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# GATT MEMBERSHIP FOR TAIWAN: AN ANALYSIS IN INTERNATIONAL LAW

YA QIN\*

## I. INTRODUCTION

On January 1, 1990, Taiwan formally applied for accession to the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> in the name of "Customs Territory of Taiwan, Penghu, Kinmen and Matsu"—the four main islands currently under the control of the Nationalist government in Taipei.<sup>2</sup> Taiwan's GATT application has encountered strong opposition from the government of the People's Republic of China (PRC), whose request for resuming China's GATT membership has been put on hold since June 1989.<sup>3</sup>

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 1103, 55 U.N.T.S. 187 [hereinafter GATT]. Technically, the General Agreement on Tariffs and Trade refers both to the text of the treaty and the institution that has evolved from the treaty. It is, however, customary to refer to the institution as the "GATT" and the treaty as the "General Agreement" or the "Agreement." KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 3 n.1 (1970). GATT members are technically "contracting parties" to the General Agreement. Article XXV:1 of the General Agreement provides that the contracting parties acting jointly are designated as the "CONTRACTING PARTIES." Accordingly, the term "contracting parties" in lower case refers to the individual member countries, whereas the same term, "Contracting Parties," in initial capitalized form is often used in GATT documents to refer to the GATT in general. See OLIVIER LONG, *LAW AND ITS LIMITATION IN THE GATT MULTILATERAL TRADE SYSTEM* 6 n.15 (1985).

2. Foreign Broadcast Information Service, Daily Report, China, [hereinafter FBIS, China] 90-004, at 53 (Jan. 5, 1990).

3. The PRC government made a formal request on July 14, 1986 to resume China's status as an original contracting party to the GATT. *Communication from the PRC*, GATT Doc. L/6017 (July 14, 1986). The negotiations on China's status in GATT became stalled after the drastic deterioration in China's relations with many Western countries following the Tiananmen incident of June 4, 1989. Although the GATT Working Party on China resumed its meeting in December 1989, little progress has been made in view of the stagnating economic reforms in China after June 4, 1989. See Jeanne-Marie C. Gescher, *GATT's Problem with China*, *FAR E. ECON. REV.*, Jan. 11, 1990, at 46.

The PRC government claims that, as a matter of international law, Taiwan has no right to apply for accession to GATT on its own, and that Taiwan's application for GATT membership can be dealt with only (i) after China's contracting party status in GATT is resumed and (ii) upon Beijing's approval.<sup>4</sup>

The question of whether GATT should admit Taiwan independently of Beijing has stimulated a great deal of interest and enthusiasm in the public as well as in political circles.<sup>5</sup> After more than a year of silence, the U.S. President, George Bush, joined the U.S. Congress in pledging support for Taiwan's application over the summer of 1991.<sup>6</sup> Subsequently, the European Community and certain other GATT countries reportedly also expressed their positive attitude toward Taiwan's accession.<sup>7</sup>

Apparently, the political and economic implications of Taiwan's GATT membership would be quite significant. Taiwan is one of the major trading powers<sup>8</sup> as well as one of

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4. Frances Williams & Jonathan Moore, *Who Goes First? Taiwan's GATT Application Angers Peking*, FAR E. ECON. REV., Feb. 1, 1990, at 36. See also *Mainland Official on Taiwan Joining GATT*, BEIJING REV., Aug. 27-Sept. 2, 1990, at 39.

5. For example, there was an ongoing debate in the *New York Times* regarding the issue. See *Taiwan: Too Big to Ignore*, N.Y. TIMES, Nov. 10, 1990, at A22; Zhao Xixin, *Taiwan Can't Act Alone in International Affairs*, N.Y. TIMES, Dec. 2, 1990, at A18; Chen Guoqing, *Taiwan Can't Independently Join GATT*, N.Y. TIMES, Apr. 24, 1990, at A24; *Taiwan Belongs in GATT*, N.Y. TIMES, Apr. 27, 1991, at A24; see also Raymond Chang, *Taiwan Should Be Allowed to Join GATT*, ASIAN WALL ST. J. WKLY., Oct. 15, 1990, at 16.

6. In his letter of July 19, 1991 to Senator Max Baucus, President Bush wrote: "The U.S. will begin to work actively with other contracting parties to resolve in a favorable manner the issues relating to Taiwan's GATT accession." It was reported that by linking Taiwan's GATT bid with the most-favored-nation (MFN) status of Beijing, Bush's move won the senators' support for his position on unconditional extension of the MFN status to the PRC. Susumu Awanohara, *Trick or Treat?*, FAR E. ECON. REV., Aug. 8, 1991, at 8; Julian Baum, *Taiwan Welcomes US Support on GATT Application: A Favour of Sorts*, FAR E. ECON. REV., Aug. 8, 1991, at 8.

7. See, e.g., *EC Supporting Taiwan for GATT*, FREE CHINA J., July 26, 1991, at 1.

8. In 1990, Taiwan had a total foreign trade volume of US\$121.9 billion, ranking as the world's 15th largest trading power, and foreign exchange reserves of US\$74 billion. Taiwan's GNP per capita was US\$7,990 in fiscal year 1990. See FREE CHINA J., Sept. 13, 1991, at 3; FREE CHINA J., June 21, 1991, at 6.

the fastest growing economies in the world. With a population of only 20 million, Taiwan's total volume of trade is larger than that of the PRC.<sup>9</sup> GATT membership for Taiwan, therefore, would subject a major trading power to GATT discipline. For the many trading partners of Taiwan, this means that Taiwan would be obligated to improve market access by lowering tariff rates and removing licensing requirements and other trade barriers, to liberalize its financial service market, and to improve its record on intellectual property protection. For Taiwan itself, GATT membership not only would bring a stable most-favored-nation treatment in its trade with other GATT member countries and provide it with an international forum for resolving its trade disputes, but also—perhaps more importantly—would enhance Taiwan's international status and add to its currently limited official ties with the international community.

Policy considerations aside, however, the membership question of an international organization is also a legal question. Because of the unique history of the Beijing-Taipei legal battles over government recognition and the ambiguous status of Taiwan in international law, Taiwan's application for GATT membership and Beijing's strong opposition confront the GATT contracting parties with some intriguing legal issues. These issues require clarification before the question of Taiwan's GATT membership can be resolved. It is the purpose of this article to provide a legal analysis of the issues involved, thereby helping clarify any confusion in this area.

## II. HISTORICAL BACKGROUND

### A. *Taiwan's Ambiguous Status in International Law*

In 1949, a change of government took place in China as the result of a popular revolution. The Nationalist government of the Republic of China was overthrown and forced to flee to the island of Taiwan. The new government declared the founding of the People's Republic of China on October 1, 1949.

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9. In 1990, the PRC's foreign trade totaled US\$115.4 billion. CHINA ECON. NEWS, Mar. 18, 1991, at 5. For the total trade volume of Taiwan in the same year, see *supra* note 8 and accompanying text.

With the founding of the PRC in 1949 began a long-term battle over the issue of government recognition, i.e., which Chinese government is the legitimate government and therefore has the right to represent China in international organizations. Despite its loss of control over the territory of mainland China, the deposed Nationalist government in Taiwan continued to claim its status as the sole legitimate government of China, a claim that prevailed in the United Nations and other major international organizations until 1971.

### 1. *The 1971 U.N. Resolution*

A dramatic change came in 1971 when the United Nations General Assembly passed Resolution No. 2758 (XXVI) (the 1971 U.N. Resolution), declaring its recognition of the PRC government as the legal representative of China to the United Nations and a concomitant decision to "expel 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."<sup>10</sup> Pursuant to this Resolution, the PRC government has replaced the Nationalist government in the China seat in the United Nations as well as other U.N.-related international organizations. The 1971 U.N. Resolution laid down the foundation for the current status of the PRC and Taiwan in the international community.

The recognition of the PRC government as the legitimate government of China conforms with international legal principles on government recognition. Under international law, the essential criterion for recognizing a government that came into power through force is whether the government has established effective control over most of the territory of the state and whether such control is likely to continue.<sup>11</sup> It was clear in the case of China that the PRC government had

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10. Resolution on Representation of China, G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (1971).

11. For general theory and state practices regarding the prerequisites and legal effects of recognition of governments in international law, see *Prerequisites*, 2 WHITEMAN DIG. § 4; *Recognition of Governments*, 2 *id.* §§ 61-65; HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 87-136 (1947); TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 97-130 (L.C. Green ed., 1951). For discussions on recognition of the PRC government and its effects in international law, see Chen Tiquang, *The People's Republic of China and Problem of Recognition*, 3 CHINESE Y.B. INT'L L.

established its effective control over most of the territory of China and had the support of the majority of the Chinese population after 1949.

Since the adoption of the 1971 U.N. Resolution, Taiwan's status in international law has been ambiguous.<sup>12</sup> On the one hand, Taiwan has lost most of its diplomatic relations and is isolated from most of the intergovernmental organizations;<sup>13</sup> on the other hand, it has been acting internationally as an independent entity, maintaining commercial and cultural exchanges with most countries in the world.<sup>14</sup> The Taipei government continues to commit itself to the "one China" policy and condemns any attempt to establish an independent state of Taiwan.

## 2. *Beijing-Taipei Relations*

Relations between Beijing and Taipei have undergone significant changes in the last decade. Stark hostility and mutual exclusion have been replaced by cautious politeness and dialogue. The beginning of this transformation came on

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(1985); *Legal Implications of Recognition of the People's Republic of China*, 72 PROC. AM. SOC'Y INT'L L. 240 (1978).

12. See Victor H. Li, *The Law of Non-Recognition: The Case of Taiwan*, 1 NW. J. INT'L L. & BUS. 134 (1979). See also Hungdah Chiu, *Certain Legal Aspects of Recognizing the People's Republic of China*, 11 CASE W. RES. J. INT'L L. 389, 412-16 (1979).

13. As of 1990, Taiwan maintained diplomatic relations with about two dozen states, including most of the Central American countries, several African countries including South Africa, a few Pacific island countries, and South Korea. *ROC's Embassies and Consulates*, 4 ZHONGGUO GUOJIFA YU GUOJI SHIWU NIANBAO [ANNUAL REPORT OF CHINESE INTERNATIONAL LAW AND INTERNATIONAL AFFAIRS] [A.R.C.I.L.I.A.] 477 (1990). The intergovernmental organizations in which Taiwan retained its participation were fewer than ten, including the International Union for the Publication of Customs Tariffs, the International Criminal Police Organization, the International Office of Epizootics, the International Cotton Advisory Committee, the Asian Productivity Organization, the Afro-Asian Rural Reconstruction Organizations and the Asian Development Bank. See Hungdah Chiu, *Legal Problems in ROC's Participation in Inter-Governmental Organizations*, 4 A.R.C.I.L.I.A. 52 (1990). For Taiwan's admission to the Asian-Pacific Economic Cooperation in 1991, see *infra* text accompanying note 27.

14. It was reported that Taiwan had commercial relations with more than 140 countries and trading areas as of 1990. FREE CHINA J., Sept. 13, 1990, at 3. For a general introduction to Taiwan's foreign relations and policy, see JOHN F. COPPER, *TAIWAN: NATION-STATE OR PROVINCE?* ch. 6 (1990).

