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DEMOCRATISATION AND LAW OF TAIWAN:
WITH SPECIAL REFERENCE TO UNITED STATES ECONOMIC PRESSURES

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DECLARATION

The material contained in this thesis is the work solely of the author. None of the material has been submitted previously for a degree in this or any other university.

ABSTRACT

This thesis discusses the impact of the United States' foreign economic policy on the legal and political systems of Taiwan. Its focus is the bilateral negotiations between Taiwan and the United States and the evolution of the legal and political systems on Taiwan.

The widely acknowledged economic miracle of Taiwan has been combined, in recent years, with a deliberate attempt to transform the country's political structures in a democratic direction. Paradoxically, Taiwan's move towards democracy has seriously strained Taiwan / United States relations. For many years, the special relations between the two countries were characterised by Taiwan's almost total dependency on the United States both as a market for its products as well as a protector of its territorial integrity. The end of the Cold War, the new role of the People's Republic of China and the globalisation of the international economy have brought this special relation to an end. The changing nature of the relationship between the United States and Taiwan has not, however, brought an end the traditional behaviour of the United States towards Taiwan which was characterised by aggressive unilateralism.

This thesis argues that in the changing context of the 1990s as the negotiating agenda between the two countries expand, the aggressive unilateralism of the United States is undermining the process of democratisation and eroding the rule of law on Taiwan. In order to comply with American pressure, the government of Taiwan is forced to resort to authoritarian measures based on the old corporatist framework that the transition to democracy is meant to supersede. Interestingly, the implications of the undemocratic consequences of these pressure do not seem to concern the United States, as short term economic advantage takes precedence over other considerations. For Taiwan, the way out of this vicious circle of external pressure - undemocratic response - external pressure is to diversify its international economic links. The problems and implications of this policy options are discussed in the thesis.

The specific policy areas analysed in this thesis are commodity trade, trade in services and intellectual property protection.

GLOSSARY OF ABBREVIATIONS

AIT	American Institute in Taiwan
BCCI	Bank of Credit and Commerce International
BOFT	Board of Foreign Trade
CCLRRC	A Collection of Current Laws and Regulations of the ROC
CCNAA	Coordination Council of North American Affairs
CEPD	Council of Economic Planning and Development
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GIO	Government Information Office
GNS	Group of Negotiations on Services
GSP	General Preference System
III	Institute for Information Industry
IPR	Intellectual Property
KMT	Kuomintang
MFN	Most-favoured-nation
MOEA	Ministry of Economic Affairs
MOF	Ministry of Finance
MOJ	Ministry of Justice
MTN	Multilateral Trade Negotiations
NICs	Newly Industrialising Countries
PRC	People's Republic of China
ROC	Republic of China
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related Intellectual Property Rights
TTWMB	Tobacco and Wine Monopoly Bureau
USTR	United States Trade Representative
VRA	Voluntary Restraint Arrangement
WTO	World Trade Organisation

RELEVANT TREATIES AND NATIONAL LAWS

A. INTERNATIONAL LAW

1. International Conventions and Treaties

Charter of the United Nations

Berne Convention for the Protection of Literary and Artistic Works of 1886

Code of Customs Valuation (Agreement on Implementation of Article VII of the GATT)

Convention of Paris for the Protection of Industrial Property of 1883

General Agreement on Tariffs and Trade

GATT Procurement Code 1978

Universal Copyright Convention of 1952

Vienna Convention on the Law of Treaties of 1966.

2. Bilateral Treaties and Agreements

Agreement Between the AIT and the CCNAA Relating to Trade in Cotton, Wool, Man-Made Fibre, Silk Blend and Other Non-Cotton Vegetable Fibre Textile Products (1990) (1993).

Agreement Between the AIT and the CCNAA Concerning Beer, Wine and Cigarettes (1986).

Agreement Concerning Measures that the CCNAA will Undertake in Connection with Implementation of the GATT Customs Valuation Code (1986).

Agreement for the Protection of Copyright Between the AIT and the CCNAA (1989) (1993).

Agreement Relating to Trade in Cotton, Wool, and Man-Made Fibre Textiles and Textile Products (1978).

Agreement Relating to Trade in Cotton, Wool, and Man-Made Fibre Textiles and Textile Products (1982).

