

**CHINA AND GATT:
A COMPARATIVE STUDY ON
THE ISSUES OF
MAINLAND CHINA, HONG KONG AND TAIWAN
IN INTERNATIONAL ORGANIZATIONS**

BY

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Abstract

As economic transactions become more and more important for all countries in their interrelations, the GATT contracting parties are considering the applications of the People's Republic of China (PRC) and Taiwan to enter into this world trade organization. This happens at a time when the Uruguay Round negotiations have resulted successfully in an agreement between the contracting parties to set up the World Trade Organization. The two applicants are very important in the world economy. Apart from negotiations on the concrete concessions of the two applicants, other questions are under consideration. The applicants share a common background that the PRC, Taiwan plus Hong Kong and Macao are originally from one China, and Hong Kong will be under the sovereignty of China in 1997 which will probably speed up the unification of the four parts into one China someday. So it is not too early to consider questions which may arise from the influence of the accession style of the mainland and Taiwan on relations and positioning between the two sides of the Taiwan Straits, and the interrelations between the four parts concerning participation in international organizations before and after unification. All four parts of China may be entitled respectively to participate in this international economic organization before and after unification. But the negative impacts on unification which may come about by the style of acceptance of the countries into the GATT cannot be ignored. The issues of the interrelations between the four parts of China in GATT should also be discussed.

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CHAPTER I: INTRODUCTION

A. CHINA, TAIWAN AND HONG KONG

China is a geographical term which describes a large Asian state with a population of approximately 1.2 billion people, which comprises twenty-two percent of humanity, and territory covering as much as 9.63 million square kilometres.¹ At present, this country is not fully unified, being separated into four parts under different administrations, i.e. Mainland China, Taiwan, Hong Kong and Macao, two of them under the control of foreign countries. Since 1949, the mainland of China has been under the control of the government of the People's Republic of China (hereinafter the PRC), which has world-wide recognition as the sole legal government of China. Hong Kong and Macao, for a long time, have been under the sovereign control of the Governments of the United Kingdom and the Republic of Portugal. In the last decade, the negotiations between the P.R.C. and the United Kingdom and Portugal resulted in agreements on the transfer of the two territories to the sovereign control of the P.R.C., in 1997 and 1999 respectively.² Taiwan is the last among the four parts on which no negotiations have been undertaken yet about unifying with the other three parts. But it is very encouraging that the improvement of relations between the two sides of the

¹ Source: Zhongguo Baike Nianjian (Encyclopedia of China), (Beijing: The Encyclopedia of China Publishing House, 1986), p.27.

² See text at note 145.

Taiwan Straits have developed recently.³ In April 1993, substantial contact between the two sides was started by the Wang-Koo talks in Singapore. The talks were the highest level and most formal contact between the two sides after a long-time of confrontation, despite still being semi-official.⁴

The mainland of China, Taiwan and Hong Kong together play a very important role in the world community. The PRC government enjoys world-wide recognition as the sole legitimate government of China, and holds the seats for China in most international organizations,⁵ such as the representative of China as a permanent member of the Security Council of the United Nations. It has great economic potential to the world economy, for it has the largest market, low-priced labor, and an ambitious plan for its economic reform. In foreign trade, Chinese export performance has been very impressive in recent years. In 1993, the total value of its imports and exports was US\$ 196 billion, exceeding the Republic of Korea, Spain, Taiwan and Singapore, and ranking it as the eleventh largest trading power in the world.⁶

Hong Kong, including the island of Hong Kong, Kowloon and the New Territories, is an area of 1067 square kilometers with a population of more than five

³ The Taiwan Straits is between the island of Taiwan and the mainland.

⁴ The talks were held between Mr. Wang Daohan, President of the mainland's Association for Relations Across the Taiwan Straits (Arats) and Mr. Koo Chen-fu, Chairman of Taiwan's Straits Exchange Foundation (SEF). On April 29, 1993, Mr. Wang and Mr. Koo signed four agreements. They were: (1) the general agreement on the Wang-Koo talks; (2) the agreement on institutionalized contacts and talks between the two organizations; (3) the agreement on the use and verification of notary certificates across the Straits; and (4) the agreement on inquiries and compensation concerning registered mail across the Straits. The four agreements went into effect on May, 29, 1993. See, China Daily, August 16, 1993.

⁵ The PRC has membership in many international organizations in the fields of economics, finance and trade, e.g., ECOSOC, ESCAP, UNDP, UNIDO, UNCTAD, FAO, IMF, WBG, CCC, ILO, ADB, etc. See Shen Xia, Xiangyin Chu, ed. *The Dictionary of General Agreement on Tariffs and Trade*, (Beijing: Foreign Trade Education Press, 1993), p. 559.

⁶ Annual Report, GATT, 1993. See, Jingji Ribao (Economic Daily), Beijing, 6 April, 1994.

million people. Hong Kong has been separated from China ever since the end of the Opium War. The separation is the consequence of three Chinese-Anglo agreements of the nineteenth century.⁷ Up to now, Hong Kong has transformed itself into an export-oriented industrial city with a very important status in the world economy as one of the leading financial centers. In 1993, Hong Kong ranked as the eighth largest trading power in the world, with the total of import and export including the transferred trade as high as US\$ 278 billion.⁸

Taiwan is an area of 35,981 square kilometers, encompassing the islands of Taiwan, Penghu, Kinmen and Matsu, on which the population is approximately 20 million people. Unlike Hong Kong, Taiwan has been viewed as being a part of China from almost all sides and is taken as one party in "an unfinished civil war".⁹ Though it has rarely been formally recognized as a sovereign state, Taiwan has been very successful in its economic growth. In 1993, it was ranked as the world's thirteenth largest trading power with its record of import and export as much as US\$ 162 billion.¹⁰

Separation Between Mainland and Taiwan

The complicated case of the two parts of China (the Mainland and Taiwan) should be traced back through history. The decline of the Qing Dynasty (from 1644 to 1911), the last feudal dynasty in the history of China, was marked by the Opium War, and the 1911 Xin-Hai Revolution ended it. In its place, the first republic in China, the

⁷ See the text at note 148.

⁸ Supra note 6.

⁹ Ralph N. Clough, Taiwan's International Status, Chinese Yearbook of International Law and Affairs 1981, vol. 1, ed. by Hungdah Chiu, p. 18.

¹⁰ Supra note 6.

Republic of China, led by a nationalist party, the Kuomintang, came to being. After 37 years (from 1912 to 1949) in power, the nationalist party was defeated by a communist party, the Communist Party of China, in a bloody civil war from 1945-1949. The Republic of China fled to the islands now called Taiwan. Meanwhile, as a new government, the PRC government was set up on the mainland. Since then, the two governments have been coexisting, with each claiming itself as the only legitimate government of China.

The issue of China's unification has brought many questions about the internal structure as well as the capacities of the above-mentioned parts of China in external relations, for instance, their participation in international organizations, in particular, the GATT as we are concerned with here. This concern is the starting point of my thesis.

B. GATT

The GATT is a global organization of international trade, which has 107 contracting parties, plus 24 countries to whose territories the GATT has been applied and which now, as independent States, maintain a de facto application of the GATT pending final decisions as to their future commercial policy.¹¹ Approximately 90% of the total gross trade of the entire world is undertaken between the contracting parties of the GATT.¹²

The GATT is one of the principal governmental organizations concerning

¹¹ GATT membership (April 1993), (1993) 5 World Trade Materials 3, May.

¹² Zhong Yi, GATT and China, Renmin Ribao (People's Daily), Beijing, overseas edition, February 21, 1992.

international economic relations, along with the International Monetary Fund (IMF), and the International Bank for Reconstruction and Development (IBRD, or the World Bank).¹³ To meet the necessity of mutual reduction of tariffs, the United Nations Economic and Social Council (ECOSOC), in February 1946, adopted a resolution calling for a conference to draft a charter for an International Trade Organization.¹⁴ The ITO Charter was completed in Havana in 1948, and called the "Havana Charter". At the Geneva meeting in 1947, three major parts were devoted respectively to: (1) preparation of a charter for an ITO; (2) negotiation of a multilateral agreement to reciprocally reduce tariffs; and (3) drafting the "general clauses" of obligations relating to tariff obligations. The second and third parts together constitute the GATT --- the General Agreement on Tariffs and Trade. The GATT was designed to operate under the umbrella of the ITO, but since the ITO never came into being, the GATT is applied as a treaty obligation under international law, only through the Protocol of Provisional Application (PPA).¹⁵

The GATT's purpose is to promote the liberalization of world trade through the reduction of obstacles to trade. The concept of the most-favored-nation standard (MFN) is the foundation of trade liberalization, which is embodied in Article 1 of the Agreement.¹⁶

During the last five decades, the GATT has been improved and enriched by the

¹³ These international institutions comprise the "Bretton Woods System". Although the GATT was not formed at the 1944 Bretton Woods Conference, nevertheless the Bretton Woods Conference contemplated the necessity of an International Trade Organization (ITO). See, John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, (Cambridge, Massachusetts: The MIT Press, 1991), pp. 27-28.

¹⁴ 1 UN ECOSOC Res. 13, UN Doc. E/22 (1946).

¹⁵ 55 UNTS 308 (1947).

¹⁶ Art. 1, GATT. See John H. Jackson and Williams J. Davey, *Documents Supplements To Legal Problems of International Economic Relations*, (St. Paul: West Publishing Co., 1986), 2nd ed. p.4.

following important rounds of tariff negotiations:

1. Geneva Round in 1947, leading to the conclusion of the GATT;
2. Torquay (England) Round in 1951 enabling the original Contracting Parties to GATT to negotiate tariff concessions inter se;
3. Kennedy Round, 1964-67, resulting in significant tariff reductions in percentage terms;
4. Tokyo Round in 1973-79; and
5. Uruguay Round in 1987-1993, completed with the agreement to establish the World Trade Organization.¹⁷

C. SIGNIFICANCE OF CHINA'S PARTICIPATION TO THE GATT SYSTEM

The GATT was designed to ameliorate a problem that had stymied the international economy in 1930s, the growth of obstacles to trade resulting from protective tariffs. The GATT promotes trade liberalization by establishing a world trading system and binding its members with three basic principles: (1) reciprocity; (2) non-discrimination; and (3) transparency. As with the evolution and development of the GATT itself, the interdependence of the world's economies and the increasing importance of the GATT as a universal trading system and a key international economic organization, it becomes more and more unacceptable and inconsistent with the purpose of the GATT for China to remain outside of the GATT.

The remarkable increase of China's economy in the last decade and its remarkable share of world trade makes this country more important to the world

¹⁷ Supra note 5, Shen Xia, Xiangyin Chu, Renmin Ribao (People's Daily), Dec. 17, 1993.

economy. Compared with the 105 contracting parties to the GATT, China's foreign trade makes it the eleventh largest trading power in the world. Considering the economic performance of the Mainland, Hong Kong and Taiwan in recent years, the weight of China's economy will be raised even more assuming a regional economic integration between these parties.

Another factor which needs attention is that, to the contracting parties, especially those industrialized countries, China's huge market will offer more economic opportunities, especially in the recession years. So, it would be very important to regulate all the international economic transactions between China and its trading partners in the GATT system in order to realize the ideals of reciprocity, non-discrimination, and to set up a proper universal trading order.

The last point which needs to be mentioned is that apart from the other considerations, the "universality" of the GATT trading system makes it extremely necessary to have China within the GATT scheme. China's participation would be undoubtedly helpful to strengthen this international organization in the face of tendencies toward protectionism and regionalism, which are opposed to the ideal of the liberalization of world trade. So, it will be very important to have China within the GATT system for the purpose of properly establishing a true world order for economics and trade.

It would be beneficial for the whole world if all countries behave as required by the international rules in the field of world trade, so that a normal world trading order can be set up. So, there is every reason to accept such a country in this unique international organization of trade and bind all its imports and exports within the rules of the GATT, and there seems no reason to exclude such a country out of this organization. Through a review of the history of this country in the last 14 years, it can be found that it has been changing to coincide its practices with the rules of the

world community.

D. PROS AND CONS TO CHINA OF PARTICIPATION IN THE GATT

China can be listed as one of the trading powers in the world.¹⁸ The trade between China and the contracting parties of the GATT comprises more than 85% of China's total foreign trade. To China, access to the GATT will be very beneficial to its trading conditions and also may bring a great impact to the trading system and its domestic industry. This is the main consideration for the decision makers of China when they decide to take action towards China's inclusion in the GATT. The benefits to China by acceding to the GATT will be:

1. China may, through membership in the GATT, fulfil full participation in international economic activities in an all-round way and complete its entry into all of the principal international economic organizations. China is already a member of the other two main international economic organizations, the IMF and the IBRD.
2. Participation in the GATT would allow China to enjoy greater access to the world market, enlarge its foreign trade, and promote the development of its foreign economic relations by adopting international rules of trade.
3. China would be provided with a greater defense against protectionist and discriminatory tendencies of developed countries, and be able to join the debate and fight against protectionism through the forum of this organization. Also,

¹⁸ Supra note 6; see, Li Lanqing Speech on a meeting of the inspection on imported and exported goods of China, 18 December, 1992, Shijie Ribao (World Journal, daily), 19 December 1992. Mr. Li Lanqing, Minister of the Ministry of Foreign Economic and Trade. In the Spring 1993, he was appointed Vice Premier of the State Council of China.

China would have access to the GATT's dispute settlement mechanisms to ward off protectionism and discriminatory treatment.

4. It would be helpful for China to have the unconditional most-favored-nation (MFN) treatment, as the GATT requires that all contracting parties should be accorded such status.

5. As a developing country, China may enjoy preferential tariff treatment under the U.S. Generalized System of Preferences (GSP). China has gained GSP treatments from all developed countries that have such schemes except the U.S.¹⁹

6. China's participation in the GATT would be of great help to it in deepening and developing its internal economic reforms. China's economic development and prosperity has paramount significance to the stability and peace both of the world and the country itself. In the last 14 years, China has made remarkable efforts and also great progress with its economic reforms. At the 14th National Conference of the Communist Party of China, the basic line was stipulated as establishing "the Socialist market economy".²⁰ This was a historic change for a socialist country like China, though the line is still modified with the word "socialist". This change is affirmatively considered as a "creative and revolutionary" change and much encouragement is needed, because for China, the progress needs support from all sides to have enough

¹⁹ At the first United Nations Conference on Trade and Development (UNCTAD) in 1964, the Secretary General of that UN organization shepherded through the adoption of a report designed to focus international attention on the need for special rules for the trade of developing countries. The final legal step for these special rules was taken in the GATT, in the form of a GATT waiver to the MFN clause, called the Generalized System of Preferences. The waiver was granted in 1971 for a ten-year period, so it expired in 1981. As part of the Tokyo Round negotiations, the Contracting Parties adopted an "enabling clause" in a declaration entitled "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries". See, *supra* note 13, John H. Jackson, p. 278.

²⁰ *Supra* note 8.

time to grow in a healthy way. To the international society, it is definitely necessary to have a country like China stable politically and prosperous economically.

Though China would obtain certain privileges in international trade by full participation in the GATT, in turn, it would have to make concessions by opening its markets to the GATT members and would have to submit its trade regime to international scrutiny and surveillance. Furthermore, China would have to undertake measures to liberalize its trade regime that would be commensurate with the GATT requirements. The hard bargaining on the terms for China's access is foreseeable. China will be asked to make other arrangements to ensure that its imports would increase in return for tariff concessions on the part of the contracting parties with market economies. Those arrangements would be concentrated on the reduction of the level of imports determined by a state plan; reduction of the substantial licensing requirements; abolishing the administratively set exchange rate; free access to foreign exchange; and so on.

E. METHODOLOGY

For the research as to the above questions, comparative study is employed as the methodology. Different emphasis will be placed on the PRC, Hong Kong, and Taiwan respectively. In Chapter I, the introduction, information will be given on the background of China, Taiwan and Hong Kong, GATT, the significance of China's participation in the GATT system, and pros and cons to China of participation in the GATT. Chapter II deals with the PRC case. Most analysis will be concentrated on the legal issues concerning China's resumption of GATT membership, as well as the compatibility of China's economic system with GATT. Chapter III deals with the

Taiwan case. Analysis is unfolded around Taiwan's application to accede to the GATT as a separate customs territory, and some legal issues concerning this. In Chapter IV, the analysis will be focused on Hong Kong, such as Hong Kong's status and capacity in its external relations, particularly in international organizations, as well as the influence of Hong Kong's transfer to China in 1997 on its capacity towards its international obligations. Chapter V mostly deals with issues concerning the impact the unification of the four parts of China would bring to their respective capacities in external relations.

CHAPTER II: PEOPLE'S REPUBLIC OF CHINA AND GATT

On 10 July 1986, the PRC officially applied to resume its membership in the GATT.²¹ In February 1987, China submitted a memorandum on its foreign trade regime to the GATT.²² On 4 March, 1987, China asked the GATT to set up a working group to consider China's trade regime and determine the conditions under which China could rejoin the GATT²³. China is a very unique case because it is now in the midst of a transition from a centrally-planned economy to a market economy²⁴ and its application is to "resume" its seat in GATT instead of acceding to it.

A. CHINA'S MEMBERSHIP IN THE GATT AND TAIWAN'S WITHDRAWAL FROM IT

China's membership in the GATT can be traced back to the moment when this

²¹ Supra note 5, Shen Xia, Xiangyin Chu, p. 231. See, China Bids to Rejoin Trade Body, China Daily, Beijing, 14 July, 1986.

²² Ibid, Shen Xia, Xiangyin Chu, p. 231. See, "China Moves Step To GATT Membership", China Daily, Beijing, 16 February, 1987.

²³ See, Focus (GATT Newsletter), No.44, March 1987.

²⁴ See, Jiang Zemin, Report to the Fourteenth National Congress of Communist Party of China in Beijing on November 1992, "Speed Up The Space of Reform, Opening and Modernization and Win Greater Victories in the Socialist Cause With Chinese Characteristics", People's Daily, November 1992; also see FBIS-CHI-92-204-S, October 1992. Mr. Jiang is the General Secretary of the Central Committee of the Communist Party of China and he was elected President of the P.R.C. in the later election in Spring 1993.

international trade institution was established. China, represented by the Nationalist government, participated in all the negotiations aimed at establishing the International Trade Organization (ITO) and the GATT as early as 1946. On 30 October, 1947, China signed the Final Act of the General Agreement and became one of 23 original contracting parties of the GATT. On 21 April, 1948, China deposited its Instrument of Acceptance of the Protocol of Provisional Applications (PPA) of the General Agreement. Pursuant to paragraph 3 of the PPA, China provisionally applied the General Agreement from 21 May, 1948.²⁵ During the following activities within the GATT, such as the first and second rounds of the multilateral tariff negotiations, which were held in Geneva in 1947 and in Annecy in 1949 under the auspices of GATT, China participated in the negotiations for tariff concessions with the other contracting parties and accepted protocols modifying GATT provisions and ratifying the General Agreement.²⁶

Soon after these events happened, there was a replacement of governments within China. On 1 October, 1949, the Nationalist Government of China was ousted from power and replaced by the PRC.²⁷ The replacement of governments within China was followed by the complicated question of the representation of China in the GATT and a prolonged absence of China's participation in this organization. The PRC came into power over most parts of China's territory except the Taiwan Islands as well as the small islands of Penghu, Kinmen and Matsu, on which the deposed regime installed

²⁵ See, GATT: Status of Legal Instruments, GATT/LEG/1, Supp. No. 13, April 1988, pp. 1-3.

²⁶ China accepted the First Protocol of Rectification of the General Agreement on 7 May, 1948, the Second Protocol of Rectification on 14 September, 1949 and the Third Protocol of Rectification on 13 August, 1949.

²⁷ After it had taken over almost the entire territory of China, and won the Civil War definitively, the CPC established a coalition government and changed the state from the Republic of China to the People's Republic of China. On 1 October, 1949, the Central People's Government declared itself established.

itself.

