

The Emerging Legal Framework for Regulating Economic Relations Between Taiwan and the Mainland

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INTRODUCTION

The Formosa Plastics Group, the largest private industrial concern in Taiwan, announced in 1990 the possibility of investing up to U.S. \$7 billion in a petrochemical facility in the Fujian province of Mainland China. The proposed project, which would include an oil refinery and two naphtha crackers capable of producing over one billion metric tons of ethylene per year, was expected to lead many "downstream" petrochemical industries into the Mainland as well.¹ Given that petrochemicals account for roughly one-third of Taiwan's industrial output, the government of the Republic of China ("R.O.C.") has been reluctant to approve the project.² The Formosa Plastics case highlights some of the complicated and challenging issues presented by the growing interaction between the people of Taiwan and the Mainland.

For more than forty years following its relocation to Taiwan in 1949, the R.O.C. government prohibited its citizens from virtually all contact with those under the effective jurisdiction of the People's Republic of China ("P.R.C."). Despite this prohibition, Taiwan business enterprises have, in the last decade, increasingly explored Mainland trade and investment opportunities presented by the opening up of the Mainland economy.³ Correspondingly, the R.O.C. government has come to realize that its insistence on absolute separation between the R.O.C. and the P.R.C. only prevents it from addressing the concrete issues that are emerging from the renewed contact. The R.O.C. authorities have thus gradually adopted liberalizing measures, from the legalization of visitations in 1987⁴ to the establishment of special entities to deal with Mainland affairs in 1991.

Although the R.O.C. government still maintains no formal relations with the P.R.C. and remains committed to regaining control over the Mainland, in July 1992, the R.O.C. government promulgated a special law — entitled the "Statute Governing Relations Between People of the Areas of Taiwan and Mainland China" (the "Statute") — which is

1. See, e.g., Zhuyuan Zheng, *Haixia liangan jingmao guanxi xianshi ji qianjing*, *Zhongyang Ribao* [Central Daily News], July 22, 1990, at 3; *Overcoming Isolation by Investing*, *Wash. Post*, July 5, 1990, at D1.

2. See, e.g., *Formosa Plastics Plans to Construct Taiwan Complex*, *Wall St. J.*, Nov. 26, 1990, at A5.

3. Mitchell A. Silk, *Silent Partners*, 17 *China Bus. Rev.* 32 (Sept.-Oct. 1990).

4. Huizhen Huang, *Kaifang Dalu tanqin fei guli zhengce suowei sishinian zhengjing jianshe zhanxian zixin suozhi*, *Zhongguo Shibao* [China Times], Sept. 7, 1987, at 2.

designed to serve as the primary source of legal authority to direct any civil exchanges across the Taiwan Strait and to resolve any conflicts that might result from such interaction.⁵ Despite purporting to address concrete problems emerging from renewed Taiwan-Mainland contacts, certain key provisions of the Statute are vague and may not be effective when applied to particular situations. Moreover, although the Statute is intended merely to serve as an "interim" regulation prior to the re-unification of Taiwan and the Mainland, there are political concerns inherent to interaction between two entities like Taiwan and the Mainland which the R.O.C. government needs to consider and address in the Statute.

The economic relations between Taiwan and the Mainland are increasingly critical to the economic development of both sides, and these relations present an important "case study" for the illustration and examination of the inadequacies of the Statute. As will be demonstrated, certain "market failures," including imperfect information and externalities, are present in the current economic relationship between Taiwan and the Mainland. An important purpose of the Statute, therefore, must be to provide for the correction of such market failures to allow Taiwan-Mainland commercial activities to proceed optimally. At the same time, heightened interaction with the Mainland may be a double-edged sword. The nature and degree of current contact with the Mainland may very well influence and even pre-determine the future relationship between the R.O.C. and the P.R.C. For instance, the development of a strong commercial relationship between the two may lead to a change in their relative bargaining powers in any future negotiations over the terms and conditions for re-unification.⁶ It is in this light that the Formosa Plastic project symbolizes a turning point in Taiwan-Mainland commercial relations. The government representing each community must ensure that the natural desire of a community and its members to maximize material wealth in the short-run does not jeopardize the fundamental values and ideals upon which the community is built.

In Part I, this article reviews the history of Taiwan's growing ties with the Mainland and the responses by the Executive and Judicial Yuans of the R.O.C. government to issues emerging from the renewed

5. Taiwan Diqu yu Dalu Diqu Renmin Guanxi Tiaoli [Statute Governing Relations Between People of the Areas of Taiwan and Mainland China] (1992) (hereinafter SGR).

6. Zheng, *supra* note 1, at 3.

relations between the people of the two sides. Part II presents an overview of the Statute's provisions. Part III identifies certain "market failures" that ought to be considered in order for the Statute to achieve its stipulated goals in the economic context. Although Article 1 of the Statute asserts that it is enacted as an interim regulation prior to the eventual re-unification of Taiwan and the Mainland, Part IV recommends that the Statute be examined in the context of the long-term security, stability and welfare of Taiwan and points out additional ways to achieve a more principled and democratic model.

I. GROWING TIES WITH THE MAINLAND

On December 7, 1949, following its defeat by the Communist forces, the R.O.C. government retreated to Taiwan and set up a provisional capital on the island. In the period since the R.O.C. established political and military control over the island, the Nationalist Party, or Kuomintang ("K.M.T."), has been the dominant political party. Although the Mainland has been outside its actual scope of control since 1949, the K.M.T. government of the R.O.C. continues to assert its legitimacy as the sole government of all of China. At the same time, the P.R.C. government claims jurisdiction over Taiwan.⁷ The R.O.C. government has dealt with this political dilemma with "three no's": no contact, no negotiation and no compromise with the "enemy."⁸ The P.R.C., on the other hand, has taken several initiatives to establish relations.⁹ Despite the P.R.C.'s seemingly friendly posture, the R.O.C. government has adhered strictly to its policy by consistently refusing any official contact.¹⁰

7. Republic of China Yearbook 97-99 (1988).

8. Tiansheng Gao, Kaitang tanqin sanbuqu, Xinxinwen Zhoukan, [New News Weekly], Aug. 31-Sept. 6, 1987, at 10.

9. For instance, on October 1, 1979, the very day of the normalization of diplomatic relations with the United States, the P.R.C. National People's Congress recommended resuming postal services between the two sides or opening some other channel for communication. At the same time, the Congress made a gesture of its intention to abandon the threat of "liberating" Taiwan by ordering a cease-fire on Quemoy and Matsu, Taiwan's Mainland defense frontiers. On September 30, 1981, the National People's Congress again tried to approach Taiwan by announcing nine suggestions for a peaceful re-unification with Taiwan, which became the basic framework for the P.R.C.'s Taiwan policy. Youxin de miandui Diren, Taibei zhaodaoqiu dingei Beijing le, Zili Wanbao [Independence Evening Post], Aug. 29, 1987, at 2.

10. Id.

Because of the announced policies of the R.O.C. and the P.R.C. towards each other, each desiring re-unification under its own aegis, no compromise has been reached by the two in the past forty years. Nevertheless, the people of the two sides share a common ancestry, a common history and a common cultural heritage. Thus, there is strong desire to establish social and economic ties spanning the Taiwan Strait. Indeed, relations between the two peoples expanded tremendously in the late 1980's. For instance, the value of indirect trade between the two sides grew from approximately U.S. \$1 billion in 1985 to U.S. \$4 billion by 1990.¹¹ These contacts led to various issues that the R.O.C. government gradually found itself confronting. Correspondingly, the Executive Yuan and the Judicial Yuan were compelled to come up with appropriate responses.

A. Legalizing Commercial Activities

Prior to 1979, the only officially sanctioned trade between Taiwan and the Mainland was limited to the indirect import of Chinese medicine through Hong Kong by an agency of the R.O.C. government.¹² However, the fact that the supply and demand of the two economies are so well matched has caused their indirect trade to flourish. Taiwan lacks the low cost of labor and raw materials that the Mainland can provide, while the Mainland needs the light industrial goods that Taiwan can readily produce.¹³ Nevertheless, fluctuations in inter-Strait commercial activity can be attributed in large part to the political maneuvers of both sides.

Since the relocation of the R.O.C. government to Taiwan in 1949, the P.R.C. government has sought to "liberate" Taiwan and to implement its "one country, two systems" proposal. As the modernization movement took hold around 1978, the Mainland began to assume a more peaceful posture toward Taiwan, partly because a good international image was crucial to attracting the capital it so desperately needed for economic development.¹⁴ P.R.C. authorities have indicated

11. Meizhi Zhu, *Taiwan haixia liangan zhuankou maoyi fazhan yu xianzhuang*, 13 *Zhongyang Yinhang Jikan* [Central Bank of China Quarterly] 41 (Spring 1991).

12. Zongda Yan, *Liangang Jingmao Guanxi yu Woguo de Dalu jingmao zhence* [Cross-Strait Commercial Relations and Our Mainland Commercial Policy], *Zhonghua Zhanlue Xuekan* [China Strategic Studies Journal] 44 (Summer 1990).

13. Silk, *supra* note 3, at 35.

14. Yan, *supra* note 12, at 45.

that investments by Taiwan residents are welcome and will receive preferential treatment. Still, the "realization of re-unification" was hailed as one of the three primary goals for the 1980's.¹⁵ Correspondingly, various investment and trade incentives were targeted at Taiwanese businesses to "induce the industrial and commercial circles in Taiwan to establish the conditions for re-unification"¹⁶ and to "gradually increase the reliance of Taiwanese goods on the Mainland market to obtain control over Taiwan's economy such that re-unification efforts can be sped up."¹⁷

In response to the political stalemate between Taiwan and the Mainland, the R.O.C. government's position on commercial interaction with the Mainland was until recently consistent with the traditional "three no's" described earlier. However, in order to achieve its announced policy of eventual unification under Taiwan's political and economic system, the R.O.C. government came to acknowledge that renewed contacts between the two sides are essential. Only through interaction can Taiwan hope to induce internal changes in the Mainland to the extent that Communist rule will become inappropriate. Only by contact can people in the Mainland contrast the economic, political, educational and cultural achievements of Taiwan with the tremendously "inferior" life under the socialist regime, and thereby help Taiwan overthrow the Communist party dictatorship.¹⁸

Thus, in 1984, controls over imports of certain goods from Hong Kong were relaxed, signifying an implicit acceptance of indirect trade with the Mainland. This was followed by the official Executive Yuan announcement of a modified "three no's" policy with respect to indirect commerce: no official contact, no encouragement, and no intervention.¹⁹ In 1987, the R.O.C. government permitted for the first

15. *Id.*

16. See *Wo chanye shengji caineng jie jue kunjing*, *Jingji Ribao*, Sept. 9, 1990.

17. *Id.*

18. For example, the Secretary of the Central Commission of the KMT, Li Huan stated, "We wish not to replace the P.R.C. political rule, but to advance the democratization of the Mainland, to promote freedom of information and economic development there so that China can be freed of the bondage of Communism and become a free and modern nation." *Zhongguo Shibao* [China Times], Sept. 7, 1987, at 2.

19. The Executive Yuan of the R.O.C. government is headed by the Office of the President and the Prime Minister, and is composed of various ministries and related commissions and councils. While responsible for executive functions, it is also substantially involved in the legislative process. In fact, most legislation in the R.O.C. initiates in the Executive Yuan. That is, the Ministry of Justice drafts the law and then submits it to the Legislative Yuan for deliberation and enactment. Under certain circumstances, the Executive Yuan can even return a

time the indirect import of 27 items of agricultural and industrial resources. The list has since been substantially enlarged.²⁰ These ad hoc commercial liberalization efforts received the endorsement of the 13th Plenum of the K.M.T. in 1988, which adopted a new Mainland Commercial Policy. As with all other cross-Strait interaction, commerce was to be developed according to five general principles: civil, indirect, unilateral, gradual and safe.²¹

Since then, the Taiwanese authorities have replaced a number of previously restrictive laws with permissive ones. In February 1990, for example, the Ministry of Economic Affairs lifted the prohibition on Mainland market survey trips and expressly legalized participation by Taiwanese businesses in Mainland trade exhibitions.²² In October 1990, it promulgated administrative procedures governing indirect investment in and technical cooperation with the Mainland. Correspondingly, it approved a list of 3,353 categories with respect to indirect investment in the Mainland. An additional 326 categories were added to the list by March of the next year.²³ In 1992, the Mainland Affairs Council of the Executive Yuan proceeded to lift the ban on indirect Mainland investments by certain service industries.²⁴

B. Legalizing Visitations

Parallel to the opening up of commercial activities was the liberalization of visitations by Taiwan residents of relatives in the Mainland beginning in November 1987.²⁵ In response to the

law that has already been passed to the Legislative Yuan for reconsideration and revision, upon which the law as written can be reaffirmed only by the two-thirds vote of the Legislative Yuan. *Zhonghuaminguo Xianfa* [Constitution of the Republic of China], arts. 53, 57, 58. Needless to say, the Executive Yuan is under the control and influence of the ruling party, the K.M.T. Therefore, K.M.T. policies are readily implemented by the Executive Yuan.

20. Yan, *supra* note 12, at 46-47.

21. *Id.* at 47.

22. Silk, *supra* note 3, at 33.

23. Zhichun Zou, *Shishi paoqianmian, juece yiluzhui, falu pinming gan*, *Zhongshi Wanbao* [China Times Evening Post], Sept. 10, 1992, at 3.

24. Taiwan to Let Service Industry Invest in China, *Reuter Libr. Rep.*, June 12, 1992.

25. The visible liberalization effort began in June 1987 during a session of the Legislative Yuan. Several legislators of the Democratic Progressive Party ("D.P.P."), the major opposition party, initiated a "Return to the Native Land Movement," calling for the government to "let Taiwanese return to Taiwan and let Mainlanders return to the Mainland." Gao, *supra* note 8, at 11. Naturally, the Executive Yuan gave the "standard reply" that to do so would jeopardize Taiwan's security given the Communist plots to infiltrate Taiwan society, *Id.*, and to use the

humanitarian plea to reunite family members after some forty years of separation, the Office of the President, under the instructions of then President Chiang Ching-Kuo, began to study whether allowing visitations would fly in the face of the strict Mainland policy and whether allowing an international organization such as the Red Cross to assist in the logistics was desirable.²⁶

Although the policy makers supported adherence to the traditional "three no's" in every official capacity, they decided to allow people to make autonomous decisions with respect to visitations under a modified "three no's" similar to the new policy governing economic interactions: no encouragement, no assistance, no prohibition. For instance, while the government will not issue any documents for direct travel to the Mainland, it will issue entry/exit permits for Hong Kong or Macao, or passports for travel to other countries, thereby allowing indirect access to the Mainland.²⁷

The R.O.C. announced the new policy by issuing a negative statement prohibiting such visitations for individuals engaged in the military, the civil service and public education, rather than an affirmative statement expressly allowing all others to go. This illustrates the government's passive stance. A judgment was also made to avoid giving any international organization a role, since to do so might give such organizations a mistaken impression that there is a chance for them to assume an intermediary position in the P.R.C.-R.O.C. relationship, and might even generate suspicion that there had been certain contacts administered through such organizations all along.²⁸

Though the R.O.C. government repeatedly emphasized the non-governmental nature of any resulting contact, liberalization of visitations is another representative step in a more comprehensive reevaluation and readjustment of Taiwan's Mainland policy. This new openness probably stems from a more realistic assessment of the changes and developments

"beauty of the motherland" as bait for the people in Taiwan. Yiling Lin, *Dalu zhengce zhuanhouweigong*, 74 *Lianhe Yuekan* [United Monthly Gazette] 6 (Sept. 1987). Nevertheless, on July 18, 1987, the Prime Minister announced the revocation of tourism restrictions that applied to Hong Kong and Macao, signalling a first step in the other direction. Gao, *supra* note 8, at 11. Furthermore, the Ministry of Foreign Affairs interpreted the traditional "three no's" to solely assert Taiwan's position in the international arena, and not to apply to any exchange between the people on the two sides of the Taiwan Strait. Lin, *supra*, at 7.

