

The Taiwan Relations Act After Ten Years

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The Taiwan Relations Act¹ hardly had an auspicious beginning. The then Deputy Secretary of State was pelted with eggs, tomatoes, and stones when he traveled to Taiwan in December of 1978 to explain the United States (U.S.) plan for continuing "unofficial" relations with Taiwan in the aftermath of recognition of the People's Republic of China (PRC).² When the Carter administration sent its draft bill on Taiwan relations to the Congress, Senator Frank Church, then chairman of the Senate Foreign Relations Committee, characterized the plan as "woefully inadequate,"³ and that was one of the milder congressional reactions. After the Act was passed, the PRC minced no words in asserting that it "betrays the principles that have brought about the normalization of relations between China and the United States."⁴

Now that we have had more than ten years experience with the TRA, it is possible to draw some conclusions about whether the Act deserves abuse or praise. Part I of this article offers evidence that under the structures established by the Act, the Act's principal policies have been fulfilled; indeed, Taiwan has benefited from continued trade and other relations with the U.S. to a degree that probably could not have been predicted ten years ago. Part I is organized around three major areas with which the TRA is concerned: (a) commercial and similar relationships, (b) security, and (c) human rights.

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1. Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified at 22 U.S.C. §§ 3301-3316 (1982)) [hereinafter TRA].

2. Washington Post, Dec. 28, 1978, at A1, col. 5.

3. *How to Protect Taiwan* — *Both Sides of the Senate Debate*, U.S. NEWS & WORLD REPORT, Feb. 19, 1979, at 53.

4. *Shadow of "Two Chinas" Again Stalks Capitol Hill*, Xinhua General Overseas News Service, Oct. 25, 1979.

In each case, comparisons are drawn between the policies toward Taiwan embodied in the TRA and the policies that have characterized U.S. relations with the PRC over the same period. A key theme of Part I is the extent to which centralized decision making on Taiwan's side has shaped the "people-to-people" relations envisioned by the TRA.

Part II then looks at some aspects of how U.S. law has been applied to Taiwan and how that law might affect the future direction of U.S. policy. Part II.A considers U.S. cases that have applied the TRA, with particular attention to the treatment in U.S. courts of Taiwan as an entity with "sovereign" attributes. Surprisingly, litigation under the TRA has focused on public acts of the authorities on Taiwan, but this pattern in no way prejudices how the question of Taiwan's political status might ultimately be resolved. Part II.B then looks at the treatment in U.S. law of Taiwan's international relationships, including international agreements and participation in international organizations.

Finally, Part II.C considers the role of U.S. law in structuring relations between the U.S. and Taiwan, and more broadly between the U.S. and the Chinese on both sides of the Taiwan Strait. It will have become clear from the discussion in Part I that there are two quite different legal regimes now governing U.S. relations with Taiwan and with the PRC. Relevant legislative distinctions are found not only in the TRA, but also in other statutory provisions that require differential treatment as between China, which is a communist, non-market economy country, and Taiwan, which is not. Part II.C explores the significance of these two different legal regimes, in light of the continuing insistence by the authorities both on Taiwan and on the Mainland that "there is but one China and Taiwan is a part of China."⁵ The article concludes by asking whether U.S. law is supple enough to permit creative responses to developments in Taiwan and the PRC, such as a negotiated rapprochement between the two, or, not inconceivably, the establishment of Taiwan as an independent state. Over the long term, it is inevitable that contacts between Taiwan and the Mainland will increase, and the TRA may become a relic of the past.

I. THE POLICIES OF THE TRA

The principal policies of the TRA may be loosely grouped under

5. Joint Communiqué on the Establishment of Diplomatic Relations Between the United States and the People's Republic of China, Dec. 15, 1978 [hereinafter *Joint Communiqué*], reprinted in DEPARTMENT OF STATE, AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1977-1980, at 967 (1983).

three categories: (a) commercial and other similar relations, (b) security, and (c) human rights.⁶ The gist of the Act is to preserve the relationships and substantive policies that were in effect prior to the change in recognition, while restructuring their form. In place of official, government-to-government relations, the Act establishes a nominally private framework for preserving and promoting "extensive, close, and friendly commercial, cultural, and other relations between the people of the U.S. and the people on Taiwan."⁷ The two institutions designated to carry out the functions that would otherwise be handled by government agencies are, on the U.S. side, a "nongovernmental entity" called the American Institute in Taiwan (AIT),⁸ and on the Taiwanese side, an "instrumentality" known as the Coordination Council for North American Affairs (CCNAA).⁹ The notion of "people-to-people" relations was, of course, always a fiction. In the commercial area, the vision could have been borrowed from Adam Smith — private businesses pursuing profit-making deals between the U.S. and Taiwan, unencumbered and unassisted by governments. But the creation of the AIT and the CCNAA as the facilitators for "people-to-people" relations did not change the underlying reality of centralized control over the politico-economic policies of the "people on Taiwan." The "governing authorities on Taiwan," the TRA's euphemism for a government,¹⁰ continue to exercise centralized direction of the island's economy and tight control over many private activities.

A. Commercial Relations

It was a major objective of the TRA to ensure that commercial relations between the U.S. and Taiwan could develop normally, without adverse effects from the derecognition of Taiwan. At the time, the U.S. was Taiwan's largest trading partner and Taiwan was the eighth largest trading partner of the U.S.;¹¹ thus both sides had a tremendous economic stake in nourishing profitable commercial relations. Just as

6. There were other subsidiary policies, including the disposition of the diplomatic properties in the United States that had been held by the former Republic of China prior to the change of recognition. See generally 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 146-62 (1980); Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 492 (1987).

7. TRA, *supra* note 1, § 2(b)(1).

8. *Id.* § 6(a)(1). The AIT is a nonprofit corporation incorporated under the laws of the District of Columbia.

9. *Id.* § 10.

10. See, e.g., *id.* §§ 4(b)(3)(B), (c), 12(b)(1), 15(2).

11. The United States accounted for 32.3% of Taiwan's foreign trade in the first half of 1978. S. REP. NO. 96-7, 96th Cong., 1st Sess. 22 (1979), reprinted in 1979-1 U.S. CODE CONG. & AD. NEWS 57; see also *Implementation of the Taiwan Relations Act: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 96th Cong., 1st

important was the security dimension of continued economic and commercial activity. A stable, prosperous Taiwan was thought to be critical to the maintenance of peace and security in the Western Pacific, and in the words of the TRA, any effort on the part of the PRC to undermine Taiwan's economic health would be a matter of "grave concern to the United States."¹²

In framing the TRA, Congress and the administration fully expected that commercial relations between Taiwan and the U.S. would not only continue but would most likely strengthen, as had been true of other industrialized nations that had shifted their economic relations with Taiwan to an "unofficial" footing upon recognition of the PRC. A study of the experiences of Australia, France, Japan, and West Germany, that was prepared for the U.S. Congress in 1978, showed that in almost every case trade with Taiwan grew significantly in the years following change of recognition from the ROC to the PRC.¹³ The same pattern proved to hold for U.S.-Taiwan trade; as expected, economic links between the U.S. and Taiwan prospered rather than suffered following the change in recognition. Two-way trade has continued to increase substantially, as shown in Table 1.

TABLE 1
U.S. TRADE WITH TAIWAN
(Billions of U.S. Dollars)

	1981	1982	1983	1984	1985	1986	1987
U.S. Imports	8.03	8.863	11.193	14.706	16.354	19.771	24.576
U.S. Exports	4.136	4.086	4.296	4.658	4.337	5.057	7.019
Turnover	12.166	12.949	15.489	19.364	20.691	29.828	31.595
Taiwan's Surplus	3.894	4.777	6.897	10.048	12.017	14.714	17.557

Source: U.S. International Trade Commission, *Operation of the Trade Agreements Program* (annual reports prepared in conformity with Section 163(b) of the Trade Act of 1974).

Sess. 2 (1979) (statement of Ass't Sec'y of State Richard Holbrooke) [hereinafter *Implementation*].