Arrangement Between the CCNAA and the AIT Concerning Trade in Certain Machine Tools (1986).

Implementing Agreement Relating to Trade in Cotton, Wool, and Man-Made Fibre Textiles and Textile Products (1980).

Exchange of Letters Between the AIT and the CCNAA Concerning the Amendments and Changes of an Agreement Relating to Trade in Cotton, Wool, Man-Made Fibre, Silk Blend and Other Vegetable Fibre Textile and Textile Products (1986)

Memorandum Concerning Extension of Self-restraint Measures for Exporting Colour Television to the United States (1980)

Memorandum of Understanding Between the AIT and the CCNAA Concerning Exports of Rice from Taiwan (1984).

Memorandum of Understanding Between the AIT and the CCNAA Concerning the Trade of Turkeys and Ducks (1989).

Memorandum of Understanding Concerning Trade in Whole Turkeys, Turkey Parts, Processed Turkey Products and Whole Ducks (1989).

Treaty of Friendship, Commerce and Navigation Between the Republic of China and the United States of America (1948).

Understanding Between the CCNAA and the AIT Concerning Trade in Certain Machine Tools (1992).

United States - Taiwan Trade Agreement (1978)

B. NATIONAL LAWS

1. LAWS OF THE REPUBLIC OF CHINA (ROC) ON TAIWAN

ROC Constitution

Administrative Litigation Law

Banking Law

Cable TV Law

Central Bank Law

Code of Civil Procedure

Code of Criminal Procedure

Commodity Examination law

Company Law

Consumer Protection Law

Copyright Law

Criminal Code

Customs Law

Fair Trade Law

Foreign Trade Law

Guidelines for Reviewing United States Insurance Company Applications for Establishing a Branch in the ROC

Guidelines for Screening and Approval of Establishment of Branches and Representative Offices by Foreign Banks

Insurance Law

Law Governing the Council of the Grand Justice

Martial Law

Measures for Application of Importation of Goods by Public Enterprises

National Mobilisation Law

Organic Law of the Executive Yuan

Organic Law of the Fair Trade Commission

Patent Law

Petition Law

Police Offence Law

Regulations Concerning the Auditing and Monitoring of Project Construction, Repair, Purchase, Ordering and Selling of Property by Governmental Organs

Regulations for Control of Hoodlums

Regulations Governing the Wholesale Importation of Materials

Screening Criteria for Export Application

Screening Criteria for Import Application

Social Security Law

State Compensation Law

Statute for the Administration of Foreign Exchange

Temporary Provisions for the Duration of Mobilisation to Suppress the Rebellion

Temporary Regulation Governing Tobacco and Wine Within the Province of Taiwan

Trademark Law

Wildlife Conservation Law

2. UNITED STATES LAWS

United States Constitution

Buy American Act

Clayton Act

*Exchange Rate and International Economic Policy Coordination Act Pelly
Amendment to the Fishermen's Protective Act*

Fishermen's Protective Act

International Banking Act

Omnibus Trade and Competitiveness Act

Sherman Act

Taiwan Relations Act

Trade Expansion Act

Trade and Tariffs Act

3. UNITED KINGDOM LAWS

Statutory Instrument Act of 1947

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Table 4. MAJOR TRADE ISSUES OF UNITED STATES-TAIWAN BILATERAL NEGOTIATIONS 1982-1993

Table 5. TAIWAN'S IPR LEGISLATIVE CHANGES

PART I. INTRODUCTION

It has become routine to tell the story of Taiwan's economic and political "miracles". Scholars have little to add except digesting the so-called "Taiwan experience" to fit into their theories; while journalists continue to report on recent "developments". And yet, after so many years, it is still possible to speak of a major constitutional and legal failure.

CHAPTER 1. INTRODUCTION

A. GENERAL BACKGROUND ABOUT TAIWAN

Taiwan, an island situated beside the Chinese Mainland and close to Japan and the Malayan Archipelago, catches the world's attention by its shining economic performance. All sorts of Western economic indicators have shown that Taiwan is more than just a developing country. It is the world's twelfth biggest trading nation¹ producing diversified products such as computers, integrated circuits, textiles, electronics, machine tools and toys etc.² Due to the success of state-led, export-oriented policies and strategies to accumulate capital,³ it has

¹ GATT Focus, No.108, p.2 (June, 1994).