26. Gao, *supra* note 8, at 10.

27. *Id.*

28. *Id.*

of both sides during the past forty years and a sense of confidence generated by Taiwan's political and economic advancement.²⁹

C. *Emergence of Legal Problems*

Numerous legal issues have arisen from the renewed contact brought by the flood of Taiwanese people going to the Mainland for business and pleasure after the legalization of visitations. For one, "bigamy" cases emerged. Of those who moved to Taiwan with the K.M.T. in 1949, many left their spouses behind. Later, recognizing the impossibility of reunion given the forced political separation, some opted to marry again in Taiwan. Yet, divorce with the original spouses could not be arranged before these second marriages for the very same reason. Therefore, for all legal purposes, the second marriages created bigamy.³⁰

Such was the case of Deng Yuan Jeng.³¹ An R.O.C. district court ruled in favor of Deng's mainland wife and stripped the 28-year relationship with Deng's Taiwan wife of all legal effect. Public outrage grew as both Superior Court and Supreme Court upheld the decision.³²

29. See, for example, the statement of Li Huan, *supra* note 18.

30. Minfa Qinshupian [Taiwan's Family Relations Law, Civil Code] (hereinafter Family Relations Law) was revised in 1985 to provide that a bigamous marriage has no legal effect from inception. In the past, the second marriage would be annulled from the time of legal judgment, meaning that all acts before legal judgment are still valid. Thus, for instance, children born before the judicial annulment of the second marriage would not be illegitimate under the original version but would be under the revised version. Basically, the revision brought about harsher consequences for "bigamous" relationships. What is more, because of the serious disturbance to social order and tradition that bigamy is assumed to cause, there has never been a statute of limitations on the right to sue and any interested party — including parents and other relatives of the parties involved — has standing to bring suit. Nevertheless, the cases of interest here are still governed by the old law, because of the dates involved. See Dongwei Dai, *Ershiba nian de laogong zenmo meile?*, 133 Faxue Congkan [China Law Journal] 27-29.

31. Deng married Chen in Fujian in 1940. When the Mainland fell to the Communists, Deng made for Hong Kong alone and then resettled permanently in Taiwan. In 1960, lying about his marital status, he married Woo. In 1986, after having left for Hong Kong herself, Chen, through a Taiwanese lawyer, brought suit against Deng for bigamy, seeking to annul his second marriage. Deng's defense was that he had merely cohabitated with Chen in Fujian, but they were never officially married. However, photographs of a wedding banquet for some forty tables of guests were introduced into evidence. Moreover, documents show that when Deng registered his residence in Taiwan for the first time in 1951, he listed Chen as his spouse. *Id.* at 25-26.

32. Joyce C. Fan & Nigel N.T. Li, *An Uncommon Case of Bigamy; An Uncommon Constitutional Interpretation*, 4 J. Chinese L. 69 (Spring 1990). Indeed, even after the annulment, there would be no way for the original Mainland spouse to come to live in Taiwan. Meanwhile, the annulled Taiwan spouse loses the right to her children and ends up with a property position

Amidst protest, the Committee of Grand Justices found the application of Article 992 of the R.O.C. Civil Code (which allows any interested party to apply for annulment of a bigamous marriage) to be unconstitutional under the circumstances. The Committee reasoned that such an application would conflict with the guarantee of fundamental freedoms and rights set forth in Article 22 of the Constitution by damaging family relations to the detriment of social order. With this interpretation, the Supreme Court finally reversed the unjust decision.³³

The Deng case illustrates the inappropriateness of applying existing laws to certain circumstances that stem from the unusual Taiwan-Mainland situation. At the same time, reliance on "manipulative" interpretations to escape socially unacceptable consequences is not a principled solution. Moreover, allowing "deviant" judicial precedents to build up can be dangerous, especially in an area where one wants to retain flexibility so as to accommodate future policy changes.³⁴

D. Creation of Administrative Entities

In light of the renewed contact and the accompanying problems, efficient administration of the development of Taiwan-Mainland relations became essential. In August 1988, again under the directive of the 13th Plenum of the K.M.T., a Mainland Affairs Guidance Group was established in the K.M.T. to promote the logical evolution and implementation of a "Current Stage" Mainland policy.³⁵

More recently, the R.O.C. government has organized a three-tier structure to deal comprehensively with Mainland issues. Starting from the top, the National Unification Council has been established under the Office of the President. Its members, individually appointed by the President, are vested with the highest executive authority to formulate

that is worse than how she would have fared had she undergone a divorce. The best she can hope for is compensatory damages under Article 999 of the Family Relations Law. See Dai, *supra* note 30, at 33.

33. See Fan and Li, *supra* note 32, at 71.

34. For a good discussion, see Haibo Deng, *Haixia liangan zhi faluguanxi yu shehui guanxi* [Cross-Strait Legal and Societal Relations], 56 *Falu Pinglun* [Chao Yang Law Review] 14 (May 1990).

35. The "Regulations Governing Visitations by Mainland Scholars and Students Residing Abroad" and the "Main Points on International Academic Conferences and Cultural or Sports Activities that Involve the Mainland in the Current Stage" are among the creations of the group. Haiyuan Qu & Zhengyi Lin, *Pinggu Dalu tanqin yu liangan jiaoliu zhengce*, 8 *Quanmin Zazhi* [The People] 20 (June 1989).

a comprehensive strategy for eventual re-unification with the Mainland and to propose a time-table for the various steps in that direction.³⁶

Next, on January 31, 1991, the Executive Yuan established the Mainland Affairs Council which is responsible for the implementation of the general policies produced by the National Unification Council. Specifically, it is responsible for coordinating the efforts required of the different ministries. For instance, it will direct the Ministry of Justice to draft various laws to implement specific policy decisions regarding Taiwan-Mainland relations.³⁷

Finally, the Straits Exchange Foundation is entrusted by the Mainland Affairs Council to carry out the day-to-day operations necessary for the smooth functioning of mechanisms designed to implement the Mainland policy. This nominally civilian organization functions in reality as a quasi-governmental entity similar in nature to the Coordination Council for North American Affairs in Washington, D.C. Given the prohibition on official contact, it substitutes for the R.O.C. government in crucial intermediary matters, like document certification and notarization, facilitation of economic and cultural exchanges, provision of judicial assistance, issuance and ratification of travel documents, and assistance in dispute resolution.³⁸ In fact, it is almost entirely funded by the R.O.C. government.³⁹

II. THE STATUTE GOVERNING RELATIONS BETWEEN PEOPLE OF THE AREAS OF TAIWAN AND MAINLAND CHINA

The various executive and judicial measures examined above paved the way for legislative action as well. Certain amendments in the law became essential to the just implementation of the new policies. With regard to visitations, for instance, no R.O.C. legislation ever expressly prohibited Taiwan residents from visiting the Mainland.⁴⁰ In order to

36. Yu-ming Shaw, *The Republic of China on the Move: Liberalization, Democratization and the Reunification of China*, at 5 (Address at the Carnegie Council on Ethics and International Affairs, May 22, 1991).

37. *Id.*

38. *Id.*

39. Taiwan Survey, *The Economist*, Oct. 10-16, 1992, at 17.

40. Guojia Anquanfa Shixingxize, Di Shisan Zhang [Article 13 of the National Security Law Implementation Procedures] (R.O.C.) provides only that those who have travelled to the "enemy-occupied territory" may be denied the right to leave the country again. In addition, Article 12 of the same Procedures states that those who have travelled to the enemy-occupied territory and aided any rebellious organization there may be denied the right to re-enter Taiwan.

provide clear guidance as to the nature of the recent liberalization, the R.O.C. government should affirm the legality of such visitations while setting forth the categories of individuals who are prohibited from visiting the Mainland for policy reasons.⁴¹ Moreover, the R.O.C. government should consider the extension of assistance and legal protection to its people travelling to the Mainland.⁴² Indeed, the significant number of Taiwan-Mainland legal issues and headline incidents that have continued to emerge (such as the expulsion and repatriation of illegal immigrants from the Mainland with the help of the Red Cross and the effort to secure greater foreign passenger death benefits for the Taiwanese victims of a plane crash in Guangzhou) finally prompted legislative action.

In December 1988, the Ministry of Justice assembled all the relevant ministries to investigate any existing and potential legal problems related to the Taiwan-Mainland situation and to formulate the principles for their resolution. Then it established a drafting committee to give shape to the desired provisions of a special law. A first draft was completed in February 1989, to which the Mainland Affairs Council made various changes and additions.⁴³ With President Lee Tung-Hwei's announcement of his intention to terminate "the period of mobilization and rebellion suppression" by May 1, 1991, the draft was sent back to the Ministry of Justice for further revisions. By October 1990, the Executive Yuan delivered a new 78-article draft to the Legislative Yuan for deliberation. In this final draft, conflict of laws provisions were incorporated for the first time. Also, the strong political overtone found in earlier drafts was diluted.⁴⁴ After much debate resulting from the draft's controversial nature, on July 16, 1992, the Legislative Yuan finally passed a 96-article Statute which closely tracked the Ministry of Justice draft.

41. Zhiwen Wang, *Tanqin kaifang cuoshi zhi falu zhengyi*, *Zhongguo Shibao* [China Times], Sept. 15, 1987, at 2.

42. *Id.*

43. Zhiwen Wang, *Liang'an Guanxifa chaoye banben zhi bijiao pingxi*, 42 *Faling Yuekan* [The Law Monthly] 12 (Jan. 1991).

44. *Id.*

A. *Overview of the Statute*

The Statute presents a spectrum of multi-faceted legal solutions for the unusual problems arising from 40 years of Taiwan-Mainland separation and the recent rapprochement. It essentially legalizes and solidifies the policy towards greater openness, which in turn has positive effects on the realization of this new policy. Although the Statute was drafted in broad and general terms to allow flexibility to deal with changing circumstances and the maturation of Taiwan's Mainland policy, it does not always set forth principles and limitations within which the relevant ministries may develop rules and regulations to give substance to the legislative program. The Statute is unilateral in that it does not seek or depend on similar action on the part of the Mainland government. It does not attempt to resolve any political questions, but simply to govern the relations between the two peoples in the interim before re-unification.

Founded on the five fundamental principles of stability, reality, equality, comprehensiveness and foresight,⁴⁵ the 96 articles of the Statute fall into six chapters: General Provisions, Administration, Civil Matters, Criminal Matters, Penal Provisions, and Supplementary Provisions.

1. The General Provisions

Article 1 of the Statute explains that it is enacted to ensure national security, social stability and welfare, to regulate the dealings between people of the Areas of Taiwan and Mainland China and to attend to the legal matters that arise therefrom before the country is united.⁴⁶ Implicit in this provision is the official position of the K.M.T. that re-unification with the Mainland is the ultimate goal.

Article 2 sets up the geographical definitions of the "Area of Taiwan" and the "Area of Mainland China," on which all of the provisions are based.⁴⁷

Article 4 then authorizes the Executive Yuan to establish or appoint government organizations or entrust civilian organizations to handle

45. See Kaifang tanqin yansheng de liangan falu wenti zuotan, 22 Zhongguo Dalu [Mainland China] 23 (1989).

46. See SGR, *supra* note 5, art. 1.

47. See SGR, *supra* note 5, art. 2.

matters relating to dealings between people of the Areas of Taiwan and Mainland China.⁴⁸ Entities like the Mainland Affairs Council and the Straits Exchange Foundation fall under this provision.⁴⁹

2. The Administration Provisions

The Taiwan-Mainland separation generates issues that require extraordinary administrative law treatment. The administration chapter codifies the unilateral policy decisions of the R.O.C. government under the current circumstances. Articles 9 through 21 address the issues of Taiwan people travelling to the Mainland, restrictions on Mainland people travelling to, residing in and working in Taiwan and the deportation of Mainlanders under certain circumstances.

Article 22 deals with the possibility of obtaining recognition for educational qualifications earned in the Mainland, and Article 23 addresses the problem of Mainland educational institutions soliciting students in Taiwan. Articles 24 and 25 address the problem of multiple taxation on any income earned in the Mainland. Articles 26 and 27 deal with the disposition of retirement benefits and support payments for retired government personnel and veterans who move back to the Mainland.

Articles 28 through 32 concern the issues of transportation between the two areas. Article 33 regulates any cross-Strait alliances between people or groups. Article 34 concerns the promotion of Mainland goods and services. Article 35 deals with cross-Strait investment activity, technical cooperation, trade and other commercial activity, while Article 36 specifically addresses Taiwan financial institutions in this respect. Article 37 regulates Mainland publications and productions. Article 38 restricts importation of the Mainland currency. Article 39 concerns cultural exchanges and Article 40 addresses Mainland goods.⁵⁰

48. See SGR, *supra* note 5, art. 4.

49. The quasi-governmental nature of the relevant civil organizations is illustrated by Article 4 which allows a civil servant working in such an organization to consider his employment there as civil service. See SGR, *supra* note 5, art. 4.

50. See SGR, *supra* note 5, arts. 9-40.

3. The Civil Matters Provisions

What recognition and legal effect should Taiwan give to a civil law judgment rendered by a Mainland court that affects a Taiwan party? What about a contract written under Mainland law? If the Mainland were a "foreign country," Taiwan could easily apply its private international law statutes. Foreign judgments, for instance, can be recognized and enforced under R.O.C. Civil Code Article 402.⁵¹ However, given the unique Taiwan-Mainland situation, cross-Strait civil law problems must be separately addressed.

The Civil Matters chapter (Article 41 to Article 74) consists mainly of two types of provisions that produce effective solutions in harmony with Taiwan's legal system: first, those that solve problems that are peculiar to the Taiwan-Mainland relationship; and secondly, those that tailor the conflict of laws doctrine to Taiwan and the Mainland. An example of a provision of the first type is Article 66 on cross-Strait succession, which requires that Mainland heirs submit a written declaration of inheritance to Taiwan courts within two years of their inheritance coming into force.⁵² An example of a provision of the second type is Article 56, which specifies that regulations of the place of contract govern any debt contract unless otherwise agreed upon by the parties to such contract.⁵³

51. See Minshi Susongfa [The Civil Procedure of the Republic of China], art. 402.

52. See SGR, *supra* note 5, arts. 66 and 67. The Statute's special treatment of cross-Strait succession is not well received. Scholars have criticized the practice of setting a time limit for the Mainland heirs to exercise their inheritance rights under an environment where entry/exit is stringently controlled as unreasonable. Moreover, the N.T.\$ 2 million amount limitation set by Article 67 is seen by many as purely discriminatory. Proponents, however, assert its necessity in preventing the leakage of capital into the hands of the Communists. They see nothing wrong with favoring the Taiwan heirs who have clearly contributed more to the care of the deceased over the "free riding" Mainland heirs although the latter may be closer to the deceased in terms of blood relations. See Nanping Yin, *Cong jige anli kan haixia liangan renmin guanxi zhi falu wenti*, 47 *Zhengzhi Pinglun* [Politics Review] 42, 44-45 (July 1989).

