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LEGAL AND POLICY PERSPECTIVES ON UNITED STATES TRADE INITIATIVES AND ECONOMIC LIBERALIZATION IN THE REPUBLIC OF CHINA

Lawrence S. Liu*

I. INTRODUCTION

The decade of the 1980s marked an era of rapid growth in bilateral trade and economic relations between the United States and the Republic of China [ROC].1 When the United States severed diplomatic relations with the ROC in late 1978, total bilateral trade then was just over U.S. $7 billion, representing about thirty percent of ROC's total trade. By the end of 1988, bilateral trade still represented about one-third of Taiwan's global trade, but the total amount of bilateral trade had exceeded U.S. $36 billion.2 While the ROC has become the sixth largest trading partner of the United States and the thirteenth largest trading country in the world in its own right, its trade surplus with the U.S. has also steadily widened to the order of U.S. $10.42 billion in 1988.3 For the first ten months of 1989, the ROC's overall trade surplus has increased, still including a significant trade surplus with the United States.4 As its trade and budget deficits increased, naturally

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1. The ROC on Taiwan now has a population of 20 million and a per capita income exceeding U.S. $8,000. Its recent economic achievements are accompanied by recent political reforms as well. Politically, the late President Chiang Ching-Kuo swiftly ushered in many liberalization and reform programs before his death in 1988. They included permission to form the first opposition party (the Democratic Progressive Party), lifting martial law, relinquishing control of newspaper publishing, allowing ROC citizens to visit relatives on the Chinese mainland, and the proposal to rejuvenate its three houses of "Congress" (that is, the Legislative Yuan, the National Assembly and the Control Yuan). Socially, Taiwan has become a more open and pluralistic society. See TAIWAN: A NEWLY INDUSTRIALIZED STATE (H. Hsiao, W. Cheng & H. Chan eds. 1989); see also Harrison, Taiwan after Chiang Ching-Kuo, 73 FOREIGN POL'Y 790 (1988). For a succinct update of the bilateral trade relations, see BOARD OF FOREIGN TRADE, THE ROC-USA TRADE RELATIONS (1989) [hereinafter TRADE RELATIONS].

2. BOARD OF FOREIGN TRADE, '89 FOREIGN TRADE DEVELOPMENT OF THE REPUBLIC OF CHINA 24 [hereinafter FOREIGN TRADE DEVELOPMENT].

3. For 1988, export to the United States represented 38.7% of Taiwan's total export, and import from the U.S. represented 26.2% of total imports to Taiwan. Id.

4. According to ROC statistics, the first ten months of 1989 registered an overall trade surplus of U.S. $11.72 billion (a 36% increase from the same period in 1988), representing U.S.
the United States has become more protectionist. Not surprisingly, U.S.-Taiwan economic and trade issues not only have occupied the forefront of their bilateral relations, but also have received increasing academic attention.

This article examines the legal and policy perspectives of U.S. trade initiatives toward the ROC in the last decade and their impact on economic liberalization in Taiwan. Part I sets forth the basic legal, policy and structural framework of this bilateral trade relationship. Part II is a sectoral retrospect of the major bilateral trade issues dealt with in the last decade. Part III presents an analysis of the recent efforts of the ROC to liberalize its trading system and economy, the primary issues and prospects of such liberalization, and their causal relations with American trade initiatives toward Taiwan. Part IV concludes with the author's cautious optimism for prosperous U.S.-ROC trade relations in the next decade.

II. BASIC FRAMEWORK OF BILATERAL TRADE RELATIONS

One could classify the basic legal framework governing U.S.-ROC trade and economic relations under three categories: treaty laws; internal laws and regulations of the United States; and internal laws, policies and regulations of the ROC. Treaty laws are a result of past trade negotiations and they are highly relevant in the further development of bilateral trade relations. U.S. trade laws are the driving force behind the formation of the treaty laws and the emerging jurisprudence on trade regulation in the ROC, which has just begun to receive wider attention in recent years.

$43.65 billion of imports (a 5.4% increase from the same period in 1988), and U.S. $55.37 billion of exports (a 10.6% increase from the same period in 1988). Exports to the U.S. as of the end of October, 1989 were U.S. $20.17 billion (representing 36.4% of total exports from Taiwan), and imports from the U.S. were U.S. $9.94 billion (representing 22.8% of total imports into Taiwan), indicating a trade surplus of U.S. $10.23 billion. Com. Times, Nov. 5, 1989, at 1. According to U.S. statistics, the first nine months of 1989 resulted in a total trade surplus of U.S. $10.4 billion for Taiwan, a 37% increase from the same period in 1988. If the gold imports to the U.S. in 1988 are excluded, however, its total trade surplus for the first nine months of 1989 remained approximately the same as compared with the same period in 1988. Excluding such gold imports from 1988 imports, the bilateral trade imbalance for the first nine months of 1989 actually improved by 14.5%. See Translation of U.S. Treasury Report on Taiwan's Currency Conversion Rate, Com. Times, Oct. 19, 1985, at 3.


A. Treaty Law Framework

The year 1979 is an appropriate watershed with which to review the treaty law framework for U.S.-ROC trade relations; the severance of formal diplomatic relations, announced by President Jimmy Carter on December 15, 1978, became official on January 1, 1979. The three decades prior to 1979 had seen close economic, political, and diplomatic ties between the U.S. and the ROC which had been reluctantly re-established in the early 1950's. The principal legal instrument governing bilateral trade and economic relations has been the Treaty of Friendship, Commerce and Navigation [FCN Treaty] between the two countries, signed in Nanking in 1946. Other sources of bilateral treaty law are embodied in various trade agreements and the exchange of letters between the American Institute in Taiwan [AIT], a District of Columbia corporation chartered under the Taiwan Relations Act [TRA] and serving as the unofficial United States embassy, and the Coordination Council for North American Affairs [CCNAA], an ROC government agency established in 1979 to conduct bilateral relations with the United States.

1. FCN Treaty

Not different from other FCN treaties established between the U.S. and its allies, the 1946 FCN Treaty was entered into after World War II to replace the unequal treaties binding the ROC as a successor to the Imperial Chinese government. It was also the most important bilateral agreement that survived the severance of diplomatic relations in 1979. But the FCN Treaty is significant in conducting the bilateral relations not merely because of its political and symbolic meanings.

The FCN Treaty sets forth general principles of national treatment and non-discrimination of persons, property, and entities of the other Contracting Party. While the ROC Constitution requires that respect

be accorded to treaties, it does not specifically provide what takes precedence when a treaty conflicts with inconsistent domestic legislation. Nonetheless, the High Court for the Province of Taiwan has relied on provisions of the FCN Treaty to grant U.S. corporations access in court, despite inconsistent domestic legislation. The Court did not even discuss as an issue the severance of diplomatic relations. Therefore, the prevailing view of the executive and judicial branches of the ROC is that the FCN Treaty continues to create binding international legal obligations capable of being enforced by the judiciary. At least one American court has reached the same conclusion, upholding the validity of the FCN Treaty after 1979 as well as the constitutionality of the TRA.

The FCN Treaty has also been useful in a trade negotiating context. This is particularly interesting in light of a provision of the protocol to the FCN Treaty excluding its applicability with respect to measures required or permitted by the General Agreement on Tariff and Trade [GATT]. In this context, the national treatment provisions of the FCN Treaty need not be legalistically or precisely relevant to the trade issues being discussed. In contrast, judicial scrutiny would require a higher standard of such relevance. American trade pressures being what they are, however, the national treatment principles embodied in the FCN Treaty persuasively supported arguments for market access to U.S. firms, particularly those in the service sector such as banking, insurance, and securities.

In a similar vein, one should analyze the international legal effect

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13. See Taiwan High Court Criminal Judgment (Ref. No. 72-Shang-SSu-806, Mar. 15, 1983) (FCN Treaty held to grant Apple Computer, a company not recognized to do business in the ROC, access to court as a complainant in a case involving the criminal infringement of its computer programs); Taiwan High Court Criminal Judgment (Ref. No. 76-Shang-Yi-5672, Feb. 28, 1987) (FCN Treaty held to take precedence over an inconsistent provision of the 1985 Copyright Law of the ROC, which requires registration of a foreign work of authorship as a precondition for copyright protection in Taiwan); accord Criminal Judgment of the Taipei District Court of Taiwan (Ref. No. 77-Yi-2574, Sept. 22, 1988), reported in 7 CHINESE Y.B. INT'L. L. & AFF. 262; see also Chiu, supra note 12, at 13-16.


of the FCN Treaty in a non-legalistic way. While this approach may not apply to FCN treaties between the United States and other signatories, political reality may necessitate such an approach for the U.S.-ROC FCN Treaty. For instance, article XXVIII of the FCN Treaty provides for the resolution of disputes and different interpretations of treaty provisions by the International Court of Justice. Despite this clear provision in the FCN Treaty, such a third-party dispute mechanism is no longer feasible.

Excluding the application of GATT measures from the FCN Treaty was considered entirely proper for several reasons. First, both the U.S. and the ROC were prepared to participate actively in an organization that was to become the International Trade Organization. Therefore, the preferred approach to resolving trade issues for both countries was multilateralism. The ROC was an original contracting party to the GATT, but withdrew in the 1940's for political and practical reasons. Second, it would be extremely difficult, if not impossible, to provide for the results of intensive trade negotiations in FCN treaties or their protocols; FCN treaties are intended only to set forth general principles.

The ROC's withdrawal from the GATT had its consequences. First, Taiwan could only opt for bilateral trade negotiations [BTNs], rather than becoming a participant in multilateral trade negotiations [MTNs]. Second, lack of access to any official international trade organization and the unfavorable political and diplomatic environment the ROC has encountered also have made BTNs a difficult and piecemeal process for the ROC. For example, both pressure from the People's Republic of China [PRC] and fewer ties with Europe have made it more difficult, at least until recent years, for the ROC to conduct trade consultations with European countries, especially with the European Economic Community [EEC]. Similarly, Taiwan has had to conduct sectoral BTNs by a piecemeal approach.

2. Trade Agreements and Exchange of Letters

Another important corpus of treaty law affecting trade and economic relations between the U.S. and the ROC is the various trade agreements and exchange of letters between the AIT and the CCNAA and their respective predecessors. It has been suggested that under the TRA, agreements concluded between the AIT and the CCNAA

17. 63 Stat. 1299, 1321.
18. Their pre-1979 predecessors were the Office for the Special Representative for Trade Negotiations and the Ministry of Economic Affairs. These trade agreements and exchange of letters may be found in the Chinese Yearbook of International Law and Affairs.
“have full force and effect under the law of the United States.”

These agreements may relate to overall tariff reductions. But as the focus of the BTNs in recent years has shifted to the imposition or removal of non-tariff barriers [NTBs], these agreements have become increasingly sectoral.