² *The Guardian*, "Taiwan: A Special Report", p.12 (22 June, 1992).

³ It is agreed among traditional liberal and statist economists that the basic driving force of Taiwan's economic development was largely due to the government's export policies and various strategies. Some of the most authoritative writings include Alice Amsden, "The States and Taiwan's Economic Development," in Peter Evans, Dietrich Rueschemeyer & Theda Skocpol (ed.), *BRINGING THE STATE BACK IN* pp.79-106 (1985); Barrett Richard E. & Chin, Soomi, "Export-oriented Industrialising States in the Capitalist World System," in Federick Deyo (ed.), *THE POLITICAL ECONOMY OF THE EAST ASIAN INDUSTRIALISATION* pp.23-43 (1987); Robert Wade, *GOVERNING THE MARKET: THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALISATION* (1990); and Tang, Foh-tsrang, "Economic Reforms and Changes in the Role of the State: The Taiwan Experience," in Claude Amoi (ed.), *THE ROLE OF THE STATE IN DEVELOPMENT PROCESSES* pp.135-154 (1992). For an orthodox liberal explanation of Taiwan's success, see World Bank, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* pp.293-338 (1993). Among the academic contributions, the "developmentalist" or "statist" analyses seem to carry more insight than the traditional liberals.

had no negative rates of growth during the past four decades.⁴ Intensive external trade has contributed to a huge accumulation of wealth. Today, Taiwan has more than US\$90 billion of foreign reserves, the second highest in the world,⁵ and virtually no foreign debts. Its per capita GNP topped \$10,000 in 1991 and, at the current projected rates of growth (around 6% annually), it will not take long for Taiwan to catch up with the British per capita GNP.⁶ In sum, as noted by a commentator, Taiwan has the most remarkable development among all the newly industrialising countries (NICs).⁷

Historically, this magnificent economic performance owes much to the support of the United States. Large amounts of United States aid in the 1950s and the early 1960s,⁸ the signing of *Mutual Defense Treaty* to ensure the security of Taiwan,⁹ and the provision of a huge market for Taiwanese exports¹⁰

⁴ Gerald Segal, *RETHINKING THE PACIFIC* p.319 (1991).

⁵ The total amount of foreign reserves in January 1995 reached US\$ 93.2 billion. *The Economist* (London), p.132 (10-16 June, 1995).

⁶ See *supra* note 2, p.10.

⁷ Segal, *supra* note 4.

⁸ From 1950 to 1965 the United States provided Taiwan with an aid programme that reached a total of US\$ 1.5 billion. This has provided a significant push to Taiwan's early economic growth. Greenhalgh even calls this "aid dependency" in the sense that Taiwan was heavily dependent on United States aid for political and economic survival. Susan Greenhalgh, "Supranational Process of Income Distribution," in Edwin A. Winckler & Susan Greenhalgh (ed.), *CONTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN* p.78-79 (1988). See also Stephan Haggard & Tun-jen Cheng, "State and Foreign Capital in the East Asian NICs," in Frederic C. Deyo (ed.), *supra* note 3, p.87.

⁹ The *United States-ROC Mutual Defense Treaty* was signed on 2 December 1954 against the background of the end of the Korean War. The treaty pledged that in the event of armed attack against the territory of one signatory in the West Pacific, the other would act to meet the common danger in accordance with its constitutional process. The treaty thus showed a positive United States commitment towards ROC on Taiwan. The treaty was terminated following the severance of diplomatic relations between the two countries in 1979. Hsieh, Chiao Chiao, *STRATEGY FOR SURVIVAL: THE FOREIGN POLICY AND EXTERNAL RELATIONS OF THE REPUBLIC OF CHINA ON TAIWAN, 1949-1979* p.85 (1985). For text of the treaty, see *United Nations Treaty Series*, Vol.248, I.No.3496, pp.214-216, 226, 228 (1956).

are all significant factors that contribute to Taiwan's prosperity. Even after United States de-recognition of the ROC in 1979, trade between the two countries remains intensive.¹¹ This was largely due to the enactment of the Taiwan Relations Act which guaranteed economic and other "non-official" ties with Taiwan.¹² The significance of these facts is evident: Taiwan relies to a very large extent, politically, militarily, and economically on the United States. As such, maintaining co-operative relations with the United States in all aspects has always been Taiwan's diplomatic priority.