With respect to the leakage problem, Mr. Lu Rong-Hai, a Taiwan attorney who has established a Wei Li Law Office in Fuzhou, P.R.C. with a Mainland partner, in January 1991, suggested in an interview that since actual amounts involved in the cases he has seen are relatively small, any worry about massive capital drainage here is not warranted. In fact, Taiwan probably has more to gain politically than it has to lose economically by abandoning the amount limitation and hence averting the criticism of treating Mainlanders as "second class citizens."

53. See SGR, *supra* note 5, art. 56.

4. The Criminal Matters and Penal Provisions

The main provision on criminal matters is Article 75, which states that crimes committed in the Area of Mainland China or on Mainland China ships or aircrafts for which punishment may already have been meted out in the Area of Mainland China may still be sentenced according to R.O.C. law, although part or all of the corresponding punishment may be exempt.⁵⁴ Basically, Taiwan seeks to maintain control over the criminal activity of its people.

Article 77 "liberalizes" the treatment of political crimes in the Taiwan-Mainland context by pardoning Mainlanders who have previously, outside the Area of Taiwan, "committed crimes of rebellion or treason but who enter the Area of Taiwan with permission upon truthful report of such in the application."⁵⁵ Namely, members of the Chinese Communist Party may be free from indictment and punishment.

The Penal Provisions (Article 79 to Article 94) designate the appropriate punishment for violations of the various regulations and prohibitions contained in the Statute. The basic categories of punishment are imprisonment or detention, monetary penalties and confiscation of certain items.⁵⁶

B. Alternative Versions

Along with the Ministry of Justice draft, a number of alternative versions of the Statute were submitted by various interest groups to the Legislative Yuan for consideration. They include: the draft by K.M.T. Legislator Chao Shao Kang et al.; the draft by the Institute for National Policy Research (I.N.P.R.), a private organization under the Chang Rong Fa Foundation; the official draft by the Democratic Progressive Party (D.P.P.), the major opposition party in the R.O.C.; and the draft proposed by the Taipei Lawyers' Association.⁵⁷

Each of these other drafts likewise proposed a legal framework to govern the relations between the people of the two sides. Each,

54. See SGR, *supra* note 5, art. 75. See generally, Zhao Bingzhi, *Issues in Criminal Law Across the Taiwan Strait*, 3 J. Chinese L. 227 (1989).

55. See SGR, *supra* note 5, art. 77.

56. See SGR, *supra* note 5, arts. 79-94. For example, Article 86 establishes fines for commercial activity conducted in violation of Article 35.

57. For a good comparison of the Ministry of Justice draft with several alternative proposals, see Professor Wang's article, *supra* note 43.

however, was premised on its own vision of the eventual resolution of the "China problem," and correspondingly, presented different interim solutions. Three areas of contention that emerged were the definition of the status of and the relationship between the two sides,⁵⁸ the recognition of Mainland law and the application of conflict of laws theory,⁵⁹ and the role of non-governmental intermediaries in this liberalization process.⁶⁰

III. THE DEFICIENCIES OF THE STATUTE AS AN INTERIM REGULATION OF ECONOMIC RELATIONS

Although the most pressing cross-Strait legal problems addressed by the Statute are probably marriage and succession, trade and investment issues are becoming more and more prominent. Indirect trade through Hong Kong has increased by an astonishing 74 times between 1979 and 1991, from an annual dollar value of U.S. \$77 million to almost U.S. \$6 billion. This translates into an average annual increase

58. The Ministry of Justice version naturally professes the current K.M.T. position of "one country, one government, two areas." Namely, the R.O.C. government is the sole legitimate ruling body over one "Republic of China" which is temporarily separated into two areas. The phrase "before the country is united", found in Article 1, clearly asserts the goal of re-unification. The Chao, I.N.P.R., and Taipei Lawyer's Association versions, on the other hand, subtly avoid definition of the current situation. As expected, the D.P.P. version asserts the very opposite. The D.P.P.'s conception almost reaches "two countries, two governments," falling short only because it applies Taiwan's foreign laws by analogy, rather than directly, for Taiwan-Mainland situations. Correspondingly, it tilts towards Taiwan independence. See Wang, *supra* note 43, at 15-16.

59. Though an express general recognition of Mainland law is absent from the Ministry of Justice draft, the status of Mainland law has been implicitly enhanced by the Statute's adoption of conflict of laws for situations involving the two legal systems. By different methods, the five alternative versions mentioned above all incorporate some form of conflict of laws theory. The Chao version and the I.N.P.R. version both present their own "unilateral" conflict of laws provisions; the Taipei Lawyer's Association version adopts the conflict principles that are used currently in Taiwan's foreign laws; while the D.P.P. version goes one step further to utilize the foreign laws themselves by analogy. See Wang, *supra* note 43, at 15-16.

60. The Ministry of Justice draft provided an important role for non-governmental intermediaries, especially with respect to the many practical necessities of Taiwan-Mainland civil interaction. Moreover, it indicated that such intermediaries will actually come closer to being "semi-official" or "quasi-governmental." This basic set-up is endorsed by the Taipei Lawyer's Association version. Under the Chao version, a "China Relations Foundation" is to manage the affairs of "visitations, tourism, commerce, transportation, communication, document notarization and authentication, cultural exchange, athletic exchange, and other matters of Taiwan-Mainland civil interaction." In contrast, the I.N.P.R. version calls for a consulate-like entity in the Mainland that is under the supervision of the Legislative Yuan while the D.P.P. version proposes an Executive Yuan representative office in the Mainland. See Wang, *supra* note 43, at 16.

of over 43% since 1979.⁶¹ By the end of 1989, the amounts involved in Mainland investment projects topped U.S. \$1 billion.⁶² Since then, another U.S. \$2 billion worth of investments have been made in the Mainland.⁶³ An official of the P.R.C. Ministry of Foreign Trade and Economic Affairs recently estimated a record U.S. \$2.6 billion in Taiwan investments for 1992, making Taiwan the second largest investor in the Mainland after Hong Kong.⁶⁴ Many factors account for this trend.

For one, the increasingly protectionist international environment meant that Taiwan could no longer depend on its traditional trade partners like the United States to support its "exported growth" economy. Rather, Taiwan must expand into new markets. The Mainland, with its cultural and linguistic similarities and newly developing economy, is the most natural target.⁶⁵ Besides, almost all of Taiwan's Asian competitors (Japan, South Korea, Singapore, Hong Kong) were already getting their feet into the Mainland door.⁶⁶

The investment attractions were slightly different. Given the increasing competition for markets, minimizing costs had become more important than ever. Yet with Taiwan's booming economy and higher standard of living, wages have had to follow. More stringent environmental protection regulations have also added to costs.⁶⁷ In addition, the strong New Taiwan Dollar further diminished the competitiveness of Taiwanese products. The Mainland, meanwhile, continued to offer cheap labor and cheap natural resources.⁶⁸ This was especially seductive to the labor intensive "sunset" industries whose very survival depended on the achievement of some cost breakthrough.

61. Zhonggongping wo liangan tiaoli buqie shiji, *Zili Zaobao* [Independence Morning Post], Sept. 8, 1992, at 7.

62. See Yan, *supra* note 12, at 49.

63. Taiwan to Let Service Industry Invest in China, *Reuter Libr. Rep.*, June, 12, 1992. For a good description of cross-Straits trade and investment trends, see Ai Wei, *Taihai liangan jingmao guanxi de fazhan jiqi xianzhi*, 30 *Wenti Yu Yanjiu Yuekan* [Issue and Research Monthly] 8 (Feb. 1991).

64. Jinnian Taiwan dui Dalu touzi jiangda ershiliuyi meijin, *Zhongguo Shibao* [China Times], Oct. 19, 1992, at 4.

65. Shengping Lin, *Haixia liangan zhuanke maoyi qianli de pinggu*, *Minzhong Ribao* [People Daily News], Feb. 26, 1988, at 2.

66. Yan, *supra* note 12, at 58.

67. Butong de qiye guimo, dui Dalu zhengce qiwanqiang butong, *Lianhe Bao* [United Daily News], Sept. 14, 1992, at 3.

68. Silk, *supra* note 3, at 33.

Moreover, Taiwan's economy needed "upgrading." Taiwan's economic development under its role as a manufacturer of cheap goods (e.g. toys, shoes, electronics) and a cheap processor of materials had reached a plateau. To continue its tremendous growth, Taiwan sought to strike out in new directions. Investment in the Mainland provided Taiwan with the perfect opportunity to get rid of its old production facilities.⁶⁹

Still more encouraging to greater commercial interaction was the recent liberalization of Taiwan's Mainland policy. The R.O.C. government began to view Taiwanese businessmen as effective diplomats and good advertisements for the K.M.T. system. Correspondingly, it became much more flexible with respect to Taiwan-Mainland trade and investment.⁷⁰

The Statute affirms this liberalized attitude by essentially legalizing economic activity between Taiwan and the Mainland. Article 35 allows Taiwan persons and organizations to engage in investment, technical cooperation, investment, trade and other commercial activity with Mainland persons and organizations with the permission of the organ-in-charge.⁷¹ To approve direct cross-Straits commerce Article 95 requires the organ-in-charge to first obtain a resolution from the Legislative Yuan. Nevertheless Article 95 provides that failure by the Legislative Yuan to come to a resolution within one month during the time it is in session shall be deemed consent.⁷² Overall, the legal framework governing cross-Straits economic relations introduced by the Statute is

69. See Lin, *supra* note 65.

70. Silk, *supra* note 3, at 32-33.

71. Article 35 provides in part:

People, legal persons, groups or other organizations of the Area of Taiwan may not engage in investment activity or technical cooperation in the Area of Mainland China nor engage in trade or other commercial activity with any person, legal person, group or other organization of the Area of Mainland China without permission from the organ-in-charge.

See SGR, *supra* note 5, art. 35.

72. Article 95 provides:

Before the implementation of direct commerce or transportation between the Area of Taiwan and the Area of Mainland China or before permitting people from the Area of Mainland China to work in the Area of Taiwan, the organ-in-charge shall obtain a resolution from the Legislative Yuan. Failure by the Legislative Yuan to come to a resolution within one month during the time it is in session shall be deemed a consent.

See SGR, *supra* note 5, art. 95.

even more permissive and flexible than that contemplated in the Ministry of Justice draft, in which the Ministry of Economic Affairs could only grant permission for Taiwan persons and organizations to engage in commercial activities with Mainland persons or organizations through areas outside of Taiwan and companies or enterprises of those areas, when the security and economic development of the R.O.C. is not affected.⁷³

However, the Statute simply states the R.O.C. government's new Mainland economic policy without dealing with the more difficult question of how governmental regulations can protect Taiwanese businesses and enhance the efficiency of bilateral economic relations which cannot otherwise be attained in the current unregulated marketplace. In fact, as will be discussed below, several special "market failures" exist in the conduct of economic activities between Taiwan and the Mainland that need to be specifically considered by any legislation governing such commercial relationships in order to promote the greatest efficiency and equity.⁷⁴

A. Microeconomic Problems for Taiwan Businesses

In conducting business with the Mainland, Taiwan businesses are subject to several unique risks which call for a higher degree of regulation and supervision than most other kinds of business relations. A discussion of four such "market failures" follows:

1. Unequal Bargaining Power

Only where the parties hold equal bargaining power can free market forces be expected to achieve the most efficient allocation of economic resources. Where there is clear imbalance in bargaining power, government intervention can help restore the potential for

73. Oct. 29, 1990 Draft of SGR, art. 23.

74. The arena of international economic interaction can be analogized to a marketplace where the interaction of rational self-interested states is driven by the desire of each state to improve its own economic welfare, even if at the expense of another. This behavior is not unlike that of a competitive firm in the unregulated market. Moreover, international commerce faces "oligopoly-like" conditions where the expected behavior of one's economic partners tends to influence one's conduct in the marketplace. However, given that "market failures" doom the existence of perfectly competitive markets, economic regulations are essential to restore the possibility of efficient exchange. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *Yale J. Int'l L.* 335, 375 (1989).

efficiency. In the United States, for instance, it is sometimes asserted that small sellers should be exempted from antitrust prosecution so as to be able to consolidate their inferior bargaining power and deal more effectively with the big monopoly buyer.⁷⁵

Given that Mainland enterprises have the full backing of the state while Taiwan businesses more or less function as independent business entities, Taiwanese businesses need to proceed with special caution and protection. The high degree of coordination between Mainland enterprises and the P.R.C. government is demonstrated by the "Taiwan Affairs Guidelines" established by the Mainland's Central Propaganda Ministry in 1989. Although the Guidelines emphasize the importance of "attracting Taiwanese investments and strengthening trade with Taiwan," such relations are "to serve the overriding goal of P.R.C.'s political interest."⁷⁶ Indeed, the Taiwan Affairs Office of the P.R.C. State Council more recently expressed the need to enhance cross-strait trade and investment to break down Taiwan's "three no's," to inhibit Taiwan's separatist tendencies, to promote peaceful re-unification and modernization, and to insulate the Mainland from possible economic sanctions by Western nations.⁷⁷

The problem of unequal bargaining power is further aggravated by the volatility of P.R.C. economic policy towards the R.O.C. To illustrate, the Mainland in 1979 advanced the notion of "three passes four flows" in an attempt to enhance interaction with Taiwan. To encourage the import of Taiwanese goods, the "Supplemental Regulations on the Purchase of Taiwanese Products" of 1980 deemed trade with Taiwan as domestic commerce and thereby offered duty-free privilege to Taiwanese products.⁷⁸ This was revoked in 1981, upon rationalization that "increasing imports from Taiwan would only build up Taiwan's foreign exchange reserves, better enabling Taiwan to buy military equipment to the detriment of peaceful re-unification."⁷⁹ Yet by 1985, the Mainland position shifted again. This time, the Mainland called for direct trade

75. See Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 549, 559 (1979).

76. Yan, *supra* note 12, at 49.

77. See Zou, *supra* note 23.

78. Yuyuan Bian, *Women xuyao mingque qianzhan de Dalu zhengce*, *Ziyou Shibao* [Freedom Times], June 5, 1988, at 2.

79. *Id.*

(including direct transportation) with Taiwan, and once again offered duty reduction benefits.⁸⁰

However, when Taiwan finally reciprocated and made an overture to greater commercial openness by allowing the indirect import of some 27 categories of P.R.C. products in August 1987, the P.R.C. surprisingly ordered an import prohibition on 27 categories of R.O.C. products. Moreover, it centralized the control and management of all Taiwan trade in the Ministry of Economics and Trade to the extent that no other public organization or any private group or individual may establish an entity to conduct trade with Taiwan or even engage in such trade indirectly through a foreign entity.⁸¹ In sharp contradiction, the P.R.C. continued to promote other trade and investment incentives for Taiwanese business.⁸²

Basically, while Taiwan is liberalizing its policy, the Mainland is consolidating control over any potential development, coupling an encouraging position with a strict and cautious stance. In tightening its trade policy, the Mainland was most likely attempting to induce a shift toward direct investment in the country.⁸³ At the same time, the Mainland may well be developing trade and investment ties with Taiwan to gain control of Taiwan's economy indirectly. Such "relax-tighten" political games are not only dangerous to the economic interests of Taiwanese businesses but can defeat any possibility of "mobilization" through enhanced commercial contact.⁸⁴ Therefore, Taiwan must also consider restricting commercial interaction with the P.R.C.