The deposed regime, losing its effective control over most parts of China, could no longer fulfil the GATT obligations it had been subject to in the name of China, mainly the commitments of tariff concessions to other contracting parties, because the products involved were exported from and imported to the mainland of China. In this situation, realizing its incapacity to act on behalf of China in the GATT, it notified the Secretary-General of the United Nations of its decision to withdraw from the General Agreement²⁸ on 7 March, 1950. Meanwhile, the PRC government was prevented by the special historical situation and exceptional circumstances from participating in international organizations, including the GATT, for many years.

China's Re-entering the GATT

The motives of China's active efforts to resume its seat in the GATT are based on the following concerns: the need to rebuild its domestic economy; and the desire to participate in the world's economic activities. In its first three decades from 1949, the PRC was characterized by radical ideology in politics and centrally-planned economy. The trade commitments and tariff concessions under the GATT between China and other contracting parties ceased to be applied. Normal trade relations between China and many of the GATT contracting parties actually ceased to exist.²⁹

²⁸ See, GATT/CP/54, 8 March, 1950.

²⁹ In the 1950s and 1960s, China's foreign trade was undertaken mainly with the Soviet Union and other East European countries. Meanwhile most Western countries followed the U.S.A. in an economic blockade of China. For example, among the thirteen countries with which the PRC had diplomatic relations in 1949, eleven were communist countries. In contrast, among the thirty three countries with which the PRC had diplomatic relations as of 1959, only six were Western countries. Those were Denmark, the Netherlands, Norway, Sweden and the United Kingdom. See, Gene T. Hsiao, *The Foreign Trade of China: Policy, Law, and Practice*, (Berkeley: University of California Press, 1977), p. 28, Table 9. In 1993, the PRC has bilateral trade agreements with 103 countries, including 71 contracting parties of GATT. See, *supra* 5, Shen Xia, Xiangyin Chu, p. 569.

Due to this situation, China ceased to apply the GATT to the contracting parties. In the 1950s, China's foreign trade was mainly carried out under bilateral agreements.³⁰ From the 1960s, the increasing share of China's trade with contracting parties of the GATT became evident.

The PRC, ever since its founding, took executive and legislative actions on the issue of legitimacy. Shortly after its founding, the PRC government notified the world community and all major international organizations generally that it was the sole lawful representative of China, and that the seat occupied by the deposed regime should be assumed by the government of the PRC since the Taiwan authorities no longer had the right to represent China.³¹

As a matter of fact, the PRC has been absent in the GATT as a contracting party. Actually, it did not take its seat back in the U.N., the unique and universal political international organization, until 1971.³² "It was appropriate for it to defer action on its GATT seat until the U.N. question was resolved."³³

After China assumed its proper seat in the U.N. in 1971, and particularly from 1980 when the country had already begun economic reconstruction, it started to make

³⁰ From 1949 to 1964, China concluded 408 bilateral economic treaties and agreements with forty-eight states out of a total number of 762 bilateral treaties and agreements which China reached with fifty-three states and the United Nations. See, Gene T. Hsiao, "Communist China's Trade Treaties and Agreements, 1949-1964", *Vanderbilt Law Review*, vol. 21, 1968, pp. 626, 656-658.

³¹ See, *Zhong Hua Ren Min Gong Ho Guo Dui Wai Wen Jian Ji*, (Collections of Materials on Foreign Affairs of the P.R.C.), vol. 1 (1949-1950), pp. 85-139. Also see, Hungdah Chiu, *Communist China's Attitude Towards the United Nations: A Legal Analysis*, *American Journal of International Law*, vol. 62, p. 22, note 6.

³² In 1970, the United Nations General Assembly adopted Resolution 2758 (XXVI), by which the rights of the representatives of the PRC Government in the United Nations were restored and the representatives of the ROC Government were expelled. See, G.A. Res. 2758, 26 U.N. GAOR Supp. (No. 29) at 2, U.N. Doc. A/8429 (1972).

³³ Robert E. Herzstein, "China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade", 2 *Law and Policy in International Business*, vol. 18, 19986, p. 396.

initial contact with the GATT, which was followed by a series of actions between Chinese officials and the GATT. In 1980, China participated in the UNCTAD-sponsored program of Cooperation among Developing Countries and Exports of Textile and Clothing, and then took part in the textile negotiations which related to the second session of the Multifibre Arrangement (MFA) in 1981. Finally, in 1983, China became a signatory to the GATT MFA.³⁴

In 1982, China expressed interest in sending representatives to participate in the GATT Contracting Parties meeting as observers and this request was accepted accordingly. It is notable that China has been reiterating its position that its participation will always be "without prejudice to the Chinese government's position with regard to its legal status in GATT".³⁵ All of these efforts made by China led to the possible passing of the completed process for it to return to the GATT and its formal request of resuming its proper status in the GATT in 1986.

B. LEGAL ISSUES OF RESUMING CHINA'S MEMBERSHIP IN GATT

The PRC government is applying for the GATT membership by claiming the resumption of its original membership in the organization, rather than accession. The legal issues which this gives rise to should be discussed and analyzed.

³⁴ The MFA is open to all countries, whether or not contracting parties to the GATT.

³⁵ For example, this position can be shown in its official communications to the Contracting Parties through the Secretariat such as its accession to the MFA (COM.TEX/W/142), its request for participation as observer in Sessions of the Contracting Parties (L/5344, L/5549), and participation in the Council of Representatives (L/5712).

1. Legal Effects of the Replacements of Governments in China

China was one of the 23 original signatories of the GATT³⁶. In 1949, the PRC replaced the Republic of China.³⁷ The ROC government lost its control on the mainland as well as the legitimate status and went to the Islands of Taiwan, which is a territory as small as one fifty-sixth of the whole territory of China.

This replacement of governments does not affect the continuity of the state, resulted in the transfer of the representation of China from the ROC to the PRC. Thus, the PRC became the legitimate government of this country, having the right to succeed to the status of China in international organizations. As a result, the Taiwan regime lost authority to represent the country of China.

2. The Invalidity of Taiwan's Withdrawal from GATT

On 6 March, 1950, the deposed regime which occupied China's seat in the GATT ever since 1949 notified the UN Secretary General of its decision to withdraw from the GATT.³⁸ This withdrawal from the GATT is not at all lawful, and without any legal effect because the membership belonged only to the country of China, not to a part of that country. Any regime which had no legal right to represent the country, though occupying a part of the territory, cannot conduct a valid act in excess of its authority. This view was shared by many delegates at the Contracting Parties

³⁶ Preamble, GATT, 55 U.N.T.S., 194, also GATT, Basic Instruments Supplement Documents, (BISD), vol. IV.. China was represented by the ROC government.

³⁷ In the author's view, before the replacement of the governments happened in China, the R.O.C. government had been the legitimate government of China. But after that time, the self-called "ROC" government in Taiwan ceased to be the legitimate government of China. This limitation of the titles has important significance.

³⁸ See, GATT/CP/54.

conference held in Torquay in November 1950. In its statement to the meeting, the Czechoslovakian delegate expressed his government's position that his country did not recognize the validity of China's withdrawal from the General Agreement because the notification was made by persons having no legal powers to act on behalf of China.³⁹ On 27 June, 1951 the Government of Czechoslovakia notified the Executive Secretary to the same effect in the context of disputing the U.S. withdrawal of concessions negotiated with China.⁴⁰

As a matter of international law, the legitimacy of the ROC government as the government of China ceased when it was ousted. As a result, all its conducts after the date in the name of China are null and void, including its "withdrawal" from the GATT. The question on the validity of the withdrawal was raised again when the Taiwan regime requested observer status in the GATT in 1965. "Observer status" is a non-membership status in the GATT, which gives no rights and obligations to the observer concerning the requirements of the organization. Viewing the observer status as a means of access, Taiwan requested observer status as a way to return gradually to the GATT. It would also provide Taiwan another chance to be recognized as the government of China. Based on their recognition of the PRC as the sole lawful government of China, many contracting parties, including Czechoslovakia, Cuba, Yugoslavia, France, the United Kingdom, Sweden, the Netherlands, Denmark, Norway, the United Arab Republic (now Egypt), Poland, Indonesia and Pakistan, rejected Taiwan's request.⁴¹ Finally, Taiwan was granted observer status because the discussion of the validity of its request was circumvented by the announcement of the

³⁹ See, Chung-chou Li, Resuming of China's GATT Membership, *Journal of World Trade*, 26 vol. 21, 1987.

⁴⁰ See, GATT/CP/115/Add.1. Ibid, Chung-chou Li.

⁴¹ See, Contracting Parties Summary Record, SR. 22/3, 1965.

Chairman of the Contracting Parties that the admission of observers did not prejudice the position of the Contracting Parties or of individual contracting parties towards recognition of the government in question. It is important that Taiwan's observer status in the GATT was finally terminated by a decision of the GATT Secretariat. The legal basis of this GATT decision is the Contracting Parties' agreement to follow the decisions of the U.N. on essentially political matters. Though the GATT is not a specialized agency of the United Nations, it stipulated that its decisions would coincide with the U.N.'s decisions with respect to political matters. In 1950, the General Assembly stipulated that the Assembly's resolutions on the representation issue "should be taken into account" by other organs of the United Nations".⁴² In 1970, the United Nations General Assembly adopted Resolution 2758 (XXVI), by which it "decided to restore all rights to the PRC and to recognize the Representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it,"⁴³ The Contracting Parties to the GATT implemented this Resolution by re-examining the decision they had taken in 1965 on the observer status of China, and deciding to expel the representatives of Taiwan. Thus, the GATT not only took the position of expelling Taiwan from the organization as an observer, but also, by its decision, accepted the legal effect that the representatives of Taiwan had not legal authority to represent China in the GATT as soon as the PRC was founded on 1 October, 1949.

⁴² G.A. Res. 396, 5 U. N. GAOR Supp. (No. 20) at 24, U. N. Doc. A/1775 (1950).

⁴³ Supra note 32.

3. The Legal Representation of the PRC Government

The PRC's position of the representation of China has been supported not only by the theory of international law, but also by the practice of the UN and most other international organizations as well as almost all the countries in the world. As a result, this support to the PRC's representation means the denial of the legitimacy of the actions of the Taiwan authorities on behalf of China after 1949.

The terms employed in the U.N. Resolution 2758 (XXVI), like "restore" the PRC's rights and "expel" Taiwan from the seat they "unlawfully occupied", showed clearly the UN's stand that the PRC should have succeeded to the rights and duties for the country from the date of its founding, and from the same date, Taiwan's occupation in the UN became "unlawful". That is the basis of the decision of the GATT Contracting Parties on the termination of Taiwan's observer status in the organization, because the representatives were only the "persons having no power to act on behalf of China",⁴⁴ including the "notification of the Taiwan regime to withdrawal from the GATT in March of 1950". So, a reasonable conclusion should be that China's seat in the GATT has never been lawfully suspended, in other words, it should still be available for the lawful representatives of the PRC.

4. Retroactive Effects of Recognition

It is generally agreed upon among international lawyers that, in principle, the personality of State is not affected by a change of its government or of persons composing its government,⁴⁵ and ". . . in the recognition of governments, there is no

⁴⁴ See, *supra* note 40.

⁴⁵ See, Ti-Chiang Chen, *The International Law of Recognition*, (London: Stevens & Sons Ltd., 1951), p. 97, note 2.

question of the creation of personality. For the personality belongs to the state and survives the change of government".⁴⁶ The international practice of recognition shows that recognition is an administrative function, and different governments, considering the political factors in different angles based on their own interests, make the decisions of recognition at different times. It is an explainable opinion that the recognition is only a declaration of the existence of a fact. The political conduct of recognition does not have the legal effect because this would mean the recognized state begins its existence after the conduct of recognition. Its existence begins at the time it came into power to control the country. In international practice, the doctrine of the retroactivity of recognition has been an accepted principle of English law as early as 1921 since the decision in Luther v. Sagor, in which case the Court of Appeal held that the Soviet Government having been recognized, it must be treated as "having commenced its existence at a date anterior to any date material to the dispute between the parties to this appeal".⁴⁷ This principle was reaffirmed later when the Soviet decrees made before recognition were later treated as acts of a sovereign authority.⁴⁸ In another case, the Supreme Court of the United States explained the doctrine further through the following:

When a government which originates in revolution or revolt is recognized by the political department of our government as the de jure government of the country in which it is established, such revolution is retroactive in effect and validates all the actions and conduct of the government to recognition from the commencement of its existence.⁴⁹

⁴⁶ Ibid, p. 103.

⁴⁷ See, [1921] 3 K.B. 536, 543. Also see, D.P. Achenial, International Law, 2nd ed., (London: Stevens & Sone Ltd, 1990), p. 192.

⁴⁸ Supra note 45, Ti-Chiang Chen, p. 173, note 13.

⁴⁹ See, [1918] 246 U.S. 297, 302-303. Ibid, Ti-Chiang Chen, p.175.

In 1936, the Institute of International Law resolved that "recognition de jure is retroactive in its effects from the date when the new state actually begins to exist as an independent State."⁵⁰

According to the principle of retroactivity, China's (PRC) membership in all international organizations of which China (ROC) had been a signatory should commence from the date it was established.

5. Difference between Recognitions to State and Government

It is on this presumption, on which the principle of the retroactivity of recognition is established, that, in the case of a changeover of governments, the successor government which is habitually obeyed by the bulk of the population of that state exercises effective authority within its territory, meanwhile the deposed government has lost the control over the territory thus the latter is no longer entitled to rights nor subject to duties on behalf of the state.

In the case of Taiwan's "withdrawal" from the GATT in 1952, it is clear that the reason for the decision to withdraw is nothing but its loss of capacity to effectively control the state and its failure to fulfil China's GATT obligations, mainly commitments of tariff concessions to contracting parties since the products involved were exported from mainland China. More basically, whether a government recognizes a new government in another state, generally speaking, does not affect its recognition of that state if a new government is in power. In other words, the refusal to recognize a new government does not deny the recognition already given to that State.

⁵⁰ Annuaire, 1936; Art. 7. Supra note 47, D.P. Achenial, 2nd ed. p. 185.

6. Theoretical Aspects of Government Succession

As a matter of international law, the "change of government does not affect the personality of the State . . . even when the change is revolutionary . . .",⁵¹ and "thus it may introduce the proposition that the legal rights and responsibility of states are not affected by changes in the head of state or the internal form of government, ... if there is continuity, the legal personality and the particular rights and duties of the state remain unaltered."⁵² When a government is replaced by a new one, the personality of the State does not change. The replacement of governments does not affect the continuity of states or its status in the international community. All international obligations committed by the deposed governments are expected to be succeeded while the international responsibility of the state should be undertaken by the new government. What has been changed within this state is the representatives of authority. Though, in some cases, this kind of change leads to a change in the domestic political structure, in a legal context, the change is purely domestic. So, many cases support this principle by the fact that the representatives of a new government take the seat of the State, replacing the deposed government, in international organizations, and they are treated as the representatives of the State by foreign countries.

51 D.P. O'Connell, *International Law*, (London: Stevens & Sons Ltd., 1970), 2nd ed., vol. 1, p. 394.

52 Ian Brownlie, *Principles of Public International Law*, (Oxford: Clarendon Press, 1979), third ed. p.87. Comments on this topic are also from Louis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smit, *International Law: Cases and Materials*, (St. Paul, Minn: West Publishing Co., 1980), p.675, "The replacement of one state by another is different, of course, from the changes in government which take place without affecting the legal identity of the state," and H. Lauterpacht, *Recognition in International Law*, (Cambridge, England: The University Press, 1947), p.87, States are normally concerned with changes in the composition or in the form of government which occur in other countries; the international personality of the state is not affected by transformations of that kind."

Questions also arise on the attitude of this new government towards the rights and obligations in international relations enjoyed and undertaken by the predecessor government in the name of the states. According to the principle of state sovereignty, a new government of a state may make its own judgement on the succession of the international rights and obligations. In practice this discretion is always considered abused because the denial and abolishment of its former international obligations is so controversial to the principle of estoppel and cause retaliation from the concerned countries. This pick-and-choose style is under argument and brings, in practice, many disputes.

However, as it represents the state which used to be represented by its predecessor, "a successor government is required by international law to perform the obligations undertaken on behalf of the state by its predecessor.⁵³ Also, its rights will not remain unless it undertakes the accompanying obligations. As to the membership of states in international organizations, in most cases, this remains unchanged when a changeover of governments occurs. The first category of examples is of a constitutional changeover of governments, which is undoubtedly of no effect to the status of the state in international organizations.

The second category is of the succession between the new and old governments by revolution, which also supports the conclusion that the personality of state is not affected by the change of government, thus the status of the state in international treaties should be intact.

The third category is newly-independent countries. Even if it is of the succession of state, far from that of government, the states of this category succeed to the memberships in international organizations of their predecessor states.⁵⁴ From the

⁵³ Supra note 51, D.P. O'Connell, p. 394.

general practice, it appears conclusive that in the sense of succession, since the conditions of the personality of a state is not affected by the change of governments, the new government should succeed to the rights of representation for the membership of the State in international organizations unless it explicitly declares its unwillingness to succeed.⁵⁵

The above-said analysis, though simple due to the length of this thesis, supports strongly and reasonably the conclusion that the PRC government, ever since the date of its founding, should succeed from its predecessor government all the rights of representation of the State of China concerning international organizations, such as the GATT.

7. Practice of Succession in the GATT

Within the framework of the GATT, the succession of membership in the organization between governments has less frequently been a problem than has the succession of states.

By reviewing and examining the GATT practice on the succession of states, we can know the principles and considerations of the contracting parties of the GATT on such issues, which will give the answer to this question on the succession of membership in the GATT either by a successor state or a new government of a state whose status in the GATT is not at all affected by the changeover of the governments.

The provision in the General Agreement relative to state succession is Article XVI, paragraph 5(c). This special clause provides:

⁵⁴ For example, the new Dominion of India claimed to be the same international personality as British India which had been one of the founding members of the United Nations, and therefore it remains a member of the U.N.

⁵⁵ See, D.P. O'Connell, *The Law of State Succession*, (Cambridge, England: The University Press, 1956), p. 67.

If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full authority in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.⁵⁶

This clause was originally recommended by the Ad Hoc Sub-Committee of the Tariff Agreement Committee, when the General Agreement was drafted. At that time, Burma, Ceylon and Southern Rhodesia, under the control of the British Government, had autonomy in external commercial relations. The question was whether those territories could be admitted to participate as full contracting parties in the GATT. The affirmative answer to this question led to the existing Article XXVI par. 5(5). " Since the date of acquiring full autonomy in external commercial relations almost always coincided with the date of acquiring full independence, this special clause has provided a convenient formula a flexible application of which has in fact facilitated state succession."⁵⁷

In the case of the Federation of Rhodesia and Nyasaland,⁵⁸ after the Governments of the United Kingdom and Southern Rhodesia submitted joint declarations respectively on September 22, 1953 and November 6, 1953 to the members of GATT, which declared that the Federation had acquired full responsibility for matters covered by the General Agreement, the contracting parties in a declaration

⁵⁶ This clause was originally Article XVI paragraph 4, section proviso (55 U.N. Treaty Series 274) in almost identical wording, which became par. 4(c) pursuant to an amending protocol of August 13, 1949 (62 U.N. Treaty Series 114), and then par. 5(c) pursuant to the Protocol Amending the Preamble and Parts II and III of the General Agreement which entered into force on October 7, 1957 (228 U.N. Treaty Series 204).

⁵⁷ Tasuro Kunugi, "State Succession in the Framework of GATT", American Journal of International Law, vol. 59, 1965, p.270.

⁵⁸ Southern Rhodesia was an original signatory to the Protocol of the Provisional Application of the General Agreement. The Federation of Rhodesia and Nyasaland was established by the Act of the British Parliament dated March 24, 1953, which became effective on August 1, 1953.

on October 29, 1954, decided

that the Government of the Federation of Rhodesia and Nyasaland shall henceforth be deemed to be a contracting party ... and to have acquired the rights and obligations under the General Agreement of the Government of Southern Rhodesia and the Government of the United Kingdom...⁵⁹

This undeniable right of succession to the status of their predecessors in this organization can be viewed in many other similar cases, showing the practices of the GATT.⁶⁰ Though new states were expected to follow a process by sending declarations to the contracting parties of the GATT, the practice affirms a state's succession to the GATT.⁶¹ The examples of state succession to the GATT all happened with respect to new states established by decolonization, thus the personalities of the state were changed somehow. This is affirmative support for the succession of governments to the rights and obligations in the GATT where no changes to the personality of the states has occurred.