In recent years, Taiwan has also become a target of Western political scientists in their study of Third World democratisation. Its second-class international status¹³ and constant military threats from the People's Republic

¹⁰ According to Segal, Taiwan clearly depended on Japan for a push-start into the international trading economy, but it was the United States that took the leading role. In 1977, for instance, the United States took 39% of Taiwan's export and 25% of imports. Segal, *supra* note 4, p.320.

¹¹ In fact, trade and economic relations between the two countries grew even stronger after de-recognition to the extent that American politicians joked it took de-recognition to double the United States trade volume. Chien, Frederick F., "The Role of the Coordination Council for North American Affairs in the Context of the United States-- Republic of China Relationship," 6 *N. Y. L. Sch. J. Int'l L.*, p.122 (1984).

¹² The Taiwan Relations Act [U.S.C.A. § 3303] came into effect on 1 Jan., 1979. For a history of the enactment and implementation of the Taiwan Relations Act, see Lori Fisler Damrosch, "The Taiwan Relations Act After Ten Years", 3 *J. Chinese L.*, pp.157-183 (Fall 1989); C.J. Gable, "Taiwan Relations Act: Legislative Re-recognition," 12 *Vanderbilt J. of Transnat'l L.*, pp.511-532 (1979); Hsiao, Gene T., "The Legal Status of Taiwan in the Normalization of Sino-American Relations", 14 *Rutgers L. J.*, pp.839-913 (1983); Chen, Chi-di, "Taiwan Relations Act: Legislative Re-recognition of Taiwan After De-recognition," 11 *Nat. Taiwan Uni. L. J.*, pp.87-96 (Dec.1981). For text of the Act, see 18 *I.L.M.*, pp.873-877 (1979).

¹³ Taiwan's minor international status is a result of the China issue. The Republic of China (KMT government) was once a member of the United Nations. But its seat was replaced by the PRC in 1971 according to a United Nations Resolution [Res.2758 (XXVI), 25 Oct., 1971]. This also brought about a series of chain effects. The PRC succeeded almost every position in international conventions and organisations previously held by ROC. These included IMF, World Bank, and the International Centre for Settlement of Investment Disputes etc. More, most of the countries (including the West) began to turn their back against ROC on Taiwan and recognised the PRC as the only government representing China. On the other hand, they only maintain "non-official" relations with Taiwan. Today, only about thirty countries, most African and South American countries, recognise the ROC on Taiwan as a sovereign nation. See *YEARBOOK OF THE UNITED NATIONS 1971*, Vol.25, pp.126-133; William M. Bueler, "Taiwan: A Problem of International Law or Politics?" 27 *World Today* pp.256-266 (1971);

of China (PRC)¹⁴ did not seem to have shaken the determination of the KMT government to pursue constitutional democracy. Indeed, in many ways, the democratisation is remarkable. It is characterised by a period of political liberalisation since the mid-1980s, the lifting of martial law in July 1987, the formation of opposition parties, the ending of the "Period of Suppression of Rebellion" in April 1991, and subsequent constitutional amendments in 1991 and 1992.¹⁵ In this period, the authoritarian KMT government extended a measure of civil and political rights to individuals and groups, and conducted comprehensive, open and fair parliamentary and local elections. A representative government was thus established. Western commentators seem to be happy with the process. One American scholar even wrote a book claiming that Taiwan's democratic process was a "quiet revolution".¹⁶ Other similar academic works and conclusions can also be found, notably in the United States and Taiwan.¹⁷ Moreover, Francis Fukuyama argues with confidence that Taiwan's "market-

Richard M. Goodman, "Chinese Participation in the United Nations: the Imperatives of a Negotiated Settlement," 65 *Am. J. Int'l L.* pp.9-16 (1971); Tan, S.H., "Representation of China in the United Nations," 65 *Am. J. Int'l L.* pp.20-30 (1971); Quincy Wright, "The Chinese Recognition Problem," 49 *Am. J. Int'l L.*, pp.320-338 (1955); D.P. O'Connell, "The Status of Formosa and the Chinese Recognition Problem," 50 *Am. J. Int'l L.*, pp.405-416 (1956); Ma, Ying-jeou, "Two Major Legal Issues Relating to the International Status of the Republic of China," 6 *Chinese Yb. Int'l L. & Aff.*, pp.171-180 (1986-1987).