Finally, unequal bargaining power also stems from the lack of control Taiwan enterprises have over various economic factors that are important determinants of the success of any commercial venture. First, the complicated bureaucracy may hinder efforts to grasp business opportunities in the Mainland. Second, monetary problems like stringent

80. Id.

81. *Taihai liangan zhankou maoyi de xiankuang yu zhanwang*, *Jingji Ribao* [Economic Daily News], Jan. 7, 1988, at 2.

82. See Lijian Lin, *Haixia liangan jingmao guanxi yu zhonggong tumou*, 22 *Zhongguo Dalu* [Mainland China] 9 (Feb. 1989).

83. Indeed, in September 1987, Guangdong Province announced a new "import substitution" policy wherein it discontinued the import of some 38 items that it could now produce locally. Among these 38 items, 26 (including color televisions and computer equipment) were manufactured by foreign investment enterprises. This was a clear signal for Taiwan firms that in order to continue expanding into the P.R.C. market, they would have to bring some capital into the P.R.C. as well. See *supra* note 81.

84. Id.

foreign exchange controls and the dual currency system may negatively affect the realization of profits. Third, the tight and discretionary central control over resources and markets may destabilize the entire production and distribution enterprise.⁸⁵

2. Information Asymmetry

Market participants must have sufficient information to evaluate competing business opportunities for the marketplace to function efficiently. However, other market failures may affect the supply and demand for information (itself being a commodity) to the extent that optimal information distribution is not achieved. Thus, government intervention is necessary to correct instances of misleading information, to help market participants make better use of the available information in making evaluations, and to provide or require the provision of more or better information in cases of information asymmetry or inadequacy.⁸⁶

Though possessing every incentive to engage in efficient and profitable commercial exchange, Mainland economic entities are governed by forces that are different from those affecting Taiwan enterprises. Primarily, Mainland businesses' operational goals may reach beyond economics into the political realm. Furthermore, due to state planning, resulting in phenomena like cross-subsidization, many of the usual economic indicators one uses to evaluate and compare potential business opportunities may be rendered useless, if not misleading. Along with the secretive and highly discretionary nature of managerial decision-making in Mainland enterprises, Taiwan firms indeed face a severe lack of information on which to conduct commercial exchange.

Therefore, for example, allowing direct trade with the Mainland may not offer any advantage for small and medium-sized Taiwan export firms since they would probably be better off hiring a professional Hong Kong distributor who has much more information on and experience with the Mainland market.⁸⁷ To illustrate, Japanese firms clearly have the option to conduct direct trade with the Mainland, Japan is geographically proximate to the ports of Shanghai and Tientsin, and has

85. See Lin, *supra* note 65.

86. See Breyer, *supra* note 75, at 556.

87. Gang Zhao, *Haixia liangan de zhuanke maoyi*, *Zhongguo Shibao* [China Times], Jan. 7, 1988, at 5.

a number of first-rate distributors of its own, yet Japan chooses to employ Hong Kong trading firms to deal with the Mainland. In fact, of all the Mainland trade that goes through Hong Kong, Japan consistently accounts for the largest portion, some one-third of the total volume.⁸⁸ In any event, so long as the R.O.C. government permits trade and investment activity with the Mainland, it should strengthen the supply of information that is relevant to doing business with Mainland entities.

3. Lack of Legal Protection

Laws that govern the rights and obligations of parties to a contract are an important source of protection in economic interaction. However, the numerous problems with the Mainland legal system, ranging from the laws themselves to the enforcement mechanisms, create a cause for concern in the conduct of commercial activities with Mainland enterprises.

First, it must be noted that the Mainland legal system is still in a fairly primitive state of development. With respect to civil law, given the Communist rejection of private ownership of property, it was not until 1980 that the Economic Contracts Law was promulgated and not until 1985 that an Inheritance Law came into existence.⁸⁹ The two are examples of the mass of legislation and administrative regulations that emerged in the 1980's, in the midst of the Mainland's desperate attempt to bring some order to the Socialist society and catch up economically with the rest of the world. However, some are poorly thought-out and hence are of no practical value though promulgated, while others have simply remained in draft form. Therefore, even if Taiwanese businesses are prepared to abide by Mainland laws, achieving a clear and fair resolution under these in the event of a dispute may be very difficult, if not impossible. After all, there may be no law that governs the issue in question, or there may be a multiplicity of internally contradictory laws.

Moreover, while the Taiwan Civil Code provides in Article 1 that where there is no law on the matter, legal tradition governs, and where there is no legal tradition, legal reasoning shall be employed, Mainland Civil Law Article 6 states in contrast that all civil activity must conform

88. *Id.* Note though that with the return of Hong Kong to the Mainland in 1997, indirect trade through Hong Kong, which accounts for three quarters of Taiwan-Mainland trade, will essentially be direct trade with the Mainland.

89. Zhonggong fayuan minshi panjue zhi chengren yu zhixing wenti, 134 Faxue Congkan [China Law Journal] 150 (Apr. 1989).

to law and where there is no law on the matter, state policy governs. Thus, judgments from Mainland courts are just as likely to be creations of political winds and judicial discretion as of law and legal reasoning.⁹⁰

Furthermore, law has been used in the Mainland as a political tool for the Communist Party to implement its policies and many platforms. The Highest People's Court, the State Council, and even the Public Security Bureau can issue "judicial orders" that instantaneously have the force of law in the Mainland. Given that P.R.C. laws are often secretive, discretionary, political and of a "class nature," they are naturally difficult to interpret and utilize in the absence of a clear understanding of Mainland politics.⁹¹ For example, the existence of a "catch-all" crime like counter-revolution is psychologically if not actually threatening.⁹² Indeed, separation of powers, institutionalized law-making and an independent judiciary are not yet ingrained in the Mainland political and legal systems.

Finally, the state of dispute resolution leaves much to be desired. Empirically, neither the use of Mainland courts nor arbitration have proven to be satisfactory to foreign parties. In addition, in the rare instances where the judge found for the foreigner, there has been almost no success in the enforcement of such judgments or the collection of damages from the Mainland parties.⁹³ Basically, given the state of development of the Mainland legal system, interests in investments in the Mainland and contractual rights in trading with the Mainland seem unstable and hard to protect. The R.O.C. government should bear this in mind in contemplating the regulation of Taiwan-Mainland commercial interaction.

90. *Id.*

91. Renqing Zhonggong falu guannian shenshen zhiding liangan guanxi falu, Minzhong Ribao [People Daily News], May 6, 1989, at 2. See also Kaifang tanqin yansheng de liangan falu wenti zuotan, 22 Zhongguo Dalu [Mainland China] 23, 31 (1989).

92. Deshan Qin, Liangan jingmao fazhan jiang gengxing reluo, Zhongshi Wanbao [China Times Evening Post], Apr. 14, 1988, at 3.

93. See generally, Gang Zhao, Haixia Liangan de Zhuankou Maoyi, Zhongguo Shibao [China Times], Jan. 8, 1988, at 5.

4. Other Transaction Costs

The unique relationship between Taiwan and the Mainland generates additional costs for Taiwan-Mainland commerce. First, because of the traditional "three no's" policy, the two governments cannot come together to formulate agreements that are economically beneficial to the market participants from the two sides. For example, bilateral investment protection and double taxation arrangements cannot be put into place.⁹⁴ In addition, none of the transportation and financial services that normally exist between two economic partners can be found for Taiwan and the Mainland. As a result, serious inconveniences plague the financial and other dimensions of cross-Straits commercial interaction. For one, Mainland and Taiwan banks cannot accept letters of credit nor direct fund transfers from each other. Instead, payments and credits have to go through third-party banks, like Hong Kong banks and foreign banks with offices in Taiwan or the Mainland.⁹⁵

Moreover, because there are no official relations, the R.O.C. government cannot intervene to protect the economic interests of its people in any commercial interaction with Mainland entities. To make matters worse, the Mainland foreign trade and investment administration regimes are extremely complicated. Though numerous laws and regulations have been promulgated, some conflict with each other, many are ambiguous and vague and others are not known to the outside world at all. Likewise, control organs are scattered all over, so an incredible number of approvals are needed for any economic activity. Given such complex procedures and substantive rules, conflicts are bound to emerge in Taiwan-Mainland commercial transactions. Indeed, since the political situation ties Taiwan's hands in dealing with these problems, it may be better insurance for Taiwan businesses to conduct trade and investment with the Mainland through a third party that can more effectively assist and protect the Taiwan firms in case of conflict.⁹⁶

94. See Silk, *supra* note 3, at 40. See also Xiuzhen Liu, *Wo dui Dalu chukou yilaidu guore*, *Jingji Ribao* [Economic Daily News], Nov. 13, 1992, at 2.

95. For reports on the emerging legal framework governing the role of Taiwan banks in the Taiwan-Mainland trade finance business, see Dongjie taishang rongzi gongyeju zhichi, *Lianhe Wanbao*, [United Evening Post], Aug. 11, 1992, at 3, and Kaifang fudalu touzi fuwuye lengre youbie, *Lianhebao* [United Daily News], May 25, 1992, at 2.

96. See Zhao, *supra* note 93. In fact, maintaining the indirect nature of commercial interaction suits the demands of R.O.C. politics very well. Further support for indirect trade can be found in the statistic that around 40% of the R.O.C.'s current exports are distributed by the Japanese *Zaibatsu*'s. If so, why is it necessary to change the portion going to the P.R.C. through

B. *Externalities on the Macroeconomy*

A different type of market failure that afflicts Taiwan-Mainland economic interaction is the presence of externalities. An externality is a situation where an individual decision or action by a market participant has the consequence of affecting the circumstances faced by other market players.⁹⁷ Thus, intervention by the R.O.C. government is necessary to match the individually optimal decisions with the socially optimal choices. Some conventional solutions to the externality problem are: requiring the internalization of all costs imposed by means of taxation, directly regulating the activities that produce negative externalities, and subsidizing or performing the activities that create positive externalities.⁹⁸

1. Economic Dependency

Currently, the P.R.C.'s GNP is only about three times that of the R.O.C.⁹⁹ Thus, Taiwan's economy is by no means minuscule compared to the Mainland's. Nonetheless, the R.O.C. greatly fears increasing its economic reliance on the Mainland. Economic data reveals that exports to the Mainland via Hong Kong in 1987 constituted about 2% of Taiwan's total exports.¹⁰⁰ By the first half of 1992, this number had already increased to 18%.¹⁰¹ In August 1992 compared to August 1991, for example, purchase orders placed by U.S., Japanese and

Hong Kong to a system of direct trade? Independence Evening Post, Dec. 26, 1987, at 2. Also, it is unrealistic to think that changing from indirect to direct will boost the volume of trade between the two because the crucial factor is not the mode but the other restrictions imposed by the two governments. Moreover, even the difference in mode is overstated. Most Taiwan firms simply conduct such "indirect" trade by incorporating in Hong Kong under a different name. See Zhao, *supra* note 87.

97. The classic example of a negative externality is pollution. Because a firm need not factor in the costs to others in weighing the costs and benefits of externality-producing operations, it is likely to engage in a level of activity that is more than socially optimal. In contrast, activities producing positive externalities, like grounds beautification, tend to be engaged in at less than the socially optimal level, since suppliers only consider the benefits they can personally reap from the activity. See Abbott, *supra* note 74, at 388-89.

98. *Id.* at 390-91.

99. Xuepeng Zhu, Dui Taihai liangan weilai jingmao guanxi de tansuo, *Ziyou Shibao* [Freedom Times], Feb. 22, 1988, at 3.

100. *Id.*

101. Liangan jingmao fangwei cuoshi ying su jianli, *Lianhebao* [United Daily News], Sept. 21, 1992, at 4.

European importers had all fallen, while that from Hong Kong/Mainland buyers rose 31%.¹⁰² In October 1992, the Mainland Affairs Council even lifted the ban on exports to the Mainland by state-run enterprises.¹⁰³ It is no surprise that Central Bank officials predict indirect exports to the Mainland will account for over 40% of total exports from Taiwan in several years.¹⁰⁴

There is clearly the possibility that closer economic ties may turn into a weapon in the hands of the Mainland. How Taiwan will fare in the event of an economic war with the Mainland will depend on whether Taiwan's economy can withstand a complete "pull-out" by the Mainland. The answer in turn depends on the completeness of Taiwan's own production structure, Taiwan's command over the distribution channels for its goods and Taiwan's continued ability to obtain and allocate natural resources.¹⁰⁵

The Economic Research Bureau of the R.O.C. Ministry of Economic Affairs noticed certain worrisome trends in the relative positions of Taiwan and the Mainland under the current trade and investment regime. First, Taiwan is increasingly relying on the Mainland as an important market for its products. Second, the Mainland is tightening control over Taiwanese trade and investment. Third, the increasing duplication of Taiwan and Mainland products brought about by Taiwan investments in the Mainland is causing the Taiwan-Mainland economic relationship to evolve from complementary and mutually beneficial to intensely competitive.¹⁰⁶ These observations indicate a greater possibility of Taiwan suffering Mainland economic sanctions.

Thus, when Ba Ji Fa, an automobile manufacturer based in Taiwan, failed because the P.R.C. buyer suddenly canceled its orders, many readily accused the Mainland government of laying traps for Taiwanese businesses.¹⁰⁷ According to the investigation of the R.O.C. Economic Research Center, the Mainland constituted over 35% of Ba Ji Fa's

102. Id.

103. Guoying shiye dui Dalu jianjie chukou jiejin, *Gongshang Shibao* [Industry and Commerce Times], Oct. 8, 1992, at 4.

104. Liangan jingmao fangwei cuoshi ying su jianli, *Lianhebao* [United Daily News], Sept. 21, 1992, at 4.

105. Rongfeng Zhang, Cong wushi de guandian tan Dalu jingmao zhengce zhi zhiding, *Minzhong Ribao* [People Daily News], Mar. 23, 1988, at 6.

106. See Wenzhang Zhao, Taishang fu Dalu touzi zhi hubuxing yu guonei chanye kongdonghua zhi wenti yanxi, 16 *Jinri Heku* [Today Huh-Koo] 42 (June 1990).

107. Yukou Zhou & Limei Wang, Gangtai liangdi kan zhuankou maoyi, *Lianhe Ribao* [United Daily News], Oct. 30, 1987, at 2.

export market, resulting in a degree of market reliance well over the 10% "alarm mark." The Center further suggested that if R.O.C. businesses adhere to the rule of not increasing production capacity when accepting P.R.C. orders, the chance of a P.R.C. "squeeze" can be minimized.¹⁰⁸

Although the Mainland, with its state of economic development and its supply and demand characteristics, seems a perfect economic partner for Taiwan, increased commercial activity with the Mainland can be a double-edged sword for Taiwan. The R.O.C. government must be careful not to jeopardize the long term stability and viability of Taiwan's economy. Any measure that may increase the economic dependency of Taiwan on the Mainland must be thoroughly examined before implementation.

2. Industrial Vacuum

There is good reason to fear that investment in the Mainland can result in an industrial vacuum for Taiwan.¹⁰⁹ First, the speed at which labor-intensive industries are emigrating exceeds the speed at which domestic technological developments are unfolding. Secondly, any emigration produces a chain reaction. This is especially serious for Taiwan's unique industrial structure, where the upstream, medium stream and downstream activities of the petrochemical industry make up nearly one-third of total industrial output.¹¹⁰

Many medium and down stream businesses, such as the plastics and textile businesses, have already emigrated due to the increased cost of Taiwan labor and the strength of the New Taiwan Dollar. The upstream businesses, like oil refining and production of petrochemicals, will likely follow in their customers' footsteps since adding any transportation cost to the price could entail a loss of market. This in turn will induce the emigration of other medium and downstream businesses whose industrial inputs are the products of the emigrated upstream enterprises, despite their original intention to remain in Taiwan.¹¹¹

108. *Id.*

109. For an article on the industrial vacuum problem, see Qin Zhong, *Taishang fu Dalu touzi de jingji xiaoguo yu zhengce jianji — jianlun chanye kongdonghua de weiji*, 23 *Jingji Qianzhan* [The Economy Forward] 18 (July 1991).