Another important point coming from the analysis on the GATT practice on the membership of successor states with respect to their memberships in the organization is that the succession of states should begin from the date the new states are established. In the case of Nigeria, the contracting parties made a declaration on Dec. 18, 1960,

⁵⁹ B.I.S.D., 3rd Supp. (1955), pp. 29-39.

⁶⁰ Such cases involve Ghana, Malaya, Nigeria, Sierra Leone, Tanganyika, Trinidad and Tobago, as well as Uganda, Laos and Guinea in their acquisitions of memberships in the GATT.

⁶¹ Ghana became independent on March 6, 1957, the contracting parties made the declaration on October 17, 1957, BISD, 6th Supp. (1958), p.9; Malaya became independent on August 31, 1957, and got the declaration from the contracting parties on October 24, 1957, BISD, 6th Supp. (1958), p. 9-10; Nigeria, became independent on October 1, 1960, and got the declaration from the contracting parties on December 18, 1960, BISD, 9th Sup. (1960), pp.13-14; Sierra Leone became independent on April 27, 1961 and got the declaration from the contracting parties on May 19, 1961, BISD, 10th Supp. (1962), pp. 11-12; Tanganyika became independent on December 9, 1961 and got the declaration from the contracting parties on December 9, 1961, BISD, 10th Supp. (1962), 14-15; Trinidad and Tobago became independent on August 31, 1962 and got the declaration from the contracting parties on October 23, 1962, BISD, 11th Supp. (1963), pp. 44-45.

which reads in part:

"the Government of the Federation of Nigeria is deemed to be a contracting party to the General Agreement on Tariffs and Trade as from 1 October 1960 [the date of its independence]".⁶²

The explicit words are used to make the effect of the declaration under Article XXVI, par. 5(c), "retroactive whenever it was necessary".⁶³

In these examples, it can be found in the GATT practice that succession of states should begin from the date of their establishment. It appears more clearly that, in the cases of succession of governments, the personality of states are not changed, in other words, the states remain the same as before the changeover happened, thus their status in the international organizations should be nothing more than unaffected. It is a basic assumption through which comes the necessity of Article XXVI, par. 5(c) of GATT. This provision is just an arrangement for the new states in succeeding the rights and obligations of their predecessors in the GATT by non-accession procedures.

It should be noted that the GATT allows the new states concerned an option as to whether to succeed to their predecessors' memberships in GATT by declaring their wishes.

"It is, however, characteristic that a new state, and not the organization, has an option as to whether that state should succeed or not under Article XXVI as it has been interpreted and applied".⁶⁴

In other words, a new state still has the membership in the organization of its predecessor state before it explicitly shows whether or not it wishes to succeed to it. It may be concluded that the principle of identity or continued personality of a new state

⁶² BISD, 9th Supp. (1961), pp. 13-14.

⁶³ Supra note 57, Tatsuro Kunugi, p.273. The same method was also used in the cases of Sierra Leone, Tanganyika, Trinidad and Tobago, and Uganda, which were deemed to be contracting parties as from the dates of their independence.

⁶⁴ Ibid, Tasuro Kunugi, p.285.

should be an essential test of its succession of the multilateral treaties.

But it is clear that it is the successor states not the GATT which has the option to succeed or not. The declarations of their wishes do not represent applications of accession but succession to the rights and obligations of the predecessor states. The requirements of declaration seem to "suggest that state succession under Article XXVI is not entirely 'automatic' in the sense that new states continue to be bound by the GATT instruments irrespective of the intention of the states concerned."⁶⁵ Since not all new states concerned submit their declarations prior to or soon after their becoming independent, questioned that how much time would be reasonable for the new states to consider succession before they actually make their decisions through declarations.

Taking a review of the history of the GATT for such a question, there seems to be no reasonable and decisive standard of timing till now.⁶⁶ The frequent changing of

⁶⁵ Ibid, p. 273.

⁶⁶ The Recommendation of November 18, 1960 stated:

" ... Recognizing the governments of newly-independent territories will normally require some time to consider their future commercial policy and the question of their relations with the General Agreement, and that it is desirable that meanwhile the provisions of the General Agreement should continue to be applied to trade between these territories and the contracting parties to GATT.

The Contracting Parties recommend that contracting parties should continue to apply de facto the General Agreement in their relations with any territory which has acquired full autonomy ... for a period of two years from the date on which such autonomy was acquired ...

See, BISD, 9th Supp. (1961), pp. 16-17. Ibid, Matsuro Kunugi, p.274.

And the Recommendation of December 9, 1961 allowed " a further period of one year with respect to any state which before expiry of the two-year period requests an extension of the time limit. The decision of November 14, 1962 allowed further time by stating that:

Considering that it is desirable to provide further time for these states ... and that an informal time - time for the expiry of the Recommendation of 9 December 1961 in respect of these States and by the Contracting Parties.

Recommend that contracting parties should continue to act upon the [said] Recommendation ... until close of the last ordinary session of the Contracting Parties in 1963 ..., and

the time limit of de facto application shows the extent of the difficulty in setting up a "reasonable" standard applicable to various cases which are very complex.

8. Resuming v. Accession

In pursuing its GATT membership, the PRC has insisted on resumption of China's original contracting status in the GATT instead of accession as a new member. It has been repeatedly claimed in the PRC government's statements that resumption instead of accession is the first among the three principles the Chinese government set out for its entry into the GATT.⁶⁷ Early in July 1986, the PRC government advised that, upon recalling that China was one of the original contracting parties to the General Agreement, the PRC government had decided to "seek the resumption of its status as a contracting party to the GATT" and was prepared "to enter into negotiations with the GATT contracting parties on the resumption of its status as a contracting party".⁶⁸ In the subsequent elaboration in a statement of the Chinese delegation to the GATT, this approach of resumption was further explained to support the argument that the PRC's resumption of China's status as a GATT contracting party is justified under international law and supported by international practice, and the PRC has the right to request such resumption.⁶⁹

The position of the Chinese government to insist on resumption instead of

Decide to review the status of the above-mentioned territories at their last ordinary session in 1963.

See, BISD, 10th Supp. (1963), pp. 53-54. Ibid, Matsuro Kunugi, p. 275.

⁶⁷ The other two principles are: (1) joining the GATT as a developing country; and (2) no special discriminatory provisions attached in the China protocol. See Statement by Shen Jueran, Deputy Minister of Foreign Economic Relations and Trade, Head of the Chinese Delegation at the Third Session of the GATT Working Party on China, Geneva, 26 April, 1988.

⁶⁸ GATT Doc. L/6017, 14 July, 1986.

⁶⁹ Ibid.

accession into the GATT has substantive significance only to the question of who has the right to represent the country, the PRC government or Taiwan authorities (the ROC). The core of the issue is the question of orthodoxy. This reflects the unsolved question left over by the civil war from 1945-1949. In the last 40 years, the PRC has been successfully striving for recognition from the world community. The question may hang on the relationship between the PRC and the ROC especially facing the recent inclination towards unification of the country. The basis of the application of resumption is the reflection of the one China policy, i.e., the political consideration on Taiwan's independence. In essence, it is more political rather than legal, and more domestic rather than international.⁷⁰

Though resumption to the GATT may, to the PRC, solve the question of the representation of China, some other realistic problems, relating to GATT regulations, would still make the resumption approach inapplicable. Those are as follows:

(1) The case of China's resumption in the GATT differs from the other cases concerning restoration of China's memberships in the United Nations, IMF, World Bank and other related organizations where China's seat had been occupied uninterruptedly by the ROC until replaced by the PRC. The relations between China and the GATT have been suspended, while the relationship in the other cases was continuous. During the suspension, China has been absent in the GATT for more than 40 years, without fulfilling its GATT obligations. Such a long absence weakens support for the application of resumption. The Taiwan authorities had no right to represent

⁷⁰ This opinion can be affirmed by the practice of the PRC to take it as a definite condition of establishing diplomatic relations with foreign countries that the PRC is the sole legal government of China and Taiwan is only a part of the country. Also this principle is applied in the relationships between China and most international organizations in which membership is applied only to sovereign states, e.g., the United Nations, IMF, and World Bank. But the PRC does not oppose Taiwan's application to enter into the GATT, and it only demands that it should accede to the GATT before Taiwan.

China after 1949, and its withdrawal from the GATT was null and void. But it does not mean that this case can refer to the models of the Mainland restoration of China's seats in the United Nations as well as the IMF, the World Bank and other related organizations, because in the GATT China's seat has been interrupted or suspended for such a long time.

It is well known that the PRC government adopted an analytical approach towards the existing treaties its preceding government concluded instead of abrogating or automatically succeeding all the old treaties. This policy is described as one in which the PRC government would make its determination as to whether to "recognize, abrogate, revise or renegotiate" each of such treaties according to its content.⁷¹ According to this policy, the PRC government should have shown its attitude clearly towards its membership in the GATT long before the late 1970s. Instead, it did not express its interest in the GATT until the late 1970s and its official position regarding its GATT membership remained unclear and indefinite until its formal request for resumption. During the years ever since the changeover of governments in China, the PRC government has carried out all of its foreign trade through separate bilateral agreements with most of the GATT contracting parties, providing for MFN treatment in their respective bilateral trade and other trade-related matters,⁷² without bearing any GATT obligations.

⁷¹ This principle was stipulated in Article 55 of the Common Program of the Chinese People's Political Consultative Conference (1949), which served as a quasi constitution of the PRC from 1949 to 1954. See J. Cohen and H. Chiu, *People's China and International Law*, (Princeton: New Jersey, Princeton University Press, 1974), v. II, 1121-1129; T. Wang, *International Law*, (Beijing: Law Publishing House, ed. 1981), p. 121. This article provides: The Central People's Government of the People's Republic of China shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and shall, in accordance with their contents, recognize, abrogate, revise, or reconclude them respectively.

⁷² China had bilateral trade agreements containing MFN clauses with over ninety countries and regions, as at 1988, and most of those countries are GATT Contracting Parties. GATT Doc. Spec (88) 13/Add 4.

(2) The changes to the domestic trade policy and economic system within China after 1949 has made it questionable for China to fulfil its old GATT obligations of tariff concessions. The statement of the PRC's delegation gives the realistic explanation to the approach of resumption:

However, having taken into account the contractual nature of the General Agreement, we agree to enter into substantive negotiations with contracting parties for the resumption of China's contracting party status and set the rights and obligations. In view of considerable changes having taken place during the suspension of relations between China and GATT, my government proposes to take a non-retroactive approach to issues which occurred during the period of suspension.⁷³

This suggestion shows that PRC is willing to enter into substantive negotiations in order to set its rights and obligations on the basis of contemporary conditions and the non-retroactive approach would avoid all the legal issues arising out of old rights and obligations. Generally speaking, this is the approach of resumption in form, but accession in substance.

All the practice and analysis mentioned above constitute the negative influences which challenge and weaken the PRC's request for resumption of its status in the GATT.

(3) In China's case, resumption may meet some legal problems, including the applicability of Article XXXV of the General Agreement, the availability of the "existing legislation" exemption for China. These include:

a. Applicability of Article XXXV. Article XXXV of the General Agreement, entitled "Non-Application of the Agreement between particular Contracting Parties", provides a contracting party with the right not to apply the General Agreement with another if either party does not consent to such application and has not

⁷³ Supra, note 64.

entered into tariff negotiations with the other at the time either accedes to the GATT.⁷⁴ A contracting party which invokes Article XXXV against another at the time of the latter's accession may vote in favor of such accession pursuant to Article XXXIII.⁷⁵ No contracting party would be forced to enter into GATT relations with another without its consent.⁷⁶

Since Article XXXV can only be invoked at the time of accession pursuant to Article XXXIII, it would not be applicable to China in the case of resumption. In this way, only the original signatories of the PPA have the right to invoke Article XXXV against China. The inability to invoke Article XXXV would be unfair to those contracting parties which acceded to the GATT after the time China began to be absent in GATT in 1949 or China withdrew from the GATT in 1950.⁷⁷ No matter which one is the legal reason, China's membership in GATT and its substantive relations with other contracting parties were suspended either from 1949 or 1950. No GATT relations can be found between China and those contracting parties which acceded to the GATT since then. The issue cannot be ignored especially comparing the current 107 contracting parties with only 23 original signatories to the General Agreement in 1948. It is understandable for China to resume its GATT membership as a special case, but it would raise the question that resumption to GATT relations between China

⁷⁴ Article XXXV, para. 1. For discussion of Article XXXV and its origin and application in the GATT history, see John H. Jackson, *World Trade and the Law of GATT*, (Indianapolis: Bobbs-Merrill, 1969), pp. 98-102.

⁷⁵ Article XXXIII, GATT.

⁷⁶ Historically, Article XXXV was drafted to accommodate the change in voting requirement under Article XXXIII from unanimity to a two-third majority, which raised the possibility that a contracting party could be forced to enter GATT relations with another country without consent. See Ya Qin, *China and GATT: Accession Instead of Resumption*, *J. of World Trade*, vol. 27, No. 2, April 1993, note 32, p.93; Jackson, *supra*, note 13, p.92.

⁷⁷ *Ibid*, Ya Qin, p. 83.

and those countries is inapplicable since no such relations ever existed before.⁷⁸

b. The "existing legislation" exemption. The existing legislation clause, also known as the grandfather clause, is provided in the PPA and every protocol of accession. It permits each contracting party to apply Part II of the General Agreement, which covers mostly restrictions on the use of non-tariff barriers, only "to the extent not inconsistent with existing legislation" at the time of its entry into GATT.⁷⁹ Concerning the availability of the "existing legislation" exemption for China, it would be hard to define the date for any legislation which already existed with respect to this exemption. For resumption of China's membership in GATT, the date for China to enter into the GATT as an original signatory is the date it signed the PPA. So, the applicable date of existing legislation for the original contracting parties is 30 October, 1947.⁸⁰ Now in the case of resumption, no such exemption seems to be applied to China since the legislation before that date has long since been abolished by the PRC. The suggestion that the applicable date for China's existing legislation exemption be the date of its resumption instead of the date of the PPA would appear inconsistent with the GATT rules and practice.⁸¹

Regarding all this background which nearly makes the resumption of the PPA impracticable, both the GATT contracting parties and the PRC seem to accept the

78 Ibid.

79 The PPA, 1(b).

80 A GATT ruling was made that PPA "refers to legislation existing on 30 October, 1947, the date of the Protocol as written at the end of its last paragraph." See, Date of Reference for the Phrase "Existing Legislation" in Paragraph 1(b) of the Protocol: Ruling by the Chairman on 11 August, 1949, 2 BISD, 35 (1952).

81 The Chinese delegation stated at the meeting of the Working Party on China that "upon the resumption of its membership, China would apply Part II of the General Agreement to the fullest extent not inconsistent with domestic legislation existing at the time of resumption." GATT Doc. Spec (88) 13/Add. 5, p.2.

approach of resumption in form and accession in substance. A GATT working party on China's status as a Contracting Party was set up in March 1987 with the mandate to "examine the foreign trade regime" of the PRC and to "develop a draft Protocol setting out the respective rights and obligations", and now the China Working Party is in the process of tariff negotiations and drafting of the protocol.⁸² In this way, the approach of resumption means only the recognition by the contracting parties of the PRC's right to succeed its preceding government since October, 1949 and the invalidity of Taiwan's withdrawal from the GATT in 1950. At the same time, the non-practicability of resumption is apparent concerning the realization of the GATT rights and obligations by the way the GATT Working Party on China has been working on renegotiation of the new tariff concessions and other obligations. Behind this method is the requirement that the PRC's claim on the invalidity of Taiwan's withdrawal from the GATT meets no challenges and the contracting parties' concern about how much interest they can get through the process of bargaining rather than the question of China's representation descending from history, which would not make any difference to their interests at present.

C. COMPATIBILITY OF CHINA'S ECONOMIC SYSTEM WITH THE GATT

Though the PRC should be entitled to status in the GATT because it should succeed to the international rights and obligations its preceding government had taken, the basic changes which have happened to the economic system inside this country

⁸² GATT Doc. L/6191/Rev. 2, 26 April, 1988.

make it arguable as to whether its economic system is consistent with the GATT requirements. The most principal character of the change is the centrally-planned economic system which is greatly different from the system before 1949. This new system, plus many other historical factors, made all the obligations and concessions committed by the former government impossible for the new government to honor at that time.

So the analysis should go from review of the GATT system to the practice of GATT with non-market economies. Finally an examination should be taken of China's economic system and the recent economic reforms, to determine as to whether there is compatibility between China's economic system and the GATT.

1. GATT's Purpose of Free Trade

The basic assumption of the GATT is an international free market system of trading. It is believed "that free international trade is beneficial to a nation because when each nation specializes in making the products that it can make most efficiently and trades them for the other products it needs, overall welfare is increased in each nation."⁸³ Generally, free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe.

The objectives of GATT are: raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and developing the full use of the resources of the world and expanding the production and exchange of goods.⁸⁴ These objectives should be achieved by: entering

⁸³ John K. Jackson, William J. Davey, *Legal Problems of International Economic Relations*, (St. Paul: West Publishing Co., 1986), 2nd ed., p.17.

⁸⁴ *Supra* note 31, John H. Jackson, William J. Davey, p. 3.

into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs to trade and to the elimination of discriminatory treatment in international commerce.⁸⁵ This international trading system "is obviously based on rules and principles which more or less assume free market-oriented economies."⁸⁶ The GATT, pursuant to trade liberalization, is a trading system based on private market mechanisms in the domestic economies. Thus, any interference, especially from government, in market mechanisms, is supposed to be limited.

In the reality of world trade, the tariff is most generally used as a restriction on the import of goods. As it is the principal form of a trade barrier, tariff reduction is the major method for countries to mutually ensure that their exported goods can fairly compete in foreign markets since the commitments for tariff concessions are reciprocal. The tariff reduction means greater access in other markets for its exports and is thus looked to for the quid pro quo of greater access to its own market for products of other countries. The most-favoured-nation treatment becomes the fundamental principle to apply tariff reduction to the goods of all contracting parties equally. Thus, two cornerstones of the GATT trading system are: national treatment reflecting the principle of reciprocity and MFN treatment as the principle of non-discrimination among all contracting parties.

2. Non-Market Economies

After World War II, some countries changed to socialist political and economic systems, of which the PRC was one. With central planning as the typical characteristic, this kind of economic system differs from the free market-oriented

⁸⁵ Ibid, p.3.

⁸⁶ Supra note 28, John H. Jackson, p.283.

economies, so it is called a non-market economy (NME). In the non-market economies in contrast to the market economies, the economic model makes all the assumption of free trade hardly applicable, because in those countries "... resources are not regulated by a market, but instead by central planning; the government does not interfere with the market process but replaces it".⁸⁷

Compared with the market function in market economies, the determining force in the centrally planned economies for price and quantity of goods is not the market itself but central plan, i.e., the pre-established economic goals set up by the planning authorities. In this way, the price of goods does not adequately reflect their production cost. Thus, the centrally planned economies can make the access of imported goods to their market much more difficult than market economies through unfair competition with the methods of mandatory production, plan-oriented pricing, lack of freely convertible currency, state trading and import monopolies. As a result, the GATT mechanisms, based mainly on tariff concessions to ensure market access in fair competition, would not be so efficient as the GATT contracting parties suppose them to be. In short, to the market economies, it would not be fair to play the same game with two sets of rules in the competition with the centrally planned economies, by which the market economies would definitely benefit less.

3. Coexistence with GATT

It is arguable whether there is a definitely unbridged gap between the two economic systems in their GATT relations.

