OF CRIMINAL PROCEDURE [C. CRIM. PROC.] art. 377 (ROC).

20. However, as noted earlier, cases concerning questions of constitutionality and admin-

of the Chinese Supreme Court appears to be narrower than that of the United States Supreme Court, the volume of civil and criminal cases it decides every year is substantial. In 1982, the sixty-seven judges decided seventeen thousand cases, with each judge deciding roughly thirty cases a month. The large volume can be attributed to the lack of limitations imposed on cases appealed from below. Civil cases are prohibited from appeal if the benefits sought are less than NT $300,000 (approximately US $12,000.00). However, this limitation provides little restraint.

E. Other Methods of Dispute Resolution

1. Mediation

Cases which can be instituted only upon complaint, such as libel, trespass, and rape, are eligible for out-of-court mediation under the jurisdiction of a local Mediation Committee.[21] The Committees are composed of seven to fifteen "men of justice" who have legal knowledge. Each are appointed and confirmed at the local level.[22] Such mediation is informal and less expensive than other means, but requires the consent of the parties or victim.

Court mediation is required before other litigation is formally instituted in all property cases valued under NT $6,000 (approximately US $240). Other cases can be mediated by a sitting judge at the discretion of the parties involved.

2. Settlement

Another way to minimize lawsuits is an in-court process called "settlement."[23] It differs from mediation because it is employed after the case is formally under way. During the litigation period, the plaintiff may withdraw before a final judgment if both parties reach agreement.

3. Arbitration

A dispute may be submitted to arbitration if both parties have so

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istrative law are handled by the Council of Grand Justices and the Administrative Court, respectively.

21. STATUTE OF MEDIATION IN VILLAGES, TOWNS AND CITIES art. 1 (ROC).

22. *Id.* art. 3.

23. C. CIV. PROC. arts. 403, 427 (ROC).

agreed in writing.[24] Lawyers, accountants, and others with commercial arbitration experience must register with the arbitration association, which is jointly established by the chambers of commerce and industrial associations at different levels.[25]

The arbitrator, who is selected from the arbitration panel, hears the case and renders an award. However, his award may not be directly enforced. An execution order, issued by the court after application, is legally required to enforce the award.[26]

4. Public Notarization

The status of Chinese notaries as officials of the court is perhaps unique in the world. Notarial functions are divided into two categories: (1) execution of certificates of authentication, and (2) acknowledgement of private instruments. Papers notarized in either form can thus be treated as prima facie evidence. Using the public notary saves time and expense in litigation. For this reason, notarization is especially popular in small cases, such as relinquishing possession of a leased or borrowed house upon the expiration of the lease period.

F. The Procurator

A procuratorship office is attached to each court. A procurator has extensive authority to perform duties similar to those performed by the prosecutor and the grand jury in the United States. He or she holds preliminary examinations to see if evidence warrants a trial, and may summon, arrest, and detain the accused without approval of a judge. In addition, a procurator may compel the appearance of witnesses and may perform investigations.[27] The procurator, having such broad powers, has no counterpart in the United States judicial system.

Procurators enjoy a status similar to that of a judge. They have the same qualifications and training as judges, and transfers between the two positions are routine, especially early in a career. With the exception of being assignable to different locations, a procurator receives the same constitutional protections as a judge. Procurators also have life tenure.

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24. STATUTE OF COMMERCIAL ARBITRATION [STATUTE COM. ARB.] art. 1, para. 2 (ROC).

25. *Id.* art. 5, para. 2.

26. *Id.* arts. 21, 30.

27. JYH-PIN FA, *supra* note 2, at 32.

G. The Role of Precedent

In the ROC, decisions of higher courts are not binding on lower courts. Most judges follow their own prior decisions out of habit, while others follow the decisions of higher justices to enhance their chances for promotion. A target rate for upholding lower decisions is set at 45% for civil and 55% for criminal cases. Decisions overturned in excess of the target percentage would harm the promotion potential of the lower court judges. Consequently, few lower court judges ignore the leading opinions of the higher court judges.

The decisions of the Council of Grand Justices bind all courts. At the Supreme Court level, certain decisions are designated as having binding force, but only the essentials of those judgments are published. Full texts of judgments are not regularly published. Precedent, therefore, does exist, albeit in a form different from that in the United States and other common law systems.

H. The Bar and Legal Services to the Poor

There are two principal methods of becoming a lawyer in the ROC. One method is to take and pass the High Examination conducted annually by the Examination Yuan. During the thirty year period from 1950 to 1980, the average passing rate was only 2.99%. In some years the rate dropped below one percent. The second route is comparatively more accessible. Judges, procurators, judge advocates, professors of law, and judicial administrators may apply to the Minister of Examination and Selection of the Examination Yuan to be certified as lawyers. For judges, procurators, and those with doctorate degrees, all exams are waived. All others are required to take a modified examination. While only 463 passed the High Examination in the thirty-year period prior to 1980, some 2,215 attorneys were certified by this alternate method.

Any candidate who either passes the High Examination or who is certified can practice immediately. However, judges and procurators must undergo further training. There are now roughly 2,000 practicing attorneys in the ROC, one for every 10,000 residents.

Chinese attorneys usually engage in general practice, but a few have formed large law firms that specialize in international trade, foreign investment, and the like. Every lawyer must join the local bar association before he can practice law. The bar association is supervised by the Ministry of Legal Affairs (formerly, the Ministry of Justice) and the chief procurator in each region.

In 1941, the Ministry of Justice issued a decree requiring the local bar association in each area to provide free legal services to those who could not afford lawyers' fees. Lawyers regularly take turns at providing such free services. A decree of 1954 requires that the procurator's office of each area make monthly inspections of the local bar association's legal services to the people.

I. Criminal Process

Like other civil law countries, the Chinese Criminal Procedure Code does not provide for trial by jury. Judges decide both questions of fact and law. Although there are no strict rules of evidence, the Chinese Supreme Court has developed case law on this subject. The Code of Criminal Procedure recognizes the concept of presumption of innocence, however there is no prohibition against self-incrimination. A warrant authorizing an arrest or search may be issued by a procurator in the course of an investigation or by a judge in the course of a trial. The accused has no right to demand cross-examination or confrontation of a witness. Permission for cross-examination or confrontation is granted at the discretion of the trial judge.

In 1967, the Criminal Procedure Code was revised to provide more protection for individual rights. For instance, an accused may be detained for no more than two months during an investigation and three months during trial; any extension must be approved by the court itself. Furthermore, each extension may not exceed two months. In 1982, the code was further revised to grant the right to counsel when a person is arrested and during interrogation. Counsel is provided for indigents if the charge carries a sentence of three years or more.

J. Police Offenses

By circumventing the more rigid procedural requirements provided in the Code of Criminal Procedure, the Law for the Punishment of Police Offenses provides the police with substantial powers to investigate crimes. The law covers a wide variety of petty offenses ranging from spitting in a public place to vagrancy. The major controversy concerning the Police Offenses Law is its enforcement procedures. Police may take custody of an individual for seven days. Under certain circumstances, the police may extend detention to two weeks. Moreover, there is no judicial review of procedures. An aggrieved individual's only opportunity for appeal is to a "higher police

authority."[28] In 1980, the Council of Grand Justices declared part of the Police Offenses Law unconstitutional. The government reportedly is in the process of abolishing this law and enacting a new law requiring the establishment of a separate division in each district court to deal with police offenses.

K. Responsibility of the State for Doing Injury to Individuals

The ROC Constitution provides that any injured person may, in accordance with the law, claim compensation from the state for damages sustained as a result of state action.[29] To implement this provision, the "Law of Compensation for Wrongful Detentions and Execution" was enacted in 1959 and the "State Compensation Law" was enacted in 1980. Rights of foreigners under both laws are based on treaties or reciprocity.

L. Civil Procedure

There is no provision for jury trials in civil cases in the ROC. In rendering a judgment, the court decides on the truth or falsity of the facts according to its moral conviction while giving due consideration to the issues raised by the oral proceedings and the evidence. If the court cannot obtain this moral conviction from the evidence tendered by the parties, or if the court deems it necessary for other reasons, it may investigate evidence on its own motion.

Generally, service shall be executed at the domicile, residence, business office, or business establishment of the person to be served, or wherever the person is actually found. If the location where service is to be executed is unascertainable, the service may be effected by court notice or publication in a government gazette or newspaper. Service takes effect 60 days after publication.

In the United States, deposing a witness is primarily a private matter. The witness is examined by lawyers for both parties. The testimony is recorded verbatim by a court reporter, who is a private person paid for the work. Because the reporter is usually a notary as well, he or she can administer an oath to the witness. In the Republic of China, domestic or foreign lawyers are not allowed to take the deposition of a witness outside of court. A foreign court seeking to obtain evidence in the Republic of China must go through the procedure

28. LAW FOR THE PUNISHMENT OF POLICE OFFENSES arts. 46, 47 (ROC).
29. R.O.C. CONST. art. 24.

provided in the 1963 Law Governing Extension of Assistance to Foreign Courts.

M. Recognition and Enforcement of Foreign Judgments or Arbitral Awards

A foreign judgment will be recognized except in any of the following cases:

> (1) If the foreign court has no jurisdiction over the case according to the law of the Republic of China;
> (2) If the losing party is a national of the Republic of China who has not responded to the action, except where the summons or orders necessary for the commencement of the action has been served on the party himself in that country or served on him through the judicial assistance of the ROC;
> (3) If the judgment of the foreign court is considered to be incompatible with public order or good morals; [or]
> (4) If the foreign country does not reciprocally recognize the judgments of the Chinese courts.[30]

Since the ROC does not have diplomatic relations with many countries, a judgment rendered in a country having no diplomatic relations with the ROC must first be verified by unofficial organs of the ROC in that country before it can be presented to an ROC court. Even if a foreign judgment is not recognized by the ROC court under the above article, the judgment will not be automatically excluded as evidence.[31] The ROC court can still use the judgment as evidence in its investigation and examination.