12. TRA, *supra* note 1, § 2(b)(4).

13. See CONG. RESEARCH SERV., FOR. AFFS. AND NAT. DEFENSE DIV., 99TH CONG., 1ST SESS., *RECOGNIZING THE PEOPLE'S REPUBLIC OF CHINA: THE EXPERIENCE OF JAPAN, AUSTRALIA, FRANCE, AND WEST GERMANY* (Report Prepared for the Subcomm. on Asian and Pacific Affs. of the House For. Affs. Comm.) (Comm. Print 1979). The single exception was exports to France (which declined in the short term but later increased significantly). *Id.* at ix-x.

Even more striking than the two-way trade figures are the trends in Taiwan's position in the global economy, as summarized in Table 2.

A telling tribute to Taiwan's economic success is the fact that in July of 1989 the Bush administration called upon Taiwan to allocate resources to assist in alleviating the plight of the most seriously indebted countries.¹⁴ This appeal to Taiwan was made at the same time that the administration acknowledged Japan's recent pledges to assist debtor countries and exhorted the Federal Republic of Germany to do more along the same lines. The implicit comparison of Taiwan to two of the world's strongest economic powers is a sign that Taiwan's achievements are seen as well-established rather than transitory.

Perhaps these successes could have been achieved even without the TRA, but it seems likely that the Act is at least partly responsible for facilitating the growth of Taiwan's commercial relations with the U.S. and therefore for strengthening Taiwan's economic health overall. Passage of the Act demonstrated, among other things, that notwithstanding the change in diplomatic recognition, the U.S. remained committed to a mutually beneficial economic relationship with Taiwan, and that this commitment was shared by both political parties and by both the Congress and the Executive.¹⁵ Furthermore, the Act removed any doubt as to Taiwan's continued eligibility for a variety of programs under U.S. law,¹⁶ some of which have turned out to be of great benefit to Taiwan.

Just one example of how Taiwan has benefited from continued access to U.S. statutory programs involves the Generalized System of Preferences (GSP), the program under which developing countries may obtain duty-free treatment for certain of their exports to the U.S.¹⁷ The TRA authorizes the President to continue to treat Taiwan as eligible for any program conducted under any provision of U.S. law,¹⁸ and the legislative history of the TRA specifically mentions GSP as a program that would continue to be available to Taiwan.¹⁹

14. N.Y. Times, July 20, 1989, at D6, col. 1.

15. *Implementation*, *supra* note 11, at 3.

16. *See generally* TRA, *supra* note 1, § 4.

17. *See generally* Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2066-71 (1974) (codified as amended at 19 U.S.C. §§ 2461-2465 (1982)).

18. TRA, *supra* note 1, § 4(b)(2).

19. *Taiwan Legislation: Hearings Before the House For. Affs. Comm.*, 96th Cong., 1st Sess. 86 (1979) (stressing that Taiwan would not be considered part of the PRC for purposes of GSP). Concerning the PRC's eligibility for GSP, see *infra* notes 25-27 and accompanying text.

Under the Trade Act of 1974, the term "beneficiary developing country" includes an

TABLE 2
KEY ECONOMIC INDICATORS - TAIWAN
(Millions of U.S. Dollars)

	1979	1980	1982	1983	1984	1985	1986	1987	1988	1989 (est.)
GNP	32.40	40.02	46.72	51.03	57.51	60.17	72.62	99.28	119.66	137.04
Per capita GNP	1.89	2.27	2.55	2.74	3.05	3.14	3.75	5.08	6.05	6.87
Exports (fob)	16.10	19.81	22.20	25.12	30.46	30.72	39.79	53.61	60.59	68.67
Imports (cif)	14.77	19.73	18.89	20.29	21.96	20.10	24.17	34.96	49.66	56.54
Trade balance	N/A	0.77	3.32	4.84	8.50	N/A	15.63	18.65	10.93	12.08
Current account balance	0.18	N/A	2.25	4.45	6.98	9.20	16.11	17.93	10.17	11.47
Foreign debt	5.08	N/A	N/A	N/A	6.21	4.90	3.83	2.27	1.87	1.40
Foreign exchange reserves	2.00	N/A	N/A	N/A	16.46	23.49	47.56	76.75	74.03	74.00

Source: U.S. Department of Commerce, International Trade Administration, *Foreign Economic Trends and Their Implications for the United States* (report prepared semiannually by the American Institute in Taiwan on the basis of data obtained from Taiwan's Directorate General of Budget, Accounting and Statistics; Statistical Department, Inspectorate General of Customs).

Taiwan took full advantage of this program. By the mid-1980s Taiwan had become the largest beneficiary of the GSP program; in 1986, for example, Taiwan accounted for some 27 percent of total GSP imports.²⁰

This success did not go unnoticed. Through the 1980s pressures mounted from the U.S. business community and Congress to "graduate" Taiwan from the GSP in recognition of its ability to compete without special tariff preferences.²¹ Effective January 1, 1989, President Reagan determined that because Taiwan was "sufficiently advanced in economic development and improved in trade competitiveness," it would no longer be eligible for GSP.²²

The GSP example illustrates some important comparisons between the positions under U.S. law of Taiwan and the PRC. At the time of the change in recognition, Taiwan enjoyed both most-favored-nation status (MFN) and preferential treatment under GSP, and both of these benefits continued after the change in recognition by virtue of the TRA. The eventual termination of the GSP benefit was a consequence of the TRA's mandate to treat Taiwan on the same basis as any other country for all purposes under U.S. law²³ and reflects Taiwan's economic success rather than any kind of disfavored status.²⁴ In contrast, the PRC enjoyed neither MFN nor GSP at the time of the change of recognition and has not yet qualified for GSP, although it has been eligible for MFN since early 1980.²⁵ In order for the PRC to qualify for either of these favorable treatments, it had to satisfy the rather stringent requirements of the Trade Act of 1974

"overseas dependent territory or possession of a foreign country" (19 U.S.C. § 2462); thus it has been possible, for example, for Hong Kong to be designated as a GSP beneficiary although the United Kingdom is not eligible. Concerning Hong Kong's current status, see Proclamation No. 5805, 53 Fed. Reg. 15,785 (1988) [hereinafter Proclamation].

20. *Generalized System of Preferences: Hearing Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 6 (1986) [hereinafter *GSP Hearing*].

21. See generally *id.*

22. Proclamation, *supra* note 19.

23. TRA, *supra* note 1, § 4.

24. As it happened, Hong Kong, the Republic of Korea, and Singapore all lost their GSP eligibility simultaneously with Taiwan. See Proclamation, *supra* note 19.

25. The PRC was promised MFN on October 23, 1979, pursuant to Proclamation No. 4697, 44 Fed. Reg. 61,161 (1979) (codified at 19 U.S.C. § 2434 (1980)).

The PRC's eligibility for GSP is constrained by 19 U.S.C. § 2462(b)(1), which prevents the President from designating any Communist country as a beneficiary developing country, "unless (A) the products of such country receive nondiscriminatory treatment, (B) such country is a contracting party to the General Agreement of Tariffs and Trade and a member of the International Monetary Fund, and (C) such country is not dominated or controlled by international communism." Condition (A) has been satisfied, but condition (B) has not; the applicability of condition (C) to China would presumably be a political judgment for the President.

governing trade relations between the U.S. and non-market economy countries.²⁶ Among other things, the PRC had to enter into a trade agreement in compliance with the Trade Act²⁷ and to provide satisfactory assurances of freedom of emigration under the Jackson-Vanik Amendment to the Trade Act. Since Taiwan is considered a market economy rather than non-market economy country, these onerous conditions of the Trade Act do not apply to it. Indeed, it was stressed at several points in the hearings leading up to the TRA that Taiwan should not be considered part of the PRC for the purposes of any statutory provisions concerning communist or non-market economy countries.²⁸

While the characterization of Taiwan as a market-oriented economy is not in doubt, centralized control over many aspects of its economy is a fact of life.²⁹ Important sectors of the economy are centrally owned or controlled;³⁰ just as significant are the laws, regulations, and administrative policies and practices that make up a powerful system of central direction of private sector activity. I will mention just a few elements of this system, concentrating on ones that have drawn the attention of U.S. authorities and tribunals:

- control of imports into Taiwan, not only by means of protectionist tariffs but through various other restric-

26. See generally Trade Act of 1974, title IV (codified as amended at 19 U.S.C. §§ 2431-2441).

27. By law, the trade agreement is limited to a renewable three-year period and must contain provisions on protection of national security interests, safeguards against market disruption, protection of intellectual property, settlement of disputes, trade promotion, consultations, and other items specified by section 405 of the Trade Act of 1974, 19 U.S.C. § 2435. The Jackson-Vanik Amendment was enacted as section 402 of the Trade Act of 1974, 19 U.S.C. § 2432 (1980).