¹⁴ Legally speaking, Taiwan and the PRC were at war before 1991 -- the year Taiwan ended the "Period of Suppression of Rebellion (communists)". However, today, PRC is still the potential enemy of Taiwan. It claims that Taiwan is part of China and will not hesitate to use force should Taiwan choose to become an independent state. The KMT government skilfully announces the policy of unification to avoid stimulating the PRC. For a discussion of the relationship between Taiwan and the PRC, see Chiu, Hungdah, "The New International Order and Intra-Chinese (Taiwan-Mainland) Relations," 10 *Chinese Yb. Int'l L. & Aff.*, pp.8-26 (1990-91).

¹⁵ See Appendix I.

¹⁶ J. F. Copper, *A QUIET REVOLUTION: POLITICAL DEVELOPMENT IN THE REPUBLIC OF CHINA* (1988).

¹⁷ See for instance, Chu, Yun-han, *CRAFTING DEMOCRACY IN TAIWAN* (1992); and Cheng, Tun-jen & Stephan Haggard (ed.), *POLITICAL CHANGE IN TAIWAN* (1992). Professor Chu is a young scholar presently teaching at the National University of Taiwan. His viewpoint, however, largely follows the theme of Huntington. Chen and Haggard are American based scholars. The book is actually a collection of articles written by contemporary Chinese (Taiwan) experts.

oriented authoritarian regime" has successfully transformed into a liberal democracy, and thus presented a perfect case for his theory of "the end of history".¹⁸ Finally, "democratic Machiavelli" Samuel Huntington concludes that Taiwan is undergoing a "direct transition from a stable authoritarian system to a stable democratic system",¹⁹ and that liberal democracy based on pluralism is in an irreversible ongoing process.²⁰

In sum, Taiwan seems to be successful in both its economic development and political democratisation. So, what is the problem?

B. STATEMENT OF PROBLEMS AND THE PURPOSE OF THE THESIS

Behind the veil of economic success and the seemingly ongoing democratic process, Taiwan is facing many unprecedented and chronic problems; its trade relations with the United States being perhaps the most tense. In fact the past decade has witnessed deepening trade frictions between the two countries. As noted above, trade relations between the two countries are intensive and it is precisely because of trade with the United States that Taiwan achieves its high economic growth. On the other hand, mainly due to its worsening domestic economy, the United States has become keen to eliminate its trade deficits with Taiwan. To remedy the situation, the United States has unilaterally demanded

¹⁸ Francis Fukuyama, *THE END OF HISTORY AND THE LAST MAN*, pp.14, 111, 123, 125 (1992).

¹⁹ Samuel P. Huntington, *THE THIRD WAVE: DEMOCRATISATION IN THE LATE TWENTIETH CENTURY* p.43 (1993).

²⁰ Words of Huntington in the Preface of the book Cheng & Haggard, *supra* note 17, p.xi.

Taiwan open its market and liberalise its economy. It also requires Taiwan to enact some legislation to protect the market order. All these messages are conveyed through bilateral negotiations -- the only channel of communication for the two countries. To ensure success, American pressures are exerted including threats to retaliation according to its various Trade Acts.²¹ The intensity of America's trade unilateralism has become too familiar to the average citizen of Taiwan to the extent that it is no longer big news that Taiwan is "blacklisted" in United States Trade Representative's (USTR) "Priority Countries" or "Priority Watch Countries". Predictably, due to its lack of bargaining power, Taiwan has to bow to American threats, and accommodate American demands. This is also a well-known fact to Western journalists and commentators.

Yet all the studies and comments seem to stop at this juncture. It seems to those journalists and commentators that when the United States has successfully pressured Taiwan (and, in fact, other countries as well) to open its markets, the story ends. For academic lawyers, however, this cannot be enough. What is ignored is how Taiwan reacted to American pressures through its political and legal measures. Or how does the KMT government adjust its policies and laws to resolve these immense foreign economic pressures? The issues are further complicated when we associate them with Taiwan's democratisation which is taking place at roughly the same time. In other words, the question we intend to ask is what is the impact of American trade pressures on Taiwan's legal and democratic processes? To what extent have American trade pressures affected

²¹ See Chapter 2 for the definition and scope of United States Trade Acts.