Foreign arbitral awards will not be recognized in the ROC in the following situations:

> (1) the award violates an imperative or prohibitive provision of a law of the Republic of China;
> (2) the award is contrary to public order or good morals of the Republic of China; and
> (3) under the law of the place of arbitration, the subject matter of the dispute is not subject to arbitration.[32]

Where an award is rendered in a country which does not recognize the ROC's arbitral awards, the court *may* reject an application for

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30. C. CIV. PROC. art. 402 (ROC).

31. Civil Judgment of the Supreme Court, 75 T'ai-shang No. 1096 (1986), *translated in* Hungdah Chiu & Jyh-pin Fa, *supra* note 1, at 296-99.

32. STAT. COM. ARB. art. 32 (ROC).

recognition of that foreign award. Therefore, the principle of reciprocity is not always applied.[33]

IV. STATUS OF ALIENS AND SPECIAL UNITED STATES-REPUBLIC OF CHINA TREATY RELATIONS

A. Status of Aliens

An alien may enter the ROC with a properly secured visa, or with a letter of introduction issued by an "unofficial mission" of the ROC in a country which maintains no diplomatic or official relationship with the ROC. The visa will be issued at the airport upon the presentation of the letter. Although the United States has not had diplomatic relations with the ROC since January 1, 1979, the ROC's representative organ for dealing with the United States, the Coordination Council for North American Affairs, and its twelve offices in the United States, can issue visas to United States nationals. However, an alien carrying a transit visa but having no return or next destination airline ticket, ship ticket, or entry visa of next destination may still be denied entry.

Article 4 of the Regulations Governing the Entry or Exit and Residence or Transit of Aliens provides that an alien who falls into one of the following categories may be refused entry:

> (1) He does not carry a passport or refuses to submit his passport for examination;
> (2) His passport is counterfeited or altered;
> (3) He uses or receives the passport of another person;
> (4) There is no valid visa on his passport or his visa has expired;
> (5) He was formerly refused entry, ordered to leave [the ROC] within a prescribed period of time or previously expelled from [the ROC];
> (6) He may undermine public order or social morals;
> (7) He is mentally ill or is considered by a quarantine organ to have a contagious disease or potentially to have such a disease;
> (8) He carries contraband;
> (9) There is evidence that he will not be able to support himself in [the ROC];
> (10) He has a transit visa but he does not have a return or next destination airline ticket, ship ticket or entry visa of next destination;
> (11) There is a possibility that he may violate the laws or regula-

33. Civil Judgment of the Supreme Court, 75 T'ai K'ang No. 335 (1986), *translated in* Hungdah Chiu & Jyh-pin Fa, *supra* note 1, at 294-96.

tions of [the ROC].[34]

After an alien has entered and resided in the ROC, the Ministry of the Interior may order the mandatory departure of an alien in one of the following situations:

> (1) An alien whose visa has been cancelled;
> (2) An alien who enters the country [without submitting his valid passport with a visa and without filling out an entry registration form for examination by the police organs of the airport or port];
> (3) An alien [with a resident visa who fails to file an application for an alien resident card within 15 days after entry] or [an alien whose card has expired and fails to file an application for an extension within 10 days after the expiration];
> (4) An alien who overstays his permitted time in [the ROC];
> (5) An alien who engages in activities or is employed for work which is inconsistent with the purpose of his visa;
> (6) An alien who is subject to expulsion from [the ROC];
> (7) An alien who cannot financially support himself in [the ROC];
> (8) An alien who may undermine any public policy or social morals;
> (9) An alien who uses a written statement, picture, speech or other means to libel or slander the leader of the Republic of China, or intentionally defames the government of the Republic of China or its officials;
> (10) An alien who has committed an offense outside the territory of [the ROC] and is at large, or who has been sentenced to a fixed-term of imprisonment but has not yet begun to serve his term, or the prison term has not yet been completely served; or
> (11) An alien whose behavior may violate the laws or regulations of [the ROC].[35]

After receiving a notice for mandatory departure, an alien must depart within seven days. If he does not depart within the prescribed time, he may be forced to depart. Under international law, a state can expel an alien from its territory, therefore, no administrative or judicial review for a decision of mandatory departure made by the Ministry of the Interior appears to exist. Also, a dual national of the ROC and a foreign country will be treated as a foreigner if he enters the ROC with a foreign passport.

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34. Regulations Governing the Entry or Exit and Residence or Transit of Aliens, art. 4, *translated in, Contemporary Practice and Judicial Decisions of the Republic of China Relating to International Law, 1986-1988*, 7 CHINESE Y.B. OF INT'L. L. & AFF. 241-51 (H. Chiu ed. 1987-88).

35. *Id.* art. 33, at 249-50.

> An alien may be refused exit in the following situations:
>
> (1) A judicial organ has notified the police organ to restrict his exit;
>
> (2) He has not submitted a certificate verifying required tax payments (or attesting to a tax exemption) or the financial or tax organ has notified the police organ to restrict his exit; [or]
>
> (3) He has a case under investigation by a relevant government organ.[36]

To protect the personal security of aliens in the ROC, aliens generally are granted the treatment that the ROC grants its own citizens. Aliens are allowed access to ROC courts, but free legal aid is granted only where there exists reciprocity with the alien's country or a special provision of a treaty entered into by the ROC.

Aliens may participate in land, mineral, banking, and insurance enterprises, however, they must fulfill certain conditions prescribed by law. Under the 1954 Statute for Investment by Foreign Nationals and the 1960 Statute for Encouragement of Investment, foreign investments are guaranteed against expropriation for twenty years. Foreign investors also receive tax concessions, the right to remit their capital and profits abroad, and other privileges.

Aliens in the ROC generally are permitted to work in common occupations of the community without an employment permit. Aliens, however, are restricted or excluded from certain professions, such as fisherman, ship master, and port pilot. Also, aliens may not engage in specialized professions[37] or be technicians[38] unless their home countries grant similar privileges to citizens of the ROC.

B. Special United States-Republic of China Treaty Relationships

The United States and the ROC severed diplomatic relations on January 1, 1979.[39] The United States Congress agreed to continue all treaties and other international agreements entered into between the United States and the governing authorities in the ROC prior to January 1, 1979, and which were effective on December 31, 1978 (until terminated in accordance with law). The ROC confirmed the continuity of the Sino-American treaties and agreements in a letter from

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36. *Id.* art. 6, at 242.
37. Specialized professions include accounting, law, and medicine.
38. Restricted technical areas include architecture, agriculture, industry, and mining.
39. 22 U.S.C. § 3301 (1979).

the Ministry of Foreign Affairs to the Ministry of Justice (now called the Ministry of Legal Affairs).

The most important treaty between the United States and the ROC is the 1946 Treaty of Friendship, Commerce, and Navigation.[40] The treaty granted the nationals and corporations of each country most-favored status.[41] The nationals of the contracting parties are entitled to reside, travel, and conduct trade throughout each other's territory.[42] Each country's corporations and associations are entitled to have their juridical status recognized within the territories of the other contracting party.[43] The nationals, corporations, and associations of each party shall enjoy free access to the courts of justice, administrative tribunals, and agencies in the territories of the other, as established by law, in the pursuit and defense of their rights.[44]

Under a 1952 agreement, the United States Overseas Private Investment Corporation ("OPIC") extended its coverage to include United States investments in the ROC.[45] Although there is no general double taxation treaty between the United States and the ROC, the two countries did agree to relieve double taxation on earnings from the operation of ships and aircraft.[46]

After January 1, 1979, all agreements concluded between the United States American Institute in Taiwan ("AIT") and the Republic of China's Coordination Council for North American Affairs ("CCNAA") are nominally "unofficial." The agreements, however, have full force and effect under the laws of the United States pursuant to Sections 6 and 10(a) of the Taiwan Relations Act.[47] Their va-

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40. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, 63 Stat. 1299, T.I.A.S. No. 1871 *reprinted in* 6 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 761 (1971).

41. *Id.* at 763.

42. *Id.* at 762.

43. *Id.* at 764.

44. *Id.* at 767.

45. China Economic Cooperation, June 25, 1952, 3 U.S.T. 4846, T.I.A.S. 2657, 136 (as amended, 1963, 14 U.S.T. 2222, T.I.A.S. 5509, 505 U.N.T.S. 308). The rapid rise of per capita income in the ROC (about US $7,500 in 1989) disqualifies the ROC for OPIC coverage.

46. Double Taxation: Earnings from Operation of Ships and Aircraft, Feb. 26, 1972, United States-Republic of China, 23 U.S.T. 129, T.I.A.S. 7282. This agreement is replaced by *Exchange of Letters between the CCNAA and AIT Relating to Relief from Double Taxation on Earning Derived from the Operation of Ships and Aircraft, May 31, 1988, reprinted in* 7 CHINESE Y.B. OF INT'L L. & AFF. 496-99 (H. Chiu ed. 1987-88).

47. *See* 22 U.S.C. § 3305 (1979).

lidity in the ROC is similar to that of any other international treaties or agreements.

V. CONCLUSION

In the last four decades, the ROC government has established the foundation of a modern legal system in the ROC and has planted the seeds for its future growth. While the ROC's economic growth is well-known, its legal development has been ignored by Westerners.

There is a common impression that the ROC does not have a sophisticated modern legal system. This is untrue; without a modern legal system, the ROC would have been unable to reach its present level of economic development. A United States businessman operating in the ROC would not be able to adequately protect his rights under this system.

Commercial Litigation, Arbitration, and the Enforcement of Foreign Judgments and Arbitral Awards in the Republic of China

K. C. FAN*

I. INTRODUCTION

Businesspersons are usually optimistic when negotiating commercial contracts. They tend to pay more attention to the potential economic gain of a transaction and often give little thought to preparing possible solutions to potential problems. Lawyers, on the other hand, tend to approach the matter more conservatively. Consequently, lawyers are more concerned with finding legally viable positions which afford the greatest protection to their client in the event that a dispute arises. Regardless of the style in approaching commercial contracts, disputes will often arise over the interpretation of a contract. If the parties cannot settle the dispute by themselves, either through mediation or conciliation, the last method for settlement will be some form of litigation or arbitration or both.

* Attorney at Law, Formosa Transnational, Taipei, Taiwan.