New Year's Day, 1979, when the PRC's Standing Committee of the National People's Congress issued a message to the people in Taiwan proclaiming a new policy of peaceful unification. On September 30, 1981, the chairman of the Standing Committee of the National People's Congress issued an elaboration on the policy of the PRC government concerning peaceful unification.<sup>15</sup> The elaboration set forth nine basic principles which call for the establishment of Taiwan as a special administrative region enjoying a high degree of autonomy, including the right to retain its own armed forces, and for the preservation of Taiwan's current social and economic system after the unification. From Beijing's perspective, the policy of "one country, two systems" (meaning co-existence of different social and economic systems within one united China), formulated as the solution to the status of Hong Kong after its return to China, is also applicable to unification with Taiwan. In the years following Beijing's proposals, indirect trade, investment, and other economic and social contacts between the two sides of the Taiwan Straits have flourished.<sup>16</sup>

Taipei's initial response to Beijing's proposals was negative and defensive. However, this posture eventually changed. On May 1, 1991, Taipei officially terminated the forty-three-year-old "Period of Mobilization for Suppression of the Communist Rebellion," thereby declaring peace with Beijing.<sup>17</sup> Although direct commercial contacts with the mainland are still officially banned, Taipei has tacitly approved indirect trade (mostly via Hong Kong) and private investment in mainland China. Delegations of quasi-official status from Taiwan have visited the mainland to meet with mainland officials, and unofficial communications have been established to handle problems that might arise in exchanges

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15. *Ye Jianying on Reunification With China*, FBIS, China, No. 189, at U1-2 (Sept. 30, 1981).

16. Indirect trade between the mainland and Taiwan reached US\$4 billion in 1990, of which US\$3.2 billion was the mainland's import from Taiwan. Julian Baum, *Strait Expectations: Taiwan Businessmen Prepare for Direct Trade with China*, FAR E. ECON. REV., June 6, 1991, at 41. Taiwan's total investments on the mainland are estimated at US\$2 billion. *Mainland Claims Taiwan Largest Investor There*, FREE CHINA J., May 5, 1991, at 3.

17. *ROC Terminates Hostility Toward Peking*, FREE CHINA J., May 2, 1991, at 1.

across the Taiwan Straits.<sup>18</sup>

Officially, however, both Beijing and Taipei recognize the other side as an "authority" only, not a "government," to avoid any legal implication of recognizing the other's legitimacy. In international settings, Beijing is apparently willing to accept Taipei as a legitimate local government subordinate to Beijing. Taipei, however, refuses to accept such a position, but is willing to sacrifice its official name in order to achieve more realistic objectives of international recognition and participation.

### 3. *Co-existence in International Organizations*

After the 1971 U.N. Resolution settling the status of the PRC government as the representative of China in U.N.-related organizations, the battle between Beijing and Taipei on the issue of government representation in international organizations has been transformed into a game of names. Beijing formulated a policy that Taiwan's presence in international affairs, official or unofficial, should be in the name of "Taiwan, China" or "Taipei, China" in order to avoid any possible misinterpretation that there exist in the world "two Chinas" or "one China, one Taiwan." The name of "Taipei, China" has been referred to as the Olympic formula, since it was first adopted by the International Olympic Committee (IOC), a universal, non-governmental organization, in 1979.<sup>19</sup> After some resistance, Taipei accepted the use of this formula by IOC in 1981.

The co-membership of Beijing and Taipei governments in the Asian Development Bank (ADB) beginning in 1986 marked the first official compromise between the two rivals with respect to participating in inter-governmental organiza-

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18. A quasi-official liaison body of the Taipei government, the Straits Exchange Foundation, was set up in March 1991 to handle non-political, routine technical matters involving problems that might arise in contacts with the mainland. Its delegation had its first trip to the mainland in late April 1991, which opened "unofficial but formal relations with Peking." *Straits Exchange Foundation on Job in Peking; 'Historic' Contact Made*, FREE CHINA J., May 2, 1991, at 1.

19. For a description of the name battle in the IOC, see David S. Chou, *The ROC's Membership Problems in International Organizations*, ASIAN OUTLOOK, May-June 1991, at 18, 21-24.

tions.<sup>20</sup> Founded in 1966, the ADB is engaged in promoting the economic and social progress of its developing member countries in the Asia-Pacific region. The ADB is owned by forty-seven governments, of which thirty-two are from the Asia-Pacific region and fifteen from Europe and North America.<sup>21</sup> Taiwan, in the name of the Republic of China (ROC), was one of the founding members of the ADB.<sup>22</sup>

In February 1986, the ADB Board of Governors passed Resolution No. 176 admitting the PRC to the membership of the ADB and changing the designation of Taiwan from "ROC" to "Taipei, China," a name formula accepted by the PRC.<sup>23</sup> Taiwan protested vigorously against the ADB's decision and boycotted ADB's annual meetings in 1986 and 1987.<sup>24</sup> Despite its protestations, however, Taiwan retained its membership in the ADB and returned to its annual meeting in 1988.<sup>25</sup> Thus, although Taiwan has never officially accepted its name change, the co-membership of Beijing and Taipei in the ADB created a precedent of co-existence between the two rival Chinese governments in an intergovernmental organization.<sup>26</sup>

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20. The co-existence solution was only reached after a prolonged battle between the PRC and Taiwan and with backing by the United States. See William Feeney, *Chinese Policy in Multilateral Financial Institutions*, in CHINA AND THE WORLD: CHINESE FOREIGN POLICY IN THE POST-MAO ERA 266, 286-87 (Samuel S. Kim ed., 1984). During the course of the battle, Beijing changed its stand from demanding an expulsion of Taiwan from the ADB to agreeing to Taiwan's participation under an acceptable name. For a chronology and analysis of the event, see Peter K.H. Yu, *On Taipei's Rejoining the Asian Development Bank (ADB) Subsequent to Beijing's Entry: One Country, Two Seats?*, ASIAN AFF.: AM. REV., Spring 1990, at 3.

21. See ASIAN DEVELOPMENT BANK, ANNUAL REPORT (1991).

22. Taipei emphasized at the time of its joining the ADB that it represented the Taiwan area only, in anticipation of potential problems of government representation with other ADB members, as many of them were shifting their recognition to Beijing. See Yu, *supra* note 20, at 7.

23. ASIAN DEVELOPMENT BANK, ANNUAL REPORT 163 (1986).

24. Yu, *supra* note 20, at 8.

25. In May 1989, to the surprise of many, Taiwan's official delegation attended the ADB annual meeting held in Beijing. This was the first time in 40 years that officials from Taiwan set foot on mainland China. See Yu, *supra* note 20, at 10.

26. The International Criminal Police Organization (INTERPOL) is another intergovernmental organization in which Beijing and Taipei both have a presence. Taipei rejoined INTERPOL in 1961. In 1984, INTERPOL accepted the PRC's membership and changed the ROC's name

The Asia-Pacific Economic Cooperation (APEC) has recently become the second intergovernmental organization in which both Beijing and Taipei participate as equal members.<sup>27</sup> Established in 1989 to promote greater cooperation among the Pacific Rim's fast-growing economies, APEC had twelve original members: Thailand, Malaysia, Indonesia, the Philippines, Singapore, Brunei, South Korea, Japan, the United States, Canada, Australia, and New Zealand. Based on a compromise agreement worked out with both Beijing and Taipei,<sup>28</sup> APEC was able to admit the PRC, Taiwan (under the name of Chinese Taipei) and Hong Kong simultaneously to the organization at its ministerial meeting held in November 1991.<sup>29</sup>

## B. *China's Status as a Contracting Party to GATT*

### 1. *An Original Contracting Party to GATT*

China was one of the twenty-three nations that signed the Final Act of October 30, 1947 authenticating the text of the General Agreement on Tariffs and Trade.<sup>30</sup> The General Agreement, however, has never entered into force.<sup>31</sup> In

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to "Taiwan, China" and the ROC's status was "downgraded to a sort of associate membership." Chou, *supra* note 19, at 21. However, the co-existence of Beijing and Taipei in INTERPOL and the ADB differs substantially in that INTERPOL allows only one vote from one country. As a result, Taipei's representative can participate only as part of the Chinese delegation and has no right to vote. *See id.* at 21. *See generally* Chiu, *supra* note 13, at 412-19 (discussing the impact on the ROC of the widespread international recognition of the PRC).

27. Shim J. Hoon & Robert Delfs, *Block Politics*, FAR E. ECON. REV., Nov. 28, 1991, at 26.

28. Damon T. Darlin, *APEC Resolves "Three Chinas" Problem but Struggles to Define its Own Function*, ASIAN WALL ST. J. WKLY., Sept. 2, 1991, at 16.

29. It was reported that the PRC delegation to APEC told reporters that the APEC practice with respect to the co-membership of the three Chinese parties "would not be applicable to other international bodies." *APEC Endorsement Gives GATT Talks on Broad Trade Liberalization a Boost*, ASIAN WALL ST. J. WKLY., Nov. 18, 1991, at 16.

30. GATT, *supra* note 1, 55 U.N.T.S. at 198. *See* GATT, *Introduction to ANALYTICAL INDEX: NOTES ON THE DRAFTING, INTERPRETATION AND APPLICATION OF THE ARTICLES OF THE GENERAL AGREEMENT 4* (4th ed. 1989) [hereinafter ANALYTICAL INDEX].

31. Under article XXVI:6, the General Agreement will enter into force after governments representing a certain minimum share of world trade have accepted it. *See* GATT, *supra* note 1, art. XXVI(a), 55 U.N.T.S. at

stead, it was first brought into application through the conclusion of the Protocol of Provisional Application in 1947 (the 1947 Protocol),<sup>32</sup> and subsequently through a series of protocols of accession.<sup>33</sup> The 1947 Protocol was signed by all but one of the twenty-three signatories of the Final Act of October 30, 1947.<sup>34</sup> The twenty-two governments thereby

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276, amended by 62 U.N.T.S. 80, 102 (1948). Only two governments, Haiti and Liberia, have ever deposited their instruments of acceptance in accordance with article XXVI, and Liberia later withdrew. See ANALYTICAL INDEX, *supra* note 30, art. XXVI, at 11, § 9.

32. GATT, *supra* note 1, 55 U.N.T.S. at 308, reprinted in 4 GATT: BASIC INSTRUMENTS AND SELECTED DOCUMENTS 3, 77-78 (1969) [hereinafter BIRD]. The decision to apply the General Agreement on the basis of the 1947 Protocol was the product of a particular set of historical circumstances. The General Agreement was originally negotiated parallel to the Havana Charter of the International Trade Organization (ITO), the comprehensive international trade agreement, which has never entered into force. The purpose of having a separate trade agreement (GATT) negotiated simultaneously was to ensure immediate tariff reductions. By the time the negotiations of the General Agreement were near completion in 1947, the Havana Charter negotiations were still in progress. To protect the results of tariff concessions, it was deemed necessary to put into effect the General Agreement as soon as possible. However, the General Agreement incorporated certain provisions of the draft Havana Charter into Part II of the General Agreement, and some delegates indicated their lack of authority to negotiate these provisions. In order to prevent the delay of implementing the General Agreement, a compromise was reached that Part II would be applied only to an extent not inconsistent with existing legislation. The conclusion of the Protocol of Provisional Application enabled incorporation of those compromises and brought the General Agreement into immediate application to the largest extent possible. See JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 61-62 (1969) (citing U.N. Doc. E/PC/T/100 (1947), U.N. Doc. E/PC/T/TAC/PV/1 (1947), and U.N. Doc. E/PC/T/TAC/SR/4 (1947)).

33. The subsequent protocols of accession to GATT contain provisions similar to the 1947 Protocol. See, e.g., *Protocol for the Accession of the Philippines to the General Agreement on Tariffs and Trade*, GATT Doc. L/4901 (1979), reprinted in BIRD, *supra* note 32, at 192 (26th Supp. 1979).