110. See Zhao, *supra* note 106, at 46-48.

111. *Id.* at 47.

Moreover, competition from enterprises established in the Mainland may lead to the demise of even more Taiwan firms, further exacerbating the industrial vacuum problem.¹¹² For example, from 1989 to 1991, the U.S. market share of Mainland textile products rose from 12% to 15% while Taiwan's share fell from 12% to 10%, and the U.S. market share of Mainland toy products rose from 37% to 50% while Taiwan's share fell from 11% to 5%.¹¹³ In addition, intense competition is created in the domestic market as lower-priced goods manufactured by Mainland factories set up by Taiwan investors flood back into Taiwan.¹¹⁴

The following trends also characterize Taiwanese investments in the Mainland: the increasing proportion of Mainland investments from Taiwan, the increasing duration of the investment projects, the increasing high-technology nature of the production facilities transferred, the increasing instances where upstream and downstream production activities are transferred as well for vertical integration purposes, the shift from investment in labor-intensive facilities to more capital-intensive ones, and the shift from joint ventures to wholly owned enterprises.¹¹⁵

The outflow of monetary capital, managerial talent, technology and production facilities to the Mainland can be economically devastating to Taiwan. Equally problematic is the inability of domestic capital to accumulate, which is necessary for new investments to refill the vacuum left by the emigration.¹¹⁶ In addition, accompanying the problem of emigration is the danger that Taiwan's industrial structure may become increasingly, and in time, overly concentrated in securities, finance and other services.¹¹⁷ Taiwan may become a second Hong Kong, for better or for worse. Basically, although it may be economically advantageous for individual Taiwan firms to invest in the Mainland, the industrial vacuum that can result from an aggregation of such investment decisions is an externality the R.O.C. government may want to address through regulation.

112. *Id.* at 48.

113. *Lianganjingmao you hubu zouxian jingzheng hennan bimian*, *Zhongguo Shibao* [China Times], Sept. 12, 1992, at 11.

114. *Taishang touzi Dalu chanpin diji fanchi bendao*, *Zhongshi Wanbao* [China Times Evening Post], Aug. 14, 1992, at 14.

115. See Zhao, *supra* note 106, at 39-41.

116. *Id.* at 47.

117. *Id.*

3. Divergence of Economic and Political Interests

In pursuing their individual economic interests, market participants may be imposing an externality on the national security of Taiwan. Similar considerations have led to the promulgation in the United States of the Exon-Florio amendment to the Omnibus Trade and Competitiveness Act of 1988. This Act provides that the Committee on Foreign Investment in the United States has the authority to review and refuse any mergers or acquisitions that may result in foreign control of sensitive industries or in national security impairment.¹¹⁸

As a member of a larger community, individuals are expected to at times subjugate individual preferences, rights and freedoms to the greater social good. That is, given that each individual receives countless benefits from the society to which he belongs, each member should in turn be willing to contribute to the preservation of that society and to the achievement of communal aspirations. The very existence of a community necessarily entails individual sacrifice to various degrees.¹¹⁹ Clearly, a government is not out of line in restricting the rights and freedoms of its people so as to ensure the continued existence of the nation. Therefore, where the pursuit of economic interests by individual firms poses a threat to such an important political interest as national security, government intervention is more than justified.

If the present trend in trading with and investing in the Mainland continues, numerous Taiwanese businesses will eventually find their economic survival tied to the Mainland. These businesses may very well become a pressure group that seeks to influence Taiwan policy-making with regard to the Mainland so as to preserve and enhance their own entrenched economic interests, even at the expense of other political and social concerns.¹²⁰ Thus, the R.O.C. government may want to take action to pre-empt the creation of such an externality.

118. 20 U.S.C. § 5001.

119. See Wallace Wen-Yeu Wang & James Ting-Yeh Yang, *Financial Institutions in Taiwan: An Analysis of the Regulatory Scheme*, 4 J. Chinese L. 1, 42-43 (1990).

120. Yan, *supra* note 12, at 65.

IV. TOWARD A MORE PRINCIPLED AND DEMOCRATIC MODEL

Taiwan has been undergoing legal reform to promote its emergence in the international arena as a free and modern society and to secure its many accomplishments while setting a stage for further progress. Given that people from Taiwan will engage in commercial dealings with the Mainland regardless of the position of the R.O.C. government, it is certainly more consistent with the spirit of a lawful society to legalize and regulate rather than disapprove and tolerate. Conducting activities under the table only undermines the government's position, to the detriment of social order and future policy development. Regardless of the mode and extent of future Taiwan-Mainland interaction, therefore, a government which holds law to be supreme must implement its policies through intelligent laws and regulations so as to give fair notice and guidance to its citizens.

Although the Statute is a commendable attempt to bring more activities into the reach of the legal system, the preceding part of this article indicates that the Statute fails to expressly identify the various "market failures" which underlie the current economic relations between Taiwan and the Mainland. Moreover, the Statute fails to articulate the goals and aims which the R.O.C. government is seeking to promote through the system of legal rules. Without identifying the source of concern, it is difficult to forge responsive regulations. The final part of this article presents a number of general approaches to improve the Statute in order to better reflect the difficulties and complexity of the rapidly changing Taiwan-Mainland situation.¹²¹

A. *Articulate Legislative Intent*

The nature of the Statute is that of an interim law designed to govern relations between the people of Taiwan and the Mainland until the eventual re-unification. In order for the Statute to remain useful throughout this interim, it must be able to accommodate new policy decisions in an evolving political environment and to address future legal problems that cannot be anticipated or understood presently. Therefore,

121. In this light, certain existing laws must also be amended to prevent contradiction with the Statute. For instance, with respect to laws that criminalize providing "material assistance to the rebellious regime," indirect trade and investment must be clearly excluded from the definition of such "material assistance." See Chengzhi Panluan Tiaoli [Law on Rebellion], art. 4(1).

broad and general provisions were drafted to provide a flexible general framework with room for supplementation and interpretation. Namely, many of the actual implementation procedures and substantive regulations were designated by the Statute to be drafted by various organs-in-charge.¹²²

Although this means that changes to the law can be made quickly without having to go through a time consuming and complicated legislative process, it undermines the legitimacy of the Statute by leaving many difficult and fundamental policy decisions to various government ministries and agencies. Instead, the Statute should evolve with the legislators' collective view on new policy.

Legislative history may help to guide the ministries and agencies in their implementation and interpretation of the Statute's broad provisions so as not to be arbitrary and discretionary. Nevertheless, perhaps a better way is for the legislators to actually present their vision of the evolution of law and policy. The legislature could, for example, articulate a long-term strategy that sets forth the important stages in the development of Taiwan-Mainland interaction at which time certain issues must be considered or revisited. In addition, even if the legislators do leave the ministries and agencies with the initiative for the evolution of the law through their drafting of implementation procedures and substantive regulations, the legislators, or at least a committee of legislators, should ratify the products and review them from time to time to make sure they are in line with the legislative intent. (Currently, the Statute requires an initial Executive Yuan ratification for some of the implementation procedures.)¹²³ Otherwise, with the various ministries and agencies dictating the substance, the enactment of the Statute will be meaningless.

B. Recognize the Political Dimension of the Statute

Although the Statute purports to be merely a set of interim solutions, it has an inherent political dimension. According to the R.O.C. Constitution, Taiwan and the Mainland are part of one China.¹²⁴ However, Taiwan is often forced to recognize that the

122. See, e.g., SGR, *supra* note 5, art. 10.

123. See, e.g., SGR, *supra* note 5, art. 10.

124. Zhonghua Minguo Xianfa [Constitution of the Republic of China] (promulgated Jan. 1, 1947).

Mainland is an entity with its own set of laws and regulations.¹²⁵ Yet, in dealing with legal relations between the people of the two sides, the R.O.C. government cannot adopt the framework of private international law, as that would cause serious conflict with Taiwan's Constitution and other laws like the Nationality Law which spell out that there is only one China.¹²⁶ Nor can it utilize the form of inter-regional domestic law, for no Constitutional umbrella exists over the two highly autonomous legal systems that have resulted from the political division of the nation. Moreover, adoption of the inter-regional form would, in a sense, be falling prey to the Mainland's "one country, two systems" proposal that Taiwan has always opposed.¹²⁷ Therefore, a "special law" was conceived.

In fact, the existence of greater concerns is illustrated by the Statute's attempt to give legal effect to Mainland relationships and judgments without recognizing the existence of a legal order in the Mainland that is separate from that in Taiwan. Throughout the Statute, Mainland law is linguistically treated like a set of local "regulations" rather than as the "law" of a separate political entity. Then, by having the Statute invoke the application of the Mainland "regulations," the utilization of certain Mainland laws is transformed into Taiwan law. Furthermore, Article 74 provides that civil law judgments and civil law arbitration decisions rendered in the Mainland may be given legal recognition and enforced in Taiwan after a Taiwanese judicial ruling accepting the judgment is obtained. This means that Mainland legal

125. For example, it is unrealistic not to sanction a marriage formed under Mainland law when a marital relationship in fact exists. Recognition and enforcement of Mainland judgments are warranted for reasons of judicial economy, preventing defendants from escaping from legal responsibility, and promoting unity and stability for the international legal order. The arguments are the same as those underlying the doctrine of *res judicata*, the comity theory, the legal obligation theory, and the norms of reciprocity, convenience and expediency. See Fudian Li, *Cong falu chongtu jiaodu lun lianganjian jidequan baohu ji caipan zhi zhixing xiaoli*, Paper presented at Jiushi Niandai Guomindang de Tiaozhan yu Huiying Xueshu Yantaohui [the "1990's K.M.T. Challenges and Responses Academic Symposium"] organized by Zhongguo Guomindang Beiqu Zhishiqingnian Dangbu [the K.M.T. Intellectual Youth Dept.] (June 8, 1990).

126. When Taiwan's Smuggling Law was amended in 1985, a provision was added to read that during the emergency period of mobilization and rebellion suppression, the flow of goods between the enemy-occupied territory (the Mainland) and the free territory (Taiwan) is to be considered import/export activity such that any smuggling of goods from the Mainland shall be treated like smuggling from a foreign country. Following this amendment, the Legislative Yuan issued numerous interpretations out of fear that the concept of "deeming" the Mainland a foreign country would "catch on" in other areas. See *Yanshang haixia liangan falu wenti: fawubu zuotanhui jilu*, 131 *Faxue Congkan* [China Law Journal] 155 (July 1988).

127. *Id.* at 138.

judgments must first be wrapped in a layer of Taiwan legality, so that the enforcement of such judgment is not recognition of Mainland law but execution of Taiwan law.¹²⁸

Although the Statute implicitly recognizes the need to deal with Mainland legal realities and traditions, it avoids express recognition of Mainland law, perhaps fearing that to do so would imply either recognition of the P.R.C. as a separate legitimate government or acceptance of the P.R.C.'s "one country, two systems" proposal. However, perpetuating the political ambiguity of the Taiwan-Mainland relationship in the Statute can only be detrimental to addressing the needs of the rapidly growing ties between the two sides. The R.O.C. government should clearly and expressly set forth its full recognition of Mainland private law in this Statute. In fact, it has already done so through the conflict of laws provisions in the Statute, which place the laws of Taiwan on par with the "regulations" of the Mainland. Given the status acquired by Mainland laws from such provisions, it is not only meaningless but internally contradictory to deny recognition of Mainland laws by the "re-packaging" and "labelling" described above. Moreover, the formulation of a clear position with respect to the Mainland legal system will put Taiwan in a better position to systematically and consistently draft and interpret other laws and regulations that may become applicable with the growing ties.

The R.O.C. government should note that recognition of Mainland laws does not necessarily imply recognition of the P.R.C. government since the political recognition of a government is not a prerequisite to the recognition of its laws.¹²⁹ A most relevant legislative embodiment

128. *Id.*

129. An article that presents this position very well is Tung-Pi Chen, *Bridge Across the Formosa Strait: Private Law Relations Between Taiwan and Mainland China*, 4 *J. Chinese L.* 101 (1990). To highlight:

Although under traditional international legal theory "no judicial existence can be attributed to an unrecognized government" (H. Lauterpacht, *Recognition in International Law* 145-147 (1947)), the "legal vacuum" and severe injustices that may result from the strict application of such theory has prompted substantial revision. Thus, public recognition has gradually become separated and distinguished from private international law recognition. This evolution took place against the backdrop of other well established norms of private international law such as Grotius' doctrine of necessity, which asserts that an "unlawful regime's" acts should still be obeyed by citizens and enforced in courts where the acts seek to promote public order. (Hugo Grotius, *The Rights of War and Peace* 91-94 (A.C. Campbell trans., 1901)).

of this theory is the United States' Taiwan Relations Act. The U.S. normalization of diplomatic relations with the Mainland would have caused numerous legal complications if the Taiwan Relations Act had not provided that the status of Taiwan's laws and the application of U.S. laws to Taiwan would not change as a result of the normalization, that Taiwan would be deemed a foreign country for U.S. law purposes, and that the private rights and obligations of Taiwan would be preserved under U.S. law.¹³⁰

C. *Empower Governmental Entities to Identify and Address Market Failures*

Part III of this article identified certain micro-economic market failures that prevent Taiwan-Mainland economic interaction from proceeding efficiently. Since such suboptimal conditions are not self-corrective in an unregulated marketplace, the R.O.C. government should provide particular assistance and guidance. To remedy information asymmetry, for instance, the R.O.C. government can invest resources in an organization that can gather, compile and analyze information of interest to Taiwanese businesses active in the Mainland. Everything from general data on the state of economic development in the Mainland to specific information on pitfalls that Taiwanese businesses have encountered can enhance the probability of successful and fruitful commercial interaction.

Closest to home, perhaps, is the *Kokaryo Case* (107 Hanji 890 (Kyoto Dist. Ct. 1977), review granted and reh'g ordered, 115 Hanji 1053 (Osaka High Ct. 1982), rev'd, 131 Hanji 1199 (Kyoto Dist. Ct. 1986), aff'd, 119 Hanji 1232 (Osaka High Ct. 1987)) where the Taiwan government brought suit to evict pro-P.R.C. students from a dormitory in Kyoto, Japan for which the K.M.T. government acquired title before retreating to Taiwan. The defense asserted that since Japan no longer recognizes the K.M.T. government, that entity's title to property in Japan must be extinguished. The Osaka High Court found for the plaintiff, ruling that the Taiwan government clearly retains its civil capacity though it may have lost its public standing with Japan.

Though there is a growing acceptance of this new doctrine in the international judicial realm, "the issue may be framed as whether the modern view can accommodate recognition by the legitimate government of the private laws of a rebel regime within its country." In *United States v. Insurance Cos.*, 89 U.S. 99 (1874), for example, the U.S. Supreme Court affirmed the legal capacity of corporations established under the laws of a seceded state where such incorporations, affecting rights of individuals, did not damage the United States.

130. 22 U.S.C. §§ 3303(a), 3303(b)(1), and 3303(b)(3) (1988).