As a result of the Republic of China's ("ROC") rapid increase in trade, commercial disputes, particularly those regarding international trading practices, have greatly increased in recent years. Consequently, companies planning business relations with the ROC should be familiar with the ROC's legal system, particularly with respect to domestic litigation and arbitration. This article addresses the ROC's legal system as it pertains to commercial litigation, commercial arbitration, enforcement of foreign judgments, and enforcement of foreign arbitration awards.

II. COMMERCIAL LITIGATION

The ROC has an extensive civil law system for handling commercial disputes. A survey of the nuances of the ROC's legal system and its remedies leads to a greater understanding of litigation as a mechanism for resolving these disputes.

A. Legal System

A review of the structure of the court system is necessary to an understanding of how that system operates. Jurisdictional issues play a large part in commercial litigation, therefore, a review of these issues is also helpful.

1. Structural Elements

Under article 2 of the Law Governing the Organization of Courts ("LGOC"),[1] the courts are divided into three categories: the District Court, the High Court, and the Supreme Court. The District Court is a court of the first instance;[2] the High Court hears cases on appeal from the District Court;[3] and the Supreme Court hears cases on appeal from the High Court.[4] The District Court and the High Court decide issues of both fact and law. The Supreme Court deals exclusively with issues of law.[5] All decisions may be appealed to the High Court, but only those cases where the amount in dispute exceeds NT $300,000 can be appealed to the Supreme Court.[6]

1. LAW OF ORGANIZATION OF THE COURT [L. ORG. CT.] (ROC). This law underwent several amendments after it was first promulgated in 1932. The most recent amendment was on June 29, 1980.
2. *Id.* art. 10.
3. *Id.* art. 17; CODE OF CIVIL PROCEDURE [C. CIV. PROC.] art. 437 (ROC).
4. L. ORG. CT. art. 22 (ROC); C. CIV. PROC. art. 464 (ROC).
5. C. CIV. PROC. art. 464 (ROC).
6. *Id.* art. 463.

The ROC has adopted a civil law system; cases are consequently tried before professional judges without juries. In the District Court, there is generally one judge who hears and decides each case. However, more serious cases may be decided by as many as three judges sitting in council.[7]

The court collects court fees from the litigants for each appeal based on the amount in controversy. In commercial litigation, the plaintiff is charged a fee of 1% of the amount in controversy, measured at the time the lawsuit is filed.[8] For appeals, the appellant's fee rate is 1.5%.[9] Article 78 of the Code of Civil Procedure ("CCP") states that, "[t]he costs of an action shall be borne by the party defeated." Consequently, the winning party may recover all court fees from the losing party at the conclusion of the litigation. A lawyer's retainer fee, however, is not considered to be a recoverable court fee. Attorney fees are only recoverable if there is a contractual provision to that effect. In addition, if a plaintiff does not have a domicile or office in the ROC, upon the defendant's request, the court may order the plaintiff to place a certain amount of money as a bond with the court to ensure that the defendant's court fees can be recovered if he wins the case.[10]

2. Jurisdictional Issues

Jurisdiction is essential in commercial litigation and it is highly dependent on the facts of each case. There are several jurisdictional rules. Under the Rule of Defendant's Domicile, the court located in the area of the defendant's domicile or residence has jurisdiction in cases brought against the defendant.[11] The Rule of Cause of Action provides that where there is a default on a contract, the court located

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7. L. ORG. CT. art. 3 (ROC). In practice, cases where the amount in dispute exceeds NT $1 million are considered to be more serious than those involving lesser amounts.

8. LAW GOVERNING COURT FEES FOR CIVIL LITIGATION art. 2 (ROC).

9. *Id.* art. 18.

10. C. CIV. PROC. art. 96 (ROC). In practice, the bond can range from 3% to 5% of the value of the subject matter.

11. *Id.* art. 1. "A civil action is subject to the jurisdiction of the court at the place where the defendant has his domicile." *Id.* Article 2 states that:

> [a]n action against a public juristic person is subject to the jurisdiction of the court at the place where the office of such juristic person is located.
>
> An action against a private juristic person or any corporate body which may be made a party to the action is subject to the jurisdiction of the court at the place where the head office or the principal business establishment of such juristic person or corporate body is located.

Id. art. 2.

where the default occurred has jurisdiction.[12] If the cause of action is a tort, then the court located where the tort occurred has jurisdiction.[13] Finally, the Rule of Location of Subject Matter states that in a dispute regarding immovable property, jurisdiction will lie where the property is situated.[14]

The parties can avoid jurisdictional disputes by including a choice of forum provision in the contract. Article 24 of the CCP provides that: "The parties may, by agreement, [choose] the competent court of first instance, provided that the cause of action arises from a definite legal relation. The agreement referred to in the preceding paragraph shall be proved by a document."[15] In a commercial agreement, therefore, the parties may include a "choice of forum clause" designating that a certain court shall have sole and exclusive jurisdiction over any disputes arising out of the contract.

Courts liberally honor and enforce choice of forum clauses. For example, if both parties to a contract signed and performed it in the ROC, are nationals, and have domiciles in the ROC, they may include a contract clause granting a foreign court exclusive jurisdiction over any disputes and which, in effect, excludes the jurisdiction of ROC courts. Further, the ROC Supreme Court has held that forum selection clauses are valid as long as the foreign court accepts jurisdiction and its judgments are recognized and enforced by ROC courts.[16]

A United States business entity can include a choice of forum clause in an agreement with its counterpart in Taipei and vest jurisdiction of any disputes exclusively in a United States court. However, a problem may arise if the contracting parties choose an ROC court instead of a United States court, and the United States court does not uphold the choice of forum agreement. This situation may be unfair to the ROC party because he believed that the choice of forum agreement would be valid as agreed upon and bilaterally enforced.

There are two related points which deserve attention. First, article 24 of the CCP does not apply to actions where exclusive jurisdiction is provided for in the CCP.[17] For example, article 10 provides, "[j]urisdiction over an action concerning real rights to immovables, or concerning the partition or boundaries of immovables, shall be exclu-

12. *Id.* art. 12.
13. *Id.* art. 15.
14. *Id.* art. 10.
15. *Id.* art. 24.
16. Civil Judgment of the Supreme Court, T'ai K'ang No. 96 (1975).
17. C. CIV. PROC. art. 26 (ROC).

sively exercised by the court at the place where such immovables are situated."[18] In a case covered by this article, the choice of forum agreement may be deemed invalid. Second, the ROC Supreme Court has held that a choice of forum clause in a bill of lading is not binding because such a clause has not been agreed to by the consignee or the holder of the bill of lading.[19]

If neither party is an ROC national and the subject matter of the cause of action has a connection with the ROC, the parties may still agree to vest jurisdiction in the ROC courts. ROC courts will enforce this choice of forum agreement.[20] Additionally, an ROC court may act to protect a citizen against perceived unfairness in a choice of forum agreement.

Jurisdiction may be a critical issue in any commercial litigation. Although choice of forum clauses are generally enforceable, problems may arise, especially if the dispute involves immovable property or if one party has not freely contracted for the arrangement.

B. Remedies

Several remedies are available to parties involved in commercial litigation. Depending upon the circumstances of the case, the remedies of provisional attachment, ex parte proceedings, or provisional execution may be available.

1. Provisional Attachment

A Chinese saying reflects the ROC practice with regard to provisional attachments. Roughly translated it says, "When a debtor becomes nothing, he becomes a king!" When a debtor has disposed of his property, there is little that creditors or a court can do to him. Consequently, it is advisable that a creditor who finds that a debtor is unable to honor a payment immediately trace the debtor's property and apply to the court for attachment of assets.

The CCP states: "With a view to safe-guarding the compulsory execution of a money claim or of a claim convertible to a money claim, the creditor may apply for provisional seizure. The application above provided may also be made with regard to a claim not yet due for performance."[21] Under this article, a creditor may apply to a

18. *Id.* art. 10.
19. Civil Judgment of the Supreme Court, T'ai K'ang No. 96 (1975).
20. Civil Judgment of the Supreme Court, T'ai Shang No. 1618 (1981).
21. C. CIV. PROC. art. 518 (ROC).

court for seizure of a debtor's property, even prior to a lawsuit. In practice, the court will request the creditor to post a bond equal to one-third of the claim amount as security for damages that may be sustained by the debtor as a result of the seizure.[22] The debtor may pay the full amount of the claim as security to stay the order of attachment or to withdraw the attachment.[23] Although it may seem wise for a creditor to obtain a provisional attachment against a debtor to protect his rights, if the attachment is later proven to be improper, the creditor may be liable for damages sustained by the debtor because of the attachment.[24]

2. Judgment Ex Parte

Article 385 of the CCP provides:

> If, on the date fixed for oral proceedings, one of the parties fails to appear, the court may, on the application of the party present, permit him to proceed with his argument alone and render a judgment ex parte thereon; and, if the absent party fails to appear after a second summon[s], the court may *ex officio* render a judgment ex parte.
>
> If the oral proceedings or investigation of evidence was carried on in a previous session or if the non-appearing party made statement[s] in his preparatory memorandum submitted, the court shall, in giving a judgment as referred to in the preceding paragraph, take these into consideration; and, investigate, if necessary, the evidence tendered previously by the non-appearing party.[25]

Article 386 of the CCP supplements article 385 as follows:

> Under the following circumstances, the court shall, by a ruling, dismiss the application mentioned in the preceding article and postpone the date for oral proceedings:
> 1. If the non-appearing party has not been duly summoned within a reasonable period of time;
> 2. If there is reason to believe that the non-appearance of the party is due to force majeure or other unavoidable accidents;
> 3. If the appearing party cannot give necessary proof of the fact which the court ought to investigate *ex officio*;
> 4. If the statement made, facts alleged, or evidences tendered by the appearing party have not been notified to the other party

22. *Id.* art. 526.
23. *Id.* arts. 527, 530.
24. *Id.* art. 531.
25. *Id.* art. 385.

within a reasonable period of time.[26]

From the above articles, two points deserve special attention. First, under article 386 of the Code of Civil Procedure, even if a party fails to appear, a judgment ex parte may nevertheless be denied. Second, for a judgment ex parte, the court shall consider the arguments made and the evidence tendered by the non-appearing party. Thus, an ex parte judgment does not necessarily disadvantage the non-appearing party. In this sense, a judgment ex parte is different from a default judgment in the United States legal system.