(1) Regulations in the GATT Context. In the text of the GATT, there are no provisions to preclude the non-market economies. In preparing the draft of the GATT,

⁸⁷ Kevin C. Kennedy, The Accession of the Soviet Union to Gatt, 21 Journal of World Trade Law, 2, 1987, vol. 23, p. 26.

the drafters proposed an article entitled " Expansion of Trade by Complete State Monopolies of Import Trade," which was supposed to apply to non-market economies. This article was removed finally because the Soviet Union did not become a member of the International Trade Organization (ITO).

Article XVII of the GATT addresses the problem of the State Trading enterprises, which is the only rule related to non-market economies. This article requires "[E]ach contracting party undertakes that if it establishes or maintains a State enterprise, ... such enterprise shall ... act in a manner consistent with the general principles of non-discriminatory treatment ... for governmental measures affecting imports or exports by private trade;"⁸⁸ and "such enterprises shall ... make any such purchases or sales solely in accordance with commercial considerations, ... and shall afford the enterprises of the other contracting parties adequate opportunity,"⁸⁹ By this article, we can see that the coverage on the State Trading in the GATT, though not so precise as to stipulate the non-market economies, implies no exclusion of the non-market economies from the GATT.

The requirements set up in Article XXXIII do not preclude accession of non-market economies, which reads: "[A] government not party to this agreement, ... may accede to this agreement ... on terms to be agreed between such government and Contracting Parties. Decisions of the Contracting Parties ... shall be taken by a two-thirds majority."⁹⁰ Actually, on one hand, "even in market economies there are many institutions which do not operate under free-market principles, such as state trading agencies or monopolies, government-owned industries, and the like;"⁹¹ and on the

88 GATT, Article XVII, par. 1(a).

89 Ibid.

90 Ibid.

other hand, "the experience of Romania, Hungary, Yugoslavia and Poland in the GATT, however, offers evidence that while their economic, social, and political systems are different from the market economy model to which the GATT was intended to apply, they are not so fundamentally different that mutually beneficial accommodation is impossible."⁹²

It seems proved, by the fact that the GATT has explicitly accepted some non-market economies under special provisions or protocols, that GATT should have no problems accepting new non-market economies, because those precedents show the possibility of compatibility of non-market economies within the GATT.

2. Practice of the GATT. Among the examples of NMEs' membership in the GATT, Cuba and Czechoslovakia were accepted to the GATT before they shifted to a non-market economy structure.⁹³

Yugoslavia acceded to the GATT in August 1966 through the normal accession procedure, i.e., under the terms of a Protocol of Accession identical to a market economy country and on the basis of tariff concessions. After the establishment of the relations between Yugoslavia and the GATT Contracting Parties, Yugoslavia's economy was no longer "centrally planned" as it had been in 1951. Prior to its entering into the GATT, Yugoslavia's significant economic reforms successfully decentralized its foreign trading system. So, Yugoslavia got provisional accession to the GATT in November 1962 and then the full accession in August 1966, without any

⁹¹ Supra note 16, John H. Jackson, p.283.

⁹² Eliza R. Patterson, "Improving GATT Rules for Non-market Economies," *Journal of World Trade Law*, vol. 20, No. 2, 1986, p. 185.

⁹³ Cuba and Czechoslovakia became contracting parties in 1948 with the protocols of original entrant. Also see, supra note 28, John H. Jackson, p.287.

further commitments.⁹⁴

Poland acceded to the GATT in October 1967, following Yugoslavia. After a fruitful period of association between Poland and the GATT, which provided for annual reviews of trade relations between them, Poland became a full member of GATT, with the commitment to "increase the total value of its imports from the territories of contracting parties by no less than 7 per cent per annum", a figure designed to equal the increase in Poland's exports expected to result from the operation of the GATT and from the tariff reductions and other concessions granted by the contracting parties.⁹⁵

Romania, after having been an observer to the GATT for more than 10 years, acceded to the GATT on the terms of commitment to "increase its imports from the contracting parties as a whole at a rate not smaller than growth of total Romanian imports provided for in its Five-Year Plans."⁹⁶

Hungary applied for GATT membership in 1969 and acceded to the GATT in 1973 on the normal schedule of concessions in accordance with Article XXXIII, and without any additional commitments, partly because it had successfully decentralized its trade regime and introduced a new tariff system.⁹⁷

From these practices of the GATT admitting non-market economies, it seems generally accepted that the membership for non-market economies in the GATT should be conditioned with its ability to conduct its trade according to GATT principles rather

⁹⁴ Report of the Working Party on the Accession of Yugoslavia, GATT, BISD, 14 Supp. 49 (1967), and Protocol for the Accession of Yugoslavia, GATT, BISD 15 Supp. 53(1968).

⁹⁵ Protocol for the Accession of Poland, GATT, BISD, 15 Supp. 46 (1968); and Report of the Working Party on the Accession of Poland, GATT, BISD, 15 Supp. 109 (1968).

⁹⁶ Protocol for the Accession of Romania, GATT, BISD, 18 Supp. 5 (1972), and Report of the Working Party on the Accession of Romania, GATT, BISD, 18 Supp. 94 (1972).

⁹⁷ Protocol for the Accession of Hungary, GATT, BISD, 20 Supp. 3 (1974), and Report of the Working Party on the Accession of Hungary, GATT, BISD, 20 Supp. 34 (1974).

than other factors.

It is suggested that two general provisions should be contained in the non-market economies' protocols as an integral part of the framework: ... the first, a basic guideline according to which it would be agreed that the GATT will be applied by and to the non-market economies "to the extent compatible with its economic system;" the second, a dual commitment by the non-market economies to use all the means available in their economic and foreign trading systems in a manner which will ensure compliance with the GATT, and not to use the means available in its economic systems to nullify and impair the benefits of the GATT.⁹⁸

3. Analysis for China Case. In the case of China's application to resume membership in the GATT, its efforts to decentralize its foreign trade system and the transition from its centrally planned economy to a market economy qualify China for membership in the GATT.

After years of economic reforms which have brought prosperity to China's economy, bringing it closer to the requirements for participating in the GATT and more integrated into the world economy, this country decided to take a decisive step in its economic reform. On 12 October, 1992, the Secretary General of the Communist Party of China, Jiang Zemin, declared in his report to the 14th National Congress of the Communist Party of China, that "the target of our country's economic structure reform is to build a socialist market economic system."⁹⁹ He further explained the target using the following words:

... the market is allowed to play a fundamental role in the allocation of resources under the macroscopic regulation and control of the socialist country, so that economic activities obey the requirements of the law of

⁹⁸ Supra note 92, Eliza R. Patterson, p.186.

⁹⁹ Supra note 24, FBIS-CHI-92-204-S, p.8.

value and adapt to changes in the supply demand relationship."¹⁰⁰

This socialist market economy is similar to other market economies in the world in its general features. First, market force shall play a decisive role in national allocation of resources and operation of national economy; second, it has to follow the rule of market force, particularly the law of value, interplay of supply and demand and competition rules; third, it shall gear enterprises to be responsible for their own business operation, profits and losses and compete on an equal footing; fourth, all the factors of production, including imports, capital, labor and technology and etc., shall enter into the market, while government exercises indirect macro control of the economy, and all economic relations shall be based on a comprehensive legal system.¹⁰¹

To structure this economic system, much remarkable progress has been made in exposing enterprises to market competition, further reducing state mandatory plans, pressing ahead with price reform, accelerating establishment of a legal system, and intensifying reform of foreign trade regime.¹⁰²

For the purpose of the reform of foreign trade, China has been making commitments to concede tariffs on a large scale, eliminate the restrictions on licensing, foreign currency exchange and imports examinations. As for the licensing, more than two thirds of the import licensing requirements will be removed within two or three years.¹⁰³ As for the tariff concessions, following the lowering the duty rates of 225 tariff lines early in last year, China decided to continue to lower the duty rates of 3371

¹⁰⁰ Ibid.

¹⁰¹ Statement of Mr. Tong Zhiguang, Head of the Chinese Delegation at the 12th Session of the Working Party on China, 9 December 1992.

¹⁰² Ibid.

¹⁰³ Shijie Ribao, (World Journal, daily), 6 January 1993.

tariff lines on 4 December 1992.¹⁰⁴ This will result in the reduction of the tariff level by 7.3%. which represents the broadest and most significant tariff cuts the People's Republic of China has ever made.

Comparing the relative practice of the GATT to China's change, the points can be concluded as: one, the requirements for membership to the GATT are not only the nature of the economic system, but also their ability to adhere to their GATT obligations as well, and furthermore, the former is less important as a form and the latter more important as the basic requirement; two, the precedents of the GATT membership of some non-market economy countries like Yugoslavia, Poland, Romania and Hungary proves the compatibility of non-market economies with the GATT, with some conditions. All these points are positive support for China's return to the GATT.

The Working Party set up by the GATT to consider China's trade regime ceased its work from 1989, and continued its work in 1991. The consideration on China's foreign trade regime was finished at the 11th session on 21 October, 1992 and the Protocol of Accession on Resuming China's status as contracting party was being prepared at the 12th session of the Working Party in December 1992.¹⁰⁵ Thus, the substantive negotiations are going on for the terms, or "admitting ticket", for China's membership.

Furthermore, the necessity of China's resumption of its contracting party status in the GATT does not lie in unilateral benefits to China, but rests with the fulfilment of the GATT's purpose of establishing a global institution for international trade.

On this idea, John H. Jackson wrote:

¹⁰⁴ Ibid, 5 December 1992; RenminRibao (People's Daily), overseas ed. 5 December, 1993.

¹⁰⁵ This session was held from December 9-10, 1992 in Geneva, at which substantive negotiations were undertaken on the major contents of the Protocol on China, thus the basis was set up for the following drafting. Supra, note 5, Shen Xia, Xiangyin Chu, p. 592.

[I]t is my view that it will be very difficult in the long run to deny membership in the GATT to any important nation of the world. Since the GATT is the principal world trading institution, strong arguments can be made that it must be a universal institution, for both political and economic reasons. Politically, it must be recognized that an important goal of the economic institution is the preservation of peace and the prevention of tensions which could lead to war or other conflicts. An international institution which accepted all nations of the world into an endeavour to try and accommodate respective interests would seem to be an important part of that general policy. In addition, economic considerations suggest the possible enhancement of world welfare through the additional trading opportunities, economies of scale, and comparative advantage of general inclusion of all important trading blocs of the world.¹⁰⁶

The GATT, as an international institution for world trading, is not supposed to function for its purpose by "using GATT membership as a bait to try to force different national economic systems to change." Its responsibility should be "to change and to figure out an appropriate way to accommodate the different economic systems."¹⁰⁷

106 Supra note 13, John H. Jackson, p. 290.

107 Ibid.

CHAPTER III. TAIWAN AND THE GATT

A. INTRODUCTION TO TAIWAN

Taiwan, in the formation of the Island of Taiwan, as well as the smaller nearby Islands of Penghu, Kinmen and Matsu with a population of approximately 20 million people, has been under the effective control of the government of Taiwan, the ROC. In the terms of economy, Taiwan's per capita income was more than US\$6,000 in 1989.¹⁰⁸ In 1993, Taiwan's imports and exports make it the thirteenth largest trading area in the world.¹⁰⁹

This position that Taiwan is a part of China is shared by both sides of the Taiwan Straits, the Mainland and Taiwan. This "one China" principle is explained as that there is only one China and Taiwan is one of its provinces. It was during the colonization period in 19th century when, after the Sino-Japanese War, Taiwan was invaded by Japanese. According to the Treaty of Shimonoseki, Taiwan was ceded to Japan. This unequal treaty was signed under the force of Japan and its lawfulness was questioned and opposed not only by China but other countries during the World War II. In the Cairo Declaration in 1943, the United States and the United Kingdom proclaimed that Taiwan was the territory "stolen" by Japan and should be "returned to the Republic of China". Such provisions were reaffirmed in the Potsdam

¹⁰⁸ Chung-yang Jih-pao, Nov. 25, 1989, p. 2.

¹⁰⁹ Supra, note 6.

Proclamation. After World War II, Taiwan was returned to China, thus closing its history of foreign occupation. From then on, Taiwan was once again a province of China.

The Civil War in China between the Nationalists and the Communists after World War II resulted in the changeover of governments on 1 October, 1949. On that date, the PRC was established and the communists began to control most parts of China, meanwhile the ROC government was deposed and the Nationalists withdrew to Taiwan.

For more than forty years, the Mainland and Taiwan have been separately controlled by the two sides. Up to now, most of the countries and international organizations have recognized the legitimacy of the PRC and support explicitly or implicitly the position of both sides of China on a "one China" principle. The title "PRC" is recognized worldwide as the lawful government of China. At the same time, Taiwan has been under the control of the ROC government separately from the other parts of China. So, Taiwan, as an entity active independently in world affairs, especially in economic transactions, refers to the territory controlled by the ROC after October 1949. The ROC was the legitimate government of China before 1949, at that time it controlled the whole of China. But after 1949, it became only the authoritative government of the Taiwan area, losing its legitimacy as the government of the whole of China. Generally speaking, there is an intrinsic difference in the sense of legitimacy between the ROC before October 1949 and the one after that time, though under the same title.

B. RELATIONS BETWEEN TAIWAN AND THE GATT

The relations between Taiwan and the GATT should be traced back to as early as October 1949, before which date, there were no relations between Taiwan and any international treaties at all. As for the civil war of China resulting in the changeover of the governments, the ROC was deposed and lost its legitimate control over the country, meanwhile the PRC took over the power to control the country and became the legitimate government of China.

The Nationalists used the same title of the ROC for their authorities on Taiwan after October 1949, for they still tried hard to be active in international transactions in the name of China. Realizing and recognizing the fact that it could no longer control the trade policies and practice of the mainland, the Taiwan authorities notified the Secretary-General of the United Nations that it was withdrawing from the GATT, as provided in GATT Article XXXI, on 7 March 1950.¹¹⁰

In 1965, Taiwan requested observer status in the GATT in the name of China.¹¹¹ The request was approved despite much opposition. The focus of the discussion was on the question of the legitimacy of the representatives of the Taiwan regime. The opposition came from the opinions that the representatives of the Taiwan

¹¹⁰ The Taiwan government made, in the name of China, withdrawals from many international organizations in 1950's. For example, it gave the one year's notice of denunciation of the Convention on International Civil Aviation on 31 May, 1950. As of December 1988, Taiwan maintained membership status in only nine international organizations: the International Union for Publication of Customs Tariffs (IUPCT); the international Committee of Military Medicine and Pharmacy (ICMMP); the International Criminal Police Organization (INTERPOL) under the name of "China, Taiwan"; the International Office of Epizoites (IOE); the International Cotton Advisory Committee (ICAC) under the name of "China, Taiwan"; the Asian Productivity Organization (APO); the Afro-Asian Rural Reconstruction Organization (AARRO); the Asian and Pacific Council (ASPAC); and the Asian Development Bank (ADB) under the name of "Taipei, China".

¹¹¹ Supra note 28.

regime were "persons having no legal powers to act on behalf of China".¹¹² In 1970, Taiwan was unrecognized by the United Nations and was expelled "from the place which they unlawfully occupy at the United Nations and in all the organizations related to it," because it was considered unlawful that the Taiwan regime acted in the name of China.¹¹³ As a result, the Contracting Parties, at the 27th Session in November 1971, recalled its decision on granting observer status to Taiwan and decided to remove Taiwan from the seat of observer in the GATT.

On 1 January, 1990, Taiwan requested, in a letter to Mr. Arthur Dunkel, the Director-General of the GATT, accession to GATT under Article XXXIII of the General Agreement in the capacity of the separated customs territory of Taiwan, Penghu and Matsu.¹¹⁴ This decision reflects the determination of the territory to cooperate with other trading nations in the GATT to "defend an open trading system based on competition among free enterprises in the world markets".¹¹⁵ This action can also be considered as another step of Taiwan to take part in the international transactions with the realistic attitude of Taiwan towards its status in the international relations.¹¹⁶

¹¹² Supra note 40.

¹¹³ Supra note 26.

¹¹⁴ Taiwan's Bid to Join GATT Set to Raise Political Storm, Financial Times, 5 Jan. 1990.

¹¹⁵ Memorandum on Foreign Trade Regime of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu Submitted by the Republic of China to the General Agreement on Tariffs and Trade (1 Jan. 1990), Chinese Yearbook of International Law and Affairs, edited by Hungdah Chiu, vol. 9 (1989-90), p.226.

¹¹⁶ Taiwan has already participated in some international treaties as a non-sovereign entity. Examples will be given later in this paper.

C. SEPARATE CUSTOMS TERRITORY IN GATT

The Separate Customs Territory (SCT) in the GATT is the very special membership in this international trading system. As early as in the course of drafting the General Agreement, considering that the General Agreement would deal only with tariffs and trade matters and there were some territories with autonomy only in external commercial affairs but not in political affairs, the drafters agreed to accept these SCTs in the GATT as contracting parties.

The relevant clauses of territorial application in the General Agreement. Article XXIV:2 stipulates that,

for the purpose of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.¹¹⁷

Article XXIV, 1 provides that the provisions of this Agreement shall apply to two kinds of territories. The first is the kind of

the metropolitan customs territories of the contracting parties, and the second is the kind of any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application, ... each such customs territory shall, exclusively for the purpose of the territorial application of this Agreement, be treated as though it were a contracting party.¹¹⁸

This classification of the two kinds of territories actually refers to the reality of international relations at the time the General Agreement was drafted. After World War II, there were still many colonies in the world. These territories did not have

¹¹⁷ GATT Article XXIV:2.

¹¹⁸ GATT Article XXIV, 1.

political independence, so they were not sovereign entities. They were under the control of their suzerain states. But some of them had full autonomy in the conduct of external commercial relations, despite their political dependence on their suzerain states. In Article XXIV:1, the metropolitan customs territories mean those sovereign states which have suzerain relations with their colonies, and the phrase "any other customs territories ..." refers to those colonial territories qualified under the requirements of Article XXVI or Article XXXIII.

Article XXVI:5(a) provides that "[E]ach government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility ...".¹¹⁹ Article XXVI:5(c) provides that any of the customs territories possessing or acquiring full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, "shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party".¹²⁰ Hong Kong and Macao are contracting parties of this group, which acquired the membership under Article XXVI:5(c). Among this group, Burma, Ceylon and South Rhodesia are the precedents, which became contracting parties with the status as an SCT or a colony. In other words, their relations with the GATT were established by their suzerains under Article XXVI:5(a) of the General Agreement.

The requirements of membership in the GATT, is different from most of the international organizations. It emphasises the applicant's autonomy in external commercial relations. In other words, a government of a territory can be qualified as a contracting party of the GATT, if, together with other requirements, it acts on behalf

119 GATT Article XXVI:5(a).

120 GATT Article XXVI:5(C).

of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in the GATT. In this way, the GATT allows applications for membership to be filed by not only "governments" in the traditional sense, but also by a "government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement."¹²¹

By using terms like "government" and "contracting party" in the GATT for membership, instead of "state" or "country" or "member states", the definition of the contracting party surely includes governments of both sovereign states and separate customs territories.

D. APPROACHES AVAILABLE FOR TAIWAN TO JOIN GATT

In the GATT practice, there are three groups of contracting party status according to the approaches of acquiring the membership. The first group refers to the 23 original contracting parties which signed the Provisional Protocol of Application (PPA) when it entered into force; the second group is made up of those acceding to the GATT under Article XXXIII, which has never been used by any applicants in the procedure to accede to the GATT except Taiwan; the third group is of those acquiring the membership under Article XXVI:5 (c), which has been the main entrance for the existing SCT members of the GATT.

Article XXVI:5 and Article XXXIII constitute two different provisions of the General Agreement, regulating the accession of the SCTs in the GATT. In the first

¹²¹ GATT Article XXXIII.

case, the SCTs, under Article XXVI:5, as above-mentioned, a customs territory should be deemed to be a contracting party "upon sponsorship through a declaration by the responsible contracting party", through which way most SCT contracting parties fulfilled their procedure of accession to the GATT. The other case allows for the SCTs to become contracting parties under Article XXXIII, which provides that "... a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, ... on terms to be agreed between such government and the Contracting Parties." But in the GATT's history, the Article XXXIII approach has never been invoked by the SCTs in their accession to the GATT. In contrast, the SCTs prefer to adopt the Article XXVI:5 (c) approach for accession because in this way they can be exempted from making further tariff and trade concessions with contracting parties. It is interesting that Taiwan's application for the GATT membership becomes the first case under Article XXXIII.