28. See, e.g., *Taiwan Legislation: Hearings Before the House For. Affs. Comm.*, 96th Cong., 1st Sess. 86 (1979); *Implementation of Taiwan Relations Act: Issues and Concerns: Hearings Before the Subcomm. on Asian and Pacific Affs. of the House For. Affs. Comm.*, 96th Cong., 1st Sess. 118 (1979) [hereinafter, *Implementation: Issues and Concerns*].

29. I have chosen the word "centralized" deliberately, and have avoided words such as "state" or "governmental" control, in deference to the notion that Taiwan as such is not a "state." The U.S. government is no longer as scrupulous as it once was about making this distinction. For example, a recent Department of State report twice uses the word "state" in making the same point I have tried to make euphemistically. See U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988 (Report Submitted to the Sen. For. Rels. Comm. and the House For. Affs. Comm.), S. Rpt. 101-3, 101st Cong., 1st Sess. 784 (1989) [hereinafter COUNTRY REPORTS FOR 1988] ("While [Taiwan is] fundamentally a free market economy, major sectors such as finance, steel, shipbuilding, utilities, transportation, and petrochemicals have traditionally been dominated by state-run enterprises. . . . The authorities are seeking to sell to the private sector a number of state concerns — notably banking, steel, and petrochemical enterprises — over the next 4 years." (emphasis added)).

30. *Id.*

- tions as well³¹
- control over foreign investment in Taiwan³²
 - discriminatory controls on distribution and sale of certain foreign products in Taiwan³³
 - targeting of certain sectors of the economy for export promotion, including by means of subsidies³⁴
 - currency controls³⁵

In each of these cases, the Taiwan policy in question was adopted and enforced by the "governing authorities on Taiwan." The data in Tables 1 and 2 indicate that centralization of economic policy-making has produced rather stunning results.

31. Concerning protection through tariff and non-tariff barriers, see U.S. INT'L TRADE COMM., OPERATION OF THE TRADE AGREEMENTS PROGRAM, 37TH REPORT 1985, at 190, 195-97 (1986) [hereinafter ITC 37TH REPORT]. Reduction of Taiwan's tariffs has been a priority for U.S. negotiations over a number of years; some positive steps recently taken by Taiwan are cited in *GSP Hearing*, *supra* note 20, at 104-05.

Among the non-tariff practices of concern to U.S. authorities have been maintenance of barriers through import licensing and limits on access to the insurance market. See N.Y. Times, May 8, 1989, at D4, col. 3.

Customs valuation practices by Taiwan authorities have been another non-tariff barrier of concern to the United States. See generally ITC 37TH REPORT, *supra* note 31, at 197. Taiwan's customs valuation practices were challenged as an unfair trade practice in a proceeding under section 301 of the U.S. Trade Act. When Taiwan agreed to cease the challenged practice, the proceeding was terminated. 51 Fed. Reg. 37,528 (1986).

32. Large areas of foreign investment have been banned for foreigners, but there has been movement in the direction of liberalization. See U.S. INT'L TRADE COMM., OPERATION OF THE TRADE AGREEMENTS PROGRAM, 39TH REPORT 1987, 4-40 (1988) [hereinafter ITC 39TH REPORT].

Taiwan's Investment Commission approved foreign investment projects totaling \$1.13 billion in the first six months of 1989, more than double the \$483 million approved in the same period of 1988. N.Y. Times, July 10, 1989, at D10, col. 6.

33. Practices by Taiwan authorities regarding distribution and sale of U.S. beer, wine, and tobacco products were determined by the President to be actionable under section 301 of the U.S. Trade Act, and the U.S. Trade Representative was directed to propose retaliatory actions. 51 Fed. Reg. 39,639 (1986). The section 301 proceeding was terminated when Taiwan agreed to cease the challenged practices. Taiwan agreed, among other things, that it would lift a ban on importation of U.S. beer, would no longer require retail markups of imports at a higher rate than applied to domestic products, and would allow U.S. products to be sold at all retail outlets where Taiwanese products are sold. 51 Fed. Reg. 44,958 (1986). For background on these practices, see ITC 37TH REPORT, *supra* note 31, at 196-97.

34. Taiwan's automobile industry was targeted for rapid expansion through such benefits as tax holidays, export funding, assistance in research and development, and worker training. The industry has also benefited from protectionist measures such as local content requirements and import bans on foreign cars. See ITC 37TH REPORT, *supra* note 31, at 193.

Agricultural export subsidies have been an area of special concern to the United States. See N.Y. Times, *supra* note 31; see also, U.S. Dep't of Commerce, Int'l Trade Admin., *Foreign Economic Trends and Their Implications for the United States: Taiwan*, FET 89-36, p. 9 (Mar. 1989) [hereinafter *Foreign Economic Trends Report*].

35. Cf. N.Y. Times, Aug. 8, 1989, at D13, col. 1. ("Taiwan will be forced to appreciate the value of its currency further to prevent retaliation by the United States.").

Under the TRA's approach of treating Taiwan just like any other country for all purposes under U.S. law, the protective features of U.S. trade law have been fully applicable as well. Thus in the period since the TRA's enactment, proceedings have been instituted alleging that Taiwan has engaged in various sorts of unfair trade practices for which relief under U.S. trade laws was claimed.³⁶ It is difficult to characterize the extent to which these claims concerned Taiwan's centralized framework for economic relations as opposed to the purely private decisions of individual enterprises. In a range of proceedings brought under the anti-dumping laws, for example, the claim has been that an apparently private firm sold its merchandise in the U.S. at less than fair value.³⁷ Yet other anti-dumping proceedings have involved industries, such as steel, over which Taiwan has maintained a high degree of central control,³⁸ and characterization of the activity as merely private would seem inappropriate.

It has been quite apparent that some of the U.S. concerns about Taiwan's economic policies can only be resolved by means of the functional equivalent of government-to-government negotiations. As noted above,³⁹ the TRA provided for such an equivalent by authorizing international agreements to be negotiated, concluded, and carried out through the vehicle of two nominally private instrumentalities, the AIT and the CCNAA. Testimony at the time of consideration of the proposed TRA made clear that the TRA's structure would permit continuity of economic relations⁴⁰ as well as the negotiation and implementation of future economic agreements.⁴¹ The instrumentalities have in fact served as the vehicle through which negotiations over numerous commercial issues have been conducted. Again, only a few examples will be mentioned to illustrate the inevitability of some form of quasi-governmental negotiation to resolve trade-related disputes.

36. See *supra* notes 31-35.

37. See, e.g., Residential Door Locks, 54 Fed. Reg. 21,999 (1989); Martial Arts Uniforms, 53 Fed. Reg. 50,056 (1988), 54 Fed. Reg. 1,013 (1989), 54 Fed. Reg. 18,562 (1989); Fireplace Mesh Panels, 47 Fed. Reg. 24, 616 (1982), 53 Fed. Reg. 16,179 (1988), 53 Fed. Reg. 49,718 (1988).

38. E.g., Carbon Steel Tubing, 53 Fed. Reg. 46,900 (1988), 54 Fed. Reg. 5,532 (1989), 54 Fed. Reg. 12,467 (1989).

39. See *supra* notes 8-9 and accompanying text.

40. Administration witnesses noted, for example, that it would be necessary to keep existing commercial agreements in force in order to avoid deleterious effects on essential business interests. Among the agreements cited were the treaty of friendship, commerce and navigation and the orderly marketing arrangements governing certain exports from Taiwan to the United States. See *Implementation: Issues and Concerns*, *supra* note 28, at 12.