34. According to its provisions, the 1947 Protocol was to be signed by the eight governments named therein (Australia, Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom, and the United States) by November 15, 1947, and applied by them on and after January 1, 1948, and was to remain open for signature until June 30, 1948 by the signatories to the Final Act. All the government signatories but Chile signed the 1947 Protocol by the cutoff date. Chile became a GATT contracting party shortly afterwards through accession by signing the Protocol for the Accession of Signatories of the Final Act of October 30, 1947,

became the original contracting parties to GATT, and China was one of them.<sup>35</sup>

## 2. *The 1950 "Withdrawal"*

Shortly after the deposed Nationalist government relocated to Taiwan, it notified the U.N. Secretary-General on March 6, 1950 of its decision to withdraw from the General Agreement on behalf of China.<sup>36</sup> The withdrawal was made in accordance with article 5 of the 1947 Protocol, with the effective date of May 5, 1950.<sup>37</sup> China's schedule of tariff concessions (Schedule VIII), which had been made an integral part of the General Agreement by virtue of its article II:7, was accordingly terminated.<sup>38</sup>

Different opinions were expressed within GATT on the validity of the withdrawal at the time.<sup>39</sup> The representative of Czechoslovakia, for instance, challenged the validity of the withdrawal on the ground that the Nationalist government lacked competent authority to represent China.<sup>40</sup> No official

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on February 14, 1948. See GATT, STATUS OF LEGAL INSTRUMENTS 3-1.1; see also JACKSON, *supra* note 32, at 91.

35. The Nationalist government of the Republic of China deposited its Instrument of Acceptance of the 1947 Protocol on April 21, 1948. The provisional application of the General Agreement to China therefore took effect on May 21, 1948, 30 days after the deposit in accordance with article 3 of the 1947 Protocol.

36. *Communication from Secretary-General of United Nations Regarding China*, GATT Doc. CP/54 (Mar. 6, 1950).

37. GATT, *supra* note 1, 55 U.N.T.S. at 196.

38. Between 1950 and 1962, 14 GATT contracting parties withdrew the concessions they had originally negotiated with China. See F. Liser, *China and the General Agreement on Tariffs and Trade*, in JOINT ECON. COMM., CONGRESS OF THE UNITED STATES, CHINA UNDER THE FOUR MODERNIZATIONS pt. II, at 138-39 (1982).

39. *Summary Record of the Sixth Meeting of the Tariff Negotiations Committee*, GATT Doc. TN.2/SR.6 (Nov. 13, 1950).

40. *Id.* According to this Record, the Czech representative proposed to include in the Torquay Protocol, which omitted China from the list of contracting parties in its preamble, a note to the same effect as "the note which appeared in the United Kingdom official publication of the text of the General Agreement, viz. 'The Nationalist Government of the Republic of China has notified its withdrawal from the General Agreement with effect from May 5, 1950; The Central People's Government of China has not yet defined its position with regard to the General Agreement.'" *Id.* at 2. The proposal was rejected by the Chairman on the ground that it was unnecessary to mention the point in the Protocol. *Id.* at 3. The Czech repre-

decision was taken in GATT on the issue. Yet, subsequent GATT documents consistently treated China as a withdrawing contracting party.<sup>41</sup>

### 3. *GATT Decisions of 1965 and 1971*

In 1965, the Nationalist government requested observer status in GATT in the name of the Republic of China.<sup>42</sup> In discussing the matter, a number of GATT contracting parties stated that they recognized the PRC government as the legitimate government of China.<sup>43</sup> The Chairman of the CONTRACTING PARTIES evaded the issue by announcing 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."<sup>44</sup> Observer status thereupon was granted.

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sentative also suggested that an inquiry be sent to Beijing on their attitude toward the General Agreement. *Id.* at 2.

41. *See, e.g.*, ANALYTICAL INDEX, *supra* note 30, Protocol, at 13, § 5; *id.*, Contracting Parties, at 1 n.2. Both places list "Republic of China" as one of the contracting parties that have given notice of their withdrawal from the General Agreement.

42. *See* GATT Doc. SR.22/3 (Mar. 16, 1965). Observer status in GATT can be granted on request under articles 8 and 9 of the Rules of Procedure for Sessions of the Contracting Parties. *See* BISD, *supra* note 32, at 10, 11 (12th Supp. 1964). It may be valid for sessions of the Contracting Parties, or also for the GATT Council and its subsidiary bodies, except for the Committee on Budget, Finance and Administration. Observer countries do not have the right to vote. Upon invitation, they can take part in debates. In practice, they are called upon to speak after contracting parties have spoken. *See* LONG, *supra* note 1, at 46.

43. They included Czechoslovakia, Cuba, Yugoslavia, France, the United Kingdom, Sweden, the Netherlands, Denmark, Norway, the United Arab Republic, Poland, Indonesia and Pakistan. GATT Doc. SR.22/3, *supra* note 42, at 2-3.

44. *Id.* at 3. The Chairman explained the basis of his statement, noting that the CONTRACTING PARTIES had followed the policy expressed in article 86 of the Havana Charter, namely to avoid passing judgment in any way on essentially political matters and to follow decisions of the United Nations on such questions. He went on, stating that the opinion of the Legal Department of the United Nations was that "the question of representation in an international organization was distinct from the question of recognition of a government by other members of that organization." He also quoted from a memorandum by the U.N. Secretary-General to the Security Council on March 9, 1950: "[t]he members have therefore made clear by an unbroken practice that (1) a member could properly vote to accept a representative of a government which it did not recognize, or with

In November 1971, the 1965 decision on observer status was re-examined in the first meeting of the twenty-seventh session of the CONTRACTING PARTIES, following the passage of the 1971 U.N. Resolution recognizing the representatives of the Government of the PRC as the sole legal representatives of China to the United Nations.<sup>45</sup> The Chairman of the CONTRACTING PARTIES, upon recalling the GATT policy to follow the decisions of the United Nations on essentially political matters, suggested that the CONTRACTING PARTIES decide that "the Republic of China should no longer have observer status" in GATT.<sup>46</sup> A decision of the CONTRACTING PARTIES to this effect was made through a consensus declared at the meeting.<sup>47</sup> It was reported that the PRC government expressed its appreciation of the GATT decision, but did not take any step in regard to China's status in GATT.<sup>48</sup>

#### 4. PRC's Request for Resumption

It was not until the late 1970s, when the PRC government initiated an "open policy" and inaugurated economic reforms at home, that the PRC began to show some interest in GATT.<sup>49</sup> Subsequently, in 1982, the PRC government formally requested to observe the thirty-eighth session of the Contracting Parties. The communication from the PRC government carefully stated that "this request is without prejudice to the position of the Government of the People's Republic of China with regard to its legal status vis-a-vis the

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which it had no diplomatic relations, and (2) such a vote did not imply recognition or a readiness to assume diplomatic relations." *Id.*

45. See *Summary Record of the First Meeting*, GATT Doc. SR.27/1 (Nov. 19, 1971).

46. *Id.* at 2.

47. *Id.* at 3. Note that no request for a vote on the question was made. After the Chairman declared the consensus, however, the representatives of Brazil, the United States, Gabon, Ivory Coast, Greece, South Africa, and Madagascar, respectively, expressed their disagreement with the decision and their disassociation from the consensus. *Id.* at 3-4.

48. See Feeney, *supra* note 20, at 285. See also Chung-Chou Li, *Resumption of China's GATT Membership*, 21 J. WORLD TRADE L. 25, 27 (1987).

49. The initial official contact with GATT was made in 1980, which resulted in the attendance of a Chinese trade official in the GATT commercial policy training course. See Li, *supra* note 48, at 28.

General Agreement on Tariffs and Trade.”<sup>50</sup> The request was approved by GATT, with a large number of representatives speaking in support.<sup>51</sup> In 1984, the PRC government requested and received observer status in meetings of the Council of Representatives and its subordinate bodies;<sup>52</sup> since then China has been attending GATT meetings regularly in the capacity of an observer.

In June 1986, the PRC asked to participate in the forthcoming Uruguay Round of multilateral trade negotiations.<sup>53</sup> Shortly thereafter, on July 14, 1986, the PRC government formally requested resumption of its status as a contracting party in GATT.<sup>54</sup> In its communication to the Director-General of GATT, the PRC government advised that it had decided to seek the resumption of its status as a contracting party to GATT, was prepared to enter into negotiations with GATT contracting parties on the resumption of its status as a contracting party, and that to this end, would provide information on its economic system and foreign trade regime.<sup>55</sup>

#### A Working Party on China's Status as a Contracting

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50. GATT Doc. L/5344 (July 5, 1982).

51. A similar request was made in 1983, and again approved. *See* GATT Doc. L/5549; GATT Doc. C/M/173.

52. GATT Doc. L/5712 (Oct. 26, 1984); GATT Doc. C/M/183, at 4. The Council of Representatives is the intersessional body of the CONTRACTING PARTIES. It has the authority to take up all questions the Contracting Parties deal with at their sessions, as well as any urgent matter. It oversees the work of the various subsidiary GATT bodies. The Council is open to all contracting parties that request its membership. *See* BISD, *supra* note 32, at 8 (9th Supp. 1961); *see also* LONG, *supra* note 1, at 47; GATT Doc. C/M/160, at 2 (Sept. 24, 1982).

53. Li, *supra* note 48, at 39. The PRC was admitted to full participation in the Uruguay Round under the Ministerial Declaration on the Uruguay Round. BISD, *supra* note 32, at 19 (33d Supp. 1987). Part I.F(a)(iv) of the Declaration provides that the Uruguay Round negotiations are open to “countries that have already informed the CONTRACTING PARTIES, at a regular meeting of the Council of Representatives, of their intention to negotiate the terms of their membership as a contracting party.” *Id.* at 27. The provision was said to accommodate China's situation in particular. *Id.*

54. It was the hope of the PRC government that combining the new round of multilateral trade negotiations with the negotiations for its GATT membership would facilitate the process of its reentry into the GATT. BISD, *supra* note 32, at 19 (33d Supp. 1987).

55. *Communication from the PRC*, *supra* note 3.

Party was established by the Council on March 4, 1987 to "examine the foreign trade regime of the People's Republic of China" and "develop a draft Protocol setting out the respective rights and obligations."<sup>56</sup> Substantial progress in negotiations on PRC's GATT membership was underway before June 1989.

### 5. *Taiwan's Application for GATT Membership*

On January 1, 1990, in the midst of the negotiations on PRC's membership in GATT, the Taipei government submitted its application for Taiwan's accession to GATT under article XXXIII of the General Agreement. The most significant aspect of this application is the fact that it was made in the name of "Customs Territory of Taiwan, Penghu, Kinmen and Matsu."<sup>57</sup> It was reported that the Taipei government hoped that by using the term "customs territory," the application would meet with fewer "unnecessary disturbances."<sup>58</sup> Another significant feature of Taiwan's application is that it announces its intent to join GATT as a "developed" economy rather than as a developing economy, the latter being entitled to exceptions from many GATT obligations under current GATT policy.<sup>59</sup> This expression of "good will" is expected to help Taiwan win GATT members' support for its membership application.

### III. LEGAL CONSIDERATIONS

The PRC government has taken the position that Taiwan cannot legally join GATT independently. In supporting this position, the PRC's advocates have provided the following legal arguments and rationales. Taiwan's application to join GATT as a separate customs territory can only be considered after the PRC resumes China's status as a contracting party to GATT because (i) Taiwan is an inalienable part of China, and cannot function as a political entity internationally; and (ii) Taiwan cannot accede to GATT under ar-

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56. See GATT Doc. L/6191/Rev.2 (Apr. 26, 1988).

57. FBIS, China, *supra* note 2, at 53.

58. *Id.*

59. By contrast, the PRC's application specifically stated that it "expects to receive treatment equivalent to that accorded to other developing contracting parties." *Communication from the PRC, supra* note 3.

ticle XXXIII of the General Agreement in view of the fact that there is no precedent in GATT history that a regional government may utilize article XXXIII to join GATT. Consequently, Taiwan's participation in GATT must be sponsored by the PRC. To do otherwise, the PRC advocates argued, would result in recognition of "two Chinas" or "one China, one Taiwan," a situation that would lead to an unacceptable national division.<sup>60</sup>

Before analyzing the legal issues raised by these arguments, the PRC's concern with the "two Chinas" problem must be addressed. As is well known, the Taipei government consistently has insisted on the "one China" policy. Taipei applied for GATT membership in the name of the "customs territory of Taiwan, Penghu, Kinmen and Matsu" precisely to avoid the "two Chinas" problem. It seems therefore groundless to talk about the danger of "two Chinas" or "one China, one Taiwan," when Taipei has clearly refused to claim either the status of another China or that of an independent state of Taiwan in its application for GATT membership.