With respect to other market failures, such as unequal bargaining power, lack of legal protection and other transaction costs, where the R.O.C. government cannot intervene directly to correct such market failures, it can nevertheless address the issues indirectly. For instance, it can specifically direct the governmental or civil organizations that it has entrusted to handle Taiwan-Mainland matters pursuant to Article 4 of the Statute to monitor certain conditions and to organize efforts to overcome various obstacles.

D. Establish Clear Boundaries for Permissible Activity

Because the Statute is a product of Taiwan's reevaluation of its Mainland policy, the interplay between law and policy requires careful examination. A crucial question is whether the political security and continued viability of Taiwan may be compromised by any of the articles and regulations that govern the various cross-Straits private relationships. In order to minimize any potential side effects the Statute may have on policy, the political concerns must be thoroughly examined and the necessary boundaries clearly drawn.¹³¹

For example, Article 35 allows the organ-in-charge to grant permission to Taiwanese enterprises to engage in investment, technical cooperation, trade and other commercial activities with the Mainland.¹³² The Ministry of Economic Affairs, in drafting the procedures to obtain permission for indirect Mainland investment, balanced various interests and arrived at a list of prohibited industries which includes, among others, all high-technology and defense-related industries.¹³³ Yet, in the absence of specific guidelines from the Statute, certain terms like "high-technology" may have insufficient content for enforcement purposes. A narrow interpretation may create a slippery slope towards building up the Mainland economy in a way

131. For further discussion, see Qingpo Liu, *Lun zhiding Taiwan yu Dalu Renmin Guanxifa*, 40 *Faling Yuekan* [The Law Monthly] 37 (Feb. 1989), and Qingpo Liu, *Liang renmin jiaoliu lifa de falu he guojia de zhenghe*, 41 *Faling Yuekan* [The Law Monthly] 228 (July 1990).

132. See SGR, *supra* note 5, art. 35.

133. *Fu Dalu touzi fujianbiaoliexiangmu you fuan*, *Zhongyang Ribao* [Central Daily News], July 22, 1992, at 9. In addition, the Ministry of Economic Affairs has drafted the "Approval Procedures for Trade between the Areas of Taiwan and the Mainland China," which includes a list of permitted imports from the Mainland and a list of prohibited exports to the Mainland. *Jianli liangan maoyi jiance xitong*, *Gongshang Shibao* [Industry and Commerce Times], Aug. 17, 1992, at 2.

that could cause Taiwan to lose a major bargaining chip for effectuating its Mainland policy.

In addition, given the magnitude of the current trade and investment activity, a turning point has clearly been reached where the previously discussed externalities on the macro-economy have become a reality. To illustrate, Taiwan used to be the number one manufacturer and exporter of shoes. Yet, in recent years, approximately one-third of Taiwan's shoe factories have emigrated to the Mainland, transferring financial capital and machinery, as well as materials and resources. In fact, machinery already constitutes 36% of Taiwan's exports to the Mainland.¹³⁴ Of course, much of that is out-dated labor-intensive equipment that actually serves the Mainland's current state of economic development very well. However, the trend is towards higher-technology machines, which can save the Mainland much effort and resources in research and development.¹³⁵

On a grander scale is the proposed Formosa Plastics project briefly described in the Introduction. With Taiwan's new environmental protection efforts hindering its six-plant expansion scheme, Formosa Plastics naturally was tempted by the Mainland's seduction. Among the benefits promised to Formosa Plastics by Fujian Province were large tracts of land at only 1/30th of market price, permission to charter its own bank, and numerous tax breaks. At a total value estimated at U.S. \$7 billion, it will be by far the largest foreign investment project in the Mainland. In comparison, the total investment capital attributable to date to Japan, the Mainland's number one trade partner, is only around U.S. \$3 billion.¹³⁶ Sheer magnitude aside, given that the petrochemical industry has been the backbone industry for Taiwan, policy-makers are sure to find the event and its implications devastating.

As mentioned before, a foreseeable consequence of having such great financial stakes in the Mainland is that Taiwanese businesses may eventually find their interests in strong conflict with the government's political interests. A pressure group made up of businesses involved with the Mainland may influence policy-making to the extent that their personal economic interests are protected even at substantial political

134. Taiying Liu, *Dangqian dui Dalu jianjie maoyi wenti*, 276 *Guangfu Dalu* [Mainland Liberation] 46 (Dec. 1989).

135. *Id.* at 47.

136. Zhuyuan Zheng, *Haixia liangan jingmao guanxi xianshi ji qianjing*, *Zhongyang Ribao* [Central Daily News], July 22, 1990, at 3.

costs. This seems to be an unfortunate, self-created bargaining chip for the other side.¹³⁷

There are many who advocate the separation of politics and economics in dealing with the Mainland. Such a stance is entirely too naive given the very unique and delicate situation between Taiwan and the Mainland, the many advantages the Mainland clearly has over Taiwan, the fact that economics is a major bargaining chip in Taiwan's hands, and the unmistakable perception that economics is a political instrument for the Mainland.

The inclination to be more realistic and forward-looking has led to steps like the legalization of cross-Strait commerce. Yet, such measures may result in trapping the R.O.C. government on a slippery slope where it loses control over the evolution of its Mainland policy. In order to prevent the solutions presented by the Statute from becoming the roots of new problems in facing the P.R.C., clear boundaries should be drawn by the Statute with respect to permissible cross-Strait relations.

E. Encourage Reciprocity

The Statute crystallizes the unilateral policy determinations and implementation decisions Taiwan has made with respect to relations between the people of the two sides. Whether the Mainland will choose the same directions and procedures is not entirely clear. The only official indication available is the 1988 Highest People's Court's news conference on how civil cases involving parties from Taiwan are handled.¹³⁸ In addition, there is a draft of 37 articles proposed by the Taiwan Law Research Center of the China Management Science Research Institute, a non-governmental research organization.¹³⁹

137. As P.R.C. President Yang Shang Kun said, "If ten [Formosa Plastics] come to invest in the Mainland, U.S.\$ 70 billion will be transferred from Taiwan. Very soon, nothing shall be left. At that time, what bargaining chip will Taiwan have at the table?" Zhuyuan Zheng, Haixia liangan jingmao guanxi xianshi ji qianjing, Zhongyang Ribao [Central Daily News], July 23, 1990, at 3.

138. Address by Ma Yuan, First News Conference Held by the Supreme People's Court (Aug. 9, 1988), Some Legal Issues of the People's Court Dealing With Civil Cases Relating to Taiwan, reprinted in Collection of the Laws of the P.R.C. 369 (Wang Huaian et al. eds., 1989).

139. Dalu diqu yu Taiwan diqu renmin guanxifa jianyicaoan [Draft Statute Governing the Relations Between People of the Area of the Mainland and the Area of Taiwan] proposed by Zhongguo Dalu guanli Kexueyuan Taiwan falu Yanjiusuo [Taiwan Legal Study Center of the Institute of Management Science of China] (1989).

However, a comprehensive comparison of the Taiwan and Mainland proposals is beyond the scope of this paper.

Nevertheless, there have repeatedly been questions concerning legal reciprocity between Taiwan and the Mainland. The problem is most apparent in the area of succession. Critics of the Statute point out that the Mainland's Inheritance Law (which provides that heirs from Taiwan and from the Mainland shall have equal inheritance rights, and that any property unclaimed by a Taiwan heir due to notification failure or otherwise shall be temporarily held by an appointed trustee) is much more equitable than the Taiwan counterpart, which not only sets a time limit for Mainland beneficiaries to claim their interests but also an amount limitation for Mainland beneficiaries.¹⁴⁰

However, such comparison overlooks the fact that no private ownership of real property exists in the Mainland. Also, wages there are so minimal that wealth accumulation is extremely limited. In fact, the average per capita wealth in Taiwan is about thirty times greater than that in the Mainland.¹⁴¹ Therefore, a seemingly reciprocal arrangement can actually be inherently unequal given the special circumstances. True equality may mean accounting for certain differences between the two sides. Nevertheless, to attract the Mainland to reciprocate with a similar legal approach in dealing with Taiwan-Mainland affairs, facially discriminatory terms are best avoided.

CONCLUSION

Essential to the effectiveness of the Statute both as a policy vehicle and as an interim regulation of economic interaction are the over-arching legal norms of legitimacy and enforcement. As mentioned above, under the current structure, much of the regulatory substance of the Statute will be dictated by the various ministries under the Executive Yuan, rather than by the collective will of the people through their representatives in the legislature. In fact, none of the participants in the

140. Libang Zhou, *Hunyin wenti yu caichan jicheng — haixia liangan de chuli yuanze*, 61 *Minzhu Xianzheng* [Constitutional Democracy] 16 (1989). For more recent criticism from the P.R.C., see *Liang tongbao zai fali hang chuyi pingdeng diwei*, *Zhongguo Shibao* [China Times], Aug. 21, 1992, at 10.

141. Bolin Zhuang, *Haixia liangan jicheng hunyin wenti*, 41 *Faling Yuekan* [The Law Monthly] 230 (July 1990).

official Mainland relations organizations (recall the three tiers) are elected. They are all political appointees.¹⁴²

Given that the future of the relationship with the Mainland is an issue which so significantly affects the lives of the people of Taiwan, these very people ought to have a voice in determining which direction to take. A balance must be struck between flexibility and democratic law-making, which weighs the costs of enforcing the regulation.

The ease of enforcement depends on how well-accepted the legislation is. People will not support a statute that falls short of being a legitimate embodiment of their concerns and choices. Indeed, if those who are governed by the law find it objectionable on grounds such as equity and democracy, natural resistance will render enforcement measures costly, perhaps even to the point where execution of the law becomes infeasible.¹⁴³

Certain laws and regulations may entail individual sacrifice for the common good. But given that they may seem unfair or even irrational from an individual point of view, they risk rejection. Though provisions of the Statute may be entirely appropriate in terms of all the social, economic, and political goals of regulation, their effectiveness can never transcend consideration of public norms and values. The best laws and the most sophisticated implementation and enforcement procedures will fail where their interaction with the greater normative universe is not taken into account.¹⁴⁴

142. See, e.g., Shaw, *supra* note 36.

143. See Wang & Yang, *supra* note 119, at 67.

144. *Id.* at 68.

APPENDIX

The Statute Governing Relations Between People of the Areas of Taiwan and Mainland China*

CHAPTER I GENERAL PROVISIONS

Article 1

This Statute is enacted, before the country is united, to ensure national security, social stability and welfare, to regulate the dealings between people of the Areas of Taiwan and Mainland China and to attend to the legal matters that arise therefrom. Matters not regulated by this Statute shall be governed by other relevant laws and decrees.

Article 2

Terms used in the Statute are defined as follows:

1. Area of Taiwan means Taiwan, the Pescadores, Quemoy, Matsu and other areas encompassed by the power to govern Taiwan.
2. Area of Mainland China means Republic of China territory outside the Area of Taiwan.
3. People of the Area of Taiwan means people with permanent residence in the Area of Taiwan.
4. People of the Area of Mainland China means people with permanent residence in the Area of Mainland China or people of the Area of Taiwan who travel to the Area of Mainland China and continue to reside there for over four years.

* Translated by Ada Koon Hang Tse.

Article 3

Provisions in this Statute regulating people of the Area of Mainland China shall also apply to the people of the Area of Mainland China who are travelling or residing abroad.

Article 4

The Executive Yuan shall establish or appoint government organizations or entrust civilian organizations to handle matters relating to dealings between people of the Areas of Taiwan and Mainland China.

The supervision of the entrusted civil organizations referred to in the preceding paragraph shall be directed by law.

The procedures for handling the entrusted matters referred to in the preceding paragraph shall be established by the Executive Yuan.

Civil servants who transfer to such government or civilian organizations referred to in the first paragraph, including those who transferred before the implementation date of this Statute, can include the number of years served in such organizations in calculating seniority when returning to civil service.

The seniority calculation method referred to in the preceding paragraph shall be established by the Examination Yuan together with the Executive Yuan.

Article 5

The government organizations established or appointed and the civil organizations entrusted pursuant to the preceding Article shall not enter any type of agreement with a legal person, group or other organization of the Area of Mainland China without the permission of the organ-in-charge.

Any agreement referred to in the preceding paragraph shall not become effective without the permission of the organ-in-charge.

Article 6

To administer the affairs related to the interaction between people of the Area of Taiwan and people of the Area of Mainland China, the Executive Yuan may, in accordance with the principle of reciprocity, permit the establishment of branch organizations in the Area of Taiwan by legal persons, groups or other organizations of the Area of Mainland China.

The permission referred to in the preceding paragraph shall be directed by law.

Article 7

Documents produced in the Area of Mainland China shall be authenticated by government organizations established or appointed by the Executive Yuan or by civilian organizations entrusted by the Executive Yuan.

Article 8

A judicial organization may entrust an organization referred to in Article 4 or a civilian group to deliver judicial documents or conduct necessary investigations in the Area of Mainland China.

CHAPTER II
ADMINISTRATION

Article 9

People of the Area of Taiwan shall apply for permission from the organ-in-charge to enter the Area of Mainland China.

People of the Area of Taiwan who enter the Area of Mainland China with permission shall not engage in activities that impair national security or interests.

The procedures to obtain the permission referred to in the first paragraph shall be drafted by the Ministry of the Interior and promulgated upon ratification by the Executive Yuan.

Article 10

Without the permission of the organ-in-charge, people of the Area of Mainland China shall not enter the Area of Taiwan.

People of the Area of Mainland China who enter the Area of Taiwan with permission shall not engage in activities or work in variance with the permitted purpose of entry.

The procedures to obtain the permission referred to in the preceding two paragraphs shall be drafted by the relevant organ-in-charge and promulgated upon ratification by the Executive Yuan.

Article 11

An application for permission to employ a person of the Area of Mainland China shall only be submitted after an unsuccessful attempt to recruit in the Area of Taiwan using reasonable requirements.

People of the Area of Mainland China working in the Area of Taiwan with permission shall not have a term of employment exceeding one year and shall not change to a different employer or job.

Article 12

Dependents of people from the Area of Mainland China working in the Area of Taiwan with permission who become sick, give birth or die outside the effective jurisdiction of the Labor Insurance Law shall not apply for insurance payments.

Article 13

Employers of people from the Area of Mainland China shall pay an employment security fee to a special account established by the Executive Yuan Labor Commission.

The schedule for the fee mentioned in the preceding paragraph and the procedures for its management and use shall be drafted by the Executive Yuan Labor Commission together with the Ministry of Finance and promulgated upon ratification by the Executive Yuan.

Article 14

The permission to work in the Area of Taiwan may be revoked by the organ-in-charge where the person from the Area of Mainland China working in the Area of Taiwan with such permission violates this Statute or other laws or decrees.

Where the permission to work has been revoked in accordance with the preceding paragraph, the person from the Area of Mainland China shall leave the territory within a limited time or be forcefully deported in accordance with Article 18.

The preceding paragraph applies also to the termination of employment in the middle of or at the end of the contractual period.

Article 15

The following actions are prohibited:

1. To cause a person from the Area of Mainland China to illegally enter the Area of Taiwan.
2. To induce a person from the Area of Taiwan to enter the Area of Mainland China without permission.
3. To cause a person from the Area of Mainland China to engage in any activity without permission or any activity in variance with the permitted purpose of entry.
4. To employ a person from the Area of Mainland China in a job without permission or in variance with the permitted employment.
5. To introduce others to engage in the action referred to in the preceding category.