Taiwan's democratisation and law? Can constitutional democracy be built under America's trade unilateralism? What lesson can be learnt from Taiwan's experience? Since there exists a strong relationship between economics and the political-legal system,²² we have reason to believe that the questions we raise are of constitutional and legal significance. If this is the case, then contemporary studies of Taiwan's democratisation efforts certainly miss something. This thesis intends to fill the gap.

As a matter of categorisation, the subject matter of this thesis covers the areas of both international economic law as well as law in development. With regard to the former, it discusses United States government's trade unilateralism -- a hot topic of international economic scholars,²³ from the angle of the "recipient" country. This is a totally new approach, although Professor Jagdish Bhagwati has hinted that American unilateralism can only be successful in undemocratic countries.²⁴ With regard to the latter, this thesis tells the distinctive process of how the democratisation and law of a relatively affluent country are affected by an economic hegemony. In other words, it discusses a nation's legal and political development in terms of its involvement in the international market economy.

²² An excellent elucidation of this relationship can be found in Yash Ghai, Robin Luckham, & Francis Snyder (ed.), *THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER* (1989). Admittedly, this book has profound influence on the shaping of my thinking.

²³ See for instance, Jagdish Bhagwati & Hugh T. Patrick (ed.), *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* (U.S.: Michigan Uni.) (1990); Judith H. Bello & Alan F. Holmer, "Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises," 22 *Int'l Lawyer*, pp.1197-1207 (1988); M.P. Ryan, "Strategy and Compliance with Bilateral Trade Dispute Settlement Agreement: USTR's Sec.301 Experience in the Pacific Basin," 12 *Mich. J. Int'l L.*, pp.799-827 (1991).

²⁴ Jagdish Bhagwati, "It's the Process, Stupid!" *The Economist* (London), p.89 (21 March-2 April, 1993).

This thesis dwells on some serious United States-Taiwan trade conflicts which took place in the last decade, namely, issues regarding commodity trade, trade in services, and intellectual property protection -- all significant issues of contemporary world trade. Note that none of them is settled today. By analyzing in detail each and every event, we shall see the scope of United States pressures on Taiwan's democratisation and law. In addition, this provides a good opportunity for understanding the actual trade relations between the two countries as well as the legal-political system of Taiwan.

A broad argument of this thesis is that, under the United States trade threats, a domestic political cycle on the part of Taiwan was formed to resolve the trade tensions between the two nations. The political cycle functioned to open its domestic markets to American firms and to coordinate the various branches of the government (legislative, judicial and the enforcement) to achieve the objectives as demanded by the United States. This political cycle was built on the authoritarian corporatist framework of the KMT government developed in the martial law era. As the United States pressures proved to be so immense and frequent,²⁵ it became difficult for the KMT government to review its undemocratic nature. Worse, more often than not, it squeezed out many of the past democratisation efforts by undermining the proper functioning of the legislature and the judiciary, and re-established the omnipotence of the one-party state. Intriguingly, the United States implicitly supports the operation of

²⁵ According to an official report of the United States citing the comment of Taiwan's business, Taiwan negotiates with the United States every two to three months for different issues. United States International Trade Commission (USITC), *THE PROS AND CONS OF ENTERING INTO NEGOTIATIONS ON FREE TRADE AREA AGREEMENTS WITH TAIWAN, THE REPUBLIC OF KOREA, AND ASEAN, OR THE PACIFIC RIM REGION IN GENERAL: REPORT TO THE SENATE COMMITTEE ON FINANCE ON INVESTIGATION NO. TA-332-259 UNDER SECTION 332 OF THE TARIFF ACT OF 1930*, p.[1-7] (March, 1989).

such a political cycle. As a consequence, constitutional democracy was impaired even before it was fully established. In the widest sense, the research outcome also carries some theoretical implication; that is, as long as America's aggressive unilateralism remains a trade policy tool of the United States, smaller countries can never achieve the goals of economic integration and constitutional democracy.