3. Provisional Execution

A creditor who obtains a final judgment may apply to the court to enforce the judgment. A creditor may also apply for the execution of a nonfinal judgment where a provisional execution is granted in the judgment. A creditor can obtain a court order for a provisional execution in one of two ways. Under article 389 of the CCP,[27] the court shall declare, *ex officio*, a provisional execution on the judgment when it renders a judgment ordering the payment of a negotiable instrument or a judgment based on the defendant's acceptance of liability. The second method, available specifically for commercial litigation, allows the plaintiff to apply to the court for a provisional execution.

To effect the provisional execution of a judgment, a plaintiff must furnish security of approximately one-third of the value of the judgment. In order to avoid provisional execution, the defendant may furnish security in the amount of the full value of the judgment.[28]

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26. *Id.* art. 386.

27. *Id.* art. 389. Article 389 states that

> [t]he Court shall, ex officio, declare provisional execution on the judgment in any of the following cases:
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> 1. A judgment based upon the defendant's acceptance of liabilities;
> 2. A judgment ordering the performance of an obligation of maintenance, if such obligation has become due for six months immediately prior to the commencement of the action or in the course of its proceedings;
> 3. A judgment against the defendant in any of the actions specified in Article 402, paragraph 2;
> 4. A judgment ordering the performance of an obligation on a negotiable instrument;
> 5. A judgment ordering the payment of a sum of money or an amount of value not exceeding one hundred yuan.

28. If, in an action relating to property rights, the plaintiff has explained to the belief of the court that, unless provisional execution of the judgment be declared before it becomes irrevocable, damages might be caused to him, for which it would be very difficult to make recompensation, or which would be hard to be calculated, the court shall declare the judgment provisionally executable, when applied for by him.

If the plaintiff, in applying for declaration of provisional execution, has men-

The plaintiff who receives a provisional execution on a non-final judgment benefits greatly. A provisional execution can deal a preemptive blow to the defendant through execution of his property prior to litigation becoming final. Therefore, a prudent plaintiff should obtain a provisional execution.

III. COMMERCIAL ARBITRATION

Two major sources of law cover the topic of commercial arbitration in the ROC. The first, the Commercial Arbitration Act ("CAA"), was promulgated on January 20, 1961 and amended on June 11, 1982 and December 26, 1986. The second source of law is the Regulations Governing the Organization of Commercial Arbitration Association and Arbitration Fees, last amended on July 4, 1988.

The Chinese, reputed to be reluctant litigators, are even more hesitant to arbitrate. This hesitancy stems from their unfamiliarity with the concept of arbitration. However, as Chinese businessmen become more aware of the advantages of arbitration, they may increasingly submit their disputes to arbitration.

A. Commercial Arbitration Procedures in the Republic of China

An arbitration agreement is contractual in nature. Mutual consent and a writing are requisite elements.[29] For example, the ROC Supreme Court has held that a bill of lading containing an arbitration provision, but signed by only one party does not constitute a binding

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tioned that he may furnish security in advance, the court shall fix a reasonable amount of security to be furnished and declare the judgment to be provisionally executable upon the furnishing of it, even though no such explanations as referred to in the preceding paragraph have been made.

Id. art. 390.

If the defendant has explained to the belief of the court that irreparable damages might be caused to him by reason of provisional execution, the court shall, in any of the cases mentioned in Article 389, declare, on application, that the judgment shall not be provisionally executed, or, in the cases mentioned in the preceding article, dismiss the plaintiff's application for provisional execution.

Id. art. 391.

The court may declare that, unless the plaintiff furnishes security in advance, no provisional execution will be permitted, or may allow the defendant to furnish security in advance or to deposit the object under claim so as to avoid provisional execution.

Id. art. 392.

Article 393 of the CCP provides that, "[a]ll applications relating to provisional execution shall be made before the conclusion of oral proceedings. The decision relating to provisional execution shall be given the main text of the judgment." *Id.* art. 393.

29. COMMERCIAL ARBITRATION ACT [COM. ARB. ACT] art. 1 (ROC).

arbitration agreement because no mutual consent can be shown.[30]

An arbitration agreement will be invalid unless the parties enter into it in conformance with certain fixed legal relationships or the parties base it on a dispute arising out of such relationships.[31] A common form of agreement is a provision found in a contract that states, "[a]ll disputes arising in relation to this contract shall (or may) be referred to arbitration for determination."

The arbitration agreement can also include the applicable arbitration rules. In principle, the parties can select any arbitration rules to govern their agreement. An arbitration agreement need not specify the place of arbitration, however, such a provision is useful. If the place of arbitration is not specified, the arbitrator shall determine the place.[32]

1. Appointment of Arbitrators

The parties may choose the number of arbitrators. The only requirement is that there be an odd number.[33] If the parties have not specified the number of arbitrators, or the procedure for choosing them, the CAA controls. The Act states that each party shall choose one arbitrator, and the arbitrators so chosen shall choose a third arbitrator.[34] The three arbitrators then sit in council to decide the case. In the event that the parties cannot agree on a third arbitrator, they may ask the court to appoint the third arbitrator.[35] After a party has chosen its arbitrator, it may demand that the other party name an arbitrator within seven days of receipt of the demand. If the other party fails to name an arbitrator within the appointed time, the party initiating the demand can petition the court to designate the arbitrator.[36] Each party is entitled to petition the court to reject a designated arbitrator for reasons such as bias, incompetency, or bankruptcy.[37]

Unless the parties have agreed otherwise, the arbitrators shall designate the location and date of the hearing within ten days of being notified of the controversy. The award shall be made within three months, although, if necessary, this period may be extended for an

30. Civil Judgment of the Supreme Court, T'ai Shang No. 3762 (1978).
31. COM. ARB. ACT art. 2 (ROC).
32. *Id.* art. 12.
33. *Id.* art. 1.
34. *Id.* art. 21.
35. *Id.* art. 4.
36. *Id.* art. 9.
37. *Id.* art. 11.

additional three months.[38] A person may act as an arbitrator if he has specialized knowledge of the law or a particular industry and is reputed for his trustworthiness and impartiality.[39]

2. Hearing Procedures

Parties may appoint a lawyer or other representative to appear on their behalf before the arbitration panel.[40] The arbitrators conduct inquiries, hear contentions of both parties and make whatever investigations are necessary.[41] The arbitrators may also request a court of competent jurisdiction to render assistance, including the collection of pertinent evidence.[42]

3. Award

The arbitration award must be in writing and rendered by a majority of the arbitrators. The decision must be made within ten days after the hearing. The award must be signed by the arbitrators and contain, among other things, the facts of the controversy, the substance of the award, and the reasoning behind the decision.[43] The arbitrator is responsible for delivering authenticated copies of the award to the parties or forwarding the award to a court of competent authority for service on the parties.[44]

B. Effect of an Arbitration Award

The parties to an arbitration agreement may settle their dispute prior to the rendering of an award. The arbitrator shall make a written record of such a settlement. The settlement has the same effect as an arbitration award. Like an arbitration award, enforcement of the settlement by a court requires a court order of execution.[45]

An award rendered by an arbitrator has the same legal effect as an affirmed judgment of a judicial court. In principle, the award cannot be executed unless a competent court has, on application of the party concerned, granted an execution order. However, provided that the parties so agree in writing, the following awards can be executed

38. *Id.* art. 12.
39. *Id.* art. 5.
40. *Id.* art. 14.
41. *Id.* art. 13.
42. *Id.* art. 16.
43. *Id.* arts. 18, 19.
44. *Id.* art. 20.
45. *Id.* art. 28.

by a competent court without an execution order: 1) the payment of a specified sum of money, fungible items, or valuable securities; and 2) the delivery of a specified movable property.

Article 22 of the CAA sets out three situations in which a court is prohibited from issuing an execution order pursuant to an arbitration award. First, where the award does not relate to arbitrable subject matter under the terms of the arbitration agreement. Second, where the award is not signed by the arbitrators, or the award does not set forth the reasons for the award. Finally, where the award commands a party to perform an act prohibited by law.[46]

Under certain circumstances, a lawsuit can annul an arbitration award.[47]

C. Problems in Gaining Acceptance of Arbitration

Although arbitration use is increasing at the international level, the evolution of arbitration in the ROC is slow. One concern is the availability of arbitrators. Chambers of Commerce and Industrial Associations may jointly establish and organize arbitration associations to register arbitrators.[48] Currently, the Commercial Arbitration Association of the Republic of China is the only arbitration body that

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46. *Id.* art. 22.

47. *Id.* art. 23.

Article 23 of the CAA enumerates ten grounds for annulling an arbitration award:

1. if there exists any of the circumstances stated in Clauses I, II and III of [article 22];
2. if the agreement of arbitration was null and void, or if it has become invalidated before the rendering of the award;
3. if the arbitrator or arbitrators failed to cause one of the parties or both parties to present its or their contentions, or one of the parties or both parties were not lawfully represented in the arbitration proceedings;
4. if the participation of any arbitrator in the arbitration proceedings was in violation of the stipulations of the agreement of arbitration or law;
5. if there was participation by a rejected arbitrator in the arbitration proceedings, unless the plea of rejection has been denied by the court;
6. if any participating arbitrator has been convicted of a criminal offense of violating his duty of arbitration . . . ;
7. if the agent of one of the parties, or the other party, or its agent, has committed a punishable criminal offense in respect of the arbitration, which had an ill effect upon its outcome . . . ;
8. if any of the evidentiary documents, upon which arbitration was based, was adjudged to have been forged or fraudulently altered . . . ;
9. if any of the witnesses, expert witnesses, or interpreters has been convicted of perjury in respect to any of the evidentiary documents, certificates of expert evidence, or interpretations, upon which the arbitration was based . . . ;
10. if the criminal or civil judgment, or other order, or administrative decision, upon which the arbitration was based, has been reversed or modified by a subsequent judgment, . . . or by a subsequent administrative decision.