41. In an early congressional review of implementation of the TRA, the Department of State testified that certain international agreements would require immediate attention, including the textile agreement and agreements for reductions in tariff and non-tariff barriers that had recently been negotiated. *Implementation*, *supra* note 11, at 35.

The AIT and the CCNAA have consulted, negotiated, or agreed on the following subjects, among others:⁴²

- limitations on certain exports from Taiwan to the U.S.⁴³
- cessation of “unfair” Taiwanese practices that the U.S. Trade Representative had targeted for potential retaliation under the powerful new mechanism of the Omnibus Trade and Competitiveness Act of 1988⁴⁴
- resolution of a dispute over drift-net fishing of U.S.-origin salmon by Taiwan vessels in the Pacific Ocean⁴⁵
- protection of copyrighted works and other forms of intellectual property of U.S. origin⁴⁶

In several of these areas the conduct that the U.S. would like to see changed is carried out by private Taiwan companies, but the key to the solution of the problem lies with the “governing authorities on Taiwan.”

In short, commercial interaction between the U.S. and Taiwan under the TRA has involved a highly complex mix of private and quasi-governmental activity. The TRA’s framework has proved to be a pragmatic one that has permitted economic ties to flourish. The TRA has also allowed trade disputes to be addressed and dealt with as effectively as if there were a recognized government on the other side.

B. Security

The TRA affirms concern for Taiwan’s security in no uncertain terms. Of the six policy statements contained in section 2(b) of the Act, four stress the interest of the U.S. in peace, stability, and security

42. For discussion of AIT-CCNAA agreements generally, see *infra* notes 107-113 and accompanying text.

43. For example, in 1986 the AIT and the CCNAA entered into an arrangement for a system of licensing of exports of machine tools from Taiwan to the United States; on the U.S. side, the agreement is enforced by the U.S. Customs Service. 53 Fed. Reg. 53,047 (1988).

44. Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, § 1301, 102 Stat. 1107, 1164 (codified at 19 U.S.C. § 2411 (1982 & Supp. 1988)). This mechanism is commonly referred to as “Super-301” because it enhances the Trade Representative’s powers under section 301 of the Trade Act of 1974.

45. See N.Y. Times, Aug. 26, 1989, at 29, col. 1; see also N.Y. Times, June 14, 1989, at A18, col. 6.

46. Concerning AIT-CCNAA consultations over intellectual property, see ITC 37TH REPORT, *supra* note 31, at 192-93. A 1946 treaty of friendship, commerce, and navigation has provided the legal framework for copyright protection throughout the TRA period; that treaty was held to be fully in force in the litigation discussed at text accompanying *infra* note 107. In January of 1989 agreement in principle was reached on a new bilateral copyright agreement. See *Foreign Economic Trends Report*, *supra* note 34.

in the Western Pacific and in ensuring that Taiwan's future is determined by peaceful means;⁴⁷ a fifth declares that the U.S. will "provide Taiwan with arms of a defensive character."⁴⁸ The latter policy is implemented by section 3 of the Act, which provides that the U.S. will "make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability."⁴⁹

The TRA's position on the sale of defensive arms was a matter of some sensitivity, because the PRC strongly objected to such sales. The joint communique on the normalization of U.S.-PRC relations had been silent on the matter of arms sales.⁵⁰ Yet, the U.S. statement accompanying the joint communique had announced two other steps relevant to the security situation: (1) the notice of termination of the mutual defense treaty between the U.S. and the Republic of China;⁵¹ and (2) the decision to withdraw U.S. military personnel from Taiwan within four months.⁵² Nevertheless, arms sales were not mentioned. According to the testimony of administration witnesses in connection with the proposed TRA, the administration had rejected the PRC's demand that the sales of defensive arms must end, and the administration apparently did intend that such sales would continue;⁵³ but whether to say so explicitly in the Act was a matter of considerable delicacy. The result, not one that the administration solicited, but one that it could live with, was the unambiguous commitment embodied in the provisions cited in the preceding paragraph.

Tensions between the U.S. and the PRC persisted over the arms sales issue but were perhaps somewhat alleviated when the U.S. decided, in the mid-1980s, to begin selling arms to the PRC as well. The apparent anomaly of this situation, roughly comparable to selling arms simultaneously to Israel and its Arab antagonists, is partially

47. TRA, *supra* note 1, § 2(b)(2), (3), (4), (6).

48. *Id.* § 2(b)(5).

49. See also International Security Assistance Act of 1979 § 23, Pub. L. 96-92, 93 Stat. 710.

50. See Joint Communique, *supra* note 5.

51. See generally *Goldwater v. Carter*, 444 U.S. 996 (1979). In *Goldwater* some members of Congress sued to block the President's decision to terminate the Mutual Defense Treaty without congressional participation. Although their constitutional challenge failed, they did muster support in the legislative process for the provisions in the TRA that can be read as a unilateral commitment to Taiwan's defense comparable to the "mutual" commitments in the terminated treaty.

52. Statement Issued by the U.S. Government, Dec. 15, 1978, reprinted in AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1977-1980 968 (Department of State 1983).

53. See, e.g., *Implementation: Issues and Concerns*, *supra* note 28, at 12, 18 (statements of Ass't Sec'y of State Richard Holbrooke and Dep. Ass't Sec'y of Defense Michael H. Armacost).

explained by the U.S. interest in helping the PRC counteract threats from other quarters, such as the USSR. The greatest military threat to Taiwan remains the PRC, but maintenance of a secure defensive capability for Taiwan could arguably also be of benefit to the U.S. and to the West in protecting Pacific sea lanes from Soviet threats in the event of a multilateral conflict.⁵⁴

For most of the period covered by the TRA, arms sales to Taiwan have far outstripped those to the PRC. Only in 1987 did foreign military sales agreements (for future delivery) reach a level approximately equal for the two, and even in that year actual deliveries to Taiwan exceeded those to the PRC by two orders of magnitude. The relevant data are given in Table 3.⁵⁵

TABLE III
U.S. ARMS SALES TO TAIWAN AND PRC
(Thousands of U.S. Dollars; Dates are Fiscal Year)

FOREIGN MILITARY SALES AGREEMENTS

	1981	1982	1983	1984	1985	1986	1987
Taiwan	289,099	523,024	698,607	688,678	700,374	510,761	509,635
PRC	—	—	—	654	430	36,996	551,012

FOREIGN MILITARY SALES DELIVERIES

	1981	1982	1983	1984	1985	1986	1987
Taiwan	373,427	386,343	389,246	274,896	339,535	248,999	387,058
PRC	—	—	—	6	424	547	8,881

COMMERCIAL EXPORTS LICENSED UNDER ARMS EXPORT CONTROL ACT

	1981	1982	1983	1984	1985	1986	1987
Taiwan	66,731	75,000	85,000	70,000	54,463	228,400	210,000
China	—	1,000	984	22,732	46,303	54,020	14,576

Source: Foreign Military Sales, Foreign Military Construction Sales and Military Assistance Facts as of September 30, 1989, published by Data Management Division, Comptroller, Defense Security Assistance Agency.

In the aftermath of the massacre in Tiananmen Square, the Bush administration suspended arms sales to the PRC.⁵⁶

What can be said about Taiwan's security now, ten years after the change in recognition? In 1989, as in 1979, the PRC has not

54. See Day, *Maintaining the Dragon's Teeth: Balanced Sales of Advanced Weapons and High Technology to the Two Chinas — An Exercise in Balance of Power Policies by the United States*, 13 SYR. J. INT'L L. & COMM. 29, 35 n.19, 71-76 (1986).

55. The data in Table 3 come from official U.S. government documents. Valuable supplementary information on arms sales is available in the following sources: STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, *WORLD ARMAMENTS AND DISARMAMENT: SIPRI YEARBOOK* (annual); P. FERRARI, R. MADRID & J. KNOFF, *U.S. ARMS EXPORTS: POLICIES AND CONTRACTORS* (Investor Responsibility Research Center (1988)).