The first of such agreements was entered into pursuant to an exchange of letters made on December 28, 1978, just four days before the severance of bilateral diplomatic relations. The agreement sought to implement the results of U.S. tariff concessions made in the Tokyo Round of the MTNs under the GATT framework in consideration of tariff concessions to be made by the ROC. More important, it also committed the ROC to:

- observe obligations substantially the same as those applicable to developing countries set forth in the non-tariff agreements concluded in the Tokyo Round, including agreements on subsidies and countervailing duties, customs valuation, licensing, government procurement, commercial counterfeiting, and technical barriers to trade.

The same commitment was reaffirmed in another exchange of letters made on October 24, 1979. Annex II to the December 28, 1978 exchange of letters set forth the ROC’s non-tariff concessions in more detail; some of these concessions were to become the focal point of further clarification, expansion, and dispute. Among other concessions, the ROC committed to:

1. use its best efforts to secure the legislative authority to eliminate the 20 percent customs valuation uplift within five to six years;
2. give favorable consideration to taking appropriate liberalization measures regarding all non-tariff measures applied to imports of apples and automobiles;
3. give favorable consideration to allowing imports of products containing ingredients acceptable in the U.S. but not admitted to the ROC at the time, subject to appropriate health and sanitary safeguards;
4. allow U.S. firms to open branch offices to sell life insurance policies to all U.S. nationals in Taiwan;
5. allow U.S. firms to open branch offices to sell property insurance policies, except marine insurance, for property of U.S. nationals and entities (but ruling out the joint venture alternative);

21. Id. at 6440.
23. See Exchange of letters, supra note 20, at 6467, 6468.
(6) take a whole host of actions to prevent the imitation of foreign trademarks.\textsuperscript{24}

The October 24, 1979 agreement also set forth the understanding that the U.S. and the ROC would continue discussions at a mutually convenient date to define bilateral obligations and an appropriate dispute settlement mechanism for matters falling within the purview of the non-tariff measures mentioned in the agreement.\textsuperscript{25}

The meaning of these early agreements is therefore important in several ways. First, in retrospect these agreements highlighted the focal point of trade disputes in the coming decade: implementation of the various codes resulting from the Tokyo Round MTNs, the protection of intellectual property rights, and market access for U.S. firms offering financial services. Second, subsequent BTN\textsuperscript{s} showed that vaguely worded and terse commitments are susceptible to multiple interpretations which could result in further trade tensions. Third, the limited, sectoral application of the agreements reflected the lower level of U.S. concern at the time. As the U.S. trade deficit with Taiwan increased, U.S. trade initiatives toward Taiwan tended to have a broader scope. Fourth, as a result of BTN\textsuperscript{s}, these agreements have to be applied on the basis of non-discrimination, a fundamental principle governing MTNs. They, therefore, constitute a vicarious vehicle for integrating the ROC into the MTN framework. Fifth, most of these trade agreements, as well as later trade agreements, are not self-implementing in the ROC; some domestic legislative or regulatory measures have to be adopted. Gradually, they contributed to the emergence of a more sophisticated trade regulatory jurisprudence and, more importantly, economic liberalization in the ROC.

B. Internal Laws and Regulations of the United States

The second source of law in basic U.S.-ROC trade relations is the

\textsuperscript{24} \textit{Id.} at 6468. ROC manufacturers copying foreign trademarks by registering them in the ROC would have to be prosecuted pursuant to the ROC Criminal Code. The Board of Foreign Trade [BOFT], the ROC trade regulatory agency, committed itself to prohibiting them from exporting the products in question. Those who imitate foreign trademarks not yet registered in the ROC should also be prosecuted if they are suspected of committing the offense of illegally showing the trademark and the place of origin. The ROC committed itself to encourage its manufacturers to develop their own trademarks and seek foreign registration. The ROC also resolved to wage an educational campaign through industry associations on responsible trademark practice. The National Bureau of Standards [NBS], the ROC's patent and trademark office, agreed to refuse application to any trademark closely similar to a foreign trademark and to refer the case for possible prosecution. Finally, the ROC agreed to amend its Trademark Law to punish accessories to trademark counterfeiting, impose more severe punishment for trademark counterfeiting, and confiscate counterfeit products.

internal laws and regulations of the United States. The TRA, enacted in April, 1979 after diplomatic ties were severed, has been the basis for the U.S. to conduct bilateral relations with Taiwan. Most of the other internal laws and regulations are trade legislation found in Title 19 of the U.S. Code as amendments to the Tariff Act of 1930, the most important of which are the Trade Act of 1974, the Trade and Agreement Act of 1979, the Trade and Tariff Act of 1984, and the Omnibus Trade and Competitiveness Act of 1988.

1. The TRA

The TRA is an exercise in legislating *de facto* foreign relations. At least one U.S. court has recognized such *de facto* recognition. In a medical malpractice suit filed by a citizen of the ROC involving diversity jurisdiction, the U.S. District Court for the Northern District of Illinois held that the defendant could not reject the claim on the ground that the plaintiff was not a citizen "of a foreign state" recognized by the United States. The Court decided that a "*de facto* recognition standard" would satisfy the foreign diversity jurisdiction requirement, stating "we find such recognition here." In subsequent cases, it has been held that the TRA intended to continue the provisions of the FCN Treaty in force between the United States and Taiwan. It is expected that the TRA will continue to serve as the bedrock for the U.S. and Taiwan to enhance a variety of bilateral relations, including trade.

2. Trade Legislation

Individual cases based on antidumping, countervailing, import relief (section 232), and unfair competition (section 337) provisions of the U.S. trade legislation reflect the micro-aspect of the bilateral trade frictions. The focus of the American trade legislation as applied to Taiwan, however, has shifted to retaliatory provisions such as section

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31. Id.
301 and "Super 301." As the overall U.S. trade deficits and trade deficits with Taiwan increased, one finds that the more recent trade legislation has reduced executive discretion and increased legislative oversight, such as hearings and ongoing mandatory reporting.

Reflecting the protectionist sentiments in the U.S. in an election year and seeking to balance them with themes to preserve fair trade, the 1988 trade act has become more legalistic than previous trade acts. As a result, U.S. trade negotiators now bring a much more detailed and demanding agenda before their ROC counterparts. Under the rubric of Section 301, the American pressure upon foreign governments to grant greater market access and to intensify enforcement against infringement of intellectual property rights has intruded upon the domestic matters of foreign governments, the ROC included.

C. Internal Laws, Policies, and Regulations of the ROC

The third source of law in the trading framework of the bilateral trade relations is internal ROC laws, policies, and regulations, to be discussed in detail below. Its coverage ranges widely from tariff reductions, custom valuations, import and export regulation and programs, foreign exchange control, insurance, banking, securities, shipping, intellectual property rights, competition laws, agricultural and fishery policies, and government procurement, to inward and outward investment policies. These topics dovetail with the shopping list in the U.S. trade legislation discussed above. The ROC's approach to this corpus of legal and regulatory materials, however, is entirely different from U.S. trade legislation.

From a western perspective, the ROC government has taken a somewhat interventionist approach to national development in Taiwan. In an earlier stage of this process, emergency legislation enabled the government to exercise wide discretion in directing economic policies. Policies virtually became law. Furthermore, some delays usually occurred during the political process that transformed administrative policies into administrative regulations and then administrative regulations into enacted legislation. To some extent, the same process applies when the ROC adopts measures to respond to U.S. trade demands. To be sure, intervention in the economy by the ROC gov-

35. See, e.g., United States Submission to GATT, supra note 16, appendix III, at 123.
36. See L. Liu, World Law of Competition, supra note 7, at § 1.01(2).
37. The regulation of the securities market and foreign exchange control in Taiwan are two examples. See Liu, Financial Reform in the ROC, supra note 7, at text accompanying note 138.
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ernment has been less pervasive than that in Japan or Korea. Nevertheless, the regulatory apparatus resulting from such intervention necessarily creates bureaucratic inertia and time lags in the decision-making process for responsive trade measures. This is particularly so when recent BTNs have become a prelude to domestic deregulation, a difficult task in an over-regulated environment.

D. Structural Differences in Bilateral Trade Relations

Most economists would agree that the U.S.-Taiwan trade imbalance is largely a result of an American macroeconomic imbalance which has caused, among other things, huge budget deficits. To be sure, one should not discount the impact of macroeconomic imbalance in Taiwan, either. Such imbalance largely resulted from the combination of import substitution policy, adopted since the 1950s, and export promotion policy, adopted since the 1960s. In order to analyze bilateral trade issues properly, however, one should not lose sight of the fact that there are vast structural reasons for the ROC's trade surplus with the United States. Policymakers in both countries would do well to attempt to narrow such differences, rather than attempt to eliminate artificially such trade surplus.

The multilateral trade pattern of the ROC is a case in point. Except for Japan, with which Taiwan suffers a huge trade deficit, Taiwan enjoys a trade surplus with most of its leading trade partners, not only the United States. Trade diversion by, for example, shifting import items from Japanese products to American products becomes an obvious possibility for ROC trade policy.

Taiwan's overall trade surplus has been significantly padded by its excess domestic savings. For example, in 1987, its savings rate set a record by reaching almost forty percent of the total gross national product [GNP]. By contrast, its domestic investment rate has gradually declined. For example, the 1987 gap between domestic savings and domestic investment was a whopping twenty-one percent. This gap is the primary culprit for Taiwan's trade surplus, including its trade surplus with the United States. Another important structural factor contributing to its trade surplus is Taiwan's high economic growth due to extensive savings.