48. *Id.* art. 5.

exists in the ROC. Founded in Taipei in 1955, the Association remained inactive until four years ago. The Association currently has over 170 registered arbitrators and many major commercial disputes have been referred to the Association for arbitration.

The filing of a separate lawsuit to evade arbitration is another concern. Generally, if a party to an arbitration agreement institutes a lawsuit contrary to the agreement, the other party may petition the court in which the lawsuit is brought for an order staying the proceedings and for dismissal of the lawsuit.[49] ROC courts will not uphold the agreement if the agreement provides for arbitration by a foreign arbitration body in a foreign country. The Supreme Court has held that such an agreement cannot be recognized as the type of agreement mentioned in article 3 of the CAA and therefore, does not have force to stay the proceedings.[50] The business community has criticized this decision. Some believe that the jurists were too conservative and unable to address the needs of international trade. More recently, two lower court decisions have held that a foreign arbitration agreement is the type of agreement covered by article 3 of the CAA, and that such an agreement does have the force to stay proceedings.[51] These cases are presently on appeal.

IV. ENFORCEMENT OF FOREIGN JUDGMENTS IN THE ROC

A holder of a foreign judgment should not presume that the judgment will be enforceable in the ROC.[52] Generally, an ROC court will recognize and enforce a foreign judgment if it satisfies the requirements of jurisdiction, service of process, public order and good

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49. *Id.* art. 3.

50. Civil Judgment of the Supreme Court, T'ai Shang No. 3762 (1978).

51. Civil Judgment of the Taipei District Court, Kuo Mao Tze No. 002 (1989); Su Tze No. 3543 (1989).

52. C. CIV. PROC. art. 401 (ROC).

> In any of the following cases an irrevocable judgment of a foreign court shall not be deemed to be valid:
>
> 1. If, according to the law of the Republic of China, the foreign court concerned has no jurisdiction over the case;
> 2. If the party defeated is a citizen of the Republic of China, who has not responded to the action, except where the summons or order necessary for the commencement of the action has been served on the party himself in that country, or served on him through the judicial assistance of the Republic of China;
> 3. If the judgment of the foreign court is considered to be incompatible with public order or good morals;
> 4. If the judgments given by the courts of [the Republic of China] are not reciprocally recognized by the foreign court concerned.

Id.

morals, and reciprocity. These conditions, as set forth in CCP article 401, are addressed below.

A. Conditions for Enforcing Foreign Judgments

1. Jurisdiction Requirement

Article 401, section 1 states that a foreign judgment is unenforceable if the foreign court rendering the judgment does not have jurisdiction over the case.[53] This requirement is not unique to the ROC. Contracting parties should consider ensuring jurisdiction during the course of negotiations, rather than at the time of a dispute.

2. Proper Service Requirement

Section 2 states that a foreign judgment shall be invalid if the party defeated is a citizen of the ROC and if the party has not responded to the action and has not been properly served with the summons or order necessary for the commencement of the action. If the defeated party has been served with the summons or order in the country of the foreign court or if it has been served through the judicial assistance of the ROC, the service will be deemed proper.[54] The procedure for judicial assistance can be found in the Law Governing the Extension of Assistance to Foreign Courts ("LGA").[55] The LGA requires that the request for assistance go through diplomatic channels,[56] that the request set forth the name, nationality, domicile, residence, or place of business of the person to be served,[57] and that the documents to be sent include a certified Chinese translation.[58]

3. Public Order and Good Moral Requirement

Section 3 states that the judgment of the foreign court is invalid if it is incompatible with the public order or good morals of the country. This ambiguous requirement appears to give a large amount of discretion to the courts to disregard a foreign judgment. There are apparently no reported cases where the courts have refused to enforce a foreign judgment on these grounds.

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53. *Id.*
54. *Id.*
55. LAW GOVERNING THE EXTENSION OF ASSISTANCE TO FOREIGN COURTS (ROC).
56. *Id.* art. 3.
57. *Id.* art. 5.
58. *Id.* art. 7.

4. Reciprocity Requirement

Section 4 provides that judgments of foreign courts which do not recognize judgments by courts of the ROC will be deemed invalid. In practice, the Supreme Court has held that United States courts meet the requirement of reciprocity and are enforceable.[59] The United Kingdom and Hong Kong do not recognize and enforce ROC judgments; consequently, ROC courts have refused to recognize and enforce judgments from these countries.

B. Procedure for Enforceability

A party seeking to enforce a foreign judgment must file a lawsuit in a competent ROC court for permission to enforce the judgment.[60] Like an ordinary case of commercial litigation, the parties may also appeal the case to the Supreme Court. A party may not proceed with compulsory execution until the judgment approving the enforcement is final.

In summary, parties may have foreign judgments enforced in the ROC courts under appropriate circumstances meeting the prerequisites. Although the requirement for reciprocity may appear harsh, it is necessary in the current climate of international affairs. The requirement for order and good morals appears to be a discretionary provision, however, there is no indication that it has been used to deprive prevailing parties of their judgments.

V. ENFORCEMENT OF FOREIGN ARBITRAL AWARD

The ROC is not a party to the June 10, 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[61] Before its June 1982 amendment, the CAA did not provide for the enforceability of foreign arbitration awards. Thus, foreign arbitration awards, with the exception of United States arbitration awards, are not enforceable in the ROC. However, a party to an arbitration may still submit the arbitration award rendered in its favor to the ROC courts as important evidence. In practice, the ROC court will give strong evidentiary weight to such an award, provided that the award is rendered in a fair manner and is not incompatible with the public order, good morals, or the

59. Civil Judgment of the Supreme Court, T'ai Shang No. 3729 (1970).

60. LAW OF COMPULSORY EXECUTION art. 43 (ROC).

61. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, T.I.A.S. No. 6997.

mandatory laws of the ROC.[62] For example, in *Wei Chieh Shipping Co. v. Hai Long Co.*, the Supreme Court held that the lower court improperly adopted a Hong Kong arbitration award as evidence.[63]

Another reason for the ROC's recognition of United States arbitration awards, is article VI of the Treaty of Friendship, Commerce and Navigation between the Republic of China and the United States of America. The treaty provides, "the award or decision of the arbitrators shall be accorded full faith and credit by the courts within the territories of the High Contracting Party in which it was rendered, provided the arbitration proceedings were conducted in good faith and in conformity with the agreement for arbitration."[64] Because of this treaty, there has never been a question as to the recognition and enforcement of United States arbitration awards in the ROC.

On June 11, 1982, the CAA was amended to include several articles governing the recognition and enforcement of foreign arbitral awards. Articles 30 through 34 govern the recognition and enforcement of foreign arbitral awards. These provisions have provided the courts with a major resource in adjudging applications seeking recognition and enforcement of foreign arbitral awards.

Any award originating outside the ROC is considered, by definition, to be a foreign award. Article 30 of the CAA states: "[F]oreign arbitral awards are rendered by any arbitral tribunals sitting outside of the territory of the Republic of China. Foreign arbitral awards, having been ruled by a court for their recognitions [sic], may be [enforced]."[65]

Under this provision, all arbitration awards made outside the ROC's territory are considered to be foreign arbitration awards. Therefore, the place of arbitration determines if it is a foreign arbitration, regardless of the nationalities of the parties or arbitrators and regardless of the law under which the arbitration was decided.

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62. In June 1979, the Ministry of Justice wrote a letter to the Ministry of Foreign Affairs, answering a question regarding the enforceability of a Greek commercial arbitration award. The letter indicated that in the absence of a mutual treaty, a party to an arbitration may submit the arbitration award rendered in its favor to the ROC court as evidence and the ROC court will consider this evidence in rendering a judgment.

63. Civil Judgment of the Supreme Court, 62 T'ai Shang Tze 875 (1973), *codified in* 2 THE SUPREME COURT JUDGMENTS ON INTERNATIONAL TRADE AND MARITIME 9.925.

64. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, art. VI(4), 63 Stat. 1299, T.I.A.S. No. 1871, *reprinted in* 6 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949 761, 767 (1971).

65. COM. ARB. ACT art. 3 (ROC).

A. Conditions for the Recognition and Enforcement of Foreign Arbitral Awards

In principle, the ROC courts recognize and enforce all foreign arbitral awards. An award will only be refused if the limited and specified statutory grounds discussed below are proven.

1. Reciprocity

A court may refuse to recognize foreign arbitral awards if the country where the arbitral award was made does not recognize the ROC's arbitral awards.[66] The CAA, as amended, adopts a more liberal and flexible position regarding reciprocity than does the Code of Civil Procedure. Under CCP article 401, a lack of reciprocity will result in an unenforceable foreign court judgment. Article 32 of the CAA states that if the country hosting the arbitration does not reciprocally acknowledge ROC arbitral awards, the court may deny the application for recognition. Under the CAA, a lack of reciprocity will not necessarily cause denial of the enforcement of a foreign award. Rather, the ROC court may consider the right of the ROC people to determine if the application for enforcement should be denied.[67]

2. Public Policy

Where an arbitral award contravenes the "compulsory" or "prohibitive" provisions of the ROC's laws or are contrary to public order or good morals, the court shall dismiss the application for recognition.[68] This provision is equivalent to Article V(2)(b) of the New York Convention, stating that the award to be recognized and enforced may be denied if it is contrary to the country's public policy.

Public policy is difficult to define. The following examples provide some reference. In a 1987 case, the High Court ruled that, even though an award seeking recognition contradicted the findings of a previous judgment made by an ROC court, recognition of the award would not contravene the "compulsory" or "prohibitive" provisions of the laws.[69]

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66. *Id.* art. 32.

67. *Explanation of the Amendments of the Commercial Arbitration Statute*, JUD. WEEKLY MAG., July, 1982, at 22.

68. COM. ARB. ACT art. 32(1)(2) (ROC).

69. Civil Judgment of the High Court, 76 Nien Kan Tzu 1546 (1987). The author disagrees with the holding of the court. In such a case, the arbitration award should be deemed violative of the public policy of the ROC and, therefore, should not be recognized.