Taiwan's Decision. The political perspective of Taiwan's decision to apply for the GATT membership under the title of SCT comes from the reality of China's situation from October 1949, especially from the 1970s.¹²² Based on the doctrine that there is only one China and Taiwan is part of China, which is claimed by both sides of the Taiwan Straits, Taiwan, in efforts to participate in international transactions, gave up holding onto the title of the ROC in joining in international transactions under the

¹²² In Oct. 1949, the PRC government replaced the ROC government as the legitimate authorities for the country, with the actual control over most parts of China, meanwhile the latter kept its control only over a very small part of China, i.e., the islands of Taiwan and Penghu, as well as the islands of Kinmen and Matsu offshore from Fujian province of the mainland. In 1971, the action the United Nations General Assembly took to adopt Resolution 2758 (XXVI) led to the removal of Taiwan from nearly all governmental international organizations. As a result, the PRC government returned to most international organizations, and in a broad sense, returned to the international community.

reality of the wide recognition from the international community that the PRC should represent China.¹²³

Taking account of the awkward situation in which Taiwan has been unrecognized as the representative of the sovereign state of China, which thus prevents Taiwan from applying for membership in the GATT as the government of a country, and the urgent need to join the world trading institution in order to directly benefit from the open system heralded by the GATT, Taiwan decided to request its accession to the GATT as a SCT in accordance with Article XXXIII of GATT.

As to the regulations for the SCTs entering into the GATT, there are two ways, i.e. the SCTs can be contracting parties either by "sponsorship through a declaration by the responsible contracting party ... under Article XXVI:5(c), or through the application procedure by " a government acting on behalf of an SCT possessing full autonomy in its conduct of external commercial relations and of the other matters provided for in this Agreement", "... on terms to be agreed between such government and the Contracting Parties".

Accession for SCTs under Article XXVI:5(c) requires three constituents. First, a contracting party has accepted the General Agreement in respect of a SCT. Second, the SCT possesses or acquires full autonomy in the conduct of its external commercial relations and other matters provided for in the Agreement. And third, a sponsorship is needed through a declaration by the responsible contracting party establishing the above-mentioned fact. In this way, no new negotiations are necessary for the accession

¹²³ In March 1981, the Olympic Committee of Taiwan agreed to accept the 1979 decision of the International Olympic Organizations (IOC) by which Taiwan would be allowed to compete in the games provided it did so under the name "Chinese Taipei Olympic Committee" and used a new flag and anthem rather than the flag and anthem of the ROC. Up till now, Taiwan has maintained its memberships in the International Criminal Police Organization (INTERPOL) under the name of "China, Taiwan", the International Cotton Advisory Committee (ICAC) under the name of "China, Taiwan" and the Asian Development Bank (ADB) under the name of "Taipei, China".

of SCTs.

Such negotiations, in contrast, are unavoidable in the other kinds of cases for accession of SCTs under Article XXXIII. In this way, the accession of a government acting on behalf of an SCT possessing full autonomy in the conduct of its external commercial relations ... must be based on the terms to be agreed between such government and the Contracting Parties, ... and a two-thirds majority of the Contracting Parties is needed for such decision. The negotiations offer the existing contracting parties a good chance to bargain with the applicants for more favourable tariff concessions and other preferential treatments. The SCT applicants must pay for the "admission ticket".

Comparatively, to save on the expense on the "admission ticket", SCTs, in accession under Article XXVI:5 (c), are required to be in a situation in which their external relations are under the responsibility of their suzerain governments. This category of cases includes Burma, Ceylon and South Rhodesia as well as Hong Kong and Macao in recent years.

In Taiwan's case, it cannot accede to the GATT either as a government of sovereign state because the opinion of "One China" is constituted in the laws of both sides of the Taiwan Straits and supported by the common sense of international community, or as an SCT under the sponsorship through a declaration by a government establishing the fact of its autonomy in the conduct of its external commercial relations and other GATT matters. That is why Taiwan has taken the choice to accede to GATT under Article XXXIII.

Taiwan, in its Memorandum to the GATT, refers to itself as "[T]he Customs Territory of Taiwan, Penghu, Kinmen and Matsu encompassing the islands of Taiwan, Penghu and the islands of Kinmen and Matsu off Fukien.¹²⁴ It is separated from

mainland China by the Taiwan Straits". "[T]he Territory has enjoyed de facto autonomy. It constitutes a separate customs territory with full autonomy in the conduct of its external commercial relations".¹²⁵

The common ground between the two sides of the Taiwan Straits about the legitimacy of the State is that both the mainland and Taiwan are inseparable parts of China. Both sides claim one China. In political perspectives, the fact of coexisting of the PRC government and the Taiwan government is only the continuity or the product of the Civil War in China. As a matter of international law, it is groundless to consider a territory as a nation-state if it itself does not claim so, like the case of Taiwan.

124 "Fukien" means Fujian Province in China.

125 Supra, footnote 115.

E. GOVERNMENT QUALIFIED TO ACT ON BEHALF OF SCT

It is reasonable to question whether Taiwan's government is eligible to accede to the GATT as a "government acting on behalf of a separate customs territory possessing full autonomy in external commercial relations and the other matters provided for in this Agreement."

According to the GATT, two kinds of governments may accede to the GATT.¹²⁶ The first kind is the government of a sovereign states which in most of the cases act as the creators and participants of all the international treaties and international organizations. The other kind is the government of a SCT which may accede to the GATT under certain requirements. Those requirements are mainly as follows.

1. The degree of autonomy of an SCT with respect to external commercial relations and other GATT matters. In the cases of Burma, Ceylon and South Rhodesia, such autonomy was requested to be proved, (a) the ability to determine and modify its tariffs without the consent of its suzerain state; (b) the ability to apply the General Agreement without reference to its suzerain state; and (c) the ability to enter into contractual relations on commercial matters with foreign governments. This apparently falls under Article XXVI:5 (a) and (c), because such SCTs have their suzerain governments which have international responsibility for them and have established the fact that these SCTs possess or acquire full autonomy in the conduct of their external commercial relations and other GATT matters.

2. The procedure for SCTs to accede to the GATT. In some cases,

¹²⁶ Article XXVI:5, Article XXXIII.

sponsorships are required by the responsible governments through declarations.¹²⁷ As in Article XXXIII, " ... a government acting on behalf of a separate customs territory ... may accede to this Agreement, ... on behalf of that territory ...". It is ambiguous which government it refers to, the local government of the SCT, or the central government of the country to which the SCT belongs to, or either one. This ambiguity, together with the "admission ticket" provided in Article XXXIII, makes this an unused Article, and has caused some legal problems in the first case of its application ever in the GATT history, i.e. the Taiwan case.

In this case, Taiwan is part of China of which the PRC government is the only legitimate one. On the other hand, there is no suzerain relations between the two sides of the Taiwan Straits. All the requirements are not applicable. It seems impossible for either the PRC's sponsorship through a declaration for Taiwan accession to the GATT, or the PRC government's accession on behalf of the SCT of Taiwan. Compared with Article XXVI:5 (c), the provision in Article XXXIII about SCT can be applicable only in the case that an SCT meets the requirements of accession to the GATT and accepts the Agreement while the central government of the country, of which the mentioned SCT is a part, is not a contracting party. Even in this case, the accession of such SCT to the GATT is often thought to require some kind of confirmation from the central government of the country which such SCT belongs to. An SCT should be understood as a part of the territory of a country with different and separate tariff system and policies from the rest of the parts of the territory of the same country, with full autonomy in the conduct of its external commercial relations. An SCT is by no means a sovereign state. It is only a part of the territory of a sovereign state with full autonomy in external commercial relations. The government of an SCT is only a local

¹²⁷ Article XXVI:5(c).

government of that country. On the basic international law principle of state sovereignty, such local government cannot participate in any external relations without certain confirmations from the central government unless stipulated otherwise in its domestic laws.

That is the basis of the requirements of sponsorship in the form of declaration for an SCT to accede to the GATT in Article XXVI:5 (c). In the modern world, there are such territories which are neither sovereign states nor belong to certain sovereign states. Surely there are some former colonial territories which became semi-independent under the trusteeship system set up by the United Nations after World War II. In these cases, the external relations of these territories are under the supervision or direction of appointed sovereign states. In other words, these sovereign states are responsible for the external affairs of these territories. Assuming this situation, the drafters of the GATT kept in mind that a non-sovereign separated customs territory should have a sovereign country responsible for its external affairs. Though the SCT has "full autonomy in the conduct of its external commercial relations..." and thus can be deemed as contracting party according to the GATT provisions, its accession is conditioned with the sponsorship of the country which is responsible for its external relations and has established the fact of its autonomy in external commercial relations.

Reviewing the relevant practice of the GATT, most SCTs belong to this group and they all acceded to the GATT under Article XXVI: 5(c). Taiwan's case is the first one applying the provisions of Article XXXIII.

According to the requirements in Article XXVI:5(c), it would be difficult for the PRC government to be the sponsor for Taiwan's accession to the GATT because, firstly, the PRC government is not a contracting party yet; secondly, the PRC government has not been responsible for Taiwan's external affairs, and thirdly, the PRC government can in no way be considered the one who has established the fact that

Taiwan "possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement".

Based on the one-China principle and the worldwide recognition of the PRC as the legitimate government of China, Taiwan authorities can only be considered as a government of a local entity of China. Measured by both the GATT regulations and practice, it would be without precedent to accept a government of a local entity of a sovereign country to GATT without a certain kind of confirmation from the central government of that country.

What the PRC is concerned about is not to impede Taiwan's accession to the GATT, but to avoid any negative impacts upon the one-China principle. Due to the current situation on the relations between the two sides, it is also impossible for Taiwan to agree with the confirmation from the PRC as a precondition of its accession to the GATT. The major divergence is on the relations between the two governments. To the PRC government, the relations between the two sides should be positioned as the one between the central government and the local government. It is unacceptable to Taiwan to be considered as a local government, because in this way, it would lose its bargain margin in the negotiations with the mainland.

F. THE PRC'S ATTITUDE ON TAIWAN'S APPLICATION

The attitude of the PRC government towards Taiwan's application for contracting party status as a SCT influences the consideration of all contracting parties on this matter.

On 16 January, 1990, half a month after Mr. Arthur Dunkel, the Director-General of the GATT, received the letter sent by the Taiwan government requesting

accession to GATT under Article XXXIII as a SCT, he was notified by the PRC government that Taiwan's action was an "utterly-illegal application".¹²⁸ It was the first reaction by the PRC to Taiwan's request for GATT membership, which was constituent with the PRC's long-time policy on Taiwan's efforts to take part in international organizations as an independent political entity. In the last four decades, especially from 1972 when the PRC returned to the United Nations as well as the other international organizations related to it, the PRC has been trying hard to advocate to "expel" or "exclude" Taiwan as the representative of China in all international relations. The basic point is on the representative of the country, or in other words, who is the legitimate authority over China. Essentially, it is the extension of domestic political conflicts to external affairs. Fearing that Taiwan, under political pressure and the instigation both from inside and outside, would be separated from the country, the PRC holds on to the one-China principle, and is determined to prevent and stop the separation of Taiwan from China at every cost.¹²⁹ It reflects the unmovable stand of the PRC on the matter of principles. Coming from this viewpoint, the PRC opposes Taiwan's request to be contracting party as an SCT. By analysis on the provisions of the GATT, we may find the legal reasons for both Taiwan's request and the PRC's opposition.

Under Article XXVI:5(c), a SCT shall be deemed to be a contracting party with the conditions of "sponsorship through a declaration by the responsible contracting party" establishing the fact that the concerning SCT "possesses or will acquire full

128 China Moves to Block Taiwan's Bid for GATT, Financial Times, 17 January, 1990.

129 Supra note 24, Jiang Zemin, FBIS-CHI-92-204-S, 21 October 1992, p. 20. In this report, Jiang, the Secretary-General of the Communist Party of China, reaffirmed that "Taiwan is an inalienable part of China's sacred territory. We resolutely oppose "two China," "one China, one Taiwan", or "one country, two governments" in any form. We resolutely oppose any attempts and actions designed to make Taiwan independent.

autonomy in the conduct of its external commercial relations and other matters provided for in this Agreement". In this case, a certain relation is required between the SCT and the contracting party which is responsible for the external relations of the SCT and has established the SCT's full autonomy in its conduct of external commercial relations and of the other matters provided for in the General Agreement. The rationale of this article is based on the fact that, at the time the Agreement was drafted, there were many colonies like Burma, Ceylon and South Rhodesia, which were not independent politically but had their own autonomy in external commercial relations. So comes the requirement of the sponsorships through declarations by their suzerains. In this way, the procedure is simple and such SCTs can enjoy the continuity of membership by virtue of its legal relationship with their current metropolitan power, instead of paying the "admission ticket" by new commitments in the form of new protocols. Reviewing the practice of GATT about accepting SCTs as contracting parties, it can be found that nearly all SCTs who are contracting parties fulfilled the admitting procedure under Article XXVI:5(c), like Burma, Ceylon and South Rhodesia and so on.

Taiwan's case is peculiar for although both sides between the Taiwan Straits stick to the one-China principle, the reality of the divided territory of China in the last four decades does not mean any likely relations of suzerainty between them. The full autonomy of Taiwan in the conduct of its external commercial relations is not established by the PRC government. Taiwan surely cannot follow this procedure to seek its membership in GATT, because it would spoil its grounds in the struggle with the mainland government for the legitimacy to present China, and further it would result in its recognition of the legitimacy of PRC government. It would be incredible and impossible for Taiwan to accept such a sub-ordinate position given the current political reality. Because it can accede to the GATT neither as a sovereign nation nor

as an ACT under Article XXVI:5(c), Taiwan took the last and the only choice, i.e. to accede as an ACT under Article XXXIII.¹³⁰

All the controversies around Taiwan's application focus on Taiwan's legal status in international transactions. The relevant practice of Taiwan, the mainland and the international community give positive verification on this question. First, both of the two sides agree that there is only one China, and Taiwan is a part of China. Second, Taiwan has not been accepted by very many in the world community as a sovereign state, whereas the representation and participation of the PRC government as the legitimate government of China has been recognized by most countries and international organizations in the world.¹³¹ This reality is with the acquiescence of the Taiwan government.¹³² Third, the activities of the ROC in international relations before October 1949 was definitely the state behavior of China. Due to the establishment of the PRC government in 1949, the ROC lost its legal basis for existence as the legitimate government of China.¹³³

130 A SCT can accede to the GATT under Article XXXIII which requires the applicant to pay for the "admission ticket", which, in Article XXXIII, reads as the "terms to be agreed between such government and the Contracting Parties", and the "decisions of the Contracting Parties ... shall be taken by a two-thirds majority."

131 The PRC has diplomatic relations with 155 countries at present.

132 Taiwan has given up claiming the legitimate representation for China, and uses the title of "China, Taipei", or "China, Taiwan" in many international organizations. Its application for the GATT as an SCT is another example by which it explicitly claims its representation for the territory of Taiwan, Penghu, Kinmen and Matsu only.

133 In other words, the ROC, in a legal sense, has a very different definition before and after the date of 1 October, 1949. Before then, the ROC was the legitimate government of China in international relations. After then it has not been recognized as the government of China by most countries of the world community and is considered only a de facto government with control over a small part of the country. Its activities under the title of the ROC in international relations after 1949 is not at all the continuity of the former Chinese government in legal sense, because its activities in the name of "China" have no authority, no representation, thus are unlawful.

CHAPTER IV. HONG KONG AND THE GATT

A. INTRODUCTION

Hong Kong, as a very important international financial center and free harbour, has established itself as an important player in the global economic arena. It is one of the world's largest banking center, the world's tenth largest trading entity, and one of the world's busiest container ports. Hong Kong is also a major foreign exchange and commercial market, the regional headquarters of a large number of multinational enterprises, and Asia's leading communications center. Hong Kong has very close connections with the mainland in trade.

In the last more than a hundred years, Hong Kong has been separated from China by three Sino-British treaties.¹³⁴ On 19 October, 1984, People's Republic of China and Britain signed the Joint Declaration on the Question of Hong Kong between the Government of the People's Republic of China and Her Majesty's Government of the United Kingdom of Great Britain and North Ireland, according to which Hong Kong will return to China on 1 July, 1997.¹³⁵ The transfer of sovereignty over Hong Kong to China raises many new questions. One important field related to the transfer is Hong Kong's status in international relations as well as the internal relations within China between Hong Kong and the central government concerning international

¹³⁴ Those treaties will be reviewed in the text at note 141.

¹³⁵ Treaty Series No. 26 (1985), Cmnd. 9543.

transactions, especially in the major international trade organization, the General Agreement on Tariffs and Trade.

On 24 April 1986, the Secretariat of the GATT notified the contracting parties that Hong Kong had become a contracting party of the GATT on 23 April, 1986.¹³⁶ China is now in the process of resuming its membership in the GATT. On the other hand, Hong Kong will be under the exercise of the sovereignty of China. The complexity leads our analysis to the following steps, i.e. the positioning of Hong Kong in China, Hong Kong's status in international organizations, and capacity to participate in international relations, the succession of treaty rights and obligations on Hong Kong after 1997, and the relations of the Hong Kong Separate Administrative Region (hereinafter Hong Kong SAR)¹³⁷ with the central government in the field of external affairs and so on.

Another case is about Macao. Concerning that much similarity lies between Macao and Hong Kong in the sense of their status in international organizations and their capacity in external affairs as non-sovereign entities, Hong Kong is chosen instead of Macao as the example for the following analysis.

B. HISTORICAL BACKGROUND

In 1840, the Opium War broke out between the British and China. On 29 August, 1842, the British government forced the Chinese government of the Qing

¹³⁶ GATT, Doc. GATT/1384, 24 April, 1986.

¹³⁷ According to the Joint Declaration between China and British in 1984, Hong Kong will be in the status of Separate Administrative Region with high autonomy.

Dynasty to sign the Treaty of Nanjing,¹³⁸ by which the Island of Hong Kong was annexed to Great Britain. In 1856, Britain launched the Second Opium War, and forced the Qing government to sign the Convention of Beijing¹³⁹ on 24 October, 1860, which was originally called the Supplementary Protocols for the Treaty of Nanjing. Under this convention, the Qing government was forced to cede the Chinese territory south of Boundary Street on Kowloon Peninsula, facing the Island of Hong Kong, to Britain. Thirty years later, taking advantage of China's defeat in the Sino-Japanese War of 1894-1905, Great Britain forced China to sign the Convention for the Extension of Hong Kong Territory on 9 June, 1898, by which a much larger area north of the Kowloon Peninsula, later called the New Territories, was leased to Great Britain for 99 years.¹⁴⁰

These three treaties were considered by Chinese governments as "unequal treaties".¹⁴¹ As early as during World War II, the government of the Republic of China demanded the termination of the 1898 lease of the New Territories in the negotiations with Great Britain for the termination of British extraterritorial and other special rights in China.¹⁴² After the PRC government replaced the ROC government in late 1949, its policy on this matter was very clearly declared in the following words:

138 Treaty of Nanjing, August 29, 1842, Great Britain-China, art. III, 50 British and Foreign State Papers (Gr. Brit.) 389; 93 Parry's T.S. 465, 467.

139 Convention of Friendship, Oct. 24, 1860, Great Britain-China, art. VI, 50 British and Foreign State Papers (Gr. Brit.) 10; 123 Parry's T.S. 71, 73-74.

140 Convention for the Extension of Hong Kong Territory, June 9, 1898, Great Britain-China, reprinted in Hertslet's China Treaties 130 (3d ed. 1908); 186 Parry's T.S. 310.

141 This policy has been shared by both the Chinese Nationalist government before 1949, i.e. the Republic of China, and the Chinese Communist government after 1949, i.e. the People's Republic of China. See, Hungdah Chiu, Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties, in China's Practice Of International Law, 239, 248-56, ed. by J. Cohen, 1972.