38. See J. WHEELER & P. WOOD, BEYOND RECRIMINATION, supra note 6, at 17.
39. Id. at 155.
40. Wu, An Overview of the Economy of Taiwan 9-10 (paper presented at the third Joint Meeting of Canada-Taiwan (ROC) Business Association, Edmonton, Alberta, Canada (Apr. 10, 1989)). The savings rate had started from less than ten percent in the 1950s to about twenty percent in the mid-1960s. It exceeded thirty percent in 1972 and since then has comfortably settled at a level over thirty percent, except in 1975.
41. Id. at 10.
growth, reflected in its higher output rates and productivity, relative to the United States. Taiwan’s economy grew at an average annual rate of 9.1 percent in real terms between 1983 and 1988, much higher than the U.S. economic growth rate for the same period.42

The unique demography of Taiwan’s exporters and the current year surplus enjoyed by the United States with respect to services suggest a different treatment for Taiwan-U.S. trade relations. Unlike Japan or Korea, Taiwan’s economy is represented by small and medium-size companies. Therefore, Taiwan’s firms have not been able to capture the added value from marketing their own goods. Rather, U.S. retailers, multinational corporations with manufacturing subsidiaries, and Japanese trading conglomerates control the bulk of such marketing networks.43 Significantly, exports to the U.S. by American-invested companies have represented a substantial share of total Taiwan exports to the U.S. and the bilateral trade imbalance.44 While the United States suffers a deficit in merchandise trade with Taiwan, the United States appears to be more competitive than the ROC in service trade. The possible contribution of American service trade to the narrowing of bilateral trade imbalance has been acknowledged by the ROC.45 In fact, as a result of opening its services market in recent years, there already has been a significant growth of the service sector of Taiwan’s economy.46

III. SECTORAL RETROSPECT OF MAJOR TRADE ISSUES IN THE 1980S

This part examines, on a sectoral basis, the more important bilateral trade issues resolved by the United States and Taiwan over the past decade. Without making a thorough case study of each issue, one nevertheless should be able to distill from these trade consultations the

42. Id. at 6.
44. According to BOFT statistics, the average percentage of exports to the U.S. by American-invested companies from 1981 through 1987 was 8.9%, and the average percentage of trade imbalance caused by such exports for the same period was 15.7%. The trend in recent years also suggests increasing exports by these companies, both in terms of absolute amount and percentage. See Com. Times, Aug. 14, 1989.
45. Chen, Salient Features of Amendment to the Insurance Law and Its Significance, in STUDIES ON THE LEGISLATIVE PRINCIPLES FOR THE INSURANCE LAW 9 (V. Sze ed. 1989) (Remarks of a former Director General of the MOF’s Division of Monetary Affairs [hereinafter INSURANCE LEGISLATIVE PRINCIPLES].
46. In 1988, Taiwan’s service sector grew by 9.8%, far exceeding the 4.6% rate registered for growth in the industrial sector. The service sector represented 48.5% of Taiwan’s GNP for 1988, 2.1% higher than the manufacturing sector. See Remarks by Lai, Finance Vice Minister, Com. Times, Nov. 6, 1989, at 2.
general American approach in initiating trade proposals to the ROC, the ROC's approach in meeting American demands, and the overall impact of such a trade adjustment process on Taiwan's economic liberalization. Trade consultations here are not limited to formal negotiations, but include as well informal discussions that led to trade concessions.

A. Agricultural Products

While the ROC has continued to reduce its tariffs and open its market, agricultural imports have not been liberalized to the same extent as other aspects of bilateral trade relations. Obviously, political sentiments and resistance from farmers in Taiwan are formidable hurdles and protecting the farmers has been a phenomenon in global trade. Allowing the importation of certain American agricultural imports (including turkey innards) aroused the anger of ROC farmers, who waged a violent demonstration in Taipei on May 20, 1988. On the whole, however, Taiwan has had a respectable record in responding to American initiatives in the agricultural sector. For example, Taiwan is the largest consumer on a per capita basis of U.S. apples and grapefruits, and American imports have overwhelming shares of the import and retail markets. In 1988, U.S. corn represented 98% (or U.S. $540 million) of the total corn imported into Taiwan, a conscious attempt by the ROC to offset part of the trade imbalance through grain imports from the United States.

The solution to the agricultural trade issue is more complicated than simply importing more U.S. farm products. Importation of some agricultural products may reduce the import volume of other American agricultural products. For example, imported U.S. corn has been used to feed livestock in Taiwan. According to one ROC estimate, completely opening the poultry market in Taiwan will reduce the U.S. corn exports to Taiwan by 1.22 million tons a year and soy bean exports to Taiwan by 410,000 tons a year, totaling U.S. $270 million each year.

B. Aviation

The AIT and CCNAA entered into an Air Transport Agreement

47. See Remarks by Kiang, Econ. Daily News, May 4, 1989, (Remarks of then Director General of the BOFT, during trade consultations). In 1988, U.S. apple and grapefruit imports constituted 87% and 100% of total imports and 71% and 79% of the retail market. Id.
48. Id. The tariff for corn was only 3% in 1988.
49. Id.
on March 5, 1980.\textsuperscript{50} The agreement was based on principles of reciprocity, non-discrimination, and fair competition. In September, 1987, United Air Lines sought to perform its own ground services (that is, self-handling) under Article 7 of the Agreement and terminate its ground handling contract with a government-owned service company. A dispute arose over the existence of any physical constraints or safety concerns at the Chiang Kai-Shek Airport, which under the agreement would justify a denial of the self-handling application. The issue attracted wide publicity, as it surfaced in the midst of a BTN on other trade issues, and was almost placed on the agenda. China Air Lines, the ROC national carrier, would have been retaliated against had the approval been denied. The case ended with informal discussions leading to the approval of the application.\textsuperscript{51}

\section*{C. Banking and Related Financial Services}

Traditionally conservative fiscal policies of the ROC government necessarily created an intensively regulated banking industry. In fact, various levels of the ROC government collectively own most of the commercial banks in Taiwan. Foreign banks, including U.S. banks, are subject to the review of the Ministry of Finance [MOF] and the Central Bank of China [CBC] in terms of initial establishment and business scope.\textsuperscript{52} Over the years, however, requirements of the Regulations Governing the Establishment of Branches and Representative Offices by Foreign Banks [Foreign Banks Regulations] have been gradually relaxed.

The securities business is an exception to this gradual relaxation. Many ROC commercial banks have set up independent savings and trust departments to engage in the securities business. Foreign banks, which have been treated as commercial banks, have not been allowed to set up such departments. In fact, foreign banks can only set up another branch, which must be located in Kaohsiung, if certain performance tests are met.\textsuperscript{53}

Foreign banks' ROC branches are also subject to certain lending and operating requirements. For example, their N.T.\textsuperscript{S}-denominated deposits may not exceed 12.5 times of the branch's registered operat-


\textsuperscript{51} American Institute in Taiwan, U.S. Airlines Ground Services, BACKGROUNDER, Apr. 30, 1988, at 3.

\textsuperscript{52} Liu, Financial Reform in the ROC, supra note 7, at n.341.

\textsuperscript{53} Guidelines Governing the Establishment of Branches or Agencies by Foreign Banks, arts. 8, 9.
ing capital in Taiwan. Where necessary, the MOF may, in consultation with the CBC, adopt proper restrictions on lending by such branches.\footnote{Id. art. 15. There are still some restrictions on such lending. See H. KAO, FOREIGN EXCHANGE BUSINESS: REGULATIONS AND OPERATIONS 72 (4th ed. 1987); FOREIGN EXCHANGE BUSINESS: REGULATIONS AND OPERATIONS 122 (5th ed. 1989).}

As for related financial services, BTNIs on the banking sector have led to permission for foreign banks to join the United Debit Card Center for the issuance of debit cards. As a result of trade talks in August 1988, the ROC has decided to change N.T.$-denominated debit cards into credit cards and change the center into a Credit Card Center. American companies wishing to issue such cards must operate through this center.\footnote{55. Guidelines Governing the Business of United Credit Cards Operated by Banks (amended Sept. 8, 1988).}

On July 17, 1989, a major amendment to the Banking Law was enacted. For the first time privately held commercial banks will be permitted to be set up in Taiwan. Pursuant to the amendment, foreign banks' ROC branches will be granted the powers to engage in savings and trust business.\footnote{56. Liu, Financial Reform in the ROC, supra note 7, at text accompanying note 323.} As the detailed regulations for setting up new commercial banks have yet to be finalized, the MOF is not expected to amend the Foreign Banks Regulations until early 1990. Nonetheless, the amendment made clear that treatment of foreign banks' ROC branches will approximate complete national treatment. This is not a modest gesture; ROC nationals have not been able to own banks while about three dozen foreign banks already maintain branches in Taiwan. In fact, even before the passage of the Bank Law amendment, there had been public criticism that granting national treatment to foreign banks would discriminate against ROC nationals.\footnote{57. Ying, Liberalization of the Financial Market and Integration of Regulations, in MONE- TARY MARKET POLICY, pt. A (Library of the Legislative Yuan ed. 1989).}

Foreign banks, presumably, will be interested in further development of the ROC banking market after regulations for the establishment of new commercial banks are finalized. As the banking sector is considered to be more important than the securities market, one suspects that foreign banks will not be permitted to set up or acquire ROC banks immediately; joint venture opportunities will not be available until the MOF has had the opportunity to review the effects of setting up new commercial banks.\footnote{58. See Econ. Daily News, Nov. 12, 1989, at 2.} Further liberalization of the banking sector along these lines apparently will be based on reciprocity and other countries' trade initiatives.
Despite certain lending restrictions applicable to them, foreign banks enjoy the exclusive privilege of pre-sale foreign exchange export loans. ROC banks may not engage in such business. Therefore, foreign banks are entitled to certain favorable treatment on an exclusive basis, above and beyond the national treatment requirement. Similarly, foreign ownership in financial leasing companies, a business still not open to ROC nationals on a general basis, may now reach ninety percent.

D. Beer, Wine and Tobacco

One of the most controversial and emotional chapters in the BTN's — the importation, distribution, and sale of beer, wine, and tobacco — became a thorny trade issue in 1985. All such distributions and sales could only be made by or through the Taiwan Tobacco and Wine Monopoly Bureau [TTWMB] of the Provincial Government of Taiwan, a system remaining from the days of Japanese occupation of Taiwan between 1896 and 1945. In a rush action to respond to U.S. pressures, the ROC entered into a short-term agreement in October, 1985 to open up the monopolized market. Negotiations for the detailed implementation of this market, however, broke down in mid-1986. The U.S. then made a determination in October, 1986 under section 301 of the 1974 Trade Act to seek retaliation. Taiwan had to grudgingly comply with American demands and U.S. investigations for retaliatory measures were terminated. A definitive agreement was entered into between the CCNAA and the AIT on December 12, 1986, providing for detailed implementation guidelines for market-opening measures by the TTWMB. The agreement pertained to acceptable importation procedures, monopoly taxes, pricing of products, warehousing and distribution arrangements, acceptable limits in advertising and promotional activities, labeling and packaging requirements, and penalties for noncompliance with TTWMB's guidelines.


60. Guidelines on Handling Applications to Establish Leasing Companies by Foreign Leasing Companies, art. 1.

61. In addition, the Monopoly Bureau's existence has been officially recognized by special legislation granting such monopolies in 1953.

62. Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 39,639 (1986). This agreement committed Taiwan to remove the prohibition on beer imports and permit the sale of U.S. wines, cigarettes, and beer at the same outlets for Taiwan products. It also obliged the ROC to permit price mark-ups on American products at a level not greater than that for Taiwan products. In general, the American demand sought more room for market forces. Id.