#### A. *May Taiwan Join GATT Independently?*

The central legal issue raised by the PRC's arguments is whether under international law Taiwan may accede to GATT in its own right. In order to answer this question, we need to look at both GATT law and the international law of treaties.

1. *Qualifications of a GATT Contracting Party*
- a. *Governments of Autonomous Customs Territories*

Unlike the United Nations and many other international organizations, GATT does not require its members to be sovereign states.<sup>61</sup> The term "contracting parties" is defined

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60. See *Mainland Official on Taiwan Joining GATT*, *supra* note 4, at 39; Zhao Xixin, *supra* note 5; Chen Guoqing, *supra* note 5; Yushu Feng, *One GATT, Two Systems*, FAR E. ECON. REV., Mar. 8, 1990, at 48.

61. Article 4 of the Charter of the United Nations provides: "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 judgment of the Organization, are able and willing to carry out these obligations." U.N. CHARTER art. 4, para. 1. Most U.N.-related organizations re-

in article XXXII of the General Agreement as "governments which are applying the provisions of this Agreement under articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application."<sup>62</sup> A drafting document of the General Agreement explains: "Contracting Parties were defined as 'governments,' and not as 'States' or 'nations' so that governments with less than complete sovereignty could be a contracting party to GATT."<sup>63</sup> Thus, as a matter of GATT law, a GATT contracting party is a "government," and is not necessarily a government of a sovereign state. In fact, three of the twenty-two original contracting parties to GATT—Burma, Ceylon (Sri Lanka) and Southern Rhodesia—were not independent nations at the time the General Agreement was drafted.<sup>64</sup> A more recent example is Hong Kong, which became an independent GATT member in 1986.<sup>65</sup>

The qualifications of a contracting party are set forth in article XXXIII and article XXVI:5(c), the two articles that provide procedures under which a government may join GATT. According to both provisions, a government is qualified to become a contracting party when it acts on behalf of a "customs territory" that possesses "full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement."<sup>66</sup>

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quire their members to be states. See FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING: DOCUMENTS, COMMENTS AND QUESTIONS* 100-05 (1977).

62. Paragraph 1 of article XXXII provides: "The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Article XXVI or pursuant to the Protocol of Provisional Application." GATT, *supra* note 1, art. XXII:1, 55 U.N.T.S. at 282.

63. PREPARATORY COMM. OF THE U.N. CONFERENCE ON TRADE AND EMPLOYMENT, REPORT OF THE AD HOC SUB-COMM. OF THE TARIFF AGREEMENT COMM., U.N. Doc. E/PC/T/198 (1947); PREPARATORY COMM. OF THE U.N. CONFERENCE ON TRADE AND EMPLOYMENT, VERBATIM REPORT, 22D MEETING OF THE TARIFF AGREEMENT COMM. 21-22, U.N. Doc. E/PC/T/TAC/PV/22 (1947). See also ANALYTICAL INDEX, *supra* note 30, art. XXXII, at 1.

64. See JACKSON, *supra* note 32, at 96.

65. For a detailed discussion, see *infra* text accompanying notes 77-82.

66. For a comparison of the two provisions, see *infra* text accompanying notes 95-96, 110.

b. *Rationale of GATT Membership Qualifications*

The particular eligibility requirements of a GATT member are determined by the purposes and the nature of GATT. The essence of GATT lies in the willingness of the contracting governments to restrict themselves from imposing barriers to their countries' external trade. Within the GATT framework, the contracting parties negotiate to remove or reduce the maximum level of tariff rates, quotas and other trade restrictions they may maintain with respect to specific goods that their countries may trade with each other. Once the maximum level of restrictions is agreed upon, the contracting parties are bound thereby. In particular, each contracting party has its own schedule listing the maximum tariff rates it may charge on its imports and exports; all the schedules are annexed to the General Agreement and are made an integral part thereof.<sup>67</sup> Hence, the ability to negotiate and fulfill these concrete GATT obligations is essential to a GATT member.

Given the nature of GATT obligations, a contracting party first of all must be a government representing a customs territory that maintains its own tariffs and other trade restrictions. Second, the government must be responsible for the tariff and non-tariff trade restrictions of this territory so that it will be in the position to remove or reduce them. Only the undertakings of such governments are meaningful for GATT's purposes. Obviously, a government that has no control over the trade regulations of a territory is not in the position to undertake the GATT obligations on behalf of this territory.<sup>68</sup>

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67. Article II:7 of the General Agreement states: "The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement."

68. As a practical matter, it is apparently not in the interest of a government to be held responsible for the trade conduct of a territory over which it has no real control. This explains why the deposed Nationalist government of China withdrew from GATT shortly after it lost effective control over mainland China. By comparison, the same Nationalist government remained in the China seat in the United Nations and many other international organizations until it was replaced by the PRC government in 1971.

2. *Does Taiwan Meet the Eligibility Requirements of GATT Membership?*

It is a matter of fact that (i) Taiwan is a separate customs territory—it maintains its own customs and applies its own import and export tariffs; and (ii) Taiwan enjoys full autonomy in conducting its external economic and commercial relations—no other country or government in the world has control over Taiwan's foreign trade and economic relations. Thus, under the GATT membership eligibility test, the only remaining question is whether the government that acts on behalf of the customs territory of Taiwan is qualified to do so. In light of the history of China's problem with government recognition and the fact that GATT terminated the observer status of the Taipei government following the 1971 U.N. Resolution, it seems necessary to clarify whether the same Taipei government may legally represent Taiwan to join GATT.

From a standpoint of legal necessity for GATT purposes, the Taipei government is the only authority that is qualified to join GATT on Taiwan's behalf. As already explained above, for GATT purposes the GATT contracting parties must be responsible for the trade barriers of particular customs territories and thus are capable of undertaking GATT obligations to remove or reduce those barriers. For this reason, if Taiwan is ever to participate in GATT as a separate customs territory, the government that is qualified to represent Taiwan in GATT must be the one that is responsible for imposing the trade barriers in Taiwan. Obviously, since Beijing has nothing to do with Taiwan's customs tariffs or other trade restrictions and has no control over Taiwan's conduct in its external commercial relations and other GATT-regulated matters, the PRC government is unable to undertake GATT obligations for Taiwan.

The fact that GATT once terminated the observer status of the Taipei government on the ground of its illegitimacy does not necessarily have any bearing on the Taipei government's current application for GATT membership. From a legal standpoint, the two situations are distinct from each other. Taipei obtained GATT observer status as the government of "Republic of China" in 1965, and GATT decided in 1971 that it would follow the U.N. General Assembly resolu-

tion and disallow Taipei to continue acting in such capacity in GATT. At present, Taipei is applying for GATT membership in an entirely different capacity, i.e., on behalf of the customs territory of the Taiwan area not China. Therefore, the question of which government is the legitimate representative of China is not an issue in the present situation, and there will be no legal inconsistency on the part of GATT if it decides to accept the application of the Taipei government for GATT membership. Thus, Taiwan appears to meet the eligibility requirements of GATT membership as manifested in the plain text of the General Agreement, and Taiwan's membership in GATT is justified by the purposes and nature of GATT obligations.

### 3. *Is GATT Membership for Taiwan "Legal" Under International Law?*

Notwithstanding the perspective of GATT law, we need to analyze further this issue on the plane of public international law. As a legal institution, GATT is based on a multilateral treaty<sup>69</sup>—the General Agreement on Tariffs and Trade—and its organization evolved from this underlying treaty.<sup>70</sup> In essence, the issue of GATT membership for Taiwan is an issue of Taiwan's legal capacity to enter into multilateral treaty relations.

#### a. *International Legal Theories and Practice*

It is generally accepted in international law that subjects of international law possess treaty-making capacity. A subject of international law is "an entity capable of possessing international rights and duties and endowed with the capacity to take certain types of action on the international plane."<sup>71</sup> Such entities are also commonly referred to as "in-

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69. Unless specified otherwise, the word "treaty" is used throughout this article as a generic term, inclusive of all legal instruments entered into between governments that are governed by international law. For domestic law purposes of individual countries, there may be strict distinctions between a treaty and an agreement in terms of their legal effects and procedures of approval. For instance, under the Constitution of the United States, "treaty" has a specific meaning and effect. U.S. CONST. art. II, § 2, cl. 2.

70. See LONG, *supra* note 1.

71. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS

ternational persons" or entities with "international personality." These terms—subject of international law, international personality, and treaty-making capacity—are used often as equivalents of each other for the purpose of identifying an entity's international legal status. Under the traditional view, only sovereign states are international legal persons and possess treaty-making capacity. Development of international practice in the contemporary world has widened the concept of international legal personality beyond the state,<sup>72</sup> although it is not clear how broad the concept has become. While the international personality of international organizations and non-self-governing peoples generally have been accepted, disagreement exists as to whether certain other entities, such as constituent states of a federal union, multinational corporations, or even individuals, may also possess some degree of international personality.<sup>73</sup> However, for the purpose of determining whether a particular non-state entity has treaty-making capacity under international law, it seems that the only applicable criterion is international practice itself. As one legal theorist pointed out:

It may, indeed, be doubted that international law contains any objective criteria of international personality or treaty-making capacity. The very act or practice of entering into international agreements is sometimes the only test that can be applied to determine whether an entity has such personality or

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168 (1980). The International Court of Justice has defined a subject of international law as an entity "capable of possessing international rights and duties and [which] has the capacity to maintain its rights by bringing international claims." *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11).

72. "The widening of the concept of international legal personality beyond the state is one of the more significant features of contemporary international law." HENKIN ET AL., *supra* note 71, at 168.

73. The entities that are considered to have certain international personalities include: international organizations and their agencies, international territories, non-self-governing peoples, emergent and defunct states and belligerent and insurgent communities, and for some purposes, individuals. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 61 (3d ed. 1979); HENKIN ET AL., *supra* note 71, ch. 4. By contrast, the PRC's mainstream view recognizes three subjects of international law only: states, international organizations, and nations in the stage of fighting for independence. See *INTERNATIONAL LAW TEXTBOOK* 85 (T. Wang ed., 1981).

capacity, or, indeed, "statehood."<sup>74</sup>

In international practice, for a non-state territorial entity to enter into a treaty relation with foreign states, two conditions are generally present: (i) the state that is responsible for the foreign relations of the non-state territorial entity has given its consent, either through a constitutional arrangement or an international agreement with foreign states; and (ii) other parties to the treaty accept the participation of the non-state territorial entity. For instance, all Republics of the Soviet Union were recognized as subjects of international law by the Soviet constitution, among which only the Ukrainian S.S.R. and the Byelorussian S.S.R. became members of the United Nations and were parties in their own rights to numerous multilateral treaties.<sup>75</sup> Many colonial territories, before attaining independence, entered into treaty relations with foreign states, with the consent of their dominant states.<sup>76</sup>

Hong Kong's independent membership in GATT provides a recent example of a non-state territorial entity's entry into treaty relations. Never in history has Hong Kong been an independent state. It was a Chinese territory and became a British colony in the nineteenth century; in accordance with the 1984 Sino-British Joint Declaration on the Question of Hong Kong, it will be returned to China in 1997.<sup>77</sup> With the sponsorship of the British government, Hong Kong became a separate contracting party to GATT in 1986.<sup>78</sup> A question arises as to whether Hong Kong will continue to possess the legal capacity to be an independent contracting party to the General Agreement after it becomes a

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74. Oliver J. Lissitzyn, *Efforts to Codify or Restate the Law of Treaties*, 62 COLUM. L. REV. 1166, 1183 (1962), cited in HENKIN ET AL., *supra* note 71, at 595.