The second example is a 1984 Supreme Court case holding that arbitral awards administered by the Commercial Arbitration Association of the ROC, and made under the Commercial Arbitration Act of the ROC in accordance with Article 19 of the Act, should supply reasons to support their decisions. However, a foreign arbitral award need not provide reasons unless required to do so by the law of the awarding country. If the arbitrators were not required to indicate the reasoning behind their decision, the foreign award is not contrary to any "compulsory" provisions of the law despite the fact that it lacks any supportive reasoning.[70] There is a trend in the ROC courts toward narrowing the scope and field of public policy in favor of recognizing and enforcing foreign arbitral awards.

3. Arbitrability

Where the subject matter of a case does not qualify for arbitration under the laws of the country where the arbitration occurred, the court shall dismiss the application.[71] This provision differs from article V(2)(a) of the New York Convention which allows the issue of arbitrability to be decided in accordance with the law of the country where the recognition and enforcement is sought. Accordingly, if recognition of an arbitral award made in the United States is sought in the ROC, the ROC court will look to the laws of the United States and not those of the ROC in deciding if the dispute can be settled by arbitration.

4. Invalid Arbitration Agreements and Awards

An adversarial party may petition the court for dismissal of an application for recognition of a foreign arbitral award within fourteen days of receiving notice of the application from the court. The grounds for petition include an arbitration not in accordance with the laws of the country where the arbitration was conducted or where the arbitral award has not yet become binding on the parties under the laws of the country where it was made. The party may similarly plead for dismissal if (1) the award has been set aside or suspended by a competent authority in the country where the arbitration took place, or (2) if the award was beyond the scope of the arbitration

70. Civil Judgment of the Supreme Court, 73 Tai Kan Tze 234 (1984).
71. COM. ARB. ACT art. 32(3) (ROC).

agreement.[72] The court shall revoke its own ruling recognizing the foreign arbitral award if it has been vacated by a competent authority in the country where the award was made.[73] The party may also request a dismissal of the application for recognition if the agreement of arbitration upon which the award was based was void or became invalid before the rendering of the award.[74]

5. Lack of Due Process, Partiality, or Corruption by the Arbitrators and Corruption, Fraud, or Undue Means by the Parties

ROC courts may refuse to enforce arbitration awards procured by methods contrary to general notions of fair play. For example, if a party is unable to present its contentions or is not lawfully represented at the arbitration proceedings, a court should dismiss the application for recognition of the award.[75] The court should similarly dismiss the application for recognition if a lawfully rejected arbitrator continues to participate in arbitration proceedings,[76] or if an arbitrator violates his or her duty in the particular arbitration, resulting in his or her criminal liability.[77] Likewise, if one of the parties, or their agent, has committed a punishable criminal offense relevant to the arbitration,[78] or if any of the evidence upon which the arbitration was based is adjudged to have been procured by fraudulent means,[79] the award may not be enforced. Finally, the court may refuse to enforce an award if the judgment, court order, or administrative decision upon which the arbitration was based has been reversed or modified by a later administrative decision.[80]

B. Procedures and Documents Necessary to Apply for Recognition and Enforcement

A party must comply with certain procedures in order to ensure the enforceability of a foreign arbitration award. Under article 31 of the CAA, the recognition of a foreign arbitral award shall be achieved

72. *Id.* art. 33(1)-(3). The text of the above provision is almost identical to that of article V(c)-(e) of the New York Convention.
73. *Id.* art. 34.
74. *Id.* arts. 33(4), 23(2).
75. *Id.* art. 33.
76. *Id.* art. 23(5).
77. *Id.* art. 23(6).
78. *Id.* art. 23(7).
79. *Id.* art. 23(9).
80. *Id.* art. 23(10).

by submitting an application, together with the original or certified copy of the arbitration agreement and award, and a copy of the pertinent portions, if any, of the arbitration act or rule of the country of arbitration.[81] A copy written in Chinese should be submitted if the documents are in a foreign language.[82] Copies must be certified by an embassy, a consulate, or any other representative organization of the ROC. The petitioning party must supply the court with enough copies of the application for the court to serve the other parties.[83]

Once the ROC court recognizes an award, the prevailing party gains some measure of protection. The court may order the petitioner to post sufficient security and suspend enforcement of the award if a responding party applies to the country of arbitration for a set-aside or suspension of the award.[84] This process is, in essence, quite similar to the procedure articulated in article VI of the New York Convention. If a foreign arbitration award is set aside by a competent authority in the country of arbitration, the court issuing the recognition shall revoke its order.[85]

VI. CONCLUSION

The Republic of China has evolved into a major participant in international trade. This article has discussed the primary mechanisms for resolving commercial disputes in the ROC because these disputes are a common feature of the worldwide trading system. Despite traditional Chinese reluctance to litigate or arbitrate commercial disputes, an elaborate framework to do so exists in the ROC. A legal infrastructure is currently in place that can handle most commercial controversies. Civil litigation in the ROC heavily depends upon jurisdictional issues. Attorneys advising clients engaged in trade with the ROC must be aware of these jurisdictional nuances when drafting commercial agreements. Commercial arbitration is less prevalent in the ROC than civil litigation, but it is gaining acceptance. A lack of arbitrators and the use of lawsuits to evade valid arbitration agreements has hindered the growth of arbitration as a dispute resolution mechanism. However, the number of trained arbitrators in the ROC

81. *Id.* art. 31(1)-(3).
82. *Id.* art. 31.
83. *Id.*
84. *Id.* art. 34.
85. *Id.*

is growing and courts are becoming less reluctant to dismiss lawsuits that are filed when a contract contains a valid arbitration clause.

One of the more interesting issues to observe in the future is the enforceability of foreign judgments and arbitration awards. The ROC, like many other countries, has been insular in its treatment of foreign decisions, but appears to be making great strides toward enforcing foreign judgments and arbitral awards. The specter of isolationism, as well as protectionism, may always be present throughout the world. Certainly one indication of a nation's commitment to international trade is its respect for foreign legal systems. The current trends in the ROC reflect a growing tolerance of foreign laws and systems. The nationalities of the parties are becoming less important than the existence of valid contractual agreements and fair procedures to enforce these agreements.

PERSPECTIVES ON A POTENTIAL UNITED STATES-REPUBLIC OF CHINA FREE TRADE AGREEMENT

Prospects for a Free Trade Agreement Between the United States and the Republic of China

RONALD A. CASS*

INTRODUCTION

In general, I have little confidence in predictions regarding future developments in international trade. Having been asked to offer views on the prospects for a free trade agreement ("FTA") between the United States and the Republic of China ("ROC"), I should begin by invoking all the reservations that are normally appropriate for attempts to predict the future. Indeed, extra caution is called for in this project, as analysis of prospects for a United States-ROC FTA requires considering not only the present and future relationships between the two countries, but also a number of other variables, many of which are not easily assessed.

The saving grace here, however, is that the most obvious, and probably most important, influence on the prospects for a United States-ROC agreement is the relationship between the United States and the People's Republic of China ("PRC"). Before the United States can negotiate an FTA with the ROC, it must carefully consider the likely impact of such negotiations upon its relations with the PRC. This impact is not hard to predict, and it stands squarely in the path of any possible FTA.

Before explaining why no such FTA will occur, let me briefly state the pro-FTA case. From the United States perspective, there are several advantages. The ROC has much higher average tariff rates than the United States. This makes the advantages of an FTA for

* Dean, Boston University School of Law, Boston, Massachusetts. Mr. Cass was formerly the Vice Chairman of the United States International Trade Commission. Thanks are due to Stephen Narkin for his generous assistance in the preparation of this article.

United States exporters much greater relative to other exporters to the ROC than the FTA's advantage for ROC exporters to the United States. The opportunity to sell in the ROC is of no small value, given the ROC's extraordinary levels of savings and foreign exchange reserves. If the world increasingly divides among trade blocs, the United States would be advantaged by linking up with an expanded Asian-Pacific trading area, including the ROC. Such a relationship would give United States producers access (on terms better than some important competitors) to a large group of consumers that is expanding rapidly in numbers and wealth. From the ROC perspective, there would be significant economic and political advantages in linkage on preferential terms to the world's largest single market. And there lies the rub.

THE INTERNATIONAL TRADE COMMISSION REPORT

In March 1989, the International Trade Commission ("ITC") issued a report evaluating the reaction to possible FTA negotiations by the United States with several Pacific Rim countries, including the ROC.[1] The United States Senate Committee on Finance ("Finance Committee") requested the report just after the ITC had prepared a similar report for the Committee addressing the pros and cons of negotiating an FTA with Japan.[2] In accordance with the Finance Committee's request, the ITC did not perform an independent assessment, but rather solicited and summarized the views of government representatives, private industry, and academia on the potential merits of such negotiations.

In the course of this survey, the PRC, in a letter from its ambassador to the United States, formally advised the ITC that it was "firmly opposed" to any attempt by the United States to negotiate an FTA with the ROC.[3] The PRC has taken the position that any such contacts by United States officials with ROC authorities would violate "the spirit and principles" of three United States-PRC joint communiques issued since the United States and the PRC resumed formal

1. *See* The Pros and Cons of Entering into Negotiations on Free Trade Area Agreements with Taiwan, the Republic of Korea, and ASEAN, or the Pacific Rim Region in General: Report to the Senate Committee on Finance, USITC Pub. 2166, Inv. No. TA-332-259 (March 1989) [hereinafter Pacific Rim Study].

2. Pros and Cons of Initiating Negotiations with Japan to Explore the Possibility of a U.S.-Japan Free Trade Agreement: Report to the Senate Committee on Finance, USITC Pub. 2120, Inv. No. TA-332-255 (Sept. 1988).

3. *See* Pacific Rim Study, *supra* note 1, at 1-3.

government-to-government contact in 1972.[4] The ambassador's letter stated that by these joint communiques the United States agreed to establish and develop governmental relations only with the PRC. Further, the ambassador warned that any official contacts with ROC authorities "on the ground of resolving trade or other issues" would violate the joint communiques.

Others interviewed during the course of the ITC study expressed a different view. They opined that an FTA between the United States and the ROC could be achieved through some mechanism other than a formal agreement between governments. The existing ROC Coordination Council for North American Affairs ("CCNAA") was frequently mentioned in this context. Those suggesting such an informal agreement believed it would be dramatically less disconcerting to the PRC.