Article 16

People from the Area of Mainland China who fall in any one of the following categories may apply for permanent residency in the Area of Taiwan:

1. Spouses or direct-line blood relatives of people of the Area of Taiwan, who are over 70 years old or under 12 years old.
2. Taiwan military personnel who have for draft reasons stayed in the Area of Mainland China after 1945, their spouses and their direct-line blood relatives and spouses.
3. Military personnel who were taken prisoner because of war or special mission activities after the government moved to Taiwan in 1949, their spouses and their direct-line blood relatives and spouses.
4. Those who, before the government moved to Taiwan in 1949, moved to the Area of Mainland China to pursue an education on government scholarship, their spouses and their direct-line blood relatives and spouses.
5. Those who entered the Area of Mainland China before the government moved to Taiwan in 1949, who originally were permanent residents of the Area of Taiwan and who have direct-line blood relatives, spouses or siblings in the Area of Taiwan.
6. Fishermen and sailors who were originally permanent residents of the Area of Taiwan but who, due to engine malfunction, shipwreck or other force majeure reasons, entered the Area of Mainland China before January 1, 1987.

The number of applicants from the Area of Mainland China under category (1) of the preceding paragraph may be limited.

The spouses and direct-line blood relatives of the applicants from the Area of Mainland China under categories (5) and (6) of the

first paragraph may also apply for permanent residency in the Area of Taiwan.

Article 17

People from the Area of Mainland China who fall in any one of the following categories may apply for residency in the Area of Taiwan:

1. Spouses of people of the Area of Taiwan, after two years of marriage or when children have been born.
2. Those whom the organ-in-charge finds eligible based on political, economic, social, educational, technical or cultural considerations.

Where the spouse in the Area of Taiwan has married again before November 1, 1987, an applicant from the Area of Mainland China under category (1) shall first obtain the acquiescence of the spouse from the latter marriage.

The number of each type of applicant from the Area of Mainland China under the first paragraph may be limited; the Executive Yuan shall promulgate such types and limits after it obtains the acquiescence of the Legislative Yuan.

Applicants under the first paragraph who have continuously resided in the Area of Taiwan for two years may apply for permanent residency.

People of the Area of Mainland China residing in the Area of Taiwan under the first paragraph or permanently residing in the Area of Taiwan under the preceding paragraph may have their residency approval or permanent residence registration revoked and be forcefully deported where facts point to a false marriage conspiracy.

People from the Area of Mainland China who have exceeded the permitted length of stay in the Area of Taiwan or who entered the Area of Taiwan without permission may not, while in the Area of

Taiwan, utilize the preceding Article or the first paragraph of this Article.

Procedures to obtain approval for residency or permanent residency under the preceding Article and the first paragraph of this Article shall be drafted by the Ministry of the Interior together with the relevant organs and promulgated upon ratification by the Executive Yuan.

Article 18

People of the Area of Mainland China who enter the Area of Taiwan and fall under any one of the following categories may be forcefully deported by the security organ without awaiting the initiation or conclusion of judicial process:

1. Those who enter without permission.
2. Those who enter with permission but have exceeded the permitted length of stay.
3. Those who engage in activities or work in variance with the permitted purpose of entry.
4. Those who are evidenced to have engaged in criminal activity.
5. Those who are evidenced to be likely to impair national security or the society's stability.

The people of the Area of Mainland China referred to in the preceding paragraph may be temporarily accommodated, pending forceful deportation.

The preceding two paragraphs shall also apply to people of the Area of Mainland China who enter the Area of Taiwan before this Statute is implemented.

Article 19

A person of the Area of Taiwan who, in accordance with regulations, guaranteed an entrant from the Area of Mainland China shall assist the relevant organ in forcefully deporting such guaranteed entrant who has exceeded the permitted length of stay and shall be responsible for any corresponding costs.

The deporting organ shall gather copies of all the receipts and calculations relevant to the costs referred to in the preceding paragraph and notify the guarantor of the corresponding payment deadline. Failure to comply with the deadline shall subject the guarantor to enforcement by the courts.

Article 20

A person of the Area of Taiwan who falls under any one of the following categories shall be responsible for the costs of forceful deportation:

1. He caused a person from the Area of Mainland China to enter the Area of Taiwan illegally.
2. He illegally employed a person from the Area of Mainland China.
3. His employee from the Area of Mainland China was forcefully deported under the second and third paragraphs of Article 14.

The deporting organ shall gather copies of all the receipts and calculations relevant to the costs referred to in the preceding paragraph and notify the responsible party of the corresponding payment deadline. Failure to comply with the deadline shall subject the responsible party to enforcement by the courts.

Article 21

A person of the Area of Mainland China who entered the Area of Taiwan with permission, but who has been registered as a permanent resident of Taiwan for less than ten years, may not register to be a candidate for elected office, may not become a member of the military, the civil service, the education sector or any state-run enterprise, and may not organize any political party, unless otherwise regulated by law or decree.

Article 22

The procedures to obtain recognition for education received in the Area of Mainland China for people from the Area of Mainland China who have established permanent residency in the Area of Taiwan with permission shall be drafted by the Ministry of Education and promulgated upon ratification by the Executive Yuan.

Article 23

People, legal persons, groups or other organizations of the Area of Taiwan, the Area of Mainland China or other areas, shall not, on behalf of educational institutions of the Area of Mainland China, solicit students or make introductions in the Area of Taiwan.

Article 24

People, legal persons, groups and other organizations of the Area of Taiwan shall pay income tax on income from sources in the Area of Mainland China, along with income from sources in the Area of Taiwan. However, a deduction may be taken for the amount of tax already paid in the Area of Mainland China.

The deductible amount referred to in the preceding paragraph shall not exceed the additional amount due from the Area of Mainland China income calculated with the appropriate tax rate.

Article 25

People, legal persons, groups and organizations of the Area of Mainland China that have income from sources in the Area of Taiwan shall make tax payments and take deductions according to the income's origin at rates stipulated by regulation. The filing of a consolidated tax return is exempt.

Article 26

Retired personnel of the military, the civil service, the education sector and state-run enterprises who are receiving various kinds of monthly retirement benefits and who, with permission, will travel to and establish residency in the Area of Mainland China, shall receive a lump sum calculated by subtracting the monthly retirement benefits already received by the retiree from a total amount based on the seniority achieved by the retiree at the time of his retirement and the monthly salaries of current employees of the same professional or official rank as the retiree at the time of his retirement. Where the resulting lump sum is less than one-half of the total amount referred to in the preceding sentence, an amount equal to one-half of such total amount shall be paid out to such personnel.

The personnel referred to in the preceding paragraph who have dependents in the Area of Taiwan shall get the acquiescence of such dependents before applying for such lump sum.

Article 27

Veterans being settled and supported by the Executive Yuan Committee on Assisting Veterans who enter the Area of Mainland China with permission and establish permanent residency there shall still be issued the originally designated support payments.

The procedures for issuance shall be drafted by the Committee and promulgated upon ratification by the Executive Yuan.

Article 28

Ships, aircraft and other transportation vehicles of the Republic of China shall not navigate to the Area of Mainland China without permission from the organ-in-charge.

The procedures for obtaining the permission referred to in the preceding paragraph shall be drafted by the Ministry of Transportation together with other relevant organs and promulgated upon ratification by the Executive Yuan.

Article 29

Ships, civilian aircraft and other transportation vehicles of Mainland China shall not enter the restricted or prohibited waters of the Area of Taiwan or the Taipei Aviation Intelligence Bureau restricted area without permission from the organ-in-charge.

The restricted or prohibited waters and restricted area referred to in the previous paragraph shall be announced by the Ministry of Defense.

Procedures to obtain the permission referred to in the first paragraph shall be drafted by the Ministry of Transportation together with other relevant organs and promulgated upon ratification by the Executive Yuan.

Article 30

Foreign ships, civilian aircraft and other transportation vehicles shall not operate direct routes between the harbors and airports of the Areas of Taiwan and Mainland China, and shall not be used to operate regular indirect routes between the harbors and airports of the Areas of Taiwan and Mainland China through a third area.

Where the ship, civilian aircraft or other transportation vehicle referred to in the preceding paragraph is rented, invested in or operated by a person, legal person, group or other organization of the Area of Mainland China, the Ministry of Transportation may restrict or prohibit it from entering any harbor or airport of the Area of Taiwan.

The prohibition in the first paragraph may be partially or completely lifted when necessary upon the request of the Ministry of Transportation to and ratification by the Executive Yuan.

Article 31

The organ responsible for air defense may issue a warning to leave or adopt any necessary defense measure in dealing with an Area of Mainland China civilian aircraft that without permission enters any area whose entry is restricted by the Taipei Aviation Intelligence Bureau.

Article 32

With respect to Area of Mainland China ships entering into restricted or prohibited waters of the Area of Taiwan without permission, the organ-in-charge may expel or detain such ship, goods, or crew member or take any necessary defense measure.

The organ-in-charge shall deal with any ship, goods, or crew member detained in accordance with the preceding paragraph within three months and in the following manner:

1. Confiscate or return the detained ship or goods.
2. After investigation, either transfer the detained crew member to the relevant organ for legal processing or forcefully deport him.

Any Area of Mainland China ship, goods or crew member that has already been processed by the organ-in-charge before this Statute is implemented shall remain thus processed.

Article 33

People, legal persons, groups or other organizations of the Area of Taiwan shall not become members of or assume any position in any legal persons, groups, or other organizations of the Area of Mainland China, or jointly establish a legal person, group or other organization or establish any alliance with any person, legal person, group or other organization of the Area of Mainland China without permission from the organ-in-charge.

Procedures to obtain the permission referred to in the preceding paragraph shall be drafted by the relevant organ-in-charge and promulgated upon approval by the Executive Yuan.

A person, legal person, group or other organization of the Area of Taiwan who has already become a legal person of the Area of Mainland China, become a member of or assumed any position in any group or organization of the Area of Mainland China, or jointly established a legal person, group or other organization or established an alliance with a person, legal person, group or other organization of the Area of Mainland China before this Statute is implemented, shall within six months of the effective date of the Statute, apply for permission from the organ-in-charge in accordance with the procedures referred to in the preceding paragraph. Those who fail to comply by the deadline or whose applications have not been approved shall be deemed to be without permission.

Article 34

People, legal persons, groups or other organizations of the Area of Taiwan shall not entrust, be entrusted to or on its own import, produce, distribute, be an agent for, broadcast or publish any advertising or engage in any promotional activity for products, services or other goods of the Area of Mainland China without permission from the organ-in-charge.

Procedures to obtain the permission referred to in the preceding paragraph shall be established by the Executive Yuan.

Article 35

People, legal persons, groups or other organizations of the Area of Taiwan shall not engage in investment activity or technical cooperation in the Area of Mainland China nor engage in trade or other commercial activity with any person, legal person, group or other organization of the Area of Mainland China without permission from the organ-in-charge.

Procedures to obtain the permission referred to in the preceding paragraph shall be drafted by the relevant organ-in-charge and promulgated upon ratification by the Executive Yuan.

Those who, before this Statute is implemented, have, without permission, already engaged in the investment activity, technical cooperation, trade or other commercial activity referred to in the preceding paragraphs, shall within three months of the day this Statute is implemented, apply for permission from the organ-in-charge. Those who fail to comply by the deadline or whose applications have not been approved shall be deemed to be operating without permission.

Article 36

Financial and insurance organizations of the Area of Taiwan or their branches established in countries and areas outside the Area of Taiwan shall not have any direct business dealings with any person, legal person, group or other organization of the Area of Mainland China or its branches in countries or areas outside the Area of Mainland China without permission from the organ-in-charge.

Procedures to obtain the permission referred to in the preceding paragraph shall be drafted by the Ministry of Finance and promulgated upon ratification by the Executive Yuan.

Article 37

Publications, advertisements, movies, recorded programs, and broadcast television programs of the Area of Mainland China shall not enter the Area of Taiwan nor be distributed, produced or broadcast in the Area of Taiwan without permission from the organ-in-charge.

Procedures to obtain the permission referred to in the preceding paragraph shall be drafted by the Information Bureau of the Executive Yuan together with any relevant organs and promulgated upon ratification by the Executive Yuan.

Article 38

Currency issued by the Area of Mainland China shall not enter the Area of Taiwan. However, currency that has been voluntarily declared to customs upon entry into the Area of Taiwan shall be subsequently carried out.

The organ-in-charge may, when necessary, promote procedures to permit currency issued by the Area of Mainland China to enter and leave the Area of Taiwan.

Procedures to obtain the permission referred to in the preceding paragraph shall be drafted by the Ministry of Finance and promulgated upon ratification by the Executive Yuan.

Article 39

Chinese historical relics from the Area of Mainland China transported with permission from the organ-in-charge into the Area of Taiwan for open display or exhibition may be transported back.

Cultural products and artistic objects of the Area of Mainland China besides those referred to in the preceding paragraph may be restricted or prohibited from open display or exhibition in the Area of Taiwan where they violate laws or decrees or impair public order or moral traditions.

Article 40

The inspection, quarantine, management and processing, etc. of goods of the Area of Mainland China transported or carried into the Area of Taiwan shall be handled according to regulations in the relevant laws and decrees.

CHAPTER III CIVIL MATTERS

Article 41

Unless otherwise regulated by this Statute, the laws of the Area of Taiwan shall apply to civil law matters between people of the Areas of Taiwan and Mainland China.

Unless otherwise regulated by this Statute, the regulations of the Area of Mainland China shall apply to civil law matters among people of the Area of Mainland China and between foreigners and people of the Area of Mainland China.

What this Chapter calls the place of the act, the place of contract, the place of permanent residence, the place where the fact occurred, the place of performance, the place where a subject matter is situated, the place of litigation or the place of arbitration refers to either the Area of Taiwan or the Area of Mainland China.

Article 42

Where, according to this Statute, the regulations of the Area of Mainland China shall apply, yet various localities within the Area of Mainland China have different regulations, the regulations of the parties' place of permanent residence shall apply.

Article 43

Where, according to this Statute, regulations of the Area of Mainland China shall apply, but nothing is stated expressly in the Area of Mainland China regulations with respect to the legal relationship involved, or the Area of Mainland China regulations specify that laws of the Area of Taiwan shall apply, laws of the Area of Taiwan shall apply.

Article 44

Where, according to this Statute, regulations of the Area of Mainland China shall apply, but where such regulations run counter to the public order or moral traditions of the Area of Taiwan, laws of the Area of Taiwan shall apply.

Article 45

Where the place of the act or the place where the fact occurred with respect to a civil legal relationship spans both the Areas of Taiwan and Mainland China, the Area of Taiwan shall be taken to be the place of the act or the place where the fact occurred.

Article 46

Regulations of the Area of Mainland China shall apply to the legal capacity of people of the Area of Mainland China. Minors who are already married, however, shall be viewed as having legal capacity with respect to legal acts committed in the Area of Taiwan.

Regulations of the Area of Mainland China shall apply to the status and legal capacity of legal persons, groups and other organizations of the Area of Mainland China.

Article 47

The form of a juristic act shall conform to regulations applicable to such act. Nevertheless, where the form used conforms to the regulations of the place of the act, such act shall be deemed valid.

The form of a juristic act relating to property rights shall conform to the regulations of the place where the property is situated.

The form of a juristic act relating to the exercise or preservation of rights over bills and notes shall conform to the regulations of the place of the act.

Article 48

A debt contract shall conform to the regulations of the place of contract, except where otherwise agreed upon by the parties.

Where the place of contract referred to in the preceding paragraph is unclear and no other agreement exists between the parties, the regulations of the place of performance shall apply. Where the place of performance is unclear, the regulations of the place of litigation or the place of arbitration shall apply.