63. Id.

64. For a full text, see 6 CHINESE Y.B INT'L L. & AFF. 440-45 (1986-87).
From an international perspective, conflict in the trade of beer, wine, and tobacco carries multilateral trade implications. The ROC has been adhering to the GATT principle of non-discrimination with its trading partners wherever possible. In addition, the European tobacco companies with their lobbyists in the EEC Commission could cause the EEC to pressure Taiwan to grant European companies the same concessions given to American companies. Failure to open the beer, wine, and tobacco market to the EEC, for example, could lead to curtailment of Taiwan's quotas for textile exports to the EEC. On January 1, 1987, the ROC opened up this market to most of its non-American trading partners, giving them a free ride on U.S.-Taiwan trade consultations.

E. Color Television Exports

Electronics became one of the leading export items from Taiwan in the late 1970s. The ROC now has come to enjoy substantial competitive advantages in the production of color television sets. On December 3, 1980, the AIT and the CCNAA entered into an agreement to extend the previously agreed upon self-restraint measures.65

F. Currency Appreciation and Foreign Exchange Control

The ROC has had foreign exchange controlled since the late 1940s.66 Shortage of foreign exchange has been a great concern to its policy makers since the beginning of the economic surge in the 1950s. The continuing current-account trade surplus and excess savings in the ROC's financial system in recent years have resulted in the accumulation of foreign exchange reserves to the order of U.S. $74 billion, suggestive of an infatuation with bullionism.67 The foreign exchange reserves and trade surpluses are easy targets in any BTN. Analysis also has shown that the N.T. dollar had been undervalued between 1981 and 1986.68 As a result of informal trade discussions, the N.T. dollar has been allowed to appreciate nominally more than

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66. See Liu, Financial Reform in the ROC, supra note 7, at text accompanying n.9.
67. See Translation of U.S. Treasury Report on Taiwan's Currency Conversion Rate, Com. Times, Oct. 29, 1989, at 3. The amount of Taiwan's foreign exchange reserves is the second largest in the world and represents 19 months of merchandise imports. Id. Another statistic suggests that such reserves had been reduced to U.S. $72.8 billion by October 18, 1989. See Com. Times, Oct. 19, 1989, at 1.
57.5% against the U.S. dollar since 1985. Unlike other sectoral trade adjustments, currency appreciation has affected virtually the entire economy as Taiwan has become greatly dependent on international trade. With the currency appreciation, less competitive businesses had to either fold or relocate their manufacturing operations overseas.

From an institutional perspective, currency appreciation precipitated the liberalization of foreign exchange controls. To that end, the Statute for the Administration of Foreign Exchange was amended in June 1987. To forestall further appreciation and the influx of short-term, speculative "hot monies," limits on inward remittance were erected, whereas virtually all limits on outward remittance were removed. Soon after an informal consultation between officials of the two countries in early 1989, Taiwan implemented a major modification in the trading system of the Taipei Foreign Exchange Trading Center. As a result, N.T. dollar trading and fluctuation now are practically driven by market forces. Although expressing inclinations to see narrowing trade surpluses, U.S. Treasury officials stated in their October 27, 1989 report to the Congress that they saw no clear indication of currency manipulation by the ROC. The report also acknowledged that the first eight months' trade volume showed a 14.5 percent reduction in the trade imbalance.

Taiwan’s economic development began when it was suffering from a shortage of foreign exchange. That is no longer the case, as indicated by the amendment to the Statute for the Administration of Foreign Exchange to liberalize foreign exchange controls. As a result, its laws and regulations governing foreign investment in the ROC and overseas investment by individuals and companies, which have always used foreign exchange repatriation rights as a primary incentive, have been substantially amended.

69. See Econ. Daily News, Oct. 29, 1989, at 2. Trade talks on currency appreciation have been extremely sensitive and secretive so as to avoid market speculation expectations beforehand.

70. See Liu, Financial Reform in the ROC, supra note 7, at text accompanying n.56.

71. Id. at text accompanying nn.81, 85. Inward remittance limit was first set at U.S. $50,000 per person per year, and has been increased to U.S. $500,000 per person per year. Outward remittance limit is U.S. $5 million per person per year.

72. See Liu, Financial Reform in the ROC, supra note 7, at text accompanying n.120.

73. See Translation of U. S. Treasury Report on Taiwan’s Currency Conversion Rate, supra note 67.

74. The report also indicated that, if Taiwan's U.S. $2.5 billion of gold imports from the U.S. in 1988 were included as the basis for comparison, then the trade imbalance actually worsened by 13%. Id.

75. They include amendments to the Statute for Investment by Foreign Nationals and Regulations Governing the Review of Outward Investment and Outward Technical Cooperation. See Liu, Financial Reform in the ROC, supra note 7, at text accompanying nn.90-116.
G. Customs Valuation

The 1978 and 1979 trade agreements discussed above essentially obligated the ROC to adhere to certain rules governing customs valuation resulting from the Tokyo Round MTN. The GATT customs valuation code requires the use of transaction values, but, for convenience in administration and assurance of customs revenue collection, the ROC continued to use its tables for duty paying values in assessing ad valorem customs duties. As a result, the United States made a finding of violations of trade agreements and the USTR was directed to seek retaliations under section 301 of the 1974 Trade Act in August 1986.

The issue was quickly disposed of when the ROC agreed to cease the challenged practice by October 1, 1986. The U.S. subsequently terminated its investigations for retaliatory measures. On June 29, 1986, the ROC promulgated an amendment to its Customs Law to provide for true transaction values as the basis for customs valuation and eliminated any customs duty uplift.

H. Export Performance Requirement

As part of the ROC's Automobile Industrial Development Plan to develop further an automobile industry, foreign investors in the automobile industry were required, as an administrative matter, to meet certain export performance standards. The case in point was the ROC's approval of Toyota's investment application to set up a manufacturing subsidiary in Taiwan. The investment approval was granted on the condition that the production would gradually increase from 12.5% at the beginning to fifty percent by 1992. The USTR commenced an investigation in April, 1986 under section 307 of the 1974 Trade Act. Trade consultations were soon held, and the ROC agreed to forsake such a requirement for pending and future applications. It also agreed to overhaul its Automotive Industrial Development Plan by June, 1987 and to discontinue the Plan's export performance requirements retroactively. In return, the USTR closed the case.

76. See supra nn. 20, 22.
79. See Exchange of letters between Representative Konsin C. Shah and Chairman David Dean of the AIT (Oct. 24, 1979), supra note 22.
81. See Termination of Investigation: Export Performance Requirements in the Automotive...
I. Fishery Dispute

On August 24, 1989, the AIT and the CCNAA entered into a definitive Northern Pacific fishery agreement. The agreement avoided U.S. retaliatory measures such as restricting the U.S. $400 million's worth of annual fishery imports from Taiwan. The trade issue came about as a result of some Taiwan fishing boats catching salmon in total disregard of international fishery conventions. Significantly, the agreement granted U.S. coastal authorities parajudicial privileges such as visitation and inspection rights aboard ROC fishing vessels on the high seas, subject to prior notice and subsequent transfer of any incident of violation to the ROC authorities. These privileges generated heated debates in the press and among legislators. ROC negotiators also belatedly sought to add a third-party arbitration provision to the agreement, but failed to obtain it. Nevertheless, the national interest was thought served by having an agreement to reduce tensions in bilateral trade relations with the U.S.

J. Insurance

Taiwan's insurance market is still relatively untapped, and insurance was identified as one of the key American trade interests as early as the 1979 bilateral trade agreement. The MOF, therefore, adopted Measures for Screening and Approving the Establishment of Branches by United States Insurance Companies within the ROC in 1985 to implement the results of trade consultations since 1979. As amended in April, 1986 and October, 1987, the Measures provide for certain eligibility requirements to be met by American insurance companies. The ROC was able to set a quota in the Measures regarding the number of American insurance applicants; currently each year at most two American life and two non-life insurance companies will be


83. Id.


86. Id. Essentially, they must have at least N.T. $500 million (about U.S. $20 million) of paid-in capital, ten years of track record, a favorable business result equal to "class A" given by rating agencies for the year before the application, a clean record of not having been subject to regulatory sanctions in the U.S. for five years before the application, and experience in international insurance business.
licensed. There are now twenty-three domestic insurance companies (including fourteen property insurance companies, eight life insurance companies and one reinsurance company) and twelve American insurance companies (six of them are life insurance companies and the other six are non-life insurance companies).

The investment powers of these branches have been expanded recently. They now may invest in the listed stocks and bonds of ROC manufacturing companies for up to thirty-five percent of their funds and liability reserves. Because of limited space in Taiwan, American insurance companies' Taiwan branches have not been accorded full national treatment as far as real estate investment is concerned. But the Insurance Law will be amended in part to accommodate U.S. trade initiatives, such as creating mutual insurance companies as a new legal form of insurance company.

K. Intellectual Property Rights

The protection of intellectual property rights has always been one of the most important bilateral trade issues. Not merely limited to BTN by the executive branch, it has also involved coordination with the legislative and judicial branches of the ROC on the enactment, amendment, and enforcement of relevant laws. The 1988 Trade Act has placed even greater focus on the protection of intellectual property rights by foreign countries. As a result, strenuous efforts have been made to ensure American satisfaction. For example, the Executive

87. Id.
88. See Sze, Analysis of a Bill of the Ministry of Finance to Amend the Insurance Law, in SZE, INSURANCE LEGISLATIVE PRINCIPLES, supra note 45, at 139.
89. Regulations Governing the Investment in Securities by Overseas Chinese and Foreign Nationals and Remittance, art. 2.
90. See Chen, Salient Features of Amendment to the Insurance Law and Its Significance, in INSURANCE LEGISLATIVE PRINCIPLES, supra note 45, at 13. The former Director General of the MOF's Division of Monetary Affairs stated that during trade talks in Washington, D.C., the ROC expressed the view that such real estate investment powers should not be granted as Taiwan is only one-twentieth the size of Texas. Id.
91. Id. For a criticism, see Sze, Analysis of A Bill of the Ministry of Finance to Amend the Insurance Law, in INSURANCE LEGISLATIVE PRINCIPLES, supra note 45, at 140. For a general comparison of the ROC insurance law and American insurance law, see Kimball, Insurance Law in the United States and the ROC: A Brief Comparative Analysis in INSURANCE LEGISLATIVE PRINCIPLES, supra note 45, at 21.
Yuan announced an important policy statement on the protection of intellectual property rights on August 31, 1989. Within the cabinet's Sino-American Trade Task Force, a policy coordination subgroup has been set up. The BOFT has requested the Ministry of Legal Affairs, the Ministry of Interior [MOI], and the Government Information Office to provide statistics on the enforcement of intellectual property rights by the fifteenth of each month in order to forward them to the United States. Enforcement staff at the MOI and the BOFT will be expanded, as will the National Anticounterfeiting Committee. Starting from 1990, textbooks for elementary schools and junior high schools will contain lessons intended to emphasize the importance of the protection of intellectual property rights. In a circular letter dated August 1, 1989, the Judicial Yuan of the ROC requested that various courts review the seriousness of violations in infringement cases so that the punishment will provide adequate disincentives, that special tribunals be established or judges be assigned for infringement cases, and that judges follow deadlines for speedy trials.