While it may be true that an informal agreement between the United States and the ROC would encounter fewer legal and political constraints, I doubt that the exact nature of the arrangement will substantially affect the prospects for a United States-ROC FTA. When considering whether an FTA is worth pursuing, the United States will weigh heavily the PRC's reaction to such an agreement, regardless of its technical structure. Any agreement, however implemented, that grants the ROC a special status in the United States—a status currently enjoyed by only two other countries—is apt to be disfavored by the PRC. An FTA which promises both closer economic ties between the United States and the ROC and a strengthening of the ROC's economy appears particularly objectionable to the PRC, even if it is not encapsulated in a document with all of the trappings typical of government-to-government agreements.

POSSIBLE PRC OBJECTION TO AN FTA

The real question, then, is just how heavily the PRC's objection would weigh. It appears that, regardless of the current status of relations between the United States and the PRC, the United States is

4. *See Joint Statement Following Discussions with Leaders of the People's Republic of China* in U.S. GOV'T PRINTING OFFICE, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 1972 376 (1974); *Joint Communique of the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China* in 2 U.S. GOV'T PRINTING OFFICE, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1978 2264 (1979); *United States-China Joint Communique on the United States Arms Sales to Taiwan* in 2 U.S. GOV'T PRINTING OFFICE, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1982 1052 (1983).

unlikely to risk significant damage to that relationship over an FTA with the ROC. Certainly, the political events in the PRC during the summer of 1989 were a significant setback to relations between the United States and the PRC. United States policy following these events, however, made it apparent that maintaining good relations with the PRC is extremely important to the United States. To be sure, the United States strongly condemned the PRC's reaction to the demonstrations for democracy, and critics of the Bush administration complained loudly that the executive branch moved too quickly to return United States-PRC relations to a "normal" state. Some voices still call for sanctions of at least symbolic value against the PRC. Still, if one looks beneath the rhetoric, there has been bipartisan support for the United States government's efforts to preserve the political and economic gains that resulted from the dramatic improvement in relations between the United States and the PRC over the past two decades. Accordingly, if the United States perceives any risk that FTA negotiations with the ROC would further impair its relationship with the PRC, this risk alone may deter the United States from any such discussions.

In sum, as long as relations between the United States and the PRC are good, the United States will not want to create potential new tensions. Even if relations are strained, the United States will not want to take action that increases that strain, at a minimum requiring assurance that such actions promise benefit to the United States sufficiently great to counterbalance the risks attending worsened United States-PRC relations. For the past twenty years or so, the United States' treatment of the PRC and the ROC have demonstrated the former point; governmental pronouncements over the past year and a half reflect the latter. At present, the United States expresses little interest in developing an agreement that would bring the United States closer to the ROC, regardless of the possible benefits. There are now virtually no discussions by the government indicating a movement toward an FTA with the ROC at any time in the foreseeable future. Based on correspondence between the PRC government and the ITC, obtained in the course of our recent FTA study, it appears that United States-PRC relations may, in fact, deteriorate if the United States enters into an FTA with the ROC.

POSSIBLE CONCERNS OF OTHER NATIONS

Even if diplomatic tensions would not be triggered by discussions

of an FTA between the United States and the ROC, it is still questionable whether the United States would consider this an opportune time for such discussions. The United States attaches great importance to the ongoing Uruguay Round of the General Agreement on Tariffs and Trade ("GATT") negotiations. Based on various public statements made by administration officials testifying before Congress and in other forums, it is clear that the GATT talks have become the administration's primary means of achieving greater international protection of intellectual property, elimination of subsidies in agriculture and steel, adoption of rules respecting trade in services, and progress on a host of other critical issues.

There is a widespread fear in the United States that other nations would perceive United States FTA negotiations with other countries—at least with noncontiguous nations, outside of North America—as an indication that the United States has lost faith in the GATT process. For this reason alone, FTA negotiations with other nations, including the ROC, are not likely to occur in the near future.[5] Discussion of other possible FTAs, while not ruled out, is being confined by administration officials to speculation on alternatives if the GATT round fails. In this context, it is arguable that the ROC is a special case and should be treated as such because the ROC is not a party to GATT. Intellectually, this argument carries some force. Realistically, however, it does not suffice to alleviate the United States' concern that other nations would construe any such bilateral FTA negotiations as a lack of commitment to the Uruguay Round.

For these reasons, I believe that near-term prospects for an FTA between the ROC and the United States are dim, if not hopeless. Although longer-term prospects for such an agreement are more difficult to assess, they too are doubtful. Nevertheless, several situations could arise which may lead the United States to give greater consideration to such an agreement in the future.

First, the Uruguay Round could fail. If it does, the United States may view FTAs with other countries (or combinations of countries) as a "second-best" way to remove impediments to free trade. Because the ROC has expressed interest in exploring FTA possibilities with the United States, it is possible that the ROC could then find itself on the list of potential United States negotiating partners. Alternatively, if other nations begin seriously to consider FTAs with the ROC, this would significantly increase the potential attractiveness of a United

5. Mexico is an exception.

States-ROC FTA. In that event, the United States would have an incentive to enter into an FTA in order to avoid being placed at a competitive disadvantage in its trade with the ROC. As noted earlier, given the height of current ROC tariffs, an FTA is likely to cause trade diversion to the ROC's FTA partner and away from other current exporters to the ROC. Further, if other nations were first to initiate FTA discussions with the ROC, this perhaps might reduce the danger of an adverse reaction from the PRC government toward the United States. I do not believe, however, that either the complete failure of the Uruguay Round or serious efforts by major trading nations to negotiate FTAs with the ROC are likely.

Second, the United States may also take a greater interest in FTA negotiations with the ROC in response to the developments unfolding in Europe as the European Community ("EC") moves toward a single market in 1992. If the United States perceives that the single market process will produce a "Fortress Europe," it may seek to create a trading bloc of its own. If so, Asia is one of the most likely places where the United States will find potential members for such a rival trading group. In fact, the actual existence of a "Fortress Europe" with increased formal barriers to trade into the Community might not be a prerequisite to such a scenario. There has already been much discussion in the United States about the need for increased protectionism to counter the developments in the EC, including the widening circle of countries seeking assimilation or at least association with this broad, rich market. It is not just fear of European protectionism, but also fear of a nascent economic juggernaut occupying the European "economic space," that fuels calls for a United States-centered trade bloc. Developments in Europe to date do not provide much basis for predicting increased formal barriers to most trade into the EC, but even unfounded fears can cause nations to initiate what they view as defensive measures. Whatever the United States response to events in Europe, a response that I still expect on balance to be quite positive and supportive, a United States-ROC FTA would be improbable. If friction between the United States and the EC increases, the probability of any FTA involving the United States will increase marginally, but for reasons given above, an agreement with the ROC would remain a quite remote possibility.

Finally, changes in the political relationship between the United States and the PRC, or between the PRC and the ROC, would significantly alter the United States' assessment of the political costs and

benefits of an FTA with the ROC. It is unlikely that developments in the PRC will cause relations between the United States and the PRC to deteriorate to the point that the United States becomes relatively unconcerned about the potential negative political fallout that would result from an FTA with the ROC. As indicated earlier, this is an unlikely scenario and would certainly require a change in the United States' attitude toward the PRC and the ROC. Alternatively, and more optimistically, the PRC may come to believe that an FTA between the United States and the ROC would serve its own interests. This might be the case if the FTA were formulated in such a way as to confer substantial economic advantages on the PRC, or if the relationship between the ROC and the PRC changes in such a way that the PRC no longer objects to official ties between the United States and the ROC. These scenarios, as well, are unlikely at the moment. In light of recent events in Eastern Europe and in the PRC itself, however, I hesitate to be bold in my predictions. As these events reveal, dramatic political changes can take place quickly, and even the best informed observers are often caught off guard.

PAST FTAS INVOLVING THE UNITED STATES AND THEIR APPLICATION TO THE ROC

Accordingly, we cannot completely disregard the possibility that unknown future developments could remove substantial foreign policy obstacles to a United States-ROC FTA. Even if this were to happen, other substantial obstacles to such an agreement would still remain. The FTAs that the United States has entered into with Canada and Israel should not mislead anyone into thinking otherwise. Special factors made agreements with Israel and Canada possible, and these cannot be generalized.

In the case of Israel, the special factors were essentially political. Over the past two decades, the United States has sought to bolster Israel's economic viability by providing extraordinary amounts of financial aid in various forms. On many occasions, the United States also has sought to give that nation symbolic assurance that it has special status in the United States' eyes. The FTA with Israel was intended to promote both of these objectives. Moreover, from the United States' standpoint, the economic significance of the agreement was, at most, modest. As explained below, this reduces opposition to such FTAs.

In the case of Canada, the economic consequences of the agree-

ment will be considerable. However, the United States and Canada have always been the closest of neighbors in every sense of the word—geographically, linguistically, culturally, and economically. The FTA was intended further to integrate the economies of the two countries, recognizing that the integration process was substantially complete even before the agreement. The economic and political circumstances that formed the bases for the Israel and Canada FTAs were, therefore, quite different from those pertaining to the case of the ROC. While the Canada FTA might be expanded into a North American FTA, encompassing Mexico as well, extension of that framework to other nations is problematic. Even if the United States were prepared to move forward with FTAs in less exceptional circumstances, an FTA with the ROC still seems improbable for several reasons beyond the patent political issues addressed above.

First, FTA negotiations between the United States and the ROC (or any other major trading nation) would generate enormous opposition, both domestically and abroad. Certain domestic industries would benefit from such an agreement, but many others would be seriously threatened by a United States-ROC FTA. For example, the textile and steel industries have substantial political influence which they have used successfully and repeatedly to secure protection against imports. These industries would almost certainly react forcefully to even a hint that the United States was contemplating a comprehensive FTA with the ROC. Given the vague, yet widespread, belief in the United States that Asian countries are export "machines" with which United States business cannot successfully compete, it would be surprising if the pleas of these and other threatened industries went unheeded. In addition, even without considering potential PRC objections, discussion of an FTA with the ROC would likely generate opposition from many of the United States' other Asian trading partners, unless the United States was willing to conclude FTAs with those countries as well. The latter scenario, of course, while diminishing foreign opposition would increase domestic resistance.