142 Hungdah Chiu, Introduction, in 20 Case Western Reserve Journal of International Law, No. 1, 1988, p. 2.

At the time the People's Republic of China was inaugurated, our government declared that it would examine the treaties concluded by previous Chinese governments with foreign governments, treaties that had been left over by history, and would recognize, abrogate, revise, or renegotiate them according to their respective contents.

As a matter of fact, many of these treaties concluded in the past either have lost their validity, or have been abrogated or have been replaced by new ones. With regard to the outstanding issues, which is a legacy from the past, we have always held that, when conditions are ripe, they should be settled peacefully through negotiations and that, pending a settlement, the status quo should be maintained. Within this category are the questions of Hong Kong, Kowloon, and Macao and the questions of all those boundaries which have not been formally delimited by the parties concerned in each case.¹⁴³

In its practice in the following years, the Chinese government has never given up its claim on Hong Kong.¹⁴⁴

¹⁴³ A Comment on the Statement of the Communist Party of the United States of America, People's Daily (Renmin Ribao), Mar. 8, 1963. Supra note 71, Jerome A. Cohen and Hungdah Chiu, p. 380 (1974).

¹⁴⁴ One case of the Chinese striving for their sovereign rights over Hong Kong in the 1960s to the 1970s is about the listing of Hong Kong with the colonial territories. In 1964, the World Youth Forum adopted a resolution putting Hong Kong and Macao on a par with Timor Island, Papua, Oman, Adan, and South Arabia and demanded "independence" for those places in accordance with the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples. For the Declaration, see G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66 U.N. Doc. A/4648 (1960). This resolution met a strong protest from the PRC delegates. In the United Nations, the PRC readdressed its policy after its entry into the United Nations. On March 10, 1972, the Chinese Ambassador to the United Nations, after finding that the General Assembly's Special Committee on Colonialism included Hong Kong and Macao in its list of colonial territories, sent a letter to the Chairman of the Committee, stating that :

As known to all, the question of Hong Kong, and Macao belongs to the category of questions resulting from the series of unequal treaties left over by history, treaties which the imperialists imposed on China.

Hong Kong and Macao are parts of Chinese territory occupied by the British and Portuguese authorities. The settlement of question of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of colonial territories.

Consequently, they should not be included in the list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples.

With regard to the question of Hong Kong and Macao, the Chinese government has consistently held that

The Resolution of the Question of Hong Kong. After negotiations on the future of Hong Kong between the two sides, the PRC and Britain initialled the Joint Declaration on the Question of Hong Kong.¹⁴⁵ According to the Joint Declaration, Hong Kong will be under the sovereignty of China on 1 July, 1997, and China promises Hong Kong's prosperity with the detailed policy on Hong Kong, the post-1997 Hong Kong regime, and its international relations. These policies mainly include that Hong Kong will enjoy a "high degree of autonomy" except in foreign and defence affairs, as a Special Administrative Region; Hong Kong will maintain the capitalist economic and trade systems for fifty years after 1997. As to its international relations, the Declaration affirms that Hong Kong may participate in relevant international organizations and international agreements. It may establish official and semi-official economic and trade missions in foreign countries, using the name "Hong Kong, China" to maintain and develop relations and conclude and implement agreements with states, regions, and relevant international organizations in appropriate fields.

they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions.

For the above reasons, the Chinese delegation is opposed to including Hong Kong and Macao in the list of colonial territories covered by the declaration and requests that the erroneous wording that Hong Kong and Macao fall under the category of so-called colonial territories be immediately removed from the documents of the special committee and all other United Nations documents.

¹⁴⁵ The Joint Declaration on the Question of Hong Kong between the Government of the People's Republic of China and Her Majesty Government of the United Kingdom of Great Britain and North Ireland, was signed on 19 October, 1984, and the instruments of ratification were exchanged on 27 May, 1985.

C. HONG KONG'S EXTERNAL RELATIONS AND STATUS IN INTERNATIONAL ORGANIZATIONS

1. Situation of Hong Kong's External Relations

Hong Kong's significant status in international economic transactions makes it very necessary to let Hong Kong participate in international treaties, though it has never been a sovereign subject.

The international activities of Hong Kong are so worldwide as to include membership and participation in several international organizations and multilateral conventions, as well as negotiation and conclusion of agreements with foreign governments. Actually, Hong Kong, either through the United Kingdom or as a separate member, is in fact participating in more than 85 multilateral treaties or arrangements, relating to arbitration, aviation, copyright, settlement of investment dispute, judicial assistance, maritime matters, the control of narcotics, patents, publications, satellite communications, telecommunications and other matters.¹⁴⁶

Hong Kong has also been granted separate export quotas by its major trading

¹⁴⁶ In May 1990, the international organizations Hong Kong participates in include the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP); International Bank for Reconstruction and Development (IBRD); International Monetary Fund (IMF); United Conference on Trade and Development (UNCTAD); Food and Agriculture Organization (FAO); International Labor Organization (ILO); International Maritime Organization (IMO); Universal Postal Union (UPU); International Telecommunication (ITU); International Telecommunication Satellite Organization (INTERSAT); International Atomic Energy Agency (IAEA); International Criminal Police Organization (INTERPOL); General Agreement on Tariffs and Trade (GATT); Asian Development Bank (ADB); Asian and Pacific Development Centre (APDC); Asia-Pacific Postal Union (APPU); Asia-Pacific Telecommunity (APT); Customs Co-operation Council (CCC); International Typhoon Committee (ITC); International Development Association (IDA); International Finance Corporation (IFC); International Hydrographic Organization (IHO); International Maritime Satellite Organization (INMARAT); United Nations Commission on Narcotic Drugs (UNCND); World Health Organization (WHO); World Meteorological Organization (WMO).

partners such as the United States, the U.K., Canada, and the European Economic Community. Hong Kong maintains its own memberships in 312 international nongovernmental organizations. There are more than 60 countries that maintain consulates and eight British Commonwealth countries that maintain commissioner's offices (i.e. consulate in fact) in Hong Kong. Externally, Hong Kong has many offices in other countries.¹⁴⁷ Being a part of Hong Kong's external relations, the bilateral agreements between Hong Kong and other governments are many and range widely.¹⁴⁸

¹⁴⁷ At the governmental level, Hong Kong maintains offices in London, Geneva (under the U.K. Mission to the United Nations European Headquarters), Brussels, Toronto, Tokyo, and Washington (under the British Embassies), and New York (the offices of the Commissioner for Hong Kong Commercial Affairs in the British Consulate General). For the industrial promotion, Hong Kong has offices in Tokyo, London, Stuttgart, and San Francisco. The Hong Kong Trade Development Council maintains offices in 17 cities such as Vienna, London, Paris, New York, Toronto. Hong Kong's interests are represented by the British embassies or consulate for the areas or countries in which it has no special offices.

¹⁴⁸ Under the authorization from the British Government and the agreement of the Sino-British Joint Declaration, Hong Kong is entitled to act on behalf of itself, for example, in one of the important fields of governmental cooperation, civil aviation. The international standardization of machinery for technical or operational safety in air transport need the determination, assurance and control of sovereign states, most of the concerned agreements are signed between the governments of sovereign states. So, all the bilateral air service agreements which were in force in respect of Hong Kong were between the U.K. and the concerned countries. For example, Australia, Burma, Canada, Sri Lanka (Ceylon), France, Germany, India, Indonesia, Italy, Japan, Kenya, Korea, Kuwait, Lebanon, Malaysia, New Zealand, Philippines, Portugal, Singapore, South Africa, Switzerland, Thailand, USA. See Gary Heilbronn, *Hong Kong's First Bilateral Air Service Agreement: A Milestone in Air Law and An Exercise in Limited Sovereignty*. Also see, *Hong Kong Law Journal*, vol. 18, Jan. 1988, No. 1, p.64, note 2.

On 26 June, 1987, the Agreement between H.K. and the Netherlands Concerning Air Services came into force. It was signed at the Hague on 17 September, 1986. See, Special Supplement No. 5 to Hong Kong Gazette, June 26, 1987 and replacing, for Hong Kong, UK-Netherlands agreement (cmd No. 6893, Aug. 13, 1946) entry into force in Hong Kong, Nov. 31, 1971, by cmd No. 4856. It is the first air service agreement entered into by Hong Kong in its own right also it is the first example in international aviation's relatively short history of an international air services agreement being made by a political entity possessing less than the full sovereignty. Up to now, the H.K. has concluded agreements on civil aviation with Netherlands, Switzerland, Canada, France, New Zealand, Malaysia, Brunei and Brazil.

2. History and Status of Hong Kong in International Organizations

Hong Kong's relations with, and its activities in international organizations has been formed and determined by the special relation between Hong Kong and Britain in history.

In the passing century, the government of the United Kingdom has been responsible for Hong Kong's international relations, because of its dominance over its overseas territories. But Hong Kong has been authorized with considerable autonomy in the area of commercial and cultural relations. Hong Kong's status and functions are varied in different international organizations according to the various natures and regulations of those organizations. Cases are classified in general as follows:

(1) Some international organizations regulate that only states (sovereign states) are qualified for membership. Hong Kong can be a participant in the conferences of these organizations as a member of the U.K.'s delegation to such organizations. In other words, Hong Kong takes part in the activities of these organizations only because the U.K. has the membership. Hong Kong has no separate status in these organizations, though its representative, as a member of the U.K.'s delegation, may, in some cases, make a speech on matters concerning Hong Kong. In case of the International Maritime Organization of which 55 maritime countries are members. The U.K. became one of its members on May 3, 1967. The membership brought Hong Kong within the application of the Convention as well as being a territory of which the U.K. was responsible for international relations.

(2) In some international organizations, memberships are open not only to states, but also to some areas or the governments of these areas, with the former (states) as the formal members and the latter as formal members, quasi-members, associate members and observers, etc. Hong Kong has various separate status in such

organizations. For instance, the Economic and Social Committee of Asia and Pacific (ESCAP, it was first called the Economic Committee of Asia and Far East, ESCAFE) is a subsidiary body of the United Nations Economic and Social Council. Hong Kong was included in the geographical scope of Asia and the Far East by Resolution 37 (IV) of the ECOSOC on March 28, 1947 by which the ESCAFE was established. In the Resolution 69(V) of ECOSOC on August 5, 1947, Hong Kong was classified within the limits of the function and administration were of ESCAFE, thus becoming one of the areas qualified to be associate members when the applications for the memberships were submitted by the member states which are responsible for the international relations of these areas. Afterwards, Hong Kong became an associate member of the ESCAP through the application of the U.K. In the Asian Development Bank (ADB), Hong Kong obtained a separate membership by its own qualification for the ADB. It is regulated in the Protocol of the Asian Development Bank that the memberships are open to the members and quasi-members of the UNESCAP, other countries in this area, and the developed countries in the United Nations or the special agencies of the U.N. Hong Kong's membership as a quasi-member in the ADB was obtained through the U.K.'s application on March 27, 1969 according to Article 3(3) of the Protocol of the ADB.

(3) In some international organizations, though the memberships are limited to states or the official representatives of states, the territories or the governments of the territories for which a member state is responsible for its international relations are allowed to take part separately in the regional organizations or conferences subsidiary to the organizations in the names of themselves, such as the International Criminal Organization (ICO). The Hong Kong Branch of the International Criminal organization was established in 1960, subordinate to the British National Bureau of ICO. Afterwards, Hong Kong's representative took part in the plenary conferences of the

ICO as a member of the British delegation, and in the names of "U.K., H.K." and "H.K." made presentations in the conferences on the Asian Region called by the Secretary General and some seminars concerning criminal affairs.

In some international organizations, the memberships are open not only to states, but to states which, though they are not located in the certain regions themselves, are responsible for the international relations of some areas in these regions. For instance, according to such regulations, the U.K. became a member of the West Pacific Region Committee of the World Health Organization by the Resolution WHO 2.103 of the World Health Organization on June 30, 1949, because the U.K. was responsible for the international relations of Fiji (not independent then) and Hong Kong which were located in the West Pacific Region. Before 1970, Hong Kong and Fiji sent their representatives in turn to take part in these conferences as the delegation of the U.K. in the name of the U.K.. Hong Kong itself has represented the U.K. in these conferences after Fiji became independent.

D. HONG KONG'S CAPACITY TO JOIN INTERNATIONAL ORGANIZATIONS

On Hong Kong's capacity in international organizations as a non-sovereign entity, consideration is concentrated to the status of non-sovereign entities in international organizations according to practice, and so on. It is necessary to scrutinize the evolution, essence, and the characteristics of international organizations.

1. Definition and Evolution of International Organizations

The development of international organizations is an outstanding characteristic of the modern world of mankind in the sense of international cooperation and progress. In general, international organizations are defined as "bodies of various kinds set up by multilateral agreements between States for various co-operative purposes Such organizations are normally created by multilateral treaty, but may be created in other ways, such as by resolution of the United Nations General Assembly"¹⁴⁹ or as an "intergovernmental organization constituted by States to which its Member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters,"¹⁵⁰ or " ... intergovernmental organizations [are] created by nation-states to promote common purpose through agreements among themselves ...".¹⁵¹

The functions of international organizations at present range from the universal international political organizations such as the United Nations to the regional international organizations as the Central American Common Market (CACM), covering the issues of political, economic, social, cultural, scientific, and technological cooperations among states.

Ever since the beginning of the contemporary system of sovereign territorial states from the end of the Thirty-Years War in 1648, concluded by the Peace of

¹⁴⁹ David M. Walker, *The Oxford Companion to Law*, (New York: Oxford University Press, 1980), p.641.

¹⁵⁰ This phrase is used in Annex IX, Art. 1 of the United Nations Convention on the Law of the Sea to describe the international organizations such as the European Community. Parry and Grant, *Encyclopedia Dictionary of International Law*, (New York, U.S.: Oceana Publications, Inc., 1986), pp.277-78.

¹⁵¹ Lung-chu Chen, *An Introduction to Contemporary International Law*, (New Haven: Yale University Press, 1989), p.50.

Westphalia, the interactions between states in Europe were, in the seventeenth and the greater part of the eighteenth centuries, determined by the concerns of these states about prestige, military power, and territorial security. But under the impact of the Industrial Revolution, international economic relations assumed greater importance, and by the nineteenth century interstate relations increasingly embraced matters of commerce and trade in manufactured goods.¹⁵²

Since World War II, the number of international organizations has grown tremendously. One of the main reasons for that growth is the fact that the number of states has more than tripled since then, largely as a consequence of decolonization.

2. Membership and Exceptions

Generally speaking, the membership of International Government Organizations (IGOs), in most cases, belongs only to states, because "the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively."¹⁵³ The basic assumption is that only nation-states are capable to represent a nation's interests and interact with each other in this sense.¹⁵⁴

With respect to International Non-governmental Organizations (INGOs), membership does not require the participants to be representative of the government of a nation-state. INGOs carry out a variety of border-crossing activities to attain their goals in the pursuit of the interests for which they have been created. These activities

¹⁵² Werner J. Feld, Robert S. Jordan, Leon Hurwitz, *International Organizations*, (New York: Praeger Publishers, 1983), p.1.

¹⁵³ H. Lauterpacht, *Oppenheim's International Law*, 8th ed. (Longmans, Green and Co. Ltd., 1955), p. 19.

¹⁵⁴ *Ibid*, pp.4-5. "Law of Nations or International Law (*Droit des gens*, *Volkerrecht*) is the name for the body of customary and treaty rules which are considered legally binding by States in their intercourse with each other."

create relationships of the INGOs with both governmental and nongovernmental entities and actors; such relations have been labelled transnational in contrast to traditional international relations, which are generally understood to apply only to activities and contracts between governmental actors.

Except for the distinction between IGOs and INGOs, some exceptions can still be found to show that some non-state territories have certain status in some IGOs.

a. Canada and Australia, as dependent members of the Commonwealth, were members of the Universal Postal Union prior to the First World War. At that time, they did not "become subjects of International Law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to administrative unions, such as the Universal Postal Union. Even when they were empowered by the mother importance with foreign states, they still did not thereby become subjects of International Law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them."¹⁵⁵ This exception shows a precedent of the participation of non-sovereign entities within the Commonwealth in the IGOs.

b. Danzig. The details of the settlement regarding Danzig under the Peace Treaty of Versailles and the Paris Convention of 1920 between Poland and Danzig are a matter of the past. It is still interesting to analyse the characteristics of the international personality.¹⁵⁶

¹⁵⁵ Ibid, H. Lauterpacht, p.198.

¹⁵⁶ Ibid, H. Lauterpacht, p. 193, footnote 5. The Free City of Danzig was created a separate State by Article 100-198 of the Treaty of Peace with Germany in 1919 and "placed under the protection of the League of Nations," which was represented at Danzig by a High Commissioner. The constitution, that is, the political organization, of the Free City was placed under the guarantee of the League. A treaty of November 9, 1920, between the Free City and Poland regulated the relations between them upon a number of points and provides that the Polish Government shall undertake the conduct of the foreign

The Permanent Court of International Justice upheld Danzig's claim to be entitled to an international personality of its own, and "the ordinary rules governing relations between States" applied in the relations between Danzig and any other state. In accordance with these rules the general principles of international *lex specialis*, "to the treaty provisions binding upon the Free City and to decisions taken by the organs of the League under these provisions."¹⁵⁷

Danzig, as a half-sovereign state half-protectorate, would have had to receive in each case the prior consent of Poland before she could have taken part in any of the normal activities of international organizations. To answer the question whether Danzig could become a member of the International Labor Organization, the Court held that, unless Poland waived in advance her objections to any action of Danzig as a member of the International Labor Organization, the Free City was not eligible for membership.¹⁵⁸ In other words, Danzig could be a party to international organizations such as the ILO, with the consent of Poland.

c. Ukraine and Byelorussia. The Ukrainian Soviet Socialist Republic and Byelorussian Soviet Socialist Republics were, herewith, the two republics of the former Soviet Union. These two republics took part in the San Francisco Conference in 1945 by which the United States was established, among 50 states, and they became members of the U.N. as "Sovereign States."

This is an exception to the requirement of sovereignty. Neither of the two republics were sovereign states under international law because they were part of the

relations of the Free City as well as the diplomatic protection of its citizens when abroad. Thus Poland exercised on behalf of the League this very important aspect of the Protectorate, and all disputes between the Free City and Poland arising out of this matter or any other matter under the Treaty of Versailles or any arrangements or agreements made thereunder are decided in the first instance by the High Commissioner of the League, subject to an appeal by either party to the Council of the League.

¹⁵⁷ A/B 44, (Series A/B, the P.C.I.J., 1931-1940).

¹⁵⁸ [16] B 18, at 15, (Series B. the P.C.I.J. 1922-1930)

Soviet Union and controlled by that government. But they got admission to full membership in the United Nations.¹⁵⁹ This is a precedent to allow a state extra representation through assigning sovereign status to territorial units within a state, and also the precedent that non-sovereign states can become members of this largest of political intergovernmental organization.¹⁶⁰

A similar phenomena to the Ukraine and Byelorussia is India's status as an original member of the League of Nations, although its full sovereignty was not established until 1947.¹⁶¹ Another exception is the Philippines being also accorded the status of original member prior to the transfer of sovereignty. All the concessions to the memberships of the Ukraine, Byelorussia, India and Philippines in the two major political, intergovernmental organizations did not meet generally accepted standards of statehood and made important exceptions and precedents in the history of the international organizations.

d. Other cases. Many cases of this kinds of exceptions of the membership in IGOs appear to form a clear picture that many non-sovereign entities are formal participants in IGOs by various flexible provisions of these IGOs. In the GATT, 28 parties (plus Kiribati, Tonga and Tuvalu) are the territories to which the GATT applied

¹⁵⁹ Stephen S. Goodspeed, *The Nature and Function of International Organizations*, 2nd ed. (New York: Oxford University Press, 1967), pp. 81-82.

¹⁶⁰ The two republics also participated in some U.N. specialized and related agencies, such as International Atomic Energy Agency (IAEA), International Court of Justice (ICJ), International Labor Organization (ILO), International Telecommunication Union (ITU), United Nations Education, Science, and Culture Organization (UNESCO), Universal Postal Union (UPU), World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Meteorological Organization (WMO), and International Civil Aviation Organization (ICAO).