75. HENKIN ET AL., *supra* note 71, at 594.

76. See Oliver J. Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties*, 125 RECUEIL DES COURS 1 (1968).

77. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 23 I.L.M. 1371 [hereinafter Joint Declaration].

78. *Accession of Hong Kong, Succession*, GATT Doc. L/5976 (Apr. 23, 1986), reprinted in BIRD, *supra* note 32, at 27 (34th Supp. 1988).

subordinate administrative region of China in 1997.<sup>79</sup> In this case, Hong Kong's contracting party status in GATT will be retained, because the PRC government, which will be responsible for Hong Kong's foreign relations after 1997, has given its express consent to a limited treaty-making capacity of Hong Kong, including specifically the capacity to maintain its own GATT membership. The PRC's consent was first given in its agreement with the British government in 1984,<sup>80</sup> then in its unilateral statement to GATT in 1986,<sup>81</sup> and finally in the Basic Law of the Hong Kong Special Administrative Region, adopted by the PRC legislature in 1990.<sup>82</sup> Thus, it is based on the PRC's international commitment and particular constitutional arrangement that Hong Kong will maintain its treaty-making capacity with respect to certain subject matters after becoming an administrative region of the PRC.

b. *Taiwan's Treaty-Making Capacity*

Taiwan, however, presents a different situation. For the

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79. Note that China is not a federal union. Hong Kong will become a Special Administrative Region of the PRC in accordance with article 31 of the Constitution of the PRC. Joint Declaration, *supra* note 77, art. 3(1), 23 I.L.M. at 1371.

80. The Joint Declaration provides that the government of Hong Kong Special Administrative Region will enjoy a high degree of autonomy, including the rights to retain the status of free port and a separate customs territory, and to maintain economic and cultural relations and conclude relevant agreements with states, regions and relevant international organizations on its own under the name "Hong Kong, China." Joint Declaration, *supra* note 77, art. 3(6), 3(10), 23 I.L.M. at 1372. Annex I to the Joint Declaration, Elaboration by the PRC Government on its Basic Policies Regarding Hong Kong, made a special reference to GATT in article VI thereof: "The Hong Kong Special Administrative Region shall be a separate customs territory. It may participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles." *Id.* annex I, 23 I.L.M. at 1375.

81. The PRC's statement referred to the Sino-British Joint Declaration and notified the GATT that, with effect from July 1, 1997, the Hong Kong Special Administrative Region "may, using the name of 'Hong Kong, China,' continue to be deemed to be a contracting party to the General Agreement on Tariffs and Trade." GATT Doc. L/5987 (Apr. 24, 1986).

82. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 116, 29 I.L.M. 1520, 1538 (1990).

purpose of determining its treaty-making capacity under international law, Taiwan can only be considered as a non-state territorial entity, as both Beijing and Taipei agree that Taiwan is a province of China, not an independent state. Although some commentators consider Taiwan as a de facto state,<sup>83</sup> it is not useful for the purposes of international law to argue that Taiwan actually possesses the legal requisites of a state, for it seems certain that no entity is a state that does not assert itself to be such.<sup>84</sup> The pertinent inquiry should therefore be made into whether Taiwan as a non-state entity has certain international legal personality.

As a non-state territorial entity, Taiwan is sui generis in terms of its treaty-making capacity. Ordinarily, as a component territory of China, Taiwan should acquire its treaty-making capacity by the consent of the central government of China, either through certain constitutional arrangements or by virtue of an international agreement entered into by China with other states. But in this case, it is impossible to apply this theory since Taiwan is controlled by the political rival of the internationally recognized legal government of China. Although Taipei no longer claims itself to be the sole legitimate Chinese government internationally, it still holds itself out as an equal rival of the PRC government, not the government of a subordinate administrative region of China, and it certainly will not take orders from Beijing.<sup>85</sup> Thus, short of an agreement between Beijing and Taipei, one cannot expect to resort to any constitutional arrangement in or-

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83. See, e.g., R. Sean Randolph, *The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs*, 15 INT'L LAW. 249, 256 (1981).

84. See CLIVE PARRY ET AL., *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* 375 (1986).

85. The current PRC-Taiwan relations have entered into a post-civil war era. Although the PRC government still refuses to renounce the use of force as a means to achieve unification with Taiwan, the two sides are no longer in the de facto or de jure state of civil war, which was waged more than 40 years ago. One can say that the de facto belligerency ended when the PRC army stopped its routine firings at the Kinmen Island following the initiation of the PRC's peaceful unification proposals in the late 1970s. The abolishment of the "Period of Mobilization for Suppression of the Communist Rebellion" on the part of Taiwan on May 1, 1991 marked the official ending of the de jure belligerency between the two sides of the Taiwan Straits.

der to determine Taiwan's treaty-making capacity or international legal personality.

Neither has there been any international legal instrument that may be used to determine the treaty-making capacity of Taiwan. Under international law, the PRC-Taiwan relation is China's "internal affair" with which no foreign government is supposed to interfere. Thus, as a matter of international law, the issue may not even become a subject matter of any international agreement. In reality, with respect to Taiwan, the agreements between the PRC and foreign states are only applicable to the extent that the relevant foreign government recognizes that the PRC government is the only legitimate government of China and that Taiwan is part of China.<sup>86</sup> Such agreements do not define the relations between the PRC government and the Taipei government (as the Sino-British agreement did on Hong Kong's relations with Beijing after 1997) or provide any terms for the unification of China. The same is true of the 1971 U.N. General Assembly Resolution on China.<sup>87</sup>

In practice, under different names and in various capacities, Taiwan has entered into economic, commercial, cultural, and technical agreements with foreign countries that have no diplomatic relations with Taiwan,<sup>88</sup> and maintained

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86. For example, the Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, January 1, 1979, says with respect to Taiwan: "The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan"; and "[t]he Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China." DEP'T ST. BULL., Jan. 1979, at 25.

87. Notwithstanding the legal effect of U.N. General Assembly resolutions, the subject matter of the 1971 U.N. Resolution concerns government representation of China in the United Nations. It does not address the issue of Taiwan's status after its expulsion from the Organization. G.A. Res. 2758, *supra* note 10, at 2.

88. A question arises as to whether agreements between Taiwan and foreign countries under unofficial names are indeed treaties. It is generally accepted in international law that a treaty must be an agreement governed by international law and not subject to municipal law. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 1155 U.N.T.S. 331, 333 [hereinafter Vienna Convention]. But what should be the criteria

its status as a party to a few multilateral treaties.<sup>89</sup> For instance, Taiwan has continued to be a member of the Asian Development Bank after its name was changed from "Republic of China" to "Taipei, China,"<sup>90</sup> and the name change has not affected its status as an independent contracting party to this multilateral inter-governmental treaty. For the other members of the ADB, maintaining their ADB relations with Taiwan after its change of name implies that they have accepted the treaty-making capacity of Taiwan for ADB purposes.

The PRC's own practice with respect to Taiwan's membership in the ADB is inconsistent with its current position on Taiwan's membership in GATT. In the case of the ADB, Taiwan was already a member when the PRC joined in 1986. Although Taiwan's name was changed to "Taipei, China" at the PRC's request, this name change can hardly be interpreted as the indication of "consent" of the PRC government to Taiwan's ADB membership. Taiwan entered into treaty relations with ADB members without Beijing's approval when it was, as a matter of international law, a non-state entity regardless of what name it used at the time.<sup>91</sup> If

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for determining whether an agreement is governed by international law? Should it be a matter of the parties' intent, or instead dictated by the nature of the subject matter of the agreement? It appears that at least some of Taiwan's agreements have apparent attributes of a treaty because the subject matter of the agreement involves the exercise of government power. *See, e.g.*, Protocol Concerning Income Tax Exemption on Shipping Enterprises Between Far East Information Bonn Office and the Taiwan Committee of the German Economy, Aug. 23, 1988, Taiwan-F.R.G.; Exchange of Notes Between the Coordination Council for North American Affairs and the American Institute in Taiwan Relating to Relief from Double Taxation on Earnings Derived from the Operation of Ships and Craft, May 31, 1988, U.S.-Taiwan; Agreement of Air Service Between Chamber of Commerce of China, Jakarta, and Chamber of Commerce of Indonesia, Taipei, Nov. 17, 1988, Taiwan-Indon. (specifically referring to the standard of the Chicago Convention on Civil Aviation of 1944); *reprinted in* 4 A.R.C.I.L.I.A. 313, 463-69 (1990); *see also* Randolph, *supra* note 83.

89. Chiu, *supra* note 13.

90. *See supra* text accompanying note 23.

91. It is particularly significant that Taiwan joined the ADB under the name of "ROC" but made it clear from the very beginning that its representation was limited to the Taiwan area only. *See supra* note 22 and accompanying text.

Taiwan's legal capacity to maintain its ADB membership after the PRC joined could be interpreted as the result of Beijing's giving its "consent," then there is no reason why Beijing cannot express its "consent" in the same way to Taiwan's GATT membership. The ADB and GATT are both inter-governmental economic organizations and both multi-lateral treaties in nature; in both cases, Taiwan acts as a non-state entity. In the case of GATT, what the PRC opposes is the method and timing of Taiwan's application, not Taiwan's eventual participation in GATT as a separate customs territory. Thus, if the PRC can agree to Taiwan's separate participation in the ADB, it is difficult to see why legally it cannot accept Taiwan's separate participation in GATT, since it is always in the position to express its "consent," either now or at the time of its own entry into GATT, regardless of the necessity of such consent.<sup>92</sup>

The fact that Taiwan has been independently conducting its foreign relations, notwithstanding the specific names it has used to do so, is evidence that Taiwan, as a non-state territorial entity, possesses a certain international personality. So far as the foreign countries maintaining various kinds of agreement with Taiwan are concerned, they have recognized *de facto* Taiwan's international personality for certain specific purposes other than political and diplomatic relations. Such recognition is inevitable for the countries that wish to have exchanges with Taiwan, since it is practically impossible for Beijing to conduct foreign relations and take international responsibility for Taiwan. Given this unusual situation, individual states, as a foreign policy matter, have to decide whether and how to enter into a treaty relation with Taiwan on a specific subject matter.<sup>93</sup> Thus, the

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92. The political implications of the ADB situation are, however, quite different from that of GATT. The name change in the ADB was at the PRC's request, and Taiwan only accepted it with protest, whereas in the case of GATT Taiwan took the initiative to use the name of a customs territory, thereby leaving Beijing behind. It is the continuous political competition between Beijing and Taipei that underlies their contention on the issue of GATT membership. It is also noteworthy that Beijing agreed to enter into APEC simultaneously with Taipei but refuses to do the same with respect to GATT membership. *See supra* note 29 and accompanying text.

93. The United States may serve as an example. Under the Taiwan Relations Act, enacted after the United States recognized the PRC govern-

very practice of states has become the only criterion by which Taiwan's treaty-making capacity and the extent of such capacity can be determined.

c. *The Legal Significance of Taiwan's GATT Membership*

To accept Taiwan as a contracting party to GATT without Beijing's consent would mean that GATT, as an international organization, and those GATT countries which agree to enter into GATT relations with Taiwan,<sup>94</sup> recognize Taiwan's treaty-making capacity for GATT purposes. In international law, GATT membership for Taiwan would add to the evidence that, as a non-state territorial entity, Taiwan possesses treaty-making capacity for specific purposes. However, as far as Taiwan's legal status is concerned, except for the scope and purposes of the organization, GATT membership for Taiwan on behalf of "the customs territory of Taiwan, Penghu, Kinmen and Matsu" is no more legally significant than the ADB membership for Taiwan under the appellation of "Taipei, China." Both GATT and ADB are inter-governmental economic organizations, and Taiwan acts in each as a non-state territorial entity.