C. ACADEMIC WRITINGS ON THE SUBJECT

While there are no academic writings on this topic, some Western scholars and commentators do touch upon aspects of the issue examined in this thesis. Drawing on different theories, Western political scientists have already noticed the link between foreign economic coercion and domestic political process. Georg Sorensen, for instance, claims that external factors which include economic, political, ideological and other elements that constitute the international context often have profound influence on the democratic process.²⁶ The conclusion he has drawn is, however, quite vague,

"(t)he dynamics of dependence and interdependence in the international system directly affect the scope of democratic decision-making at the national level. In general, one must expect large and socioeconomically strong countries to be much less susceptible to international pressures and challenges than is the case with smaller, socioeconomically weak countries."²⁷

In comparison with Sørensen's view, Robert Pinkney's comment is more conclusive. While recognising "external pressures" as a possible conducive

²⁶ Georg Sørensen, *DEMOCRACY AND DEMOCRATIZATION* pp.21, 22, 158 (1993).

²⁷ *Id.*, p.22.

condition for democracy --- a point no author has ever made according to him,²⁸ Pinkney holds the view that they can as well "quite easily topple a democracy, through means such as economic sanctions".²⁹ Yet, no detailed discussion as to what kind of economic sanctions or how democracy is "toppled" is offered. Another observer Peter Ferdinand, after several case studies on different countries, concludes that,

"(i)t is an irony that as the goals of spreading democracy become a more prominent element in the foreign policies of the United States and a number of other Western States, and as multi-party systems are seen as evidence of greater democracy, domestic and international economic forces make it more difficult for stable parties to form and operate."³⁰

Instead of discussing the general effects on the democratisation process, Ferdinand places more emphasis on the formation and operation of new political parties. True, in a democracy, new political parties play an important role. But still the attitude and power of the old ruling party remain the core issue. A more analytical, but rather radical viewpoint is provided by dependency theorists. Peter Evans, for instance, argues that, due to the "triple alliance" of state, local, and foreign capital which constitute the so-called "dependent development", "the need for repression is great while the need for democracy is

²⁸ Here Pinkney gives several examples of the "external influences": President Carter had more scruples in his dealings with authoritarian rulers; American Presidents have had to face a more critical lobby opposed to "aiding the dictators"; and even the ending of the Cold war has raised questions as to whether there are any practical reasons for supporting Third World despots. See, Robert Pinkney, *DEMOCRACY IN THE THIRD WORLD* pp.32-33 (1993).

²⁹ *Id.*, p.33.

³⁰ Peter Ferdinand, "The Party's Over -- Market liberalisation and the Challenges for One-Party and One-Party Dominant Regimes: The Cases of Taiwan and Mexico, Italy and Japan," *1 Democratisation*, No.1, p.149 (1994).

small".³¹ Evans' argument is, in fact, a subtle elucidation and modification of Fernando H. Cardoso's point made in the 1970s. Cardoso's argument is that due to the inequalities and distortions of the economies and societies of the Third World brought about by their dependent positions in the world economic system, democracy is difficult to grow.³²

Despite their theoretical and ideological discrepancies, it is obvious that all the above-mentioned scholars assume the significance of external forces, both economic and political, on the internal democratic development in Third World states. But to what extent is their conclusion relevant to Taiwan is not known. This is perhaps due to the fact that this topic is too new for Taiwanese scholars and studies. The reasons are not difficult to comprehend. First, as a civil law nation, academic works are devoted much to the elucidation of foreign code laws (notably, German and Japanese laws). On the other hand, while there are a handful of constitutional and administrative law writings in Taiwan and in the United States, most of them are descriptive. This does not mean that they are not useful, only that critical analyses are rare.

There are, however, three academic works which are relevant to the main theme of this thesis. The first was written by Liu, Lawrence in 1990.³³ By

³¹ Peter Evans, *DEPENDENT DEVELOPMENT: THE ALLIANCE OF MULTINATIONAL, STATE, AND LOCAL CAPITAL IN BRAZIL* p.35 (1979).

³² Fernando Henrique Cardoso, "Dependent Capitalist Development in Latin America," 80 *New Left Rev.*, pp.83-95 (1973).