1. Copyright Protection

Copyright issues involve the publishing business, computer companies, motion pictures, and Taiwan's need to obtain new information through translating foreign work. Indeed, the stakes are high. As the result of a series of BTN's, the ROC completely rewrote its Copyright Law in 1985. The 1985 law remedied many of the problems under the prior law. For example, computer programs were made specifically subject to copyright. A foreign person or company holding an ROC copyright could bring a private criminal prosecution in ROC courts even though it has not been recognized to do business in Tai-

94. Id. For example, from January, 1989 to August, 1989, a total of 2270 cases were subject to police investigations for criminal prosecution, including 28 cases involving American owners of intellectual property rights, 76 cases involving European owners, 16 cases involving Japanese owners, and 2149 cases involving ROC owners. Of them, 2268 cases were prosecuted, including 16 cases involving American owners, 76 cases involving European owners and 16 cases involving Japanese owners. Id.
95. Id.
96. Id.
97. For example, during the first eight months of 1989, the Government Information Office, the Taiwan Provincial Government, and the Taipei and Kaohsiung City Governments conducted investigations on MTV parlours on 4,197 occasions, on videotape leasing outlets on 1,143 occasions, and on other premises on forty-nine occasions. 36,156 videotapes copying Taiwanese-made films, 4148 videotapes copying Western-made films and 23,475 videotapes copying Japanese films were seized. Id.
98. Copyright Law, art. 4(1)(xiv).
Foreign authors could seek ROC copyright registration based on first publication in Taiwan or reciprocity. As a result of pre-emption under the FCN treaty, American authors are not even subject to this requirement. The 1985 Copyright Law also provides for the seizure of infringing products and has increased penalties for violation up to a minimum prison term of three years. It allows damages to be assessed on the basis of both loss of profits to copyright owners and illegal gains to infringers, and provides for minimum damages at 500 times the retail value of the infringed articles.

Continuing trade consultations also led to the initialing of an agreement on July 14, 1989 by the AIT and the CCNAA on the protection of intellectual property rights. The agreement will include translation and similarly derivative works and the term of protection will be fifty years. There also will be retroactive protection (excepting translation rights) for works completed since 1965. Translation rights, which have not been protected as a result of an exception to the FCN Treaty, but which have been a controversial issue, nevertheless will be granted but made subject to compulsory licensing. The ROC also agreed to add the definition of “public” displays in a bill to amend the 1985 Copyright Law. The agreement is expected to be signed after the bill is enacted.

On August 24, 1989, the ROC’s Executive Yuan approved a bill to amend the 1985 Copyright Law to expand the definition of “public” display or performance and broaden the definition of infringement to include duplications such as public displays, performances or screenings. As a result of an ultimatum from the USTR in late October, 1989, the ROC agreed to revise the bill so that infringement could be found regardless of whether the infringer seeks profit from such duplication. In response, the USTR removed Taiwan from the priority watch list in its November 1, 1989 report required by “Special 301” of the 1988 Omnibus Trade Act. Instead, Taiwan was placed on the general review watch list.

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99. Id. art. 17.
101. Copyright Law, art. 38.
102. Id. art. 33.
103. See Agreement for the Protection of Copyright between the American Institute in Taiwan and the Coordination Council for Northern American Affairs, art. 19.
104. See From Intensive Care Unit to the General Ward, China Times (Chung Kuo Shih Pao), Nov. 2, 1989, at 10. The ROC will continue to negotiate on the “fair use” doctrine. Id. Placement on the priority watch list would have required improvement in three months to avoid retaliatory measures.
A further amendment to the Copyright Law is expected to be submitted in 1990 to the Legislative Yuan to expand the definition of editorial work (to include, for example, editing encyclopedias), remove the limitation on foreign authors' Chinese translation rights (but subject to compulsory licensing), relax the definition of "first publication in the ROC," extend protection to both foreign authors and foreign copyright holders, expand the doctrine of fair use, and remove the restriction that foreign works of authorship have to be registered in Taiwan in order to be copyrighted.

2. Patent Protection

The Patent Law was substantially amended on December 24, 1986, and incorporated many proposals brought out in BTNs on patent protection. Responding to American concerns, product patents on chemicals and pharmaceuticals and their use may now be granted; under the prior law only the manufacturing process could be patented. The amendment also provided for three alternative tests to determine damages for patent infringement: the traditional approach based on loss of profits and cost incurred, the restitution approach treating illegal gains as loss of profits, or awards assessed by the National Bureau of Standards. Significantly, the burden of proof in infringement cases involving process patents has been reversed.

Foreign patentees have also been granted access to ROC courts, even though they have not been recognized to do business in Taiwan. The amendment also authorized the establishment of special patent tribunals.

While the 1986 Patent Law has been largely satisfactory, there are ongoing discussions to enhance certain aspects of the law. They relate primarily to those provisions in the 1986 law that restrict patentability or the exercise of patent rights. It has been recommended that the reversal of burden of proof, for example, be expanded to in-
clude cases involving infringement by imported articles. It has also been suggested that article 68-1, added in 1986 to require compulsory licensing for failure to practice a patent, be relaxed so that importation and sale of patented products in an amount sufficient to meet the ROC's need will constitute proper working of the patent. Other suggestions have included extension of the term for pharmaceutical patents, deletion of the compulsory licensing requirement in article 42 relating to process patents, deletion of article 67 relating to the revocation of a patent for failure to practice it, and extending patent protection to microorganisms.  

3. Trademark Protection

Trademark protection was one of the trade issues identified early in the 1978 and 1979 trade agreements. As a result of further trade discussions, the Trademark Law was amended in 1983 and 1985. Added in 1983, article 62-1 extended trademark protection to unregistered but "world famous" foreign trademarks. This is a major breakthrough, as trademark protection in the ROC generally rests on registration, which is based on a first-come, first-registered principle. In addition, article 62-3 provides for seizure of infringing goods and article 62 provides for a five-year maximum prison term.

In the same spirit, the 1985 amendment revised Article 66 to grant all foreign owners of ROC-registered trademarks access to bring civil actions and criminal prosecutions in ROC courts, even though they have not been recognized to do business in Taiwan. Significantly, article 64 was also amended to provide for statutory damages between 500 to 1,500 times the value of the infringed products, substantially reducing the burden of proof for trademark owners. Indeed, hefty damages in the order of millions of dollars have been awarded, a notable phenomenon in a civil law jurisdiction where judges are conservative in such assessments. Following a further amendment in May, 1989, foreign trademark owners who first used a trademark which was subsequently registered by others in Taiwan may now lodge an opposition action as interested parties on the grounds of the registrant's misleading the public. Circumstances authorizing the seizure of infringing goods have also been expanded.  

113. Id. at 1 et seq.
115. See Board of Foreign Trade, ROC's Determination to Eradicate Counterfeiting and Current Accomplishments 9 (July 1986). The award of N.T. $82,580,000 in this case translates into more than U.S. $3 million.
116. Trademark Law, arts. 46, 52.
117. Id. arts. 62-63.
One of the ROC's commitments in its 1979 trade agreement with the United States was preventing the export of counterfeit goods from Taiwan. In April, 1981, the BOFT issued the Regulations Governing the Prevention of Trademark Counterfeiting and False Marking of Place of Origin.\footnote{118} Essentially, unless an exporter can demonstrate the right to use a trademark in the country of destination with respect to trademarked goods, he will not obtain the export permit for the exportation of such goods. Amazingly, these regulations practically provide for extraterritorial applicability of section 337 of the 1974 Trade Act,\footnote{119} with the BOFT instead of U.S. Customs being the enforcement authority.

4. Fair Trade Law Draft

As a natural crossover from the protection of intellectual property rights, unfair competition laws prohibiting trade libel, misappropriation of and the passing off of trade secrets were discussed in BTN's between 1985 and 1986. A Fair Trade Law draft was then adopted in 1986 for legislative debate. However, as an omnibus legislation that will also provide for antitrust rules, the Fair Trade Law draft generated enough controversy to be bogged down in the ROC's Legislative Yuan.\footnote{120} Indeed, American pressures for its passage may backfire insofar as U.S.-invested businesses in Taiwan will be subject to the antitrust rules in the Fair Trade Law draft.

L. Labor Affairs

The 1984 Trade Act specifically acknowledges foreign labor practices as a keen American trade interest, insofar as they affect the perceived competitiveness of foreign goods in the U.S. market. The Act ties the American evaluation of foreign workers' rights to the continuation of the Generalized System of Preferences [GSP] for imports from a particular country.\footnote{121} On May 12, 1986, the AIT and the CCNAA entered into a set of Guidelines for A Cooperative Program in Labor Affairs.\footnote{122} Under the pretext of enhancing "commercial, cultural and other relations," the Guidelines enabled the U.S. Department of Labor, as a "consultant" to the AIT, and the Ministry of

Interior (MOI), as an “affiliate” of the CCNAA, to increase contacts and cooperation between the two parties’ labor personnel. The types of cooperative activities include exchange of information such as publications, visits, seminars, workshops, and research. The initial areas of cooperation include topics such as vocational training, employment service, occupational safety and health, mine safety and health, and labor statistics.

Compared to other topics of American trade interest, the AIT apparently has been more tacit in voicing American concerns with the labor practices in Taiwan. There may be several reasons for this caution. First, labor matters are the internal matters of another country. Second, recent political developments in Taiwan have had much to do with the emerging labor movement. Third, the ROC enacted a Basic Labor Standards Law [BLSL] in 1984, which has been applied to the manufacturing sector of the economy. The BLSL provides for substantive labor requirements such as compulsory retirement fund and severance fund contributions, limitations on terminable-at-will employment contracts, occupational safety requirements, and wages. Arguably, the corpus of labor legislation in the ROC is at times more stringent than American labor laws because of substantive requirements such as those under the BLSL.

M. Machine Tools

A voluntary restraint agreement (VRA) was entered into between the AIT and the CCNAA on December 15, 1986, governing the export of machine tools, another example of a successful ROC industry attracting protectionist sentiments in the United States. The VRA limited the market share of Taiwan’s machine tool exports to the United States under a licensing system until the end of 1991. Talks, however, could begin pursuant to the agreement, which permitted review after three years.