56. N.Y. Times, June 6, 1989, at A1, col. 5.

renounced the possibility of using force for "reunification of the motherland." A recent statement issued by the Embassy of China in Washington deals with the matter as follows:⁵⁷

We sincerely hope and insist that peaceful means should be used to solve the Taiwan issue. We are patient, but this cannot be decided by us alone. China has never committed to not taking nonpeaceful means to solve the Taiwan issue simply because such a commitment would make peaceful reunification impossible.

Yet in 1989, the possibility of a Chinese invasion or blockade of Taiwan seems even more remote than in 1979. The PRC has neither the will nor the capability to subdue Taiwan by force. Presumably, the continued sale of defensive arms from the U.S. to Taiwan under the TRA has made the calculation of any potential use of force more costly for the PRC. Just as important as arms sales to Taiwan is the TRA's explicit commitment to maintain the capacity of the U.S. to resist any resort to force or coercion that would jeopardize Taiwan's security. As a statement of a political commitment adopted by the Congress, this policy is probably at least as effective as the mutual defense treaty that was in effect prior to the change in recognition.⁵⁸

C. *Human Rights*

The TRA's policy statement concerning human rights is embodied in the following provision:

Nothing contained in this Act shall contravene the interest of the U.S. in human rights, especially with respect to the human rights of all the approximately eighteen million inhabitants of Taiwan. The preservation and enhancement of the human rights of all the people on Taiwan are hereby reaffirmed as objectives of the U.S.⁵⁹

This passage, while important, has to be understood in the context of ambivalent tendencies within the U.S. government concerning human rights policy in general and Taiwan's human rights performance in particular. What, if anything, should the U.S. do to exercise leverage against "allies" whose practices of domestic repression hardly exemplify the high ideals of the American democratic tradition? Congress

57. N.Y. Times, July 18, 1989, at A20, col. 6.

58. Cf. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509 (1986) (questioning whether a treaty approved by the Senate but not implemented by Congress can commit the United States to use force).

59. TRA, *supra* note 1, § 2(c).

had begun to insist upon using such leverage by passing important human rights legislation around this time,⁶⁰ but the approach was in its early stages and had not ripened into a consistent philosophy nor one that commanded universal support within the Congress.

The case of Taiwan posed especially difficult questions. Although Taiwan's supporters in the Congress invariably portrayed Taiwan as a bastion of democracy in the Pacific,⁶¹ any unbiased appraisal had to take account of the reality of severe repression by the aging Kuomintang (KMT) leaders. One of the few members of Congress to confront this reality directly was Representative Jim Leach of Iowa, who documented in detail the view of the KMT as "a harshly repressive regime which for years has denied the majority of people on the island the most fundamental human freedoms."⁶² Noting that the island had been under martial law for three decades and that its record on political rights and civil liberties was hardly better than that of the PRC, Representative Leach offered language that would have required the AIT to promote human rights on Taiwan as one of its primary responsibilities.⁶³

The bland, negative phrasing of the human rights provision that was eventually included in the TRA suggests that Congress was not quite sure what to do about the situation. However, Congress did not wish the KMT leaders to seize upon any aspect of the Act as a pretext for further repression.⁶⁴ The TRA's human rights provision was a mild signal to the KMT that it should not think itself immune from criticism on human rights grounds, and that if it wished to stay in favor with U.S. public opinion it should improve its human rights performance.

From time to time over the intervening decade Congress has focused explicitly on various aspects of human rights on Taiwan. Hearings have been held on the surveillance, harassment, and even murder in the U.S. of opponents of Taiwan's government;⁶⁵ on mar-

60. See, e.g., Pub. L. No. 95-118, 91 Stat. 1069, sec. 701 (codified at 22 U.S.C. § 262d) (directing the U.S. government to use its voice and vote in international financial institutions to channel assistance away from countries whose governments engage in a consistent pattern of gross violations of internationally recognized human rights).

61. See, e.g., *Taiwan Legislation: Hearings Before the House For. Affs. Comm.*, 96th Cong., 1st Sess. 92-94 (1979) (statement of Rep. George Hansen).

62. *Implementation: Issues and Concerns*, *supra* note 28, at 66.

63. *Id.* at 66-67.

64. Notably, local elections which were to have been held in Taiwan on December 22, 1978, had been cancelled in the wake of the December 15 announcement of derecognition, and this fact was mentioned by Representative Leach in explanation of his proposed amendment. *Id.* at 68.

65. See *Taiwan Agents in America and the Death of Prof. Wen-Chen Chen: Hearing Before the Subcommittee on Asian and Pacific Affairs of the House For. Affs. Comm.*, 97th

tial law and its potential termination;⁶⁶ on Taiwan's electoral system and restrictions on political activities;⁶⁷ and on religious persecution.⁶⁸ Each year, Congress has had before it the State Department's Country Reports on Human Rights Practices, which have included reports on Taiwan prepared by the AIT.⁶⁹ Occasionally Congress has passed resolutions or statutes that have criticized or praised Taiwan for its human rights practices.⁷⁰

In the last several years Taiwan's human rights performance has improved markedly. The election law has been liberalized and KMT opponents have been able to field candidates in contested elections.⁷¹ Restraints on political activity have been eased and martial law has finally been lifted.⁷² Nonetheless, major restrictions remain. Without in any way minimizing the seriousness of other human rights violations that have been criticized by human rights advocacy groups,⁷³ I will underscore those that affect the ability of the people on Taiwan to choose freely their future relationship with the PRC.

Specifically, the law in effect on Taiwan punishes as sedition any advocacy of Taiwan independence or of positions contrary to the claim that the KMT is sovereign over all of China.⁷⁴ Political parties that would espouse these views have been restricted; persons who have dared articulate them have been severely punished. In October of 1987 the authorities arrested two leaders of the newly formed Formosan Political Prisoners Association, because its charter contained a provision stating that Taiwan should be independent. The sedition statute under which they were charged carried a possible

Cong., 1st Sess. (1981); *Murder of Henry Liu: Hearing Before the Subcomm. on Asian and Pacific Affairs of the House For. Affs. Comm.*, 99th Cong., 1st Sess. (1985).

66. See *Martial Law on Taiwan and U.S. Foreign Policy Interests: Hearing Before the Subcomm. on Asian and Pacific Affairs of the House For. Affs. Comm.*, 97th Cong., 2d Sess. (1982); *Political Developments in Taiwan: Hearing Before the Subcomm. on Asian and Pacific Affairs of the House For. Affs. Comm.*, 98th Cong., 2d Sess. (1984).

67. See *Elections in Taiwan: Hearings Before the House For. Affs. Comm.*, 100th Cong., 2d Sess. (1988).

68. See *Religious Persecution as a Violation of Human Rights: Hearings Before the Subcomm. on Human Rights and International Organizations of the House For. Affs. Comm.*, 97th Cong., 2d Sess. 612-83 (1982).

69. For the latest such report, see COUNTRY REPORTS FOR 1988, *supra* note 29.

70. In addition to these measures, see *infra* notes 78-79 and accompanying text.

71. COUNTRY REPORTS FOR 1988, *supra* note 29, at 793-95.

72. *Id.*

73. See, e.g., HUMAN RIGHTS WATCH & LAWYERS COMM. FOR HUMAN RIGHTS, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1987 158-61 (1987) [hereinafter REAGAN RECORD 1987]; HUMAN RIGHTS WATCH & LAWYERS COMM. FOR HUMAN RIGHTS, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1988 183-89 (1989) [hereinafter REAGAN RECORD 1988].

74. See COUNTRY REPORTS FOR 1988, *supra* note 29, at 789-90; REAGAN RECORD 1987, *supra* note 73, at 159-60; REAGAN RECORD 1988, *supra* note 73, at 185.

death penalty.⁷⁵ In January of 1988 the two were convicted and sentenced to lengthy terms of imprisonment.⁷⁶

The TRA's human rights provision could and should be read as a directive to the AIT to work actively for the promotion of human rights on Taiwan, yet the AIT has apparently been less than optimally vigorous toward this end. Human rights advocacy groups have criticized the AIT for failing to send an observer to the trials of the dissidents mentioned above and for failing to make strong public statements of concern over the issues of freedom of expression and fair trial that were implicated.⁷⁷ Apparently, the AIT, like its principal the Department of State, is uncomfortable with the idea of interceding in support of freedom of expression when the expression in question touches so closely on the sensitivities on both sides of the Taiwan Strait over Taiwan's eventual political status. But the AIT's reticence is unwarranted: support for the principle of freedom of expression is always quite a different matter from support for the content of the expression at stake.