At the same time, the forces in support of an FTA with the ROC would be relatively limited. The ROC's home market, while growing at an astounding rate, is still widely viewed as small and offering only limited opportunity for United States exports. The possibility that an FTA with the ROC might create new opportunities for United States business investments, as well as the possible use of the ROC as a base for other activities in the region, might appeal to some United States

business interests. But it is difficult to visualize these interests coalescing to form a formidable force in support of an ROC FTA. United States agricultural producers probably would perceive an open ROC market as a significant new opportunity. However, compared to most other Asian countries, the ROC is already relatively open to United States agricultural exports. Accordingly, the practical potential for additional agricultural exports might be limited.

Finally, the appeal to the United States of an FTA with the ROC might be dampened by the belief that the United States can achieve increased exports to, and investment in, the ROC without yielding the concessions that such an agreement would necessarily require. The ROC has been rapidly opening its domestic market even without such agreements. Furthermore, the ROC may be uniquely vulnerable to unilateral pressure by the United States aimed at securing trade concessions, because the ROC is politically isolated and dependent upon the United States for protection of its security interests. However unfortunate it may be from the ROC's perspective, the United States' desire for greater access to ROC markets is much more likely to be embodied in political pressure on the ROC than in support for a United States-ROC FTA.

An Initial Perspective on the United States-Republic of China Free Trade Agreement

DOUGLAS T. HUNG*

The Republic of China ("ROC") greatly values its long-lasting, cordial relationship with the United States. In particular, the two countries enjoy a mutually beneficial commercial relationship based upon earnest trust and goodwill.

For several years, the ROC has been contemplating various ways to improve bilateral trade relations with the United States, its major and most important trading partner. For instance, the ROC has been exploring ways to protect this trade relationship from the impact of political swings in both countries. The ROC recognizes the need for a

* Director, General Chamber of Commerce of the Republic of China, Liaison Office, San Francisco, California.

more creative response to the perennial problems between itself and the United States. Rather than restricting imports, both sides would be better served by liberalizing their respective trade policies.

The ROC's commitment to liberalizing trade is sincere. According to the "Detailed Action Plan for Strengthening Economic and Trade Ties with the United States," promulgated by the Council for Economic Planning and Development of the Executive Yuan, the ROC has already taken steps to increase imports from the United States. This measure will continue to reduce the ROC's trade surplus. The ROC government understands that the solution to the persistent ROC-United States trade imbalance requires policy adjustments within several sectors of the economic structure and believes its willingness to negotiate a Free Trade Agreement ("FTA") with the United States evidences its commitment in this area.

The ROC believes an FTA with the United States should follow the model set by the agreements between the United States and Israel and the United States and Canada. Over a period of time, such agreements will remove all tariff and non-tariff barriers between the two signatory countries. The arrangements between the ROC and the United States should include provisions for the free flow of commerce, investment, services, and the opportunity for negotiations regarding similar practices in intellectual property rights protection, licensing, and standards.

Some members of the United States Congress seem to believe that the United States is not getting a fair share of trade from the ROC. The ROC, however, maintains that this perception is inaccurate. The ROC's proposal to consider the establishment of an FTA with the United States demonstrates the sincerity of its commitment to liberalize its market with its major trading partner.

What would both sides gain from such an agreement? First, trade—which amounted to about $36 billion last year—would increase significantly if duties and non-tariff barriers were removed. I would expect that investment by United States business in the ROC would increase substantially, as would joint ventures between ROC and United States businesses. Furthermore, the ROC's labor force is well-educated, highly skilled, and would accept a wage rate considerably below the prevailing wage rate in the United States. Thus, the ROC's economic structure could complement that of the United States. Moreover, an FTA would enhance the benefits to both sides.

Despite its small size (about one-third the size of Ohio), the ROC

is the fourth largest importer of United States goods. In 1988, imports from the United States accounted for 26.2% of all ROC imports. Eliminating all trade barriers, which currently hinder United States shipments, would increase this share significantly.

The ROC's economy is ready to absorb a higher volume of imports. Its per capita income was almost $6,000 in 1988 and is expected to increase at the rate of 7% in 1989. Furthermore, the ROC has an ample foreign currency reserve to finance increased imports. These reserves are now estimated at around $75 billion, an amount which can support a tremendous volume of consumer demand.

In addition to increasing consumer demand for imports, the ROC has plans to implement major projects over the next several years. The authorities in Taipei have recently appropriated about $4 billion for major projects, including rapid transit and telecommunications systems, port facilities, highways, environmental protection, and hospital facilities. These projects will require an increase in the amount of imports. An FTA would give United States bidders on these projects a substantial edge over international competitors.

Currently, the United States is the second largest supplier of imports to the ROC market; Japan is the largest, with nearly 30% of the market. At the United States government's request, the ROC has significantly reduced its tariffs. Tariff cuts on 4,738 items in 1989, alone, lowered the average nominal tariff rate to under 4.7%. However, multilateral tariff cuts benefit Japanese exports more than United States exports, since the Japanese already supply more goods to the ROC. An FTA between the United States and the ROC, which would lower tariffs on a bilateral basis, would increase the relative competitiveness of United States exports to the ROC. Despite its small size, the ROC could be a significant and lucrative market for United States exports.

United States agricultural exports to the ROC are already quite substantial. Nevertheless, the ROC is continually pressured to liberalize trade barriers. Admittedly, agricultural goods generally face high tariffs, as well as other import restrictions in the ROC. It should be noted, however, that the United States government also intervenes in agricultural trade in efforts to improve the competitiveness of United States agricultural products abroad. An FTA would provide significant opportunities for an increase in agricultural trade. Expected gains in this area would go primarily to United States farmers by giving them a competitive advantage in marketing their farm prod-

ucts. Therefore, although the ROC is already one of the largest importers of United States agricultural products in the world, an FTA would increase United States agricultural shipments even further.

Because the ROC's tariffs are generally higher than the tariffs of the United States, the ROC would have to liberalize further in order to implement an agreement with the United States. The average ROC tariff is just under 13%, while the average tariff on United States imports is about 3.5%. Of course, the agreement would not take effect overnight; both sides would have a timetable for tariff and non-tariff liberalization. Additionally, the agreement should include special provisions for handling so-called "import sensitive" items on both sides.

The unusually small size of most ROC firms would preclude any major export drive which might result from trade liberalization under an FTA. This significantly contrasts with both Japan and the Republic of Korea, whose export sectors rely heavily on large firms and export trading companies. Furthermore, a United States-ROC bilateral FTA would have to include a provision enforcing the rules of place-of-origin, so as to ensure that other countries do not take advantage of the agreement through transshipments.

In addition to increasing trade, an FTA would foster increased United States investment in the ROC. The ROC's well-educated labor force, most notably in the engineering and computer fields, provides a good incentive for investment and joint research and development projects between the United States and ROC businesses. Moreover, substantial revisions in the laws regulating and protecting intellectual property rights will further enhance United States investment opportunities. Also, the ROC's location gives United States investors an excellent position from which to trade with other rapidly growing markets in the Far East, particularly Japan.

An FTA between the United States and the ROC would bestow yet another benefit by providing a model for the multilateral trade agreement currently being negotiated in the Uruguay Round. Most likely, an agreement between the United States and the ROC would include services, an area in which the United States has repeatedly expressed the desire to negotiate at the Uruguay Round. Concluding an FTA with an important Asian trading partner such as the ROC should aid United States efforts in multilateral trade negotiations. Furthermore, an agreement regarding services could significantly improve the balance of trade, because the United States has greater ex-

pertise and a relative cost advantage in this area. In particular, United States exports of banking services, motion pictures, shipping, leasing, and advertising likely would increase. The United States is extremely competitive in these areas, and liberalizing the ROC market would provide significant opportunities for United States service industries. Thus, the ROC could become a very significant financial center for United States investment in Asia.

What would an agreement mean to the ROC? Unquestionably, there is a risk in competing with the strongest economic power in the world. However, due to its limited natural resources, the ROC has no choice but to continue to trade. Therefore, the ROC is willing to take the risk of reducing trade barriers with the United States. In fact, the ROC welcomes the opportunity to trade on a fair and competitive basis with the United States. Currently, the ROC is subject to the vagaries of trade policy development in the United States, even though it is ready to accept all of the obligations and rights of a fully developed bilateral trading partner.

The ROC government wants to avoid the political swings which negatively affect its trade flows. Additionally, it wants to avoid political fallout which might result from any misunderstanding of the ROC's developing economy. The ROC also wants to avoid future trade-related complaints which would only serve to exacerbate problems, making an equitable and mutually acceptable solution to both parties all the more difficult. An FTA would mitigate these problems.

The ROC is prepared for the United States to extensively review the ROC's economy and trade practices, just as it has done with Israel and Canada. The ROC will also investigate the United States economy and trade practices in order to better understand its complexities. Furthermore, as in the Israeli and Canadian agreements, the ROC is willing to discuss special provisions in the agreement for sensitive products.

The ROC understands and respects the United States' commitment to strengthening the multilateral trading system. The ROC has both contributed to and benefitted from this system. However, the ROC is not a member of the General Agreement on Tariffs and Trade ("GATT"). Therefore, when the Uruguay Round begins, or alternatively, when it finally concludes, the United States and the ROC would still need to negotiate a GATT-parallel bilateral trade agreement, similar to the agreement generated after the Tokyo Round.

The United States and the ROC should set their mutual goals for these bilateral discussions at a higher level from the outset.

Furthermore, I believe that FTA discussions between the United States and the ROC could cause some of the United States' trading partners in the Far East to take trade policy discussions with both countries more seriously. Consequently, a bilateral FTA between the United States and the ROC would make both countries more competitive in Asia and elsewhere.

In summary, the benefits of a Free Trade Agreement greatly outweigh the burdens for both countries. From the ROC's standpoint, the initiative to create such an agreement should be seen as a reaffirmation of the ROC's serious commitment to a free trade system. From the United States' perspective, the agreement would aid the Executive and Congress in further opening markets for United States exports.

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