N. Rice Exports

Rice has been a staple on Chinese farms. In the transition from an

123. Id. at 410, 411.
124. Id. at 411, 412.
125. Rather, Taiwan’s labor legislation is perhaps more analogous to Japanese labor laws. For a U.S.-Japan comparison, see W. GOULD, JAPAN’S RESHAPING OF AMERICAN LABOR LAW (1984).
127. Id. at 446, 447.
agrarian society to an industrialized economy, Taiwan found that its rice production exceeded demand in the domestic market. In 1984, the U.S. Rice Millers' Association lodged a complaint alleging subsidized rice exports from Taiwan that led to BTNs. As a result, the CCNAA and the AIT entered into an agreement to limit the quantity and markets for Taiwan's rice exports through 1988.129 Under the agreement, Taiwan could only export rice to countries with less than U.S. $795 of per capita income.130 Ironically, the series of letters constituting the agreement also contain a reaffirmation of Taiwan's "Buy American" policy, including the purchase of U.S. grains.131

O. Securities

The ROC began to internationalize its securities market in 1983, when the government adopted a three-stage plan.132 As a first step, four mutual fund management companies were allowed to be set up as international joint ventures. These companies included leading American banking and securities firms as their shareholders.133 Each of the companies has set up a much sought-after mutual fund for foreign investors to invest indirectly in listed stocks on the Taiwan Stock Exchange.134

When a major amendment to the Securities and Exchange Law [SEL] was enacted in 1988, care was taken to ensure that foreign securities firms could set up operations as partially-owned subsidiaries or branches. American and other foreign securities firms have been able to occupy a significant minority position in integrated securities houses.135 In mid-1989, regulations were adopted to allow three world-class securities firms to apply to set up a branch in Taiwan each year to engage in the brokerage business; two of the three applicants for 1989 are American securities firms.136

The Banking Law amendment of 1989 will enable foreign banks to set up trust departments.137 As the trust departments of most ROC

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130. Id. at 335.
131. Id. at 340.
132. See Liu, Financial Reform in the ROC, supra note 7, at text accompanying note 160.
133. Id. at n.163.
134. Id. at n.164. Subsequent steps were postponed as a result of bulging foreign exchange reserves and the inflationary pressure that will result from allowing more passive investment funds to come into Taiwan. Id. at text accompanying note 161.
135. Id. at text following note 232.
136. Id. at text following note 242.
137. See Liu, Financial Reform in the ROC, supra note 7.
commercial banks have been licensed as securities firms under the SEL, foreign banks may also set up trust departments, through which they may then seek licensing as securities firms.\textsuperscript{138}

P. \textit{Shipping and Transportation}

A series of technical talks between the CCNAA and the AIT on shipping issues were held in November, 1986, April, 1987, and September, 1989. As a result of the April, 1987 meetings, U.S. carriers now may have their branch offices licensed to do business as container terminal operators or as sea cargo forwarders and U.S. shipping may be licensed to conduct similar business in Taiwan as well.\textsuperscript{139} The AIT also expressed concern with matters such as the reasonableness of the rental payments for harbor space leases and the permission for U.S. carriers to own and operate trucking services for land transportation of containers as part of the intermodal movement of cargo. Although the ROC's National Highway Law prohibited such foreign trucking services, the CCNAA agreed to consider a legislative amendment authorizing such foreign services, provided that certain conditions based upon the ROC's police powers were met.\textsuperscript{140}

In the BTNs, the CCNAA also voiced concerns about various matters, including the perception of the U.S. Federal Maritime Commission's investigation of the ROC's national carriers as retaliatory, and the difficulty faced by ROC carriers' employees in securing visas from the Immigration and Naturalization Services.\textsuperscript{141}

Q. \textit{Tariff Reductions}

Tariff reductions have been a major item of discussion in every BTN. Since 1971, the ROC has revised its tariff schedules almost twenty times to reduce tariffs, whether as a result of BTNs with the United States or unilateral concessions.\textsuperscript{142} In all cases, one policy goal has always been to cut tariffs on those items which will make U.S. goods more competitive. The average effective duty rate was reduced

\textsuperscript{138} The Foreign Banks Regulations will have to be amended first. See text following note 56.


\textsuperscript{140} \textit{Id.} at 427. They include the application of expropriation and other measures in cases of national emergencies, security inspection, taxation, tariff regulation, and other requirements applicable to domestic operators.

\textsuperscript{141} \textit{Id.} at 431.

\textsuperscript{142} See TRADE RELATIONS, supra note 1, at 6.
from 14.4 percent in 1971 to 6.9 percent in 1987. By early 1989, it had been reduced to 5.66 percent, not much higher than the prevailing rate in other industrialized countries. The ROC has adopted a plan to further reduce tariffs so that by 1992, the average effective rate will have been reduced to 3.5 percent.

R. Technology Transfer

The urge to diversify its exports and explore new frontiers in trade have led Taiwan to newer markets. For example, Taiwan is now seeking to expand its new trade frontiers to include the Eastern Bloc and certain other socialist countries. Technology exports from Taiwan, therefore, have become an American trade and strategic concern. Recent trade consultations between the AIT and the CCNAA concluded that formal BTNs on the control of Taiwan's export of technology and technological products will commence by May, 1990. The U.S. claimed that an agreement on such control will make American technology, and even technology from member countries of the Coordinating Committee on Export Controls (COCOM), more accessible to Taiwan's companies. Still the ROC is rightfully concerned that such strategic controls do not become trade barriers; technological products have become the most important exported items from Taiwan, which now needs to penetrate new markets to diversify its exports.

It is expected that a control agreement will be concluded, and that the ROC position will seek to minimize the agreement's adverse effect upon its technology industry. In fact, the proposed Trade Law draft already contains a provision authorizing the BOFT to regulate the export of technology and technological products. However, public opinion in Taiwan remains negative because of the perception that the agreement will result in net disadvantages to Taiwan.

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143. Between 1985 and 1987, tariffs on 4,727 items were cut and in February 1988, tariffs on 3,523 items were slashed again. Id.
144. Id. at 7.
145. COUNCIL FOR ECONOMIC PLANNING AND DEVELOPMENT, DETAILED ACTION PLAN FOR STRENGTHENING ECONOMIC AND TRADE TIES WITH THE UNITED STATES 12 (Mar. 1989) [hereinafter ACTION PLAN].
150. See Draft Trade Law, art. 27; see also Econ. Daily News, Nov. 24, 1989, at 7.
U.S.-Taiwan Trade

S. Textiles

Textiles have been one of Taiwan’s leading export items. Therefore, it is not surprising that textiles have been subject to extensive voluntary restraint agreements between the AIT and CCNAA since the early 1980’s. Suffice to state that the adverse impact of such quotas on consumer welfare has been well demonstrated. The most recent textile agreement will expire by the end of 1989, and three rounds of negotiations to extend it have already been held. The third round, like the two before it, also ended in a stalemate. Disagreement centers on the American demand to slash the quota by twelve percent. This reduction would seriously affect apparel, the most competitive category of Taiwan’s textile exports.

IV. Issues and Prospects of Bilateral Trade Relations and Economic Liberalization in Taiwan

A. From Reactivism to Proactivism

U.S. trade demands have been considered incessant in Taiwan. Still, the ROC understands that reciprocal trade relations are an important element of an amicable overall relationship and that as long as the trade imbalance cannot be corrected, it will have to deal with American trade pressure. Trade adjustment is a difficult process for Taiwan, especially when many issues, such as labor movements, social welfare issues, environmental issues, and further political developments, have all converged at the same time to compel its transformation. Therefore, BTNs have been marked by emotional and confrontational occasions. The beer, wine, and tobacco issue represented such an incident, as well as a watershed in bilateral trade relations.

The American government was accused of being pressured by the tobacco lobby in Washington, D.C. to push cigarettes to Third World countries, including the ROC. Analogies to the Opium War were readily made. American businesses already operating in Taiwan were


155. See text accompanying notes 61-64.
chagrined that, of all American products, cigarette exports occupied a disproportionately important position among American trade priorities toward Taiwan. There was fingerpointing on the other side, too; the ROC government was accused of unnecessarily inciting Taiwanese public opinion and having less than clean hands in maintaining the monopoly system and the TTWMB, itself a cigarette producer.

The beer, wine, and tobacco experience exposed the unfairness of unilateral trade measures such as section 301 of the 1974 Trade Act; the Americans made the rules, acted as judges, and sought to enforce the judgment, too. Similarly, the role of the ROC government in the sale and distribution of these products also spurred outcries for privatization and the restructuring of TTWMB into a privately held company. Since the U.S. will only intensify its use of unilateral trade retaliatory laws in the future, the ROC in recent years has gradually realized the importance of becoming more proactive in dealing with American trade initiatives and readjusting its domestic economy.

One example of this proactive approach is the Detailed Action Plan for Strengthening Economic and Trade Ties with the United States ["Action Plan"]. Admittedly, the specter of further protectionist pressure following the 1988 Trade Act prompted the Action Plan. The ROC, however, has set forth in the Action Plan not only short-term responses to U.S. trade initiatives, but also means and schedules for long-term adjustment of the entire economy as a part of its trade policy toward the United States. The Plan will seek comprehensive solutions to bilateral trade issues, rather than piecemeal resolution of individual difficulties.

Reflecting such a proactive trade policy, the Action Plan boldly sets forth quantitative goals to be reached; the ROC is committed to the aim of reducing its total trade surplus from ten percent of the GNP in 1988 to four percent of the GNP by 1992, and reducing its trade surplus with the United States by ten percent each year. The Plan will also strive to reduce the proportion of exports to the U.S. to about one-third of its total exports. It will continue to implement the tariff reduction program, focusing on categories in which American products are more competitive or in which the United States has

156. For a journalistic critique of the ROC's trade reactivism, see Com. Times, Nov. 12, 1989, at 3.
157. See ACTION PLAN, supra note 145, at 12.
158. See id. at 1.
159. Id.
160. Id.
161. Id. In 1988, exports to the United States represented 38.7 percent of the total exports. See FOREIGN TRADE DEVELOPMENT, supra note 2.
expressed an interest.\textsuperscript{162} By 1992, the average effective duty rate will be reduced to 3.5 percent from the 1988 average rate of 5.66 percent and the average nominal rate will be reduced to 7 percent from 12.6 percent in 1988.\textsuperscript{163} Because adjustment in the agricultural sector is more difficult and politically more sensitive, the average nominal tariff rate on agricultural products will decrease by 1992 only to 19.82 percent compared to 5.02 percent for industrial products.\textsuperscript{164}

To diversify its export markets and reduce the share of its American exports relative to its total exports, the ROC has to expand its European trade. Some improvements have been shown; the absolute volume of its European trade has grown over the past decade.\textsuperscript{165} The past ten years also saw the ROC's European trade, as a percentage of total trade, decline for the first half of the decade but recover and increase in the second half.\textsuperscript{166} According to one informal source, the ROC should also be able to meet its Action Plan goal of reducing its trade surplus with the United States by ten percent in 1989.\textsuperscript{167} Nevertheless, the ROC will face the formidable task of achieving the same performance in the coming years, especially if the European Economic Community, which represents most of Taiwan's European trade, develops by 1992 into a Fortress Europe with which Taiwan has fewer ties.