Although Taiwan still has a long way to go before it can be considered in full compliance with internationally recognized human rights principles, comparisons with the PRC still run in Taiwan's favor. On several recent occasions the Congress has included in its foreign relations authorization legislation back-to-back provisions concerning human rights in China and on Taiwan. For example, in 1987, Congress applauded trends toward democratization on Taiwan⁷⁸ while simultaneously expressing its sense that China had not done enough to protect human rights.⁷⁹ In the wake of the Tiananmen Square massacre, the contrast between human rights on Taiwan and on the Mainland has intensified, but that contrast should not cause us to lose sight of the need for Taiwan to progress further still.

II. THE ROLE OF LAW IN U.S.-TAIWAN RELATIONS

The TRA is more than just a series of policies and procedures: not only is it "law" in its own right by virtue of being a statute of the

75. REAGAN RECORD 1987, *supra* note 73, at 160.

76. See REAGAN RECORD 1988, *supra* note 73, at 185-86. Original sentences of more than ten years were subsequently reduced. *Id.* at 186.

77. *Id.* at 185.

78. Foreign Relations Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1426, § 1246 (1987).

79. *Id.* § 1245; *cf.* Foreign Relations Authorization Act for Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 451, §§ 806, 807 (1985) (commending democratization in Taiwan; commenting on U.S.-China trade).

U.S., but it also prescribes the way that other sources of law will apply to relations between the U.S. and Taiwan. Concerning U.S. domestic law, the TRA provides, among other things, that all laws of the U.S. referring or relating to foreign countries, nations, states, governments, or similar entities shall be construed as applying to Taiwan.⁸⁰ Moreover, by virtue of the TRA, the absence of diplomatic relations and recognition with respect to Taiwan does not affect Taiwan's rights and obligations under the laws of the U.S.⁸¹ The TRA specifically confirms Taiwan's capacity to sue and be sued in courts in the U.S.⁸²

The TRA also deals (albeit only indirectly, and only to a limited extent) with international law. The Act "approves the continuation in force of all treaties and other international agreements, including multilateral conventions," that had previously been in effect between the U.S. and the Republic of China⁸³ and establishes the AIT-CCNAA structure as the functional substitute for inter-governmental agreements following derecognition.⁸⁴ It also contains an ambiguous provision on Taiwan's membership in international organizations.⁸⁵

How has this structure worked? The following sections explore that question, concentrating in Part II.A on the application of U.S. domestic law to Taiwan and in Part II.B on Taiwan's international agreements and relationships as they have evolved in the ten years of the TRA. Part II.C concludes with some thoughts on the role of law in structuring relations between Taiwan and the U.S. on the one hand and Taiwan and the PRC on the other, in view of the various possibilities for resolution of the Taiwan issue as between the PRC and Taiwan.

A. *Taiwan in United States Courts*

Cases under the TRA have generally been faithful to the congressional intent and executive policy concerning Taiwan's treatment under U.S. law, yet there is a striking pattern that challenges the notion of merely "people-to-people" relations. That pattern is an emphasis on Taiwan not just as a geographic location or a community of human beings, but as a self-governing political unit — indeed one with attributes of "sovereignty." Thus, Taiwan has been held to be a foreign state that can act in a public capacity for purposes of sover-

80. TRA, *supra* note 1, § 4(b)(1), (3), (4).

81. *Id.* § 4(b)(3)(A), 4(b)(5), 4(b)(8).

82. *Id.* § 4(b)(7).

83. *Id.* § 4(c).

84. *Id.* §§ 6, 10-12.

85. *Id.* § 4(d); *see infra* notes 114-119 and accompanying text.

eign immunity concepts and the act of state doctrine,⁸⁶ to have a governmental system with authority to promulgate laws,⁸⁷ to be capable of engaging in external relations such as by regulating the export-import trade,⁸⁸ and to enjoy rights and obligations under international treaties.⁸⁹ Ironically, this series of cases stresses the state-like attributes of Taiwan both in its local political organization and its relations with foreign countries, notwithstanding the premise of the TRA that commercial and other relations with Taiwan could be sustained on an "unofficial," people-to-people basis.

Of the several cases that illustrate this point, *Millen Industries v. Coordination Council for North American Affairs*⁹⁰ is the most vivid example. In 1983, plaintiff established a shoe-box manufacturing plant in Taiwan, allegedly in reliance on an agreement with CCNAA as agent for Taiwan and on certain representations that CCNAA made on Taiwan's behalf. According to plaintiff, CCNAA induced plaintiff to invest in an export-oriented business by promising, among other things, that plaintiff would be able to import its supplies into Taiwan on favorable terms. When the plant turned out to be a money-losing operation, plaintiff closed it and sued CCNAA in the U.S. Viewed from one angle, the transaction could have been an ordinary commercial one between a U.S. company and a Taiwan "association" (CCNAA)⁹¹ that acted as "public relations agent and broker" for Taiwan and possibly as "commercial 'customs expediter.'" ⁹² Yet the court of appeals assessed the transaction not just as a purely private contract but as an exercise of the "sovereign prerogative" to regulate exports and imports to and from Taiwan.⁹³ The court underscored certain features of CCNAA's alleged representations that it thought to be predominantly "sovereign" rather than merely "commercial," such as commitments to allow the importation of raw materials on a duty-free basis and to accord the plaintiff certain benefits under Taiwan law.

86. *Millen Industries, Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879 (D.C. Cir. 1988).

87. *United States v. 594,464 Pounds of Salmon, More or Less*, 871 F.2d 824 (9th Cir. 1989).

88. *Id.*

89. *New York Chinese TV Programs, Inc. v. U.E. Enter., Inc.*, Copyright L. Rep. (CCH) ¶ 26,398 (S.D.N.Y. March 8, 1989).

90. *Millen*, 855 F.2d at 879.

91. *Id.* The district court had treated CCNAA as a foreign "association" and on that basis had held that it had jurisdiction over the suit on the basis of 28 U.S.C. § 1332(a)(2) (1982). *Id.*

92. *Id.* at 880, 885.

93. *Id.* at 885, citing *MOL, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984).

The distinction between "sovereign" and "commercial" has two potential legal consequences in litigation involving foreign states in U.S. courts generally. First, under the Foreign Sovereign Immunities Act (FSIA),⁹⁴ a foreign state can be sued for its "commercial" activities but is immune from suit in the U.S. for acts undertaken in a "sovereign" capacity. Second, the act of state doctrine bars judicial inquiry into "public" acts taken by a "sovereign" within its territory.⁹⁵ The Court of Appeals applied the TRA to require treating Taiwan as a foreign state for purposes of both the sovereign immunity statute and the act of state doctrine.

The conclusion that Taiwan is a "foreign state" for purposes of the FSIA is consistent with the provision of the TRA that calls for the application to Taiwan of any laws of the U.S. that "refer or relate to foreign countries, nations, states, governments, or similar entities."⁹⁶ Indeed, in the legislative history of the TRA the FSIA was mentioned as one of the statutes that would continue to apply to Taiwan.⁹⁷ Thus, if foreign states in general are immune from suits challenging the application of their export-import laws,⁹⁸ the logic of the TRA is that Taiwan should be treated no differently. My point is not that the TRA was incorrectly applied,⁹⁹ but rather that it is ironic in view of the "people-to-people" concept of the Act that a lawsuit for breach of contract should result in a judicial opinion underscoring Taiwan's "sovereign" character.

The *Millen* case is not the only instance in which Taiwan's foreign trade laws have been the object of attention in U.S. courts. In a case charmingly entitled *U.S. v. 594,464 Pounds of Salmon, More or Less*,¹⁰⁰ the U.S. Government seized a quantity of Taiwan-origin salmon at a U.S. port of entry, invoking a statute authorizing forfeiture of certain fish imported into the U.S. in violation of "any foreign

94. 28 U.S.C. §§ 1330, 1602-11.