Legally speaking, Taiwan's GATT membership would not necessarily open the doors of other international organizations to Taiwan's participation. For Taiwan to become a member of a particular international organization, the constituent treaty of the organization must permit a non-state entity to participate;<sup>95</sup> and the members of the organization

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ment as the legal government of China and established diplomatic relations with the PRC in 1979, all the programs, transactions, and other relations conducted by the U.S. government with respect to Taiwan are to be conducted by or through the American Institute in Taiwan, a nonprofit corporation incorporated under the laws of the District of Columbia. Taiwan Relations Act, 22 U.S.C. § 3305 (1988).

94. Under article XXXV of the General Agreement, existing GATT contracting parties may opt not to apply the General Agreement with an acceding country.

95. Several major inter-governmental organizations allow a non-state entity to become an associate member (without the right to vote), including the FAO, UNESCO, WHO, and the Inter-Governmental Maritime Consultative Organization (IMCO). The Universal Postal Union (UPU) and the World Meteorological Organization (WMO) admit non-state territory members, albeit without clear provisions to that effect. See Chiu, *supra* note 13, at 55.

must decide whether to accept Taiwan for the purposes of the organization. Nevertheless, to the extent that GATT membership would testify to Taiwan's international personality for GATT purposes, it would not be inconceivable if certain other inter-governmental organizations with similar stature might consider the possibility of Taiwan's participation within the constitutions of their organizations.<sup>96</sup>

B. *May Taiwan Apply for Accession to GATT Under Article XXXIII?*

The PRC government argued that Taiwan cannot apply for accession to GATT under article XXXIII because there is no precedent for a non-state government utilizing article XXXIII to join GATT. Instead, the PRC suggested, Taiwan's participation in GATT should be through article XXVI:5, which provides for GATT membership by sponsorship of an existing GATT contracting party that has international responsibility for the applicant. The significance of this argument is that if article XXVI:5 is the correct provision for Taiwan's GATT membership, Taiwan must wait until the PRC government joins GATT and offers sponsorship for it, because under international law the PRC government would be the party that has "international responsibility" for a territorial component of China.

1. *Article XXVI:5*

Articles XXVI:5 and XXXIII provide two ways in which a government that is not an original contracting party may become a GATT member.<sup>97</sup> While article XXXIII is applicable in any general situation, article XXVI:5 is designed in partic-

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96. For example, the Articles of Agreement of the International Monetary Fund (IMF) refer to its members as countries rather than states. "Membership shall be open to the governments of countries at such times and in accordance with such terms as may be prescribed by the Fund." Bretton Woods Agreements, Dec. 27, 1945, art. 2, 2 U.N.T.S. 39, 42. This would seem to leave open at least the possibility of arguing that statehood is not required for IMF membership, as "state" is a well-defined legal concept in international law whereas "country" is not. See KIRCIS, *supra* note 61, at 105. Note that the members of IMF are eligible to be members in the International Bank for Reconstruction and Development (the World Bank). Bretton Woods Agreements, *supra*, art. 2, 2 U.N.T.S. at 136.

97. See *supra* note 62 and accompanying text.

ular for the situation in which a former colonial territory, which has been applying GATT because a contracting party has accepted the Agreement on its behalf, becomes independent in its external commercial relations. In such a situation, if the customs territory wishes to become an independent GATT member, it may do so either through a sponsorship of its former responsible contracting party or by applying under article XXXIII.<sup>98</sup> A major advantage of sponsored membership under article XXVI:5 is that the new contracting party is not required to go through new trade negotiations and make new tariff concessions as will normally be required of accession under article XXXIII. Hence, by simplifying the application process and providing a smooth transition, article XXVI:5 encourages newly independent countries to stay in GATT.

A recent example of accession under article XXVI:5 is Hong Kong,<sup>99</sup> which, before it became an independent contracting party in 1986, had been applying the General Agreement as a customs territory under the responsibility of the British government. On April 23, 1986, the GATT Secretariat received a communication from the British government declaring that Hong Kong, being a separate customs territory, possessed full autonomy in the conduct of its external commercial relations and other matters provided for in the Agreement, and that in accordance with article XXVI:5(c) and with the wishes of Hong Kong, would be deemed to be a contracting party to the Agreement from the date of the communication.<sup>100</sup> The communication also called attention to the fact that, under the Joint Declaration of the U.K. and the PRC governments, the United Kingdom will restore Hong Kong to the PRC effective July 1, 1997, and that the United Kingdom will continue to have international responsibility for Hong Kong until that date.<sup>101</sup> Subsequently, the GATT Director-General certified that the conditions required by article XXVI had been met, and a new Schedule LXXXII, which comprises the concessions specified in the

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98. See JACKSON, *supra* note 32, at 96-100; Tatsuro Kunugi, *State Succession in the Framework of GATT*, 59 AM. J. INT'L L. 268 (1965).

99. For a list of other contracting parties that acceded to GATT under article XXVI:5, see ANALYTICAL INDEX, *supra* note 30, art. XXVI, at 6-7.

100. *Accession of Hong Kong, Succession, supra* note 78.

101. *Id.*

Hong Kong Section of Schedule XIX-United Kingdom, was established for Hong Kong.<sup>102</sup>

The GATT Secretariat also received a statement from the PRC government with respect to Hong Kong's independent membership in GATT on April 23, 1986, which notified GATT that Hong Kong will become a Special Administrative Region of the PRC effective July 1, 1997 and that the PRC will have international responsibility for Hong Kong after that date.<sup>103</sup> The PRC statement declared that, effective July 1, 1997 the Hong Kong Special Administrative Region will meet the requirements for a customs territory to be deemed a contracting party as prescribed in GATT article XXVI:5(c), and therefore, using the name of "Hong Kong, China," may continue to be deemed a contracting party to the General Agreement on Tariffs and Trade.<sup>104</sup>

The PRC government's statement is legally significant in that it constitutes a unilateral commitment on its part towards the GATT contracting parties that Hong Kong's status as a separate customs territory and its autonomy in conducting external economic and trade relations will remain unchanged after July 1, 1997. The statement, together with the Joint Declaration with the U.K. Government on the Question of Hong Kong,<sup>105</sup> has provided sufficient legal basis for Hong Kong's continued contracting party status in GATT, even if the PRC's membership in GATT remains unsettled on July 1, 1997.<sup>106</sup>

It should be pointed out, however, that the PRC government's statement is legally unnecessary for Hong Kong to become a separate contracting party, because article XXVI:5(c) requires only the sponsorship of an existing contracting party that has accepted the General Agreement on the behalf of the acceding customs territory, which in this case is the British government. Once a customs territory has

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102. *Id.*

103. *See supra* note 81 and accompanying text.

104. *Id.*

105. *See supra* note 80 and accompanying text.

106. A question may be raised as to the legal effect of the PRC's unilateral declaration. It is the author's opinion that the PRC statement will, at least, have the effect of estopping Beijing from claiming that Hong Kong's contracting party status will be in question if Beijing remains outside of GATT by July 1, 1997.

become a contracting party, it is on equal footing with any other GATT member including its sponsor, and there is no need for continuing sponsorship.

The PRC government apparently wishes to deal with Taiwan's GATT membership in a way similar to its treatment of Hong Kong. However, a careful reading of the provisions of article XXVI:5 reveals that they are simply not applicable to the case of Taiwan:

(a) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary<sup>107</sup> to the Contracting Parties at the time of its own acceptance.

(b) Any government, which has so notified the Executive Secretary under the exceptions in subparagraph (a) of this paragraph, may at any time give notice to the Executive Secretary that its acceptance shall be effective in respect of any separate customs territory or territories so excepted and such notice shall take effect on the thirtieth day following the day on which it is received by the Executive Secretary.

(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.

Assuming that the PRC obtains GATT membership first, and assuming also that the PRC government has international responsibility for Taiwan, as provided for in para-

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107. The title of the head of the GATT Secretariat was changed from "Executive Secretary" to "Director-General" by a decision of the CONTRACTING PARTIES on March 23, 1965. See GATT, THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE preface (1986).

graph 5(a), the scenario for an attempt to apply article XXVI:5 to the Taiwan situation would be as follows:

(1) At the time it becomes a GATT member, the PRC government would, pursuant to paragraph 5(a), notify GATT of those "separate customs territories" of China for which it considers itself to have international responsibility but on whose behalf it will not accept the General Agreement. These territories would include Hong Kong, Macao and Taiwan, the three Chinese customs territories which are separate from that of mainland China and for which the PRC government would not be in the position to accept GATT obligations. With respect to Hong Kong and Macao, the PRC's notification under paragraph 5(a) would seem to serve a procedural purpose only since these two territories already are in GATT.<sup>108</sup> With respect to Taiwan, however, notification would be necessary, as Taiwan would still be outside of GATT at the time of the PRC's acceptance of the General Agreement.

(2) After its own entry into GATT, however, the PRC government would find itself unable to utilize article XXVI:5(c) to sponsor Taiwan to join GATT because paragraph 5(c) concerns only a customs territory "in respect of which a *contracting party* has accepted this Agreement" (emphasis added), not a customs territory that has never applied the General Agreement before. In other words, for Taiwan to become a GATT member through PRC's sponsorship under article XXVI:5(c), the PRC government must have already accepted GATT on Taiwan's behalf. As the PRC government will not have been able to do so, Taiwan cannot ex-

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108. Macao is in a situation similar to that of Hong Kong. As a colony of Portugal, Macao will be returned to China in 1999 in accordance with the Joint Declaration on the Question of Macao between the PRC and Portuguese governments signed on April 13, 1987, 16 PRC ST. COUNCIL BULL. 549 (1987). Pursuant to the Joint Declaration, Macao will enjoy a high degree of autonomy similar to that of Hong Kong after its return to China, including the right to continue its participation in GATT after 1999. Joint Declaration on the Question of Macao, *supra*, art. 2; *id.* annex I, para. 10 (elaboration of the PRC government). Macao applied GATT under the responsibility of the Portuguese government. BISD, *supra* note 32, at 3 (14th Supp. 1966). In January 1991, Macao became a separate contracting party to GATT under the sponsorship of the Portuguese government pursuant to article XXVI:5(c). GATT Doc. L/6806 (1991).

pect to become a contracting party pursuant to article XXVI:5(c).

(3) Thus, the only possibility left for Taiwan to join GATT under article XXVI:5 would be through paragraph 5(b), which provides that the contracting party that has notified GATT of a paragraph 5(a) exception may give notice to GATT that its acceptance of GATT will from now on include the previously excepted separate customs territory. However, it is obvious that the PRC government would not be able to give such notice under paragraph 5(b) so long as it does not have real control over the customs territory of Taiwan. And, of course, should the PRC be able to give such a notice under 5(b), Taiwan would not be a separate contracting party to GATT.<sup>109</sup> Therefore, from a strictly legal perspective, the provisions of article XXVI:5 (sub-paragraphs (a)-(c)) cannot be applied to the situation of Taiwan to resolve the issue of its participation in GATT. As it is technically impossible for Taiwan to accede to GATT under article XXVI:5, the only route that is available for Taiwan to join GATT is through accession under article XXXIII.

## 2. *Article XXXIII*

Article XXXIII provides the normal procedures for accession to GATT under which the contracting parties may accept a new member upon negotiated terms and by a two-thirds majority vote. Article XXXIII reads:

A government not party to this Agreement, or 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 its own behalf or on behalf of that territory, on terms to be agreed between such government and the Contracting Parties. Decisions of the Contracting Parties under this paragraph shall be taken by a two-thirds majority.

According to this provision, two kinds of governments are eligible to use the accession procedures of article XXXIII: (i) a government not party to the Agreement acting on its

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109. See *supra* notes 61, 65 and accompanying text.

own behalf; and (ii) a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and other GATT matters. Apparently, the first type of government refers to a government representing a national state, whereas the second type refers to a government that represents a territorial entity less than a state (but a separate customs territory possessing full autonomy in its external commercial relations). Theoretically, the second type of government could be interpreted as either a national government acting on behalf of a separate customs territory which is not part of its national territory, or a government of the customs territory itself. The seemingly ambiguous language is of little importance, however, given that it has already been made clear both in the legislative intent and in practice that a government less than a sovereignty is permitted to become a contracting party to GATT.