Market opening is a central theme of the Action Plan. In addition to continuing the review of various import practices which have been challenged as restrictive, the Plan will implement an overhaul of the import system. For example, the ROC will introduce a simplified import procedure by establishing a "Negative List" designed to add greater transparency to its import regulatory framework; only those sectors on the Negative List, promulgated by the ROC authorities, will be subject to the import licensing requirement.\textsuperscript{168} For the first time, a Trade Law will be enacted to regulate the ROC's international

\textsuperscript{162} See Action Plan, supra note 145, at 1.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 3, 12.
\textsuperscript{165} In 1979, such trade was only about U.S. $4 billion, including U.S. $1.7 billion of imports and U.S. $2.3 billion of imports. By 1988, total ROC-European trade had reached U.S. $17.8 billion, including U.S. $7.9 billion of imports and U.S. $9.8 billion of imports. See Euro-Asia Trade Organization, Economic Progress & European Trade of Republic of China 1989, at 4 (1989).
\textsuperscript{166} Id. at 7. The ten-year scale from 1979 to 1988 was as follows: 13\%, 12.6\%, 11.1\%, 11.4\%, 11.1\%, 10.4\%, 10.7\%, 12.5\%, 14.9\% and 16.2\%.
\textsuperscript{167} See Com. Times, Nov. 12, 1989, at 3 (Assuming the same trend for the last two months of 1989, this article suggests that the trade imbalance will decrease in 1989 by 10.1\%, given the fact that the first ten months of 1989 registered a U.S. $11.3 billion trade surplus).
\textsuperscript{168} See Action Plan, supra note 156, at 3.
trade practices in accordance with reciprocity and GATT principles.\textsuperscript{169}

Realizing the ramifications of U.S. trade actions and the powerful political sentiments resulting from the bilateral trade imbalance, the ROC has gone out of its way to correct the imbalance. It has done more than initiate tariff reductions and the removal of non-tariff barriers. It has promoted a consistent "Buy American" policy by deliberately favoring American firms where possible. For example, it has dispatched purchasing missions to the United States at least once a year.\textsuperscript{170} The ROC also pays the rental cost of the American Trade Center [ATC] in Taipei and actively sponsors U.S. import exhibitions and product shows.\textsuperscript{171}

One of the most important consequences of the U.S. trade initiatives toward Taiwan has been the ROC's commitment to adjust its economic policies and measures. Taiwan's huge trade surplus and foreign exchange reserves actually represent an inefficient use of resources and require remedy through economic liberalization.\textsuperscript{172} As part of the remedy, public investment in the infrastructure will be increased. Social, medical, recreational, and welfare programs will be expanded, and efforts will be made to increase domestic demands and control pollution.\textsuperscript{173} American trade pressures have compelled ROC policymakers to redefine economic growth and proactively reset their priorities. Over the long term, these American trade initiatives should improve the competitiveness of Taiwan's products.

\section*{B. From Participant to Referee}

Another important consequence of American trade initiatives to-
ward Taiwan has been their impact on the role of the government, particularly the executive branch. Although government intervention in Taiwan is much less than in South Korea and Japan, the ROC government still has actively participated in the domestic economy. Its economic policies have also established a pervasive regulatory framework. As trade represents a significant part of the country's GNP, trade liberalization necessarily means domestic liberalization. As a result, the government's role is also gradually changing from an active participant to a neutral referee to ensure that market forces will be at work.

One indication of the gradual change in the government's role is the plan to privatize state-owned enterprises. Although the Action Plan asserts that state enterprises' investment in fixed assets will gradually increase from 4.4 percent of the GNP in 1989 to 4.9 percent of the GNP by 1992, the plan is actually intended to encourage investment by the private sector.\textsuperscript{174} The Action Plan regards the privatization program as a means of achieving several policy goals, such as stabilizing the overheated securities market while at the same time financing various public welfare programs with privatization proceeds.\textsuperscript{175} Presently, this privatization program includes the three major state-owned commercial banks and nineteen other state-owned enterprises. In addition, nineteen other enterprises are also being reviewed for privatization possibilities.\textsuperscript{176}

To implement such a change in the government's role, a whole host of existing laws and regulations had to be amended, including the SAFE, SEL, Banking Law, Insurance Law, Copyright Law, Trademark Law, Patent Law and the Statute for Investment by Foreign Nationals. Similarly, new laws and regulations, such as the Fair Trade Law, the Consumer Protection Law,\textsuperscript{177} the Labor-Management Dispute Resolution Law,\textsuperscript{178} and Trade Law were needed to implement the new economic policies. Therefore, this economic reform will also lead to an eventual transformation of the legal horizons in the Republic of China. Two examples are illustrative: the emerging trade laws and the wider distribution of government powers over trade-related matters to the legislature and the judiciary.

In addition to the proposed Trade Law, the Customs Law already

\textsuperscript{174} Id. at 7.  
\textsuperscript{175} See id. at 8.  
\textsuperscript{178} Id. at 160.
provides for antidumping and countervailing duty relief. The Ministry of Finance (MOF) has also promulgated the Implementing Regulations for the Assessment of Antidumping and Countervailing Duties. Given the tariff reductions in recent years, the likelihood has increased that foreign imports will be sold into Taiwan at less than their fair value or will be subsidized. Several MOF investigations have already begun. However, no assessments have been made because such decisions are subject to the discretion of the ROC's Executive Yuan, which has been concerned with the possible response of Taiwan's trading partners. If the ROC is able to narrow the trade imbalance with most of its trading partners and to expand its diplomatic and de facto relations, then the enforcement of the trade laws will intensify. Similarly, the Fair Trade Law draft and the Trade Law draft both contain rules governing fair competition. Accordingly, one expects to see the government changing its role to that of a neutral arbiter in a competitive market. As this dispute resolution framework is being formed, government discretion will be reduced gradually and the decision-making process made more transparent and legalistic. The government will behave differently.

Change in the government's role will affect the equilibrium among the executive, legislative and judicial powers. Increased political participation and economic liberalization in recent years have gradually tipped the balance in favor of the legislature and the judiciary. The ROC's Legislative Yuan has been particularly vocal with respect to trade issues and jealous of the Executive Yuan's monopoly over the handling of the ROC's trade relations. One indication of the legislative uneasiness and activism is article 8 of the Trade Law draft. Where trade negotiations and agreements necessitate amending existing laws, article 8 will require that such trade agreements not become effective as binding municipal laws until the legislative process is completed. This new provision would reverse a recent trend whereby trade agreements concluded by the ROC's executive branch will or would take precedence over inconsistent domestic legislation. Similarly, when trade and economic issues become more legalistic, the judiciary will play a more prominent role.

C. Multilateralism, Bilateralism and Unilateralism

The United States largely has taken a multilateral approach in

179. See Customs Law, arts. 46, 46-1, 46-2, 47.
181. See cases and copyright rulings cited supra notes 13 and 100.
trade initiatives. As a non-GATT member that follows GATT principles, the ROC will have to extend concessions to other trading partners whenever such concessions are made to the United States. In the ROC, multilateralism means unilateral concessions to multiple trading partners without reciprocal concessions. Moreover, as far as the majority of its trading partners are concerned, the ROC's trade relations are bilateral at best; some trading partners such as the EEC would simply piggyback on American trade initiatives. When the United States uses section 301 as a threat of retaliation, the trade relationship is actually unilateral; the U.S. dictates what it wants. Accordingly, GATT re-entry has become a major trade policy objective of the Republic of China. The government announced on January 4, 1990 that it had applied for accession to the GATT with its Secretariat under the name of the customs territories of Taiwan, Pescadores (Peng-Hu Islands) and Quemoy (Kingmen and Matsu Islands).

Taiwan's trade initiatives toward the United States in the BTN's have not resulted in much affirmative response. For example, the ROC has argued for years that pursuant to the spirit of the 1979 trade agreement, a mechanism for the settlement of trade disputes should be established. Thus far, the United States has not been responsive to this request. One does not see any technical issues that will prevent the creation of such a mechanism. Quite to the contrary, examples of such bilateral trade dispute resolution mechanisms abound. One recent example is the bi-national trade arbitration panel between the United States and Canada which was part of the U.S.-Canada Free Trade Area [FTA] Agreement. Ironically, American intransigence on a simple notion of fair play and due process as reflected in the American position on a dispute resolution mechanism is flatly repugnant to its own clarion call for "a level playing field."

Another ROC aspiration based on bilateralism is to conclude an FTA agreement with the United States. This task is more formidable than seeking to establish dispute resolution mechanisms; it seeks to address all substantive trade issues at one time. The ROC has devoted much effort to persuading American policy makers and influencing

183. For the 1979 trade agreement, see supra text accompanying note 22; see also Action Plan, supra note 145, at 10.
American public opinion. The Action Plan suggests that the ROC will continue to pursue the FTA proposal with the United States. In contrast to its proposal for setting up dispute resolution mechanisms, Taiwan's FTA proposal has already received some attention from the executive branch of the United States and the International Trade Commission [ITC], which submitted a report [FTA Report] in compliance with a Congressional request on the pros and cons of concluding FTA agreements with Taiwan, South Korea, ASEAN countries, or the Pacific Rim countries in general.

The FTA Report, however, is nothing but an assemblage of submitted comments arguing for or against concluding FTA agreements with the United States' trading partners in the region. In short, the Report concluded that an FTA agreement with the ROC would have many advantages. First, it would avoid a piecemeal approach to handling trade disputes. Second, it would add more predictability and less acrimony to the bilateral trade relations. Third, it would help rectify the bilateral trade imbalance. Fourth, it would grant the U.S. exclusive and yet GATT-consistent trade benefits in a market where competition with Japanese firms has been keen. Fifth, U.S. imports would gain greater access to Taiwan at a relatively low cost, in light of the favorable position enjoyed by U.S. firms in such a regional market. Sixth, it would create a necessary forum for BTN's with Taiwan, which is not a GATT member.