95. *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

96. TRA, *supra* note 1, § 4(b)(1).

97. S. REP. NO. 7, 96th Cong., 1st Sess. 23 (1979), reprinted in 1979 U.S. CODE CONG. & AD. NEWS 36, 58; *Implementation: Issues and Concerns*, *supra* note 28, at 50, 119.

98. The court of appeals relied on *MOL v. Bangladesh*, 736 F.2d 1326, and on *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987), for this proposition.

99. Whether the FSIA was correctly applied is a different question. I do have some concern with the line of cases that began with *Bangladesh* and *Bolivia* and has now been extended to Taiwan, that seems to immunize foreign states from suit on contractual undertakings concerning how they will apply their export-import laws; but that is a concern about the application of the sovereign-commercial distinction in a whole class of cases and not one involving Taiwan's special status.

100. *United States v. 594,464 Pounds of Salmon, More or Less*, 871 F.2d 824 (9th Cir. 1989), *affirming* 687 F. Supp. 525 (W.D. Wash. 1987).

law.”¹⁰¹ Not surprisingly, the principal issue in the case was whether a determination by Taiwan’s Board of Foreign Trade prohibiting export of salmon without a permit constituted “foreign law” under this statute. What interested the court was whether Congress intended the term “foreign law” to include or exclude agency action of the sort engaged in by Taiwan’s Board of Foreign Trade: the court concluded that Congress did mean to treat the activities of foreign regulatory bodies as “law.” Taiwan’s special status posed no particular difficulty: the District Court agreed with the U.S. that by virtue of the TRA, “United States law applies to Taiwan in the same fashion as it applies to other nations.”¹⁰² Both the District Court and the Court of Appeals found that the Taiwanese governmental system is composed of five branches, or “Yuans,” among which are the Executive and Legislative Yuans, that the Board of Foreign Trade is a subsidiary of the Ministry of Economic Affairs within the Executive Yuan, and that the Board is authorized to regulate exportation of goods including salmon. The case thus serves as another instance of explicit judicial recognition of Taiwan’s governmental functions in the area of foreign trade.

Even in garden-variety suits involving merely private rights, the courts have singled out Taiwan’s quasi-sovereign characteristics for special mention. For example, in one of the earliest cases under the Act, the subject matter jurisdiction of the federal court was upheld in a medical malpractice case brought by a Taiwan plaintiff against U.S. defendants.¹⁰³ This holding is itself not controversial, but in language that was both totally unnecessary for the limited issue before it and inconsistent with the intent of the TRA, the District Court found “*de facto* recognition” of Taiwan and “quasi-governmental relations” between the U.S. and Taiwan.¹⁰⁴ The TRA specifically acknowledges the absence of recognition of Taiwan and of diplomatic relations yet provides that this fact shall be disregarded whenever the laws of the U.S. would ordinarily require either diplomatic relations or recognition.¹⁰⁵ The failure of the court to respect this nuance is unfortunate.

101. 16 U.S.C. §§ 3371, 3372, 3374 (1982).

102. 687 F. Supp. at 528 n.1.

103. *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975 (N.D. Ill. 1980) (applying the TRA to find Taiwan a “foreign state” within the meaning of Article III, section 2 of the Constitution and 28 U.S.C. § 1332(a)(2)).

104. *Chang*, 506 F. Supp. at 978 n.3.

105. TRA, *supra* note 1, § 4(a), (b)(3)(A), (5), (7), (8).

B. Taiwan as a Participant in International Agreements and Organizations

As previously noted, the TRA validates the continuing effectiveness of international agreements that had been entered into between the U.S. and the government that was recognized as the Republic of China prior to January 1, 1979.¹⁰⁶ This aspect of the TRA was important for continuity of legal relationships, economic and otherwise. A recent case, *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*,¹⁰⁷ considered several constitutional challenges to this aspect of the TRA and concluded that a 1946 treaty of friendship, commerce and navigation between the U.S. and the Republic of China was constitutionally continued in force following the change in recognition by virtue of the TRA. This case correctly held that Congress could authorize copyright protection to be extended to works of Taiwan origin, either by preserving the substantive obligations of the previous treaty or by legislating for functionally equivalent protections.

For agreements entered into since 1979, the AIT-CCNAA framework has been in operation. Approximately fifty such agreements have been concluded under this framework in the last ten years, on subjects such as aviation, trade, textiles, and others.¹⁰⁸ This number contrasts to a total of approximately sixty agreements between the U.S. and the Republic of China that were in force at the end of 1978, of which approximately twenty-five remain in effect ten years later.¹⁰⁹ In conformity with section 12 of the TRA, AIT-CCNAA agreements are transmitted to Congress under a system parallel to the transmittal of international agreements other than treaties as mandated by the Case Act of 1972.¹¹⁰ Where U.S. law requires congressional approval of an ordinary international agreement, the TRA provides that AIT-CCNAA agreements shall be subject to the same requirements.¹¹¹ Thus, for example, Congress approved an AIT-CCNAA fisheries agreement in the same manner as it approves

106. See *supra* text accompanying note 39.

107. *New York Chinese TV Programs, Inc.*, *supra* note 89. Ironically, most U.S.-Taiwan copyright disputes have involved Taiwanese piracy of works of U.S. origin, but this case involved the reverse situation.

108. The most recent list of AIT-CCNAA agreements appears at 54 Fed. Reg. 3,877 (1989).

109. These numbers come from TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1979 230-33 (Department of State 1979), as compared to the counterpart edition of January 1, 1989, at 266-67.

110. 1 U.S.C. § 112b (1982).

111. TRA, *supra* note 1, § 12(c).

international fisheries agreements generally.¹¹²

The U.S. government publishes information about U.S.-Taiwan agreements, but the format for publication differs from that used for ordinary international agreements. Instead of carrying a complete list of U.S.-Taiwan agreements in the annual Department of State publication *Treaties in Force*, that publication carries under the heading "China (Taiwan)" a lengthy statement concerning the change in recognition and the TRA, followed by a list of old U.S.-ROC agreements that have been continued in effect pursuant to the TRA. AIT-CCNAA agreements are not listed in this Department of State publication, but a cross-reference is given to the Federal Register where a listing of all AIT-CCNAA agreements is published annually.¹¹³

Concerning Taiwan's membership in international organizations, the TRA contains the following provision:

Nothing in this Act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization.¹¹⁴

At the time of the TRA, Taiwan had long since lost its United Nations seat to the PRC and was no longer active in most international organizations,¹¹⁵ but it retained membership in several international financial institutions, including the International Monetary Fund (IMF) and the Asian Development Bank (ADB). In periodic "sense of the Congress" statements adopted in 1980 and subsequently, Congress has affirmed its desire to see Taiwan continue as a member of these international financial institutions.¹¹⁶ With regard to the ADB, Congress has stated it to be the "policy of the United States" that Taiwan should be permitted to retain its membership and that a "serious review of U.S. participation" would ensue if Taiwan were expelled.¹¹⁷ In a further measure on the same subject, Congress noted Taiwan's progress from a borrower to a lender in the ADB and urged

112. See 16 U.S.C. § 1823 (1985).

Congress urged a number of "countries," including both Taiwan and the PRC among others, as countries which are not parties to the International Convention for the Regulation of Whaling and which still engage in commercial whaling, to comply voluntarily with the whaling moratorium adopted pursuant to that convention. See 16 U.S.C. § 916, citing Pub. L. No. 96-60, 93 Stat. 405, § 405 (1979).

113. See *supra* note 108 and accompanying text.

114. TRA, *supra* note 1, § 4(d).

115. For example, the KMT had withdrawn China from the GATT in 1950. See J. COHEN & H. CHIU, *PEOPLE'S CHINA IN INTERNATIONAL LAW* 309, 310 (1974).

116. As to the IMF, Congress has declared it to be U.S. policy that Taiwan shall be granted "appropriate membership." 22 U.S.C. § 286v (1979).