Article 49

With respect to obligations arising from the management of affairs without legal obligation, unjust enrichment, or any other legal fact in the Area of Mainland China, regulations of the Area of Mainland China shall apply.

Article 50

The regulations of the place of the damage shall apply to any tort, unless the laws of the Area of Taiwan do not recognize such to be a tort.

Article 51

With respect to property rights, the regulations of the place where the property is situated shall apply.

With respect to a property right where the property is another right, the regulations of the place where such other right is created shall apply.

Should there be any change in the place where the property is situated, the acquisition or loss of rights in such property shall conform to the regulations of the place where the property is situated at the time all the events giving rise to such acquisition or loss have occurred.

Property rights with respect to ships shall conform to the regulations of the place where the ship was registered. Property rights

with respect to aircraft shall conform to the regulations of the place where the aircraft was registered.

Article 52

The procedures and other requisites relating to marriage or consensual divorce shall conform to the regulations of the place of the act.

The acceptable causes for a decreed divorce shall conform to the laws of the Area of Taiwan.

Article 53

Where one spouse is a person of the Area of Taiwan while the other spouse is a person of the Area of Mainland China, the laws of the Area of Taiwan shall apply to the legal effect of such marriage or divorce.

Article 54

Where a person of the Area of Taiwan marries a person of the Area of Mainland China in the Area of Mainland China, the marital property system shall conform to the regulations of the Area of Mainland China. However, the laws of the Area of Taiwan shall apply to any property located in the Area of Taiwan.

Article 55

Legal requirements for claiming children born outside of marriage shall conform to the regulations of the places of permanent residence of the claimant and claimee at the time the claim is made.

The regulations of the place of permanent residence of the claimant shall apply to the legal effect of the claim.

Article 56

The establishment and termination of adoptions shall conform to the regulations of the places of permanent residence of the adopter and adoptee, respectively.

The regulations of the place of permanent residence of the adopter shall apply to the legal effect of the adoption.

Article 57

The parent-child legal relationship of children whose one parent is a person of the Area of Taiwan while the other parent is a person of the Area of Mainland China shall conform to the regulations of the father's place of permanent residence. However, where there is no father or where the father has married into the mother's family, the regulations of the mother's place of permanent residence shall apply.

Article 58

With respect to guardianship, where the ward is a person of the Area of Mainland China, the regulations of such Area shall apply. However, where the ward has a residence in the Area of Taiwan, the laws of the Area of Taiwan shall apply.

Article 59

The obligations related to family member maintenance shall conform to the regulations of the place of permanent residence of the person under such obligation.

Article 60

Where the deceased is a person of the Area of Mainland China, the regulations of such Area shall apply to matters concerning succession. However, the laws of the Area of Taiwan shall apply to any property of the deceased located in the Area of Taiwan.

Article 61

The legal requirements for and legal effects of establishing or revoking a will by a person of the Area of Mainland China shall conform to the regulations of such Area. However, the laws of the Area of Taiwan shall apply to the distribution by will of property located in the Area of Taiwan.

Article 62

The legal requirements for and legal effects of establishing or revoking a charitable contribution by a person of the Area of Mainland China shall conform to the regulations of such Area. However, where the contributed property is located in the Area of Taiwan, the laws of the Area of Taiwan shall apply.

Article 63

The effect and the corresponding rights and obligations of any civil law relationship established in the Area of Mainland China before this Statute is implemented, between people of the Areas of Taiwan and Mainland China, among people of the Area of Mainland China and between people of the Area of Mainland China and foreigners, shall be recognized to the extent that they do not run counter to the public order or moral traditions of the Area of Taiwan.

The preceding paragraph shall not apply where, before this Statute is implemented, there already exists another law or decree restricting the exercise or transfer of such rights.

Before the country is united, the following debts will not be dealt with:

1. Unpaid foreign currency-denominated debt issued in the Mainland before 1949 and gold short-term notes issued in 1949.
2. The various debts of the national banks and offices and deposit-accepting financial institutions incurred before retreating from the Mainland.

Article 64

Where a married couple cannot live together given that one spouse is in the Area of Taiwan while the other is in the Area of Mainland China, and where one spouse contracted a second marriage before June 5, 1985 without dissolving the first, no interested person may apply for annulment. Any such second marriage contracted between June 5, 1985 and November 1, 1987 shall be viewed as legally effective.

With respect to the situation in the preceding paragraph, where both original spouses have contracted such second marriages, the original marital relationship shall cease from the day of the latter second marriage.

Article 65

The adoption of a person of the Area of Mainland China by a person of the Area of Taiwan, except where regulated by Civil Law Article 1079, Section 5, shall not be recognized by the courts under the following circumstances:

1. Where the adopter already has children or adopted children.
2. Where the adopter is simultaneously adopting more than two persons.
3. Where the actuality of the adoption has not been verified by the organizations established or appointed by the Executive Yuan or by the civil organizations entrusted by the Executive Yuan.

Article 66

People of the Area of Mainland China inheriting property from people of the Area of Taiwan shall, within two years of the inheritance coming into force, submit a written declaration of inheritance to the court in the locality of the decedent's domicile. Failing to comply by the deadline shall be deemed relinquishment of such inheritance right.

Heirs in the Area of Mainland China of inheritances which have come into force before this Statute is implemented shall be viewed as having relinquished their inheritance rights if they fail to submit a written declaration of inheritance to the court in the locality of the decedent's domicile within two years of this Statute's implementation.

Article 67

With respect to each deceased's property located in the Area of Taiwan, each legal heir of the Area of Mainland China may not inherit more than N.T.\$ 2,000,000 worth of property in total. Any excess shall belong to heirs of the same priority of the Area of Taiwan. If there are no heirs of the same priority of the Area of Taiwan, then the excess shall go to heirs of lower priority of the Area of Taiwan. Where there are no heirs of the Area of Taiwan, the excess shall go to the national treasury.

This Article shall not apply to any inheritance referred to in the preceding paragraph which has, before the implementation of this Statute, already been given to the national treasury in accordance with law.

This Article shall apply to any amounts temporarily held in escrow in accordance with law.

The total amount of property in the Area of Taiwan that can be left by will to people, legal persons, groups or other organizations of the Area of Mainland China shall not exceed N.T.\$ 2,000,000.

Where the inheritance referred to in the first paragraph includes real property that an heir from the Area of Taiwan relies on as a residence, such real property shall not be inherited by an heir from the Area of Mainland China, and its value shall not be included in the total estate.

People of the Area of Mainland China who, in accordance with regulations, cannot inherit rights in real property shall convert such rights into monetary value.

Article 68

The property of those serving in or retired from the military who died without heirs, without clear indication of whether heirs exist or whose heirs for good reason cannot administer the estate, shall be administered by the organ-in-charge.

The estates referred to in the preceding paragraph that are already being administered by the organ-in-charge before the implementation of this Article shall so remain.

The procedures for estate administration referred to in the first paragraph shall be drafted by the Ministry of National Defense and the Executive Yuan's Committee for Veterans, respectively, and promulgated upon ratification by the Executive Yuan.

Article 69

People of the Area of Mainland China shall not acquire or establish rights with respect to real property in the Area of Taiwan nor rent the various properties listed in Article 17 of the Land Law.

Article 70

Legal persons, groups and other organizations of the Area of Mainland China shall not engage in juristic acts in the Area of Taiwan without permission.

Article 71

A party that engages in juristic acts in the Area of Taiwan with a legal person, group or other organization of the Area of Mainland China which, in its capacity as such, does not have permission to so engage, shall be jointly liable with such legal person, group or organization of the Area of Mainland China.

Article 72

People, legal persons, groups or other organizations of the Area of Mainland China shall not become members or employees of any legal person, group or other organization of the Area of Taiwan without permission from the organ-in-charge.

Procedures to obtain the permission referred to in the preceding paragraph shall be drafted by the organ-in-charge and promulgated upon ratification by the Executive Yuan.

Article 73

Foreign corporations with over twenty percent of outstanding shares owned by people, legal persons, groups or other organizations of the Area of Mainland China may be denied recognition. Where already recognized, such recognition may be revoked.

The same applies for foreign corporations whose influential shareholders include a person, legal person, group or other organization of the Area of Mainland China.

Article 74

Civil law judgments and civil law arbitration decisions rendered in the Area of Mainland China that do not run counter to the public order and moral traditions of the Area of Taiwan may be given recognition by a judicial ruling upon application.

The judgments or decisions given recognition by judicial ruling referred to in the preceding paragraph which involve payments may be duly enforced.

CHAPTER IV CRIMINAL MATTERS

Article 75

Crimes committed in the Area of Mainland China or on Mainland China ships or aircraft for which punishment may already have been received in the Area of Mainland China may still be sentenced according to law. However, part or all of the corresponding punishment may be exempt.

Article 76

Where one spouse is in the Area of Taiwan and the other in the Area of Mainland China, the spouse that either contracted a second marriage without dissolving the first or, for the purpose of leading life together, lived with a non-spouse before November 1, 1987, shall be free from indictment and punishment. The same applies for the person who married or lived with such spouse.

Article 77

People of the Area of Mainland China who have once, outside the Area of Taiwan, committed crimes of rebellion or treason but who enter the Area of Taiwan with permission upon truthful report of such in the application, shall be free from indictment and punishment. The same applies for those entering the Area of Taiwan to participate in conferences and activities held with the approval of the organ-in-charge, who are exempt from reporting by special permission.

Article 78

The right of a person from the Area of Mainland China to sue on an infringement of his copyright or other rights in the Area of Taiwan shall be limited by the reciprocal enjoyment by a person from the Area of Taiwan of such right to sue in the Area of Mainland China.

CHAPTER V
PENAL PROVISIONS

Article 79

Violators of category (1) of Article 15 shall be sentenced to no more than five years of imprisonment or detention and/or a penalty of not more than N.T.\$ 500,000.

The preceding paragraph shall also apply to those who attempt the crime.

Article 80

Owners, managers, captains, pilots and other navigators of ships, aircraft and other transportation vehicles of the Republic of China that, violating the first paragraph of Article 28, navigate to the Area of Mainland China, shall be sentenced to no more than three years of imprisonment or detention and/or a penalty of not less than N.T.\$ 1,000,000 but not more than N.T.\$ 15,000,000. However, where the act of navigating to the Area of Mainland China results from the sole decision of the captain, pilot or other navigator of the transportation vehicle, only such captain, pilot or other navigator shall be punished.

Where the owner or manager of the ship, aircraft or other transportation vehicle that navigates to the Area of Mainland China, as referred to in the preceding paragraph, is a legal person, such legal person shall be dealt the penalty referred to in the preceding paragraph in addition to punishment for the perpetrator, unless the legal person's representatives have done everything possible to prevent such occurrence.

Given the situation referred to in the first paragraph, the organ-in-charge may suspend the operation of such ship, aircraft or other transportation vehicle for a certain period or terminate or revoke any relevant license and may terminate or revoke the professional license or qualification of the captain, pilot or other navigator of such vehicle.

Article 81

Any person participating in the decision, in violation of Article 36, to engage in direct dealings without permission, shall be sentenced to no more than three years imprisonment or detention and/or a penalty of not less than N.T.\$ 1,000,000 but not more than N.T.\$ 15,000,000.

With respect to the situation referred to in the preceding paragraph, in addition to punishing the people participating in the decision, the corresponding financial or insurance organizations shall be dealt the penalty established by the preceding paragraph.

The two preceding paragraphs shall also apply where the criminal act is perpetrated outside the territory of the Republic of China.

Article 82

Violators of Article 23, who engaged in soliciting students or indirect introductions, shall be sentenced to no more than three years imprisonment or detention and/or a penalty of not more than N.T.\$ 1,000,000.

Article 83

Violators of categories (4) or (5) of Article 15 shall be sentenced to no more than one year imprisonment or detention and/or a penalty of not more than N.T.\$ 300,000.

Violators of category (5) of Article 15 for profit shall be sentenced to not more than three years of imprisonment or detention and/or a penalty of not more than N.T.\$ 600,000.

In addition to punishing the representative agents, employees or other personnel of legal and natural persons who commit the crime referred to in the preceding paragraph in the course of employment, the penalty established in the preceding paragraph shall be dealt to such legal or natural persons. However, the representative of a legal person or natural person who has done everything possible to prevent the occurrence of such violation shall be exempt.

Article 84

Violators of category (2) of Article 15 shall be sentenced to not more than six months of imprisonment or detention and/or a penalty of not more than N.T.\$ 100,000.

In addition to punishing the representative agents, employees or other personnel of legal and natural persons who commit the crime referred to in the preceding paragraph in the course of employment, the penalty established in the preceding paragraph shall be dealt to such legal or natural persons. However, the representative of a legal person or natural person who has done everything possible to prevent the occurrence of such violation shall be exempt.

Article 85

Violators of the first paragraph of Article 30 shall be sentenced to a penalty of not less than N.T.\$ 3,000,000 but not more than N.T.\$ 15,000,000 and all the ships, civilian aircraft and other transportation vehicles of the owners and operators of the ships, civilian aircraft or other transportation vehicles in violation shall be prohibited from entering the harbors and airports of the Area of Taiwan for a specified period.

Article 86

Those who engage in investment, technical cooperation, trade or other commercial activity in violation of the first paragraph of Article 35 shall be sentenced to a fine of not less than N.T.\$ 3,000,000 but not more than N.T.\$ 15,000,000 and ordered to cease such investment, technical cooperation, trade or commercial activity by a certain deadline. Those who fail to comply with the deadline may be continually fined.

Article 87

Violators of category (3) of Article 15 shall be sentenced to a penalty of not less than N.T.\$ 200,000 but not more than N.T.\$ 1,000,000.

Article 88

Violators of Article 37 shall be sentenced to a penalty of not less than N.T.\$ 200,000 but not more than N.T.\$ 1,000,000.

The publication, advertisement, movie, recorded program or broadcast television program referred to in the preceding paragraph shall be confiscated without regard to ownership.

Article 89

Violators of the first paragraph of Article 34 shall be sentenced to a penalty of not less than N.T.\$ 100,000 but not more than N.T.\$ 500,000.

The advertising referred to in the preceding paragraph shall be confiscated without regard to ownership or possession.

Article 90

Violators of the first paragraph of Article 33 shall be sentenced to a penalty of not less than N.T.\$ 100,000 but not more than N.T.\$ 500,000.

Article 91

Violators of the first paragraph of Article 9 shall be sentenced to a penalty of not less than N.T.\$ 20,000 but not more than N.T.\$ 100,000.

Article 92

Currency that has not been declared, in violation of the first paragraph of Article 38, shall be confiscated by customs.

Article 93

Violators of any restriction or prohibition order issued under the second paragraph of Article 39 shall have such cultural products or artistic objects confiscated by the organ-in-charge.

Article 94

The penalties established by this Statute shall be imposed by the organ-in-charge. Those who fail to comply with the deadline specified on the payment notice shall be subject to enforcement by the courts.

CHAPTER VI
SUPPLEMENTARY PROVISIONS

Article 95

Before the implementation of direct commerce or transportation between the Area of Taiwan and the Area of Mainland China or before permitting people from the Area of Mainland China to work in the Area of Taiwan, the organ-in-charge shall obtain a resolution from the Legislative Yuan. Failure by the Legislative Yuan to come to a resolution within one month during the time it is in session shall be deemed a consent.

Article 96

This Statute's enforcement regulations and date of implementation shall be established by the Executive Yuan.