The PRC government argues that Taiwan may not accede to GATT under article XXXIII because there is no precedent that a government less than a sovereignty may do so. This argument, however, is not persuasive. First of all, lack of precedent under a certain provision of law is not a valid legal reason for not using the provision. A new precedent can always be created. Second, while it is true that in GATT practice the governments that have acceded to GATT under article XXXIII are generally representatives of sovereign states, there are two possible exceptions: the governments of West Germany and South Korea.<sup>110</sup> The accessions of West Germany and South Korea were first considered during the Torquay negotiations in 1950, which was also the first and only time in GATT history that the issue of government qualifications was raised under article XXXIII.<sup>111</sup> Although no clear answer was given to this question, it is significant enough for the purpose of interpreting article XXXIII that

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110. See ANALYTICAL INDEX, *supra* note 30, art. XXXIII, at 3-5; *id.* Contracting Parties, at 1-3.

111. The Czechoslovakian delegation protested the admission of the two countries to the negotiations on the ground that, in its opinion, the two countries "have no legal capacity to become contracting parties." 2 BISD, *supra* note 32, at 158-59. West Germany acceded to GATT on October 1, 1951. 2 *id.* at 34. South Korea did not accede to GATT until April 1967. See 2 *id.* at 33; 4 *id.* at 44 (15th Supp. 1968).

the two governments were both admitted to GATT under article XXXIII despite the fact that the statehood of the two countries was in dispute.

Finally, while articles XXXIII and XXVI:5 provide different procedures for accession to GATT, the basic eligibility requirements of a GATT contracting party should be the same under both provisions.<sup>112</sup> In fact, the language of qualifications of the second type of government under article XXXIII is almost identical to that of article XXVI:5(c); both refer to a "customs territory" possessing "full autonomy in the conduct of its external commercial relations and the other matters provided for in this Agreement." Hence, if the government of less than a sovereignty is eligible to become a GATT contracting party under article XXVI:5, such government should be eligible to accede to GATT under article XXXIII as well.<sup>113</sup> This understanding has been borne out by GATT practice, as the newly independent countries have a choice to utilize article XXVI:5 or article XXXIII to accede to GATT.<sup>114</sup> Thus, it is an unsupported view that article XXVI:5 applies to non-state customs territories and article XXXIII is for accession of governments of states only.

### 3. *An Article XXXV Problem*

One practical consequence of using article XXXIII procedures for Taiwan's accession to GATT is the possibility that Taiwan may opt not to apply GATT relations with the PRC by invoking article XXXV, given that direct trade with

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112. The major procedural differences between articles XXXIII and XXVI:5 are that accession under article XXXIII is subject to a two-thirds majority vote, negotiations of a new tariff schedule, and other terms of membership, whereas membership through sponsorship is almost automatic and does not involve renegotiation of any new term. In addition, accession under article XXXIII may involve invocation of non-application of GATT between the acceding party and existing contracting parties under article XXXV. See *infra* part III.B.3.

113. Thus, although article XXVI:5 is apparently the right procedure to use for Hong Kong to become a separate GATT member, theoretically Hong Kong should also be qualified for accession under article XXXIII. The treaty-making capacity of Hong Kong as a non-state territorial entity is a separate issue from the eligibility requirements of article XXXIII. See *supra* text accompanying notes 71-76.

114. See *supra* text accompanying note 98.

the PRC is still prohibited under Taiwan's current policy.<sup>115</sup> Paragraph 1 of article XXXV provides for non-application of the GATT relationship between particular contracting parties if: (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

Because condition (b) refers to "at the time either becomes a contracting party," article XXXV can only be invoked at the time of accession.<sup>116</sup> Both the acceding party and an existing contracting party may invoke the article. In GATT history, there have been many invocations of article XXXV.<sup>117</sup> The most extensive invocations recorded are with respect to Japan,<sup>118</sup> although a majority of these invocations have subsequently been withdrawn.<sup>119</sup> There have also been some invocations of article XXXV against centrally-planned

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115. Taipei reportedly is worried that even indirect trade with mainland China could result in undesirable economic dependence on the mainland. See *Trade Growth with Mainland Worrisome*, FREE CHINA J., June 21, 1991, at 3; see also Baum, *supra* note 16; *Mainland Claims Taiwan Largest Investor There*, *supra* note 16; Jeremy Mark, *Trade Links with China Alter Taiwanese Economy*, ASIAN WALL ST. J. WKLY., Sept. 2, 1991, at 4.

116. Article XXXV was added to the General Agreement in 1948 as a result of the changing of the voting requirement from unanimity to a two-thirds majority in taking the decision on accession under article XXXIII. The change of voting requirement in article XXXIII raised the possibility that a contracting party could be forced to enter into the GATT relation with another country without its consent. Article XXXV was designed to solve this problem. See JACKSON, *supra* note 32, at 92; ANALYTICAL INDEX, *supra* note 30, art. XXXV, at 1.

117. For the list of all invocations in GATT history and their current status, see ANALYTICAL INDEX, *supra* note 30, art. XXXV, at 3-6, §§ 6-7.

118. Fifteen contracting parties (accounting for 40% of Japan's exports to all GATT contracting parties) invoked article XXXV when Japan acceded to GATT in 1955. See Marco C.E.J. Bronckers, *A Legal Analysis of Protectionist Measures Affecting Japanese Imports in the European Community—Revisited*, in PROTECTIONISM AND THE EUROPEAN COMMUNITY 57, 60 (E.L.M. Völker ed., 1987).

119. The extensive use of article XXXV against Japan caused the CONTRACTING PARTIES to conduct several studies of the situation. See GATT Doc. L/1545, GATT Sales No. 1962-1, reprinted in BIRD, *supra* note 32, at 69 (10th Supp. 1962). Through informal persuasion, as well as collective pressure, most of the contracting parties eventually withdrew their invocation of article XXXV. See JACKSON, *supra* note 32, at 101-02. Once the invocation of article XXXV is withdrawn, it cannot be restored.

economy countries.<sup>120</sup>

As article XXXV can only be invoked in the context of article XXXIII accession,<sup>121</sup> it is understandable that the PRC would find it all the more in its interest to argue that Taiwan can only enter into GATT under article XXVI:5. However, since article XXXIII procedure is the only appropriate one for Taiwan to join GATT, it seems inevitable that the PRC government will be subject to the possibility of Taiwan's invocation of article XXXV in the event that Taiwan is admitted to GATT.<sup>122</sup> (Of course, Taiwan may decide not to do so in return for support for its GATT membership.)

C. *Is "Resumption" an Obstacle to Taiwan's GATT Membership?*

In opposing Taiwan's entry into GATT before the PRC, Beijing argued that while it is negotiating the resumption of China's original contracting party status in GATT, Taiwan must wait. Resumption instead of accession as a new member is one of the principles that the PRC government has insisted on with respect to its GATT membership. The rationale of the PRC's position seems to be that Taiwan, as a separate Chinese customs territory, cannot be considered for GATT membership before the issue of China's status as a contracting party to GATT is resolved.

The PRC's request to resume China's original status in GATT was made on the ground that the 1950s withdrawal from GATT by the Nationalist government on behalf of China was null and void as a matter of international law, be-

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120. They include invocations by (South) Korea against Cuba, Czechoslovakia, Yugoslavia and Poland and invocations by the United States against Romania and Hungary. Czechoslovakia and Romania also invoked article XXXV against Korea. See ANALYTICAL INDEX, *supra* note 30, art. XXXV, at 4-6.

121. In GATT history, a large number of new contracting parties that acceded to GATT through sponsorship under article XXVI:5(c) inherited the invocation of article XXXV against Japan from the contracting parties formerly responsible for their customs territories. However, such invocation of article XXXV by a new contracting party acceding to GATT upon sponsorship under article XXVI:5 against an existing contracting party is limited to the situation of inheritance only. See ANALYTICAL INDEX, *supra* note 30, art. XXXV, at 3-6, §§ 6-7.

122. It is unclear how this would affect the current indirect trade between the two sides of the Taiwan Straits.

cause the only lawful government of China at that time was the PRC which had effective control over mainland China as of October 1, 1949. The PRC's position on the invalidity of the 1950s withdrawal is consistent with the 1971 U.N. Resolution on China, which restored the China seat to the PRC, and conforms with international legal principle regarding the effect of government recognition.<sup>123</sup>

### 1. *The Legal Effect of Non-Application of GATT*

The invalidity of the 1950s withdrawal, although the source of the problem, is not really an issue with GATT.<sup>124</sup> What is at issue here is the continuing validity of China's contracting party status to the General Agreement after non-application of the Agreement between China and other contracting parties over a period of more than forty years—a period almost equal to the entire life of GATT—during which substantial changes have occurred both in China and in GATT. The question of China's contracting party status in GATT is, in essence, a question for the law of treaties. Under the law of treaties, the non-application (or discontinuance in force) of the General Agreement between China and GATT contracting parties may be regarded as a result of either suspension or termination of the operation of the treaty between China and other contracting parties.<sup>125</sup> By requesting “resumption” of its contracting party status, the PRC government clearly indicated its interpretation of the situation as a “suspension” rather than a “termination” of GATT relations.<sup>126</sup> However, suspension of the operation of a treaty generally requires an understanding of the parties

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123. See *supra* text accompanying note 11.

124. So far as GATT is concerned, there is no question as to the right of the PRC government to represent China. See *supra* text accompanying notes 43-44.

125. Part V of the Vienna Convention on the Law of Treaties, entitled “Invalidity, Termination and Suspension of the Operation of Treaties,” categorizes the situations of non-application of treaties. Vienna Convention, *supra* note 88, 1155 U.N.T.S. at 342.

126. If termination is the case, accession under article XXXIII would be in order. For a detailed legal analysis on the issue of resumption versus accession with respect to the PRC's membership in GATT, see Ya Qin, *China and GATT: Toward a Meaningful Participation?* 374 (1990) (unpublished S.J.D. dissertation, Harvard University Law School, available in Harvard Law School Library).

involved, either through express consent of the parties or by virtue of the provisions in the treaty.<sup>127</sup> In this case, the understanding of the situation has been anything but clear. Until the PRC's request for resumption of China's GATT status, GATT and its contracting parties consistently treated the non-application of GATT with respect to China as the result of termination of the treaty, although on a legally incorrect ground.<sup>128</sup>

More important, both the Chinese economic and trade system and the GATT system have undergone substantial changes during the period of non-application. In brief, the nature and quantity of China's trade barriers have changed dramatically since the PRC adopted a centrally-planned economic system and expanded its foreign trade relations. In the GATT system, the number of the contracting parties has increased to more than one hundred and the average level of tariffs has been substantially lowered. Given the extent of these changes, it is arguable that under the law of treaties, a fundamental change of circumstances has occurred, thereby terminating the rights and obligations of the 1947 Protocol between China and other contracting parties.<sup>129</sup>

In fact, both the PRC government and GATT contracting parties have agreed that China's re-entry into GATT

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127. See Vienna Convention, *supra* note 88, art. 57, 1155 U.N.T.S. at 345 (providing that suspension may take effect either "[i]n conformity with the provisions of the treaty" or "by consent of all the parties after consultation with the other contracting states").

128. GATT consistently treated the withdrawal as a valid action, which is reflected in all relevant GATT official documents and materials. The PRC government did not clarify its understanding of the situation until it requested resumption in July 1986. See Qin, *supra* note 126.