117. 22 U.S.C. § 285v.

that Taiwan should remain a full member regardless of how the issue of the PRC's membership might be resolved.¹¹⁸ As of 1989, Taiwan has in fact continued to play an active role in the ADB. A moment of great symbolic importance took place in the spring of 1989, when the Taiwan representative to the ADB traveled to Beijing for a meeting of the ADB's governing board.¹¹⁹

Has the congressional policy toward Taiwan's participation in international organizations been a significant factor in determining Taiwan's actual role? It is difficult to speculate on the precise effect of congressionally-generated pressure, especially since at least in the case of the ADB the organization's members may well have been motivated by the economic benefit of keeping Taiwan involved as a lender and an important economic power in the region. But it would probably not be appropriate to discount wholly the effect of the U.S. position as articulated by Congress, especially the explicit threat to reconsider U.S. participation if Taiwan were to be forced out of the organization.

C. Some Reflections on U.S. Law Governing Relations With Taiwan and the PRC

As a rule, U.S. legislation deals with general rather than particular cases, but legislation in the field of foreign affairs displays a peculiar mix of general and specific dispositions. Certain aspects of U.S. legislation apply to categories of foreign countries defined in general terms: "communist" countries,¹²⁰ "non-market economy" countries,¹²¹ "developing" countries,¹²² countries that support terrorism,¹²³ and countries that engage in a "consistent pattern of gross violations of internationally recognized human rights."¹²⁴ But in many cases Congress has legislated on a country-specific basis, either to grant a special favor to a foreign country or to subject it to discriminatory treatment.¹²⁵ The constitutional prohibition on bills of attainder has not inhibited Congress from individualizing its treatment of

118. 22 U.S.C. § 285x(c).

119. Christian Science Monitor, May 9, 1989, at 3.

120. For a catalogue of some of the respects in which U.S. law restricts transactions with Communist countries, see *Implementation: Issues and Concerns*, *supra* note 28, at 115, 118 (statement of Victor H. Li).

121. 19 U.S.C. § 2432.

122. 19 U.S.C. § 2462(b).

123. *E.g.*, 22 U.S.C. § 262g(a)(2).

124. *E.g.*, 22 U.S.C. §§ 262g(a)(1), 286e-11.

125. For selected examples, see Damrosch, *supra* note 6, at 493-94 n.39. Most recently, Congress has legislated on a country-specific basis with respect to the PRC, in response to the suppression of the democracy movement.

specific foreign countries, even when the legislation in question attaches a penalty.¹²⁶

One way of viewing the TRA is as an unusual example of specific legislation aimed at ensuring the applicability to Taiwan of general statutory policies. In contrast to most country-specific legislation, which derogates from generally applicable standards, the TRA establishes a policy of functional equality, notwithstanding Taiwan's formal difference from recognized states with which the U.S. maintains full diplomatic relations. On the other hand, it is perhaps equally plausible to say that the TRA exempts Taiwan as a *sui generis* case from certain requirements of general law, such as those that would ordinarily require recognition or the maintenance of diplomatic relations as a prerequisite to eligibility for certain legal benefits.

I have already noted that the TRA was intended to ensure that Taiwan would not be subjected to any of the statutory discriminations that operate against communist or non-market economy countries.¹²⁷ Such discriminations have been in effect in various spheres, including eligibility for foreign assistance,¹²⁸ financing of transactions through the Export-Import Bank,¹²⁹ access to subsidized programs for the purchase of surplus agricultural commodities,¹³⁰ and tariff treatment,¹³¹ among others. Because of the U.S. acknowledgment of the Chinese position that "Taiwan is part of China,"¹³² something had to be done to clarify that statutes applicable to the PRC as a communist, non-market economy country would not apply to Taiwan. The TRA resolves this problem by preserving to Taiwan all the favorable treatment to which it was entitled prior to the change in recognition. Yet, the Act does not attempt to plan for all the possible contingencies that might eventually lead to some form of economic or political integration of the island and the Mainland.

The TRA is studiously neutral as to the resolution of Taiwan's ultimate status, as long as that resolution is achieved through peaceful means. Thus, the TRA neither endorses nor precludes eventual reunification of Taiwan with the PRC, nor their separation. But major developments in either of these inconsistent directions might render the TRA unsuitable as a framework for future relations.

In the event, however unlikely it may seem today, of a declara-

126. *Id.* at 493-94.

127. *Implementation: Issues and Concerns*, *supra* note 28; *see also id.* at 115, 118.

128. 22 U.S.C. § 2370(b), (f).

129. 12 U.S.C. § 635(b)(2).

130. 7 U.S.C. § 1703(d).

131. 19 U.S.C. § 1202(e).

132. Joint Communiqué, *supra* note 5.

tion on Taiwan's part severing Taiwan's claim to the Mainland and establishing an independent, sovereign Taiwan state, the TRA would become unnecessary. The President of the United States has ample authority, unaffected by the TRA, to recognize such a state and establish diplomatic relations with it.¹³³ Whether he would choose to do so raises questions of policy that cannot be evaluated in hypothetical terms; legally, the TRA would pose no obstacle to such a course of action. The only *raison d'être* for the TRA after such developments would be as an ongoing warning to PRC of the importance that the U.S. attaches to deterring any use or threat of force against Taiwan.

The alternative scenario of a negotiated rapprochement between PRC and Taiwan would require consideration of whether the TRA should be adjusted or abandoned. Much would depend on the shape of future arrangements between the two. If, for example, Taiwan were to retain substantial autonomy in foreign affairs, then something like the AIT-CCNAA framework for negotiations and agreements might continue to serve a useful function, but the particular modalities need not be precisely those in the present Act. The policy on sale of defensive arms should not be considered an inalterable tenet of U.S. policy; a lessening of regional and global tensions might greatly alter the perceptions that motivated this policy in 1979.

Prior to the PRC's crackdown of last spring, there had been encouraging signs of a thaw between the PRC and Taiwan, such as the opening up of possibilities for family travel, business contacts, and so on. The warming trend may not be able to continue in the aftermath of the Tiananmen Square massacre, at least not in the short term.¹³⁴ For the longer term, it is worth asking whether there is a role for U.S. law and policy in encouraging the sorts of interactions that could make a future rapprochement possible. In 1979, Congress was justifiably concerned with heading off any efforts on the part of the PRC to isolate Taiwan through economic boycotts or any other form of coercion, but in 1989 those concerns seem anachronistic. The economic achievements of the 18 million people on Taiwan are formidable compared to those of the billion and more on the mainland, and no one today would expect the PRC to be able to bring Taiwan to its knees or even to make a dent in Taiwan's economic success. The PRC's long-range interests would seem to run instead in the direction of trying to cultivate mutually beneficial economic relations between Taiwan and the PRC. Indeed, such relations could be advantageous to the PRC whether or not they ever led to a political settlement.

133. See, e.g., *United States v. Pink*, 315 U.S. 203 (1942).

134. See *N.Y. Times*, Aug. 20, 1989, sec. 4, at 2, col. 1.

The TRA takes no position on whether it would be in the interests of the U.S. to encourage economic ties between Taiwan and the PRC. In 1989, the answer to that question seems a clear yes. Perhaps the time is not right for the U.S. to take a public stand on the matter, still less to deal with it legislatively; but the TRA's silence on the point reflects the needs and perceptions of 1979, not of the future that has since become foreseeable. By concentrating solely on U.S.-Taiwan relations and ignoring the U.S. interest in constructive PRC-Taiwan relations, the TRA leaves us without an affirmative vision for the 1990s.

CONCLUSION

The TRA has well served the needs of the first decade of U.S.-Taiwan relations following the change in recognition, but the challenge of the next decade will be to find a way to go beyond pragmatic accommodations towards new relationships built on secure foundations. Taiwan's economic attainments presage new opportunities in the Pacific region and globally. Economic security may usher in an era of political maturity for the people on Taiwan, perhaps including at long last the possibility of robust debate over their own future and their links with the mainland. Over the long term it is inevitable that there will be growing interactions between individuals, families, businesses, and even political leaders on both sides of the Taiwan Strait. As those ties strengthen, it will become increasingly important for U.S. policymakers to act creatively with a vision responsive to the opportunity. When the Chinese on both sides of the Taiwan Strait decide where their mutual interests lie, the TRA can become an artifact of a transitional period.