The FTA Report also listed several perceived disadvantages of an FTA agreement with Taiwan. First, it is unnecessary since the current approach is already effective in persuading the ROC to make trade concessions. Second, an FTA agreement with Taiwan would not end bilateral trade issues. Third, concluding such an agreement would enable Taiwan to seek an exception to section 301 actions or special treatment in antidumping and countervailing duty cases. Fourth, the negotiating process would be long and difficult. Fifth, it would provide only limited benefits to American firms as Taiwan's market is relatively small. Sixth, both sides would want to make exceptions to certain sensitive sectors (such as agricultural products by the ROC and footwear and textiles by the United States). Finally, the FTA Report suggested that Taiwan's real motivation could be to seek de facto

186. ACTION PLAN, supra note 145, at 10.
187. 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, USITC Pub. 2166, Inv. No. TA-332-259 (Mar. 1989) [hereinafter FTA Report].
188. Id. at vi.
diplomatic recognition and questioned the availability of legal means to enter into negotiations with Taiwan.\(^{189}\)

To be sure, Taiwan would receive both political and economic gains by concluding an FTA agreement with the United States. *De facto* diplomatic recognition, however, could not be one such gain because the Executive branch of the American government has recognized the PRC. Meanwhile, the American judiciary has already granted *de facto* judicial recognition to Taiwan under the Taiwan Relations Act.\(^{190}\) Signing an FTA agreement, therefore, should not add or subtract anything from this judicially recognized relationship. In addition, the TRA essentially requires Taiwan to be treated as a country for the purposes of U.S. law.\(^{191}\) Therefore, negotiating an FTA agreement with Taiwan should not pose more legal obstacles relative to other BTNs. In fact, questioning the validity of an FTA agreement runs directly counter to the multitude of trade and other agreements already concluded between the AIT and the CCNAA since the passage of the TRA in 1979.

Disappointingly, the FTA Report failed to weigh the advantages and disadvantages of concluding such an agreement. Furthermore, some of the disadvantages listed in the FTA Report do not even persuade this author. For example, one questions the wisdom of recommending against an FTA agreement merely because "it would not end trade disputes."\(^{192}\) That argument flies in the face of the U.S.-Canada FTA Agreement, which has a dispute resolution chapter. One of the goals of an FTA agreement is to resolve disputes; no trade agreement or trade legislation can ever prevent bilateral trade issues from arising. This line of argument is viciously circular and totally unpersuasive.

The argument that an FTA agreement would exempt Taiwan from certain special provisions of the U.S. trade laws is also circular and unpersuasive. First, the existence of an FTA agreement does not mean imports will be entirely exempt from these trade laws. It would only provide certain procedural safeguards. By presenting this situation as a disadvantage, the FTA Report is really suggesting that trade legislation should be preserved or applied in such a way so as to prevent free trade.\(^{193}\)

\(^{189}\) Id. at vi-vii.

\(^{190}\) See cases cited, *supra*, notes 14, 30.


\(^{193}\) Id. at 1-8, 1-9. In fact, the FTA Report concedes that "Taiwan might not seek exemption to section 301 since presumably the FTA would eliminate the barriers that 301 normally fights." Id. at 1-9.
Equally unpersuasive is the argument that the benefits of an FTA agreement would be limited due to the small size of Taiwan’s market. The FTA Report stated: “To support this view, [some U.S. trade officials] pointed to the relatively small size of Taiwan’s market (twenty million) and said that many areas of interest to the United States — such as agricultural products and services — would most likely be exempted, at least initially, from an FTA.¹⁹⁴

When market access is the issue, Taiwan’s huge foreign exchange reserves are mentioned instead of its small population.¹⁹⁵ The actual record of increased market-opening in the agricultural and services sectors also refutes the wisdom of this argument. Trade in agriculture and services is being liberalized. Finally, one should not lose sight of the fact that a ten-year program was contemplated under the U.S.-Canada FTA Agreement to gradually phase in an integrated FTA arrangement.

The real “disadvantage” of an FTA agreement with Taiwan was not touched upon in the FTA report since the ITC is not the appropriate agency to address this issue. Simply stated, from the American perspective, the real disadvantage resides in the possible adverse consequences of antagonizing the PRC.¹⁹⁶ Admittedly, the Tiananmen military crackdown in June, 1989 has strained U.S.-PRC relations. But it remains to be seen how international politics instead of fundamental economics will affect the feasibility of an FTA agreement between the United States and Taiwan.

While the ROC will continue to pursue the FTA proposal with the United States, it has recently intensified its efforts to rejoin the GATT.¹⁹⁷ The BOFT is drafting a memorandum on the trading system of Taiwan as well as other documents for GATT application and efforts have been made to seek the support of industrialized nations such as the U.S., EEC, Japan, Australia, and New Zealand.¹⁹⁸ The Action Plan specifically requests the United States to support the ROC’s “participation in international economic and trade activi-

¹⁹⁴. Id. at 1-10.

¹⁹⁵. The U.S. is rumored to have requested that Taiwan participate in the Brady Plan to resolve the Third World debt crisis. The ROC is rumored to be receptive to the proposal and there have been speculations of contact with Latin American authorities already. See United Evening News, Nov. 11, 1989, at 2.

¹⁹⁶. A seasoned trade practitioner and former USTR official has suggested that a rigorous analysis of the advantages and disadvantages of an FTA arrangement will not be made until the political decision is made. See Remarks of Herbert Shelly in NEW STRATEGY, supra note 185, at 9.


¹⁹⁸. Id.
ties." The ROC is prepared to offer quid pro quo and fulfill its international obligations as a maturing trading partner. Again, decisions will not be made on the basis of economic and reciprocal principles alone.

Political issues relating to the GATT application will have to be addressed first. The PRC's position and reactions of other countries will be important factors. The fact that GATT contemplates customs territories and not necessarily sovereignty as a standard for accession may be advantageous to Taiwan. In any event, continued implementation of Taiwan's trade and economic liberalization program will enhance its possibility of being admitted. Such a program and economic assistance provided to its trading partners should also improve its external relations over the long term.

Similarly, one should not discount the significance of unilateral trade "concessions" resulting from the ROC's adjustment of its economy and trade policies. Without incentives such as an FTA agreement with the United States or accession to the GATT, the economic adjustment process could proceed at a slower pace. As shown above, however, the adjustment now is not merely a response to appease trading partners such as the United States. Instead, Taiwan has discovered the benefits of affirmatively seeking such adjustment as a means of upgrading its industries and enhancing their international competitiveness.

D. Concerns for Dangerous Tendencies

Trade has to be a two-way relationship. As the party that has enjoyed a huge trade surplus with the U.S., Taiwan understands this relationship and, consequently, has been receptive to American trade initiatives. Perhaps the same reason explains why Japan, which in turn enjoys a huge trade surplus with Taiwan, has been relatively reticent about the ROC's trade measures that often favor American firms at the expense of Japanese firms. Meanwhile, the nature of ROC-U.S. trade relations has become more legalistic in recent years. Examples include issues involving intellectual property rights; market opening measures such as securities, insurance, and banking; and export control measures such as the proposed technology export controls. Therefore, one cause for concern is the lack of any procedural framework governing the resolution of substantive trade issues.

199. See ACTION PLAN, supra note 145, at 10.

200. One example is that an Overseas Economic Cooperation and Development Fund with a budget of N.T. $30 billion (about U.S. $1.2 billion) has been earmarked for providing financial assistance to developing countries in the development of their economies. Id. at 6.
This concern explains why ROC trade negotiators have persistently requested their American counterparts to set up dispute resolution mechanisms. If the U.S. believes its substantive trade initiatives are fair, then it should be prepared to permit an impartial procedural review of its claims of fairness when a dispute arises. Section 301 and the related retaliatory apparatus under American trade legislation should be examined in this light. One should find fault with section 301 not primarily because of its retaliatory nature or because its retaliation may aim at other sectors of the targeted economy. Instead, the cardinal fault of section 301 is that procedurally it makes U.S. trade negotiators both the judge and the jury.

Notions of fair play and procedural due process are not foreign to Americans. In fact, such notions have been constitutionally enshrined in their case law. To be sure, trade negotiations have never been exalted to a level demanding constitutional sanctimony. However, such procedural safeguards need not exceed those accorded under the GATT. These safeguards will also fill the void created by the difficulty in seeking dispute resolution in the International Court of Justice pursuant to article XXVIII of the FCN Treaty. The records examined in this article have shown both Taiwan's responsiveness to U.S. substantive trade initiatives and American footdragging on Taiwan's proposal for the establishment of a procedural framework. This phenomenon is a dangerous tendency in bilateral trade relations.

Another concern in the further development of bilateral trade relations relates to the high-handed approach with which the United States has sought to implement its trade benefits. One example is the tacit American pressure for more intensified judicial enforcement of the protection of intellectual property rights. The pressure has been such that the ROC's trade negotiators now have to provide monthly statistics of enforcement performance to their American counterparts and the ROC's judiciary has to request its judges to mete out more severe sentences in infringement cases. One should realize that the result of this anti-infringement campaign in the ROC is that judicial enforcement of intellectual property rights has improved. More importantly, in terms of both statistics and the prevailing mood in Tai-

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202. See GATT, supra note 15, arts. XXII, XXIII.

203. See text accompanying note 17.

204. A form of such pressure involves holding seminars on the protection of intellectual property rights for judges and prosecutors in Taiwan.

205. See text accompanying note 94.
It may be a legitimate exercise of American power to use its trade initiatives to influence the amendment of various intellectual property laws in Taiwan. In any event, the executive and legislative functions involved in such a process are more political in nature than the judiciary functions. However, the Taiwanese authorities will want to avoid any impression that American pressure has determined the appropriate level of judicial enforcement of intellectual property law in Taiwan.

V. CONCLUSION

During the past decade, U.S.-Taiwan trade volume and trade relations have rapidly expanded. For the most part, trade relations have been amicable. Even though the bilateral trade imbalance is largely a result of structural differences in the two economies, the ROC has set forth ambitious goals in its Action Plan to remedy the trade imbalance. Importantly, it has become widely accepted in Taiwan that economic liberalization and changing the role of the government in the economy should be goals of national development, rather than means of appeasing international protectionist sentiments. While the ROC should continue both to transform its economy internally and to respond simultaneously to substantive American trade initiatives, the United States should be more responsive to Taiwan's procedural trade initiatives as well. Although assisting Taiwan to rejoin the GATT and concluding an FTA agreement with Taiwan will require more effort and commitment, the U.S. can immediately embark on the less demanding task of providing for a bilateral forum for dispute resolution.

At the policy level, American trade initiatives will have far reaching impact on the transformation of Taiwan's economy. Likewise, laws and regulations enacted, amended, or adopted to implement results of the BTN's are already changing the contours of the legal horizons in Taiwan. In the long run, the ROC should emerge more competitive in the international marketplace. Since a pattern has already been developed for dealing with even the thorniest trade issues, one could be cautiously optimistic of the continued expansion of amicable and prosperous trade relations between the United States and Taiwan in the decade to come.

206. For statistics suggesting there are fewer infringement cases involving American owners, see supra note 94.