129. See Vienna Convention, *supra* note 88, art. 62, 1155 U.N.T.S. at 347 (Fundamental Changes of Circumstances (*rebus sic stantibus*)). Under article 62, the doctrine of *rebus sic stantibus* may be invoked as a basis for terminating a treaty if "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." *Id.* See generally Oliver J. Lissitzyn, *Treaties and Changed Circumstances*, 61 AM. J. INT'L L. 895 (1967) (discussing terminating treaties under the doctrine); György Haraszti, *Treaties and the Fundamental Change of Circumstances*, 146 RECUEIL DES COURS 1 (1975). For history development and application of the doctrine, see ATHANASSIOS VAMVOUKOS, *TERMINATION OF TREATIES IN INTERNATIONAL LAW* 5-11 (1985).

will have to be based on new terms subject to negotiation. The PRC government suggested a "resumption-in-form-only" approach:

[H]aving 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 occurred during the period of suspension. This approach would be in the interest of all parties.<sup>130</sup>

As realistic as it attempts to be, this resumption-in-form-only approach is legally unsound and impossible to pursue under the particular legal structure of GATT.

## 2. *The Fallacy of the PRC's Resumption Approach*

The most peculiar aspect of the GATT legal system is that the General Agreement itself has never entered into force.<sup>131</sup> Instead, the provisions of the General Agreement have been brought into application by a series of protocols—the 1947 Protocol of Provisional Application and the numerous subsequent accession protocols—entered into between and among the contracting parties.<sup>132</sup> Each of these protocols sets forth specific terms and conditions under which a

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130. Statement by Shen Jueren, Deputy Minister of the Ministry of Foreign Economic Relations and Trade of the PRC and head of the Chinese Delegation to GATT, at the Third Session of GATT Working Party on China held on April 26, 1988, in Geneva.

131. See *supra* note 31 and accompanying text.

132. A protocol of accession typically provides that the acceding party "shall apply to contracting parties provisionally and subject to this Protocol: (a) Parts I, III and IV of the General Agreement, and (b) Part II of the General Agreement to the fullest extent not inconsistent with its legislation existing on the date of this Protocol." The protocols of accession for certain centrally-planned economies, i.e., Poland, Romania and Hungary, contain additional substantive obligations not provided for in the provisions of the General Agreement. See BISD, *supra* note 32, at 52 (15th Supp. 1968); *id.* at 10 (18th Supp. 1972); *id.* at 3 (20th Supp. 1974). For a general introduction to GATT and centrally-planned economies, see M.M. KOSTECKI, *EAST-WEST TRADE AND THE GATT SYSTEM* (1979).

particular contracting party undertakes to apply the provisions of the General Agreement to other contracting parties. The tariff schedule of a particular contracting party is also annexed to its applicable protocol. Each of these protocols, therefore, is a separate multilateral treaty under international law.<sup>133</sup> As far as China is concerned, the 1947 Protocol is the treaty that brought it into GATT relations with the other twenty-one original contracting parties. Thus, in order to resume such GATT relations, the PRC would have to resume the application of the 1947 Protocol.

It is unlikely that contracting parties could resume GATT relations with China on the terms of the 1947 Protocol because of the substantial changes over the last four decades. As explained above, it is understood between China and GATT contracting parties that new terms, including a new tariff schedule for China, would have to be negotiated, and a new legal instrument incorporating these terms would have to be concluded. However, once a new agreement is concluded between the PRC and GATT contracting parties regarding to the application of GATT, the 1947 Protocol will be superseded with respect to China as a matter of international law. According to article 59(1) of the Vienna Convention on the Law of Treaties:

A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.<sup>134</sup>

There is no question that the new agreement between the PRC government and the GATT contracting parties would relate to the same subject-matter as that of the 1947 Proto-

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133. The 1947 Protocol and all the accession protocols are registered with the U.N. Secretariat in accordance with the requirement of treaty registration under article 102 of the U.N. Charter.

134. Vienna Convention, *supra* note 88, art. 59(1), 1155 U.N.T.S. at 345-46.

col—the application of the General Agreement between China and the other contracting parties—and that all the parties to the new agreement would intend that the matter of China's application of GATT be governed by the new agreement, not the 1947 Protocol. Obviously, the contents of the new agreement, including the new tariff schedule, would be so incompatible with those of the 1947 Protocol that the two instruments could not be applied simultaneously. One may question whether the 1947 Protocol could be deemed terminated with respect to China if "all the parties" to the 1947 Protocol do not enter into the new agreement, as explicitly required under article 59.<sup>135</sup> Under the Vienna Convention on the Law of Treaties, it is possible to have a multilateral treaty terminated with respect to one party only.<sup>136</sup> Since the 1947 Protocol has not been in use with respect to China, whether it would be considered "terminated" between China and an existing contracting party to the 1947 Protocol which would not enter into the new agreement with China is of neither practical nor legal consequence.<sup>137</sup>

There is also a technical obstacle standing in the way of China's resumption of the 1947 Protocol. The 1947 Proto-

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135. Article XXXV of the General Agreement allows non-application of GATT between particular contracting parties provided the decision is made at the time a country is acceding to GATT under article XXXIII. See *supra* note 116 and accompanying text. One of the legal issues involved in resumption versus accession in the China case is whether under resumption article XXXV can still be invoked. Since resumption would be impossible, the PRC would accede to GATT under article XXXIII. Accordingly, article XXXV would be invocable at the time of the PRC's accession.

136. Article 60(2) of the Vienna Convention provides that "[a] material breach of a multilateral treaty by one of the parties entitles the other parties by unanimous agreement . . . to terminate it either (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties." Vienna Convention, *supra* note 88, art. 60(2), 1155 U.N.T.S. at 346. In theory, contracting parties could argue that if China considered its GATT relations still valid, China's failure to carry out any of its GATT obligations constituted a material breach of the treaty. See *supra* notes 126-28 and accompanying text.

137. Article 30 of the Vienna Convention, concerning application of successive treaties relating to the same subject-matter, provides that when the parties to the later treaty do not include all the parties to the earlier one, "[a]s between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations." Vienna Convention, *supra* note 88, art. 30, 1155 U.N.T.S. at 339.

col is a treaty effective only among its contracting parties (currently nineteen in total, excluding China).<sup>138</sup> Thus, even if the PRC could resume China's original contracting party status by relying on the 1947 Protocol, it would still need to enter into a new agreement with the rest of the GATT contracting parties (including all the acceding contracting parties) with respect to the application of GATT between them. The legal complications involved in reconciling the two agreements make such an arrangement unlikely to happen.

In sum, assuming that the 1947 Protocol is currently suspended between China and other original contracting parties, the logic that the conclusion of a new agreement between the Chinese government and other GATT contracting parties relating to the application of GATT inevitably would replace the 1947 Protocol with respect to China makes it impossible for the PRC to resume China's original contracting party status. This conclusion will stand regardless of whether the new agreement should be titled the "protocol of resumption" or "joint declaration on the resumption of China's status as a contracting party to GATT,"<sup>139</sup> as termination of a treaty may be implied by the conclusion of a later treaty of the same subject-matter.<sup>140</sup> Of course, because it is technically impossible for the PRC to resume China's original contracting party status in GATT, the resumption argument cannot prevail in opposing Taiwan's application for GATT membership.

#### IV. CONCLUSIONS

The question of whether Taiwan may legally accede to GATT in its own right can be answered by referring to the law of GATT and the law of treaties. Under GATT law, Taiwan apparently meets the requirements of GATT membership as a separate customs territory possessing full autonomy in the conduct of its external commercial relations and other matters provided for in the General Agreement. The pur-

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138. See ANALYTICAL INDEX, *supra* note 30, Protocol, at 1.

139. It was suggested, for instance, that the legal instrument for "resumption" should be in the form of a "joint declaration" instead of a "protocol." See Li, *supra* note 48, at 46.

140. Vienna Convention, *supra* note 88, art. 59, 1155 U.N.T.S. at 345-46.

poses and particular nature of GATT legal obligations also justify Taiwan's independent membership.

Under the law of treaties, the question of Taiwan's qualification for GATT membership is a question of Taiwan's treaty-making capacity as a non-state territorial entity. Because Taiwan does not fit into any usual category of non-state territorial entities recognized under international law, there is no ready answer to this question. In practice, Taiwan has been acting internationally as an independent entity. The Taipei government has engaged in foreign relations, and Taiwan has entered into international agreements of various purposes with countries that do not maintain diplomatic relations with it. GATT membership for Taiwan would add to the evidence in international law that Taiwan possesses treaty-making capacity for specific purposes.

The PRC government's position that Taiwan, as a territorial component of China, has no right to function internationally without the approval of the PRC government would find support under international law if Taiwan were not under the effective control of its political rival. However, the legal character of PRC-Taiwan relations, which is inherently "domestic" under international law, prevents Beijing from resorting to any international agreement or legal principle to bolster its position. In practice, the PRC's acceptance of Taiwan's equal participation in certain other inter-governmental organizations, e.g., the Asian Development Bank, does not appear to be legally consistent with its position on Taiwan's GATT membership.

At the level of GATT procedure, Taiwan's accession to GATT can be accomplished only through article XXXIII of the General Agreement. The PRC government's contrary argument, that Taiwan is not a national government and thus cannot accede to GATT under article XXXIII and instead must wait for sponsorship from Beijing, cannot be supported. The procedure under article XXVI:5, pursuant to which an autonomous customs territory may become a GATT member upon the sponsorship of a responsible contracting party, is applicable only to a situation in which the acceding territory has already been applying the General Agreement prior to its accession by virtue of the acceptance of GATT by its responsible contracting party on its behalf. Since Taiwan has not been applying GATT, and since the

PRC will not be able to accept GATT on Taiwan's behalf even if it joins GATT first, article XXVI:5 is technically not applicable to the situation of Taiwan. By comparison, the plain language of article XXXIII suggests that a government of a non-state customs territory may accede to GATT pursuant to its provision. The fact that in GATT practice governments with disputable legal status (i.e., West Germany and South Korea) were permitted to use the article XXXIII procedure for accession to GATT also supports the view that article XXXIII is not restricted to use by national governments. While articles XXXIII and XXVI:5 provide different procedures for accession, the basic eligibility requirements of an acceding government are the same under both provisions. For these reasons, article XXXIII is the correct procedure under which Taiwan may apply for accession to GATT.

The PRC's position that Taiwan's participation in GATT should not be considered before the PRC resumes China's original contracting party status in GATT cannot be sustained because of the fallacy of the resumption approach. Given the substantial change of circumstances in the last forty years, resumption of China's original contracting party status is practically impossible under the peculiar legal structure of GATT. The resumption-in-formality-only approach adopted by the PRC government is legally unsound and impossible to pursue in a legally coherent manner.

The PRC government's argument that Taiwan's membership in GATT without Beijing's approval would cause a "two-China" problem is legally groundless, given that Taipei has applied for GATT membership as a separate customs territory of China, and not as the state of China.

On the whole, the PRC government's position on Taiwan's application for GATT membership is not founded upon solid legal ground. The GATT membership rivalry between Beijing and Taipei is a continuation of their political rivalry in the contemporary context. Thus, for GATT and GATT contracting parties, the question of whether to admit Taiwan to the organization in its own right, regardless of Beijing's opposition, is essentially a political issue rather than a legal one.

As a policy matter, GATT membership for Taiwan, as it is for any other independent trading area, would be consis-

tent with the pronounced objectives of GATT. Given Taiwan's considerable trading power, its undertaking of GATT obligations certainly would be beneficial to the development of world trade.

The legal significance of GATT membership for Taiwan is rather limited, since such membership would not change Taiwan's ambiguous status in international law in any fundamental way. Nevertheless, GATT membership would testify to Taiwan's treaty-making capacity as a non-state territorial entity, which would lend to the legitimacy of the island in seeking more participation and recognition in international relations.

Taiwan's application for GATT membership has forced the world to confront an issue that it has shunned over the past decades—the proper status of Taiwan in the international community. Hopefully, this new attention to the issue will lead to a solution that meets the need for peace and prosperity of the region, the right of the Taiwan people to participate in world affairs, and the goal of national unification.