¹⁶¹ The membership of the League of Nations was stated as being open to "any full self-governing state, dominion or colony" might be admitted by a two thirds vote of the Assembly. See A. LeRoy Bennett, *International Organizations*, (New Jersey: Prentice Hall, Inc., 1977), p. 66. Source: *Zhongguo Baike Nianjian* (Encyclopedia of China), (Beijing: The Encyclopedia of China Publishing House, 1986), p.27

to before their independence, and another case is Hong Kong, which became a contracting party in 1986. The Holy See (Vatican City) has memberships in IAEA, ITU, UPU, and WIPO.¹⁶²

As the requirements of membership in various international organizations depend upon the very regulations of each organizations, it is very hard to classify them according to their membership requirements. Many of the organizations' decisions will be made by its organs consisting of representatives of member states.

According to the Charter of the United Nations, the requirement for membership in this organization is stated as follows:

Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out those obligations.¹⁶³

The case of the memberships of Ukraine and Byelorussia in the United Nations reflects mainly the bargaining and concessions made between the two superpowers in order to keep political balance in future confrontation. But, as the modern world found itself in desperate need of enhancing cooperation among the members of this international society, member states of some international organizations put more weight upon consideration of the capacity and willingness of an applicant to carry out

¹⁶² Political Handbook of the World, 1981 (New York: McGraw-Hill, 1981), pp. 673-76.

¹⁶³ Article IV, para. 1, Charter of the U.N. In the Advisory Opinion of International Court of Justice in 1948, the requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must be: (1) a State; (2) peace-loving; (3) accepted the obligations of the Charter; (4) able to carry out these obligations; and (5) willing to do so. See, International Court of Justice, Advisory Opinion, 1948. [1948] I.C.J. 57. Also see, Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting: Documents, Comments and Questions*, (West Publishing CO. 1977.), pp. 84-85. A widely recognized definition of statehood is stipulated in Article 1 of the Convention on Rights and Duties of States, signed in Montevideo in 1933, which is as follows: "The state as a person of international law should possess the following qualifications: a) permanent population; b) a defined territory; c) government; d) capacity to enter into relations with other States." Frederic L. Kirgis, Jr., p. 89.

the obligations of membership in the organization.

E. HONG KONG'S RIGHTS AND DUTIES IN EXTERNAL RELATIONS AFTER 1997

The Arrangement between the PRC and the U.K. in Part XI of Annex I of the Sino-British Joint Declaration on Hong Kong¹⁶⁴ was made so that Hong Kong, in addition to its high autonomy in internal affairs within the territory, enjoyed some rights in its external relations.

1. The representatives of the Hong Kong Special Administrative Region (Hong Kong SAR) Government may participate, as members of the delegations of the Government of the PRC in negotiations at the diplomatic level directly affecting the Hong Kong SAR concluded by the Central People's Government.

2. The Hong Kong SAR may on its own, using the name "Hong Kong, China", maintain and develop relations and conduct and implement agreements with states, regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sporting fields.

3. The representatives of the Hong Kong SAR Government may participate, as members of delegations of the Government of the PRC, in international organizations or conferences in appropriate fields limited to States and affecting the Hong Kong SAR, or may attend in such other capacity as may be permitted by the

¹⁶⁴ Supra note 145. The Sino-British Joint Declaration includes three annexes. Annex I: Elaboration by the Government of the People's Republic of China of Its Basic Policies Regarding Hong Kong; Annex II; Sino-British Joint Liaison Group; Annex III: Land Lease.

Central Government and the organizations or conferences concerned, and may express their views in the name of "Hong Kong, China".

4. The Hong Kong SAR may, using the name of "Hong Kong, China", participate in organizations and conferences not limited to States.

It is clear from the declaration that Hong Kong is authorized to participate in the international organizations or conferences "not limited to States". Furthermore, it is authorized to participate even in international organizations or conferences limited to States.

Hong Kong SAR may participate, with the restrictions of being members of the delegations of the PRC Government, "in appropriate fields ... and affecting the Hong Kong SAR." With the permission of the Central People's Government and the organizations or conferences concerned, Hong Kong SAR may attend in "such other capacity and express their views in the name of 'Hong Kong, China'". Though the vague words "appropriate fields" and "affecting" are employed, which will depend on the interpretation of the Standing Committee of the National People's Congress, it is very important that Hong Kong SAR is authorized to maintain and develop relations and conclude and implement agreements on its own with States, regions and relevant international organizations, with some limitations.

As to the application concerning international agreements to the Hong Kong SAR, the Joint Declaration stipulates that these are dealt with according to different cases.

1. The international agreements to which the PRC is or becomes a party. The application of such agreements to the Hong Kong SAR "shall be decided by the Central People's Government." But this decisive power is with the restriction of "according to the circumstances and needs of the Hong Kong SAR" and "seeking the

views of the Hong Kong SAR Government" beforehand.

2. The international agreements which are implemented in Hong Kong, but to which the PRC is not a party, may remain implemented in the Hong Kong SAR.

3. The international organizations of which the PRC is a member and in which Hong Kong participates in one capacity or another. In this case, the Central Government "shall take the necessary steps to ensure that the Hong Kong SAR shall continue to retain its status in an appropriate capacity in these international organizations." This wording shows the policy of the PRC towards Hong Kong SAR's remaining in these international organizations, but leave enough space for consultation with the concerned international organizations for their consent.

4. The international organizations in which the Hong Kong is a participant in one capacity or another, but of which the PRC is not party. In such cases, the Central Government shall facilitate the continued participation of the Hong Kong SAR in an appropriate capacity in such international organizations.

All these arrangements are based upon two principles. One is the principle of "State sovereignty", which means that "foreign affairs are the responsibility of the Central People's Government,"¹⁶⁵ and the Hong Kong SAR is a part of China with a "high degree of autonomy." The basis of the SAR is that "Hong Kong's access to its principal overseas market in the industrialized world, which is crucial to Hong Kong's industry, depends upon recognition of the separate nature of these interests."¹⁶⁶ The purpose of these arrangements is that the Hong Kong SAR will be able to look after its own particular interests in certain areas by virtue of the power to be given to it to conclude agreements in appropriate fields and to be represented in the delegations of

¹⁶⁵ See, Explanatory Notes, Annex I, the Sino-British Joint Declaration.

¹⁶⁶ Ibid.

the PRC at negotiations of direct concern to Hong Kong.

For the implementation of the Joint Declaration, the Sino-British Joint Liaison Group has been working ever since May 27, 1985, when it came to being according to Annex II of the Joint Declaration. As to the transition arrangements of the relevant international rights and duties concerning Hong Kong, the agreement has been concluded within the Liaison Group, in the first five years of its work, about the participation of the Hong Kong SAR in appropriate capacity in 24 international organizations.¹⁶⁷

As to the continued application after 1997 to the Hong Kong SAR of multilateral international agreements which are presently implemented in Hong Kong, both sides within the Liaison Group have agreed in principle until June 1992, with the continued application to the Hong Kong SAR of 35 international agreements implemented in Hong Kong presently, including those relating to customs, research, health, trade, post and international private law.¹⁶⁸

As to the conclusion of bilateral agreements between Hong Kong and concerning countries in appropriate fields, it is agreed within the Liaison Group that the Hong Kong Government, with the appropriate authorization of the British Government, may, in the transitional period, conclude bilateral agreements in the fields like civil aviation, extradition and investment protection with the concerned countries; these agreements will, in principle, continue to be effective from July 1, 1997.¹⁶⁹

¹⁶⁷ Achievements of the Joint Liaison Group and its Sub-group on International Rights and Obligations, 1985-May 1990.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

F. BINDING FORCE OF THE JOINT DECLARATION

The above arrangements made by China and Britain drew some questions about their binding force not only on the two sides, but on third parties.

First, whether the Joint Declaration has binding force on the two parties, or whether it is a treaty. The Chinese negotiators insisted that the document would be under the name of "declaration",¹⁷⁰ rather than an "agreement". It made no difference on the legal nature of a document whether to use explicitly the term "treaty". The Chinese mode of thinking originates from the attitude of the Chinese Government to refuse to recognize the effectiveness of three treaties on Hong Kong, as "unequal" treaties.

Actually, it is no longer doubtful because both sides repeatedly emphasized the legal binding effects of this declaration.¹⁷¹ "By signing a declaration instead of a treaty, China merely sought to avoid the political embarrassment of admitting that Britain had a previous legal right to Hong Kong."¹⁷² In international law, a statement of agreement is a promise that will be upheld by the force of law, and a declaration intended as an international agreement is a treaty.¹⁷³ Obviously, both the sides signed

¹⁷⁰ In the process of designation, Xinhua, the Chinese official news agency, uses the term "declaration" to describe the coming document, and never uses the word "agreement" which the British preferred to. See, Hong Kong clears the First Hurdle, Asian Wall Street Journal, Oct. 1, 1984, p.6.

¹⁷¹ Zhou Nan, the then Chinese Deputy Foreign Minister, stated that the agreement "provides an effective guarantee for Hong Kong's future prosperity and stability", in Hong Kong Lives, Asiaweek, Oct, 5, 1984, p.22. and the legal binding nature of this agreement has been confirmed by the high British officials in many cases, Ibid., p.6.

¹⁷² Susan Karamanian, Legal Aspects of the Sino-British Draft Agreement on the Future of Hong Kong, Texas International Law Journal, Winter 1985, vol. 20, No. 1, p. 183.

¹⁷³ Vienna Convention on the Law of Treaties, opened for signature on May 23, 1969, U.N. Doc. A/CONF. 39/27, art. 2(1)(a), reprinted in 8 I.L.M. 679 (1969). Also see, T.Elias, The Modern Law of

the declaration as a treaty and are willing to be bound by it. The Declaration was sent to the United Nations for registration under Article 103 which was clearly an attempt to emphasize its binding nature.

Secondly, a very interesting point on the discussion of the binding effects of this declaration is that of its effects on the third parties, especially those provisions concerning Hong Kong SAR's participation in the international organizations, where Hong Kong's status does not only depend on the attitude of China and Britain, but very importantly on the consent of the members of those international organizations. According to the Moving Treaties Frontiers Rules, the transfer of sovereignty of a territory causes the transfer of the international rights and duties applied to this territory. Or, "territorial changes alter treaty frontiers but the regime of already existing treaties is itself not affected."¹⁷⁴ The two aspects of the moving treaties frontiers rule are expressed as follows. The positive aspect is that the treaties of the successor state begin automatically to apply in respect of the territory as from the date of the succession. The negative aspect is that the treaties of the predecessor state, in turn, cease automatically to apply in respect of the territory."¹⁷⁵ Yet, this rule has no effect of *jus cogens*, and the parties of the Sino-Joint Declaration excluded some of the consequences from the succession of states,¹⁷⁶ to avoid the unacceptable effects on Hong Kong's future prosperity and stability.

But such a bilateral agreement does not have an *erga omnes* ("binding all others") effect. So, all the arrangements need the acceptance of third parties. That is

Treaties, 13-14 (1974); also N. Green, *International Law*, 161-53 (1973).

¹⁷⁴ George Ress, "The Hong Kong Agreement and Its Impact on International Law", *Hong Kong, A Chinese and International Concern*, edited by Jurgen Domes and Yu-ming Shaw, (Boulder, U.S.A.: Westview Press, 1988), p.145.

¹⁷⁵ H. Waldock, *Third Report on the Law of Treaties*, Y.I.L.C. (1969), pt.2, p.52.

¹⁷⁶ See the text at note 165.

the reason that there are rather vague formulations, such as "appropriate arrangements for the application to the Hong Kong SAR of international agreements to which the PRC is not a party", and refers to the participation in "an appropriate capacity" of Hong Kong in international organizations.¹⁷⁷ In Annex I of the Joint Declaration, it is even worded that "this will require consultation with third countries."¹⁷⁸

Though Hong Kong's present status in those international organizations depend mainly on its own potential and importance in the international transactions, it is unavoidable to say that its membership in many international organizations are legally based on three conditions: first, its identification as a territory (or crown colony) of the U.K.; second, the representation of the United Kingdom Government in the negotiations for its access; and third, the terms negotiated by the U.K. Government.

So, those circumstances and conditions will be definitely changed as the change of sovereignty happens on July 1, 1997, though the signers of the Joint Declaration have tried hard to keep most of Hong Kong's international rights and duties basically intact in order to "Keep Hong Kong's prosperity and its importance in the world economy."¹⁷⁹

But since Annex I, Art. XI does not have an erga omnes effect, there is a rather large field for complications and much work must be done before the question is solved, because Hong Kong's status in each international institution or organization or treaty depends on the specific regulations and the willingness of the members of the bodies.

¹⁷⁷ Supra note 174, George Ress, p.145.

¹⁷⁸ Annex I, the Sino-British Joint Declaration.

¹⁷⁹ From all the arrangements by the Sino-British Joint Declaration and the work of the Joint Liaison Group for the continuation of Hong Kong's remaining in international organizations, it is clear that both sides have tried to reduce the cost of the transfer of sovereignty.

The Annex I, Art. XI enables Hong Kong, using the name "Hong Kong, China to maintain and develop relations and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields. This formulation clearly constitutes Hong Kong as an entity with the capacity to enter into internationally binding relations within the specified fields and enables Hong Kong to play a full role in these fields, "including the economic, trade, financial and monetary, shipping, communication, tourism, cultural and sports fields."¹⁸⁰

The complications sometimes may lead to the predicament to the territory even in the following cases. In the first case, Annex I, Art XI provides that "international agreements to which the PRC is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong SAR." As we know, treaties are made applicable to Hong Kong by their terms or by British legislation.¹⁸¹ In the case that Hong Kong is a member of an international organization as an adjunct of the British delegation, and the PRC is not or even will not be a member in 1997, questions will arise to Hong Kong's presence especially when the meetings are confined to sovereign states.

Take the question of the participation of Hong Kong, China as a contracting party in the GATT after 1997 needs to be studied.

In Art. XXVI, 5(c) of GATT, it clearly differentiates between the "responsible contracting party" and "customs territory". The separate customs territory, which acquires full autonomy in the conduct of their external commercial relations, are deemed "to be a contracting party" upon the declaration from the responsible contracting party. A government of a separate customs territory becomes a contracting

¹⁸⁰ Anthony Neoh, "Hong Kong's Future: The View of a Hong Kong Lawyer", *California Western International Law Journal*, vol. 22, 1991-1992, No. 2, pp.351-352.

¹⁸¹ *Ibid*, p.350.

party under Art. XXVI, 5(c) on the terms and conditions previously accepted by the metropolitan government on behalf of the territory. Under this procedure, Hong Kong became a contracting party with the United Kingdom as its metropolitan government. The question appears here whether Hong Kong, China would continue to be deemed a contracting party after 1997 when the responsible government for the territory will change and the new one is not (for the time being) a contracting party of the GATT.¹⁸²

In the provisions of the GATT, there is no regulation stipulating whether a separate customs territory, which does not gain independence, may continue or be deemed a contracting party or not, when it changes its dependence from the former responsible metropolitan state which is a contracting party to a state which is not a contracting party of the GATT.¹⁸³ So the question of the continuation of the status of "Hong Kong, China" in the GATT after 1997 will cause discussion among the contracting parties and needs consent from them. Hopefully, it can be predicted optimistically that it would be resolved based on two factors: one is the unaffected and unchanged full autonomy of Hong Kong in the conduct of its external commercial relations after 1997, and the other is that the PRC becomes a contracting party, which is quite possible in the near future. The GATT council, at the time Hong Kong became a contracting party of the GATT in April 1986, made statements promising that the territory could retain its separate status after the PRC acquires sovereignty over it.¹⁸⁴

In the second case, Annex I, Art. XI of the Sino-British Joint Declaration provides that "the application to the Hong Kong SAR of international agreements to

182 *Supra* note 174, George Ress, pp.146-147.

183 *Ibid.*

184 Harold K. Jacobson and Michel Oksenberg, *China's Participation in the IMF, the World Bank, and GATT: Toward a Global Economic Order*, (Ann Arbor, U.S.A.: The University of Michigan Press, 1990), p.101.

which the PRC is or becomes a party shall be decided by the Central Government, in accordance with the circumstances and needs of the Hong Kong SAR, and after seeking the views of the Hong Kong SAR Government." From the legislator's willingness, the restricted power of decision of the Central Government is to some degree symbolic in a foreseeable future in "appropriate fields." In the case of the membership of "Hong Kong, China" in the GATT, it is confirmed by the declaration of the PRC that "Hong Kong, China" will continue to be deemed a contracting party after 1997.

On the presumption that both the PRC Government and the Hong Kong SAR Government are members of an international organization, still a critical question needs to be resolved, i.e. whether, after the return of sovereignty to China, the international rights and duties of this territory from the predecessor state are still acceptable to either the successor state or the third parties. If this is not acceptable to either side, it would damage the territory's status in international agreements, and bring new negotiations. For example, in the case of GATT, the conditions under which Hong Kong is now to be deemed a contracting party of the GATT are those that previously have been negotiated by the United Kingdom. Assuming the PRC becomes a contracting party before 1997, it would still make quite a difference whether a British crown colony, i.e. a territory for which the United Kingdom is and has been responsible and for which the relevant conditions have been negotiated, or a territory for which the PRC is responsible becomes automatically a contracting party or is "deemed to be a contracting party" without a new negotiation of the conditions.¹⁸⁵

It will depend on whether the terms and conditions negotiated for Hong Kong's status of contracting party as a separate customs territory are still acceptable without any renegotiation or changes to the contracting parties after 1997. There is no

¹⁸⁵ Ibid, p.146.

regulation in the context of the GATT.

G. THE RELATIVE PRACTICE OF GATT

According to Article XXVI, 5(c), "if any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party."¹⁸⁶ This clause was originally intended to deal with the questions over whether Burma, Ceylon, and Southern Rhodesia, which, according to the British Government, were possessed of autonomy in external commercial relations, could be admitted to participate as full contracting parties to the General Agreement.¹⁸⁷ "This special clause has provided a convenient formula for a flexible application of which has in fact facilitated state succession" only because the date of acquiring full autonomy in external commercial relations almost always coincided with the date of acquiring full independence."¹⁸⁸

¹⁸⁶ This clause was originally Art. XXVI, par.4, section proviso (55 U.N. Treaty Series 274) in almost identical wording, which became par. 4(c) pursuant to an amending protocol of Aug. 13, 1949 (62 U.N. Treaty Series 114), and then par. 5(c) pursuant to the Protocol Amending the Preamble and Parts II and III of the General Agreement which entered into force on Oct. 7, 1957 (278 U.N. Treaty Series 204).

¹⁸⁷ It was worked out by the Ad Hoc Sub-Committee of the Tariffs Agreement Committee when the General Agreement was drafted by the Second Session of the Preparatory Committee of the U.N. Conference on Trade and Employment in September 1947. And further, the Ad Hoc Sub-Committee suggested to include this special clause for the similar case in the future. See, U.N., Second Sess. of the Preparatory Committee of the U.N. Conf. on Trade and Employment: Docs. E/PC/T/198 and 205, and E/PC/T/TAC/PV/13, 24, 25, and 28 (1947).

¹⁸⁸ Supra note 57, Kunugi, p. 270.

But in the case of "Hong Kong, China", the customs territory does not gain independence but becomes a dependent part of the P.R.C. as a SAR.¹⁸⁹ This difference would not change Hong Kong's qualifications.

First, Hong Kong, as a separate customs territory, "has accepted this Agreement" through a declaration of a contracting party, British Government, to which Hong Kong is a dependant. This identification and situation coincides with clause. So, Hong Kong can be such a case.

Second, according to the Joint Declaration, the Hong Kong SAR will enjoy "full autonomy in the conduct of its external commercial relations and other matters provided for in this Agreement." This should be the basic requirement for such a customs territory "to be deemed to be a contracting party". In other words, if, as provided in the Joint Declaration, Hong Kong SAR's full autonomy in the conduct of its external commercial relations is not changed or affected by the transfer of sovereignty in 1997, its status as a contracting party should be renegotiated, because its above-mentioned autonomy is not affected by the transfer of sovereignty.

The relevant practice of GATT which has almost always coincided with the cases accompanied by political independence cannot be elaborated to the effect that political independence becomes one of the requirements or conditions. A customs territory not politically dependent but with full autonomy in the conduct of its external commercial relations can be a contracting party, no matter whether or not its metropolitan country is changed from one to another.

Third, another requirement of this clause is a procedural one, i.e. the sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact." It is easy to identify that on July 1, 1997, the PRC can be the

¹⁸⁹ *Supra* note 174, George Ress, p. 145.

country responsible for establishing the above-mentioned fact. The key problem is that if the PRC is not a contracting party (since it is not for the time being), it will not be qualified as a "responsible contracting party". This situation was out of the prediction of the GATT drafters, i.e. a separate customs territory succeeds its status as a contracting party when it changes its subordination, but it finds the country it subordinates to is not a contracting party to the GATT.

As developments occur in the working group on China, it is quite possible that the PRC will be a contracting party before 1997. If so, the PRC will be the "responsible contracting party establishing the above-mentioned fact" to give sponsorship through a declaration for the status of "Hong Kong, China" as a contracting party. Another unpredicted question comes out as whether the declaration of the PRC Government for Hong Kong's becoming a contracting party on April 23, 1986 is valid, for the PRC was not a contracting party at that time, or will another declaration be needed when the PRC is qualified by its sovereign jurisdiction over Hong Kong after July 1, 1997.

The Terms for "Hong Kong, China" as a Contracting Party. Hong Kong became a contracting party under the terms negotiated when it was subordinate to Great Britain. So comes another concern about the obligations or terms for "Hong Kong, China" to be a contracting party, or whether it is possible that the date of July 1, 1997 would be a chance for the contracting parties to bargain for more benefits on a quid pro quo, and furthermore whether this demand, if any, has any legal basis.

With a review of the former discussion, it can be found that Hong Kong became a contracting party mainly because its full autonomy in the conduct of its external commercial relations. Consequently "Hong Kong, China" may, at that time, succeed to the rights and obligations it has before July 1, 1997, because nothing is changed with

this autonomy. So no regulations in the context of the GATT would be found to support the suggestion of new negotiations for new terms. After Indonesia became independent on December 28, 1949, the Netherlands, at the Fourth Session of the Contracting Parties, proposed that Indonesia should become a contracting party.¹⁹⁰ In the Declaration of April 1, 1950, the Contracting Parties took a note that Indonesia had become a party under the provisions of Article XXVI and that consequently certain "sections of the schedules had in effect become separate schedules relative to Indonesia."¹⁹¹

According to the general practice of the GATT concerning the succession of rights and obligations, when a customs territory transfers its subordination from one country or another, or becomes independent, the above-mentioned rights and obligations remain unaffected. In this kind of cases, it makes no difference whether the customs territory becomes politically independent or a part of another country. This point of view can also be supported by the provisions of GATT per se. Those concerning regulations are concentrated on:

(1) The purpose and object of the General Agreement to substantially reduce the tariffs and other barriers to trade and to eliminate the discriminatory treatment in

¹⁹⁰ In an official publication prepared by the GATT Secretariat, it is noted that "Indonesia, having acquired independence status, become a contracting party in its own right on 24 Feb. 1950." BISD, 1st Supp. (1953), p.6.

¹⁹¹ BISD, 2nd Supp. (1954) 15-16. After the formation of the Federation of Rhodesia and Nyasaland as semi-autonomous members of the Commonwealth which was established by the Act of the British Parliament dated March 24, 1953 and became effective on Aug. 1, 1953, the Governments of Great Britain and Southern Rhodesia sent joint declaration dated September 22 and November 6, 1953, to inform the Contracting Parties that the Federation had acquired full responsibility for matters covered by the General Agreement. The Contracting Parties adopted a declaration on October 29, 1954, by which they considered the Declarations sent to the Contracting Parties by the Government of Southern Rhodesia and the Government of the United Kingdom as a notification and declared "that the Government of the Federation of Rhodesia and Nyasaland shall henceforth be deemed to be a contracting party ... and to have acquired the rights and obligations under the General Agreement of the Government of Southern Rhodesia and of the Government of the United Kingdom ..". BISD, 3rd Supp. (1955), pp. 29-30.."

international trade.¹⁹² To realize this purpose, all separate customs territories should be deemed to have equal rights to participate in this Agreement, no matter whether they are sovereign states or not, if they meet the requirements of full autonomy in the conduct of external commercial relations.

(2) So comes the title of "contracting party" for all members of this Agreement instead of those such as "member states", without any hierarchical classification of members such as "full member", "associate member" and so on.

All those regulations reflect the basic principle of non-discrimination or equality in the mind of the drafters of the General Agreement.

It is definite that Hong Kong's transfer to the sovereign control of the PRC in 1997 should not affect its status as a contracting party, as well as its rights and obligations under the GATT.

¹⁹² GATT, Preamble, par. 3. See, *supra* note 31, John H. Jackson and William J. Davey, 2nd ed. (St. Paul: West Publishing Co., 1986), p.3.

CHAPTER V. INTERRELATION OF THE MAINLAND, TAIWAN, AND HONG KONG IN INTERNATIONAL ORGANIZATIONS AFTER UNIFICATION

It is not unrealistic that "Hong Kong, China", as a part of China, will concurrently with the PRC be members in the GATT, assuming that the PRC will attain its membership in this international trade organization before long, as well as in some other international organizations. Questions arise consequently in a foreseeable future, such as, if and when Taiwan will possibly reunify, along with Hong Kong and Macao, with mainland China, and how these regional entities of China plus Macao will maintain a harmonious coexistence in some international organizations given the need and possibility.

A. STRUCTURE OF CHINA'S POLITY: ONE COUNTRY, TWO SYSTEMS

The two very important legal documents on the Hong Kong's future, the Sino-British Joint Declaration and the Basic Law on Hong Kong,¹⁹³ are peculiarly based on the doctrine of "One Country, Two Systems".¹⁹⁴ For the definition and content of the

¹⁹³ *Supra* note 183.

¹⁹⁴ Zhang Youyu, *The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Mode of Expression*, 2 *Journal of Chinese Law*, 9, (1988).

concept of "One Country, Two Systems", Deng Xiaoping's statement is necessary to be cited here:

"One country, two systems" must be discussed on two levels. On one level is the fact that within a socialist country we will be permitting a specially privileged area to be capitalist not just for short period of time, but for decades or a full century. On another level, we must affirm that the principal system throughout the country is socialist¹⁹⁵

This unprecedented doctrine will be decisive not only on Hong Kong's status in China but also on the fate of Taiwan's unification with the mainland both in the near future and the foreseeable long term.

From July 1, 1997, according to the Joint Declaration, the Hong Kong SAR will neither be an internationalized territory, nor have the sovereignty and territorial jurisdiction in the hands of different states, rather the Hong Kong SAR will be a part of the national territory of the PRC.

The Hong Kong SAR will enjoy a very high degree of autonomy in many fields. This autonomy is under the limits of sovereignty, which means territorial integrity. The content of the sovereign control of the Central Government over the Hong Kong SAR includes those regarding foreign affairs and defence, meanwhile the Hong Kong SAR has such a high level of autonomy in its internal affairs that it can even keep the capitalist economic and social systems for 50 years. The Hong Kong SAR actually is authorized with special status in its external relations, to guarantee further economic development, including its capacity to enter into both bilateral agreements with other states and multilateral treaties to some degree, e.g. the power to conduct its own relations to conclude agreements with states, regions, and international organizations in "appropriate fields".

The autonomy gives the Hong Kong SAR a status similar to or even beyond that

¹⁹⁵ Ibid.

of the component units within a federal state¹⁹⁶ and much more capacity to exercise functions and undertake rights and obligations in external relations rather than that of the component units of other federal states. By this special status, the Hong Kong SAR's relations and connections with the Central Government is looser than that between the component units and the federal governments in those federal states.

With respect to Taiwan's unification with the Mainland as well as with the Hong Kong SAR and Macao SAR, Taiwan's concern focuses on the relations with the mainland government and the harm to its economic prosperity. But, in the external relations, given the even more favourable status than the Hong Kong SAR is being offered by the mainland, Taiwan will enjoy more autonomy, such as in its capacity of participation in international organizations and treaty-making with foreign states. It might be very attractive for Taiwan, provided the conditions are ripe, to have such status, though such arrangements need a lot of legal work before they can be realized, such as the consent of third parties and technical arrangements for this would-be reunified country.

B. "ONE COUNTRY, TWO SYSTEMS" VS. "ONE COUNTRY, TWO INTERNATIONAL PERSONALITIES"

The Hong Kong model will be the realization of the doctrine of "One Country, Two Systems". It only refers to the domestic polity. As to its influence on the

¹⁹⁶ As examples, the Cantons of Switzerland can conclude treaties "in respect of public, economy, frontier relations and police", see, Art. 9, Art. 86 (5), Art. 102 (7), the Constitution of Switzerland,; also see, W.E. Rappard, *La Constitution Federal de La Suisse* (Boudry, La Baconniere, 1948), pp. 192 and 393 for commentary. The Federal Republic of Germany gives the Lander the power to conclude treaties with foreign states, Art. 32 (3) of the Basic Law, also see *supra* note 186, Luigi Di Marzo, p.32.

evolution of China's polity, this step will lead to a federalism polity within China in the future, given the fact that Hong Kong SAR enjoys such a high degree of autonomy. From this autonomy, the Hong Kong SAR is given much capacity in the conduct of external relations though limited to non-political, or non-sovereign matters. But this capacity, because it comes from the autonomy, is based on the constitutional authorization, not its identification of "international personality".

Under the "One Country, Two Systems" style, the sovereignty of a state is integrated, and belongs to the Central Government, and the autonomy of the SAR is acquired from the authorization of the constitution. The SAR Government is a local government, thus the SAR does not enjoy any part of the sovereignty. Hong Kong neither has had an independent international personality with the characterization of an entity sui generis, nor will it have any after 1997.

So, under the conception of "One Country, Two Systems", the capacity of the SAR in international relations is different from that of the Central Government. The former's capacity is acquired from the constitution of the nation, while the latter's comes from its sovereignty which cannot be deprived in any case. This nation's capacity in international relations cannot be deprived and is the basic and most important characteristic compared with that of a SAR. So, the former's capacity cannot be exaggerated as being an international personality equal to that of the Central Government, and can only be, at most, a partial international personality.

The same logic and deduction is also applicable to Taiwan if and when it unifies with the mainland China, regardless of the difference between Hong Kong and Taiwan.

Compared with the "One Country, Two Systems" scheme, some authors make the suggestion of the "multi-system state"¹⁹⁷ concerning the case of Taiwan. The

¹⁹⁷ Hungdah Chiu, "The International Legal Status of Republic of China And The Issue of Returning to International Organizations", Chinese Annual Report of International Law and World

kernel of this theory is "One Country, Two International Personalities".

1. Peculiarity of "Multi-System Nations"

According to the opinions on the multi-system nations, main characteristics can be summarized as follows:

- (1) In such a nation, two or more parts of the territories of this nation are separately self-controlled;
- (2) "Each part formerly belonged to a unified country; and while divided now, each part still maintains the national goal of unification.";¹⁹⁸
- (3) Each part claims to be the sole legal government of that country in international relations, thus, the representation of this country in an international conference was given to one part only, while the other part was totally excluded from participation in that conference;¹⁹⁹
- (4) None of the parts will accept an arrangement that both the concerned parts be recognized as independent states. "On the contrary, each government insists on being recognized as the sole legal government of both parts of the country, including that part over which it has no effective control.";²⁰⁰
- (5) Each part tries to use "political pressure from its allies to prevent the other part from being recognized as a state or to prevent the government of the other part from being recognized as the legal government even within the territory under the latter's

Affairs, (Taipei: Commercial Publishing House, 1989), ed. by Hungdah Chiu, vol.3, pp. 3-26. Also see, Queng-cheng Fu, Report at the Seminar on Foreign Policy and Policies on the Mainland, Ibid, pp.144-150.

¹⁹⁸ Hungdah Chiu, "The International Law of Recognition and Multi-System Nations: With Special Reference to Chinese (Mainland-Taiwan) Case," Chinese Annual Report of International Law and World Affairs, (Taipei: Commercial Publishing House, 1981), vol.1, ed. by Hungdah Chiu, p. 5.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

effective control.".²⁰¹

These characteristics are summarized from the practice in Korea and China, as well as the former Germany and Vietnam.

2. Inapplicability of Multi-system Nation Theory

From the above analysis, it is clear that the nation would be divided into two or more international personalities by the division of state sovereignty. As known, the most basic characteristic of state sovereignty is the integration, which explicitly includes the indivisibility. In practice, such division of sovereignty is far from being realized if only one part agrees so. And no force or influence can be a decisive factor for such division of sovereignty without the consent of the concerned parts of so-called multi-system nations. So, such conception of multi-system nation is contrary to the international law, and there is no precedence in the relevant practice.

Among the divided states, Germany was the most different from the case of China, and cannot be used as a precedent. The former Germany used to be two parts: the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR). The sovereignty division of Germany was decided by international agreement between outside powers, which in fact resulted into two sovereign states. Legally, they could not be considered one state when they existed in the world as East Germany and West Germany. On the contrary, the two Germanies acted and were treated as two sovereign states with full independence. This is evidenced by the fact they were admitted to the United Nations on September 18, 1973 and have normalized their relations through the treaty of December 21, 1973 on the Basis of Intra-German Relations and accompanying documents.²⁰²

201 Ibid

3. The Case of China

The case of China (Mainland and Taiwan) is very different from that of Germany in many characteristics. The first difference lies in the diminutive size of Taiwan compared to the rest of China, and the smaller population of Taiwan, around 20 million, compared to the 1.2 billion on the mainland.

The second is that both sides claim the situation as an unfinished civil war, or the current situation is the continuation of the civil war. Both sides deny the orthodoxy of the other part. The long-lasting civil war, if we call it so, has stepped on the way of peaceful solution long ago. The long time waiting for negotiations which show the good faith in trying to find a peaceful solution does not constitute a "considerable period" in which Taiwan can be said to be an independent state.

Thirdly, both sides oppose the policy of "One China, one Taiwan", i.e. there is only one China. Consequently, "no claim of separate statehood for Taiwan has been made and in such a case it is difficult to maintain that such an unsought status exists."²⁰³ Or, from another scholar, since "it considers itself as a part of the "old" China thus excluding the concept of being a separate and divided state."²⁰⁴

Fourthly, it is well accepted by the world community that there is only one China and the PRC Government is the sole legal government of this country. The PRC has very wide diplomatic relations with almost all countries in the world and occupies the seats of China in all international organizations in which the country has memberships, while the ROC maintains diplomatic relations with only 23 states which

²⁰² I.L.M., vol. 12, 1973, pp. 16-24.

²⁰³ Malcolm N, Shaw, *International Law*, 2nd ed., (Cambridge: Grotius Publishing, Ltd., 1986), p.149.

²⁰⁴ Meinhard Hilf, "Divided States", "Encyclopedia of Public International Law", ed., (Amsterdam: Elsevier Science Publishers B.V., 1987), p.127.

are all small countries with little influence in the world community.

Actually, in world-wide acknowledgement, Taiwan is, at most, a part of China under separate administration.²⁰⁵ From practice, "Taiwan is not a State, because it does not claim to be and is not recognized as such: its status is that of a consolidated local de facto government in a civil war situation",²⁰⁶ and furthermore, the government of Taiwan has not operated as that of an independent state for a long time, even during the period from 1949 to 1972, the legality of its presence as the government of China is very much in question and groundless. So, it can be concluded that the conception of multi-system nation still remains at the level of hypothesis, or at least, it does not suit the Taiwan case. Because the presumption of the theory is contrary to the basic principle of sovereign integration in international law. Taiwan should not be the case to affirm the applicability of this conception, though it may be the only case among those who try to approve this hypothesis.

Furthermore, talking about the capacity of Taiwan and Hong Kong in international relations under the structure of "one country, two systems", if and when unified with the mainland, the two cannot be included in the category of "one country, two personalities".

Generally speaking, two different systems can equally and peacefully coexist within one country in each part of the territory, without interference to each other. But this equality cannot be extended over the boundary of the country, thus there is only one representation for the country in international relations. So the possibility of two international personalities for the country is precluded. To meet the needs of the different economic and social systems in the SARs, some special functions and

²⁰⁵ *Supra* note 204, Meinhard Hilf, p.217.

²⁰⁶ J. Crawford, *The Creation of States in International Law*, (London: Oxford University Press, 1979), p. 151.

responsibilities are authorized by the constitution for the SARs to participate in international transactions, but this is limited to non-political affairs and is acquired not inherent.

C. COEXISTENCE OF THE MAINLAND AND TAIWAN IN THE GATT SYSTEM

Taking account of the GATT's function of regulating the relations of rights and obligations between the Contracting Parties with different tariffs and trade systems and its membership covering countries and non-state SCTs, Taiwan's status will not be harmful to the reunification of China some days in the future. First, Taiwan's participation in the GATT as a SCT will not enhance the possibility of its political independence. Second, the different tariff systems which apply to the mainland and Taiwan constitute de facto two Chinese customs territories to have their own contracting party status in the GATT. It would be extremely difficult in practice for the PRC government to accept the General Agreement on behalf of the SCT in Taiwan even after the PRC accepted the Agreement. Furthermore, it is acceptable to all sides that the two different tariff systems, the two customs territories as well as the two Chinese contracting parties in the GATT will exist even after the reunification of China in future.

Though in political reality, Taiwan's relations with the mainland have been under abnormal circumstances between the PRC government and the Taiwan government, the legal status of Taiwan as a local entity of China has been legally determined by not only the history and reality in China in the last decades, but also the international treaties as well as the practice of international organizations among which

the United Nations is the major one. The GATT has been carrying the policy to follow the U.N. decisions on essentially political matters.

CHAPTER VI. CONCLUSION

As the world trading system develops, especially through the establishment of the World Trade Organization, and the great progress of China's economic reform as well as Asian economic growth, it becomes more than important to accept the PRC and Taiwan into the GATT as well as the WTO. The development of the work on the applications of the PRC and Taiwan to the GATT, the working Groups, up to now, are reaching the substantial work on the drafting of the protocols.²⁰⁷ So it is predictable that the approval of the Contracting Parties on the two applications would not be far off. The analysis on the significance of the participation of the PRC and Taiwan in GATT will help to eliminate all doubt on the great importance to accept the two applicants in GATT, both to the applicants and the GATT itself.

While the contracting parties consider mostly on whether the two applicants meet the requirements for the membership of GATT and how much they can benefit from the tariff concessions and commitments given by the two applicants, it would be wise not to be involved in the domestic dispute within China and take actions against the general principles and practice of the international relations. Conclusively, it is acceptable that the PRC accedes to the GATT in the style of resumption and prior to Taiwan. More attention will be drawn onto the evolution of the process of the

²⁰⁷ The negotiations on China's application to the GATT are reaching to the step of the discussion on the protocol and tariffs concession. See, China and U.S. Will Discuss the Protocol of China's Re-entry to the GATT, People's Daily, (Renmin Ribao), Beijing, July 24, 1993; The Negotiation on China's Re-entry to GATT Comes to the Substantial Step, People's Daily, (Renmin Ribao), Beijing, August 15, 1993; People's Daily, (Renmin Ribao), Beijing, March 16, 1994; The 16th Meeting of the Working Party on China Ended in Geneva, People's Daily, (Renmin Ribao), March 19, 1994.

unification of mainland China, Taiwan, Hong Kong and Macao, as well as the interactions of the four regions within China and under the state sovereignty of China, than the comparatively independent capacity of Taiwan, Hong Kong and Macao in their external relations. Their co-existence in the GATT before unification would increase their cooperative relations with each other, thus creating a positive push for the unification of the whole of China, which is, to some degree, the common purpose of most people in the four parts.

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