³³ Liu, Lawrence S., "Legal and Policy Perspectives on United States Trade Initiatives and Economic Liberalisation in the Republic of China," 11 *Mich. J. Int'l L.*, pp.326-367 (1990).

describing some of the legal issues between Taiwan and the United States, he discreetly and briefly implies that the legislative and judicial functions of Taiwan were influenced.³⁴ Mr. Liu's reserved position is understandable. As a successful attorney with many American clients, including the United States government, he should not appear to be too critical. Apart from this point, his arguments resonate with those "GATT believers", notably Jagdish Bhagwati. No reference to Taiwan's democratisation is made. The second is contributed by Dr. Lou, C.F., presently on the teaching staff of a Taiwan university. His short article was written in Chinese and published in a domestic intellectual property journal in 1991.³⁵ Dr. Lou concludes that legislative and judicial sovereignty of Taiwan was violated when Taiwan was forced to amend its Copyright Law and told to impose severe penalties on intellectual property violators.³⁶ Unfortunately, he fails to make an in-depth study by drawing on the issue of constitutional democracy. Note that as his focus is placed on intellectual property protection, the issue of constitutional or legal integrity is not meant to be the centre of his writing.

Most recently, two American-based Taiwanese intellectuals published an article entitled "United States Industries and Government Interaction on Trade

³⁴ *Id.* pp.366-367.

³⁵ Lou, C.F., "An Analysis of Sino-American Negotiations on Intellectual Property and Related Legal Issues," 6 *Wan Ban Intellectual Property Rev.*, pp.1-20 (1991).

³⁶ *Id.* pp.14-15.

and Intellectual Property Legislation."³⁷ Originally, this contribution was written in Chinese and financed by the Ministry of Economic Affairs of the ROC on Taiwan. As such, it can be treated as a quasi-official report.³⁸ When commenting on the effects of section 301 on Taiwan, Sun and Liu only have this to say, "(t)he USTR apparently took a two-step legalistic strategy in levelling the playing fields with the ROC. First, it pushes the ROC to commit a series of legislative reforms... Second... it turns to the enforcement of these laws and put the ROC constantly in check. This is generally done without the concerns over the political reality and social economic impact to the local society."³⁹ (Emphasis added) Nothing is related to Taiwan's "quiet revolution" which has been so hot a topic in recent years. In sum, no systematic and comprehensive studies regarding the conflicts between resolving American pressures and Taiwan's effort of building a constitutional democracy can be found.

D. METHODOLOGICAL REMARKS

1. Research Materials

The main sources that I have used in this thesis include: (1) government publications from both the United States and Taiwan; (2) secondary sources such

³⁷ Sun, Andy Y. & Liu, Paul C.B., "United States Industries and Government Interaction on Trade and Intellectual Property Legislation," 12 *Chinese Yb. Int'l L. & Aff.*, pp.87-125 (1992-94).

³⁸ In Taiwan, all those government financed research projects must be examined by an *ad hoc* committee consisting of the officials of the "competent authorities". Should they find the result of the research incompatible with the government standing, they would require certain modification before publication. I have two experience handling government projects. It was simply impossible to insist on a certain opinion which the officials found inappropriate.

³⁹ Sun & Liu, *supra* note 37, p.117.

as books, journals and periodicals; (3) newspapers; (4) three informal interviews with some officials and ex-officials who had participated in United States-Taiwan bilateral negotiations; and (5) public hearings held by the Legislative Yuan (parliament) of Taiwan.

Several remarks can be made in the course of collecting these materials. First, with regard to government publications, several difficulties and limitations in obtaining Taiwan's official documentations were encountered. As a nation which is still haunted by the remains of martial law, one finds the existence of a repressive internal security apparatus. As such, freedom of information is a concept yet to be developed. Particularly in the area of United States-Taiwan trade relations which involve so many sensitive issues, many important materials are circulated among certain "competent authorities" only. Formal enquiries about or applications for some documents normally ended up fruitless. Under the circumstances, one has to rely on some special relations to retrieve them. The 1989 *Trade Consultation Report* is such a document.⁴⁰

This extremely valuable material tells an almost entirely different story about United States-Taiwan relations.

⁴⁰ The full title of the document is BOFT, *Wuo-Kuo 78 Nien Tuei-Wai Mao-Yi Tsu-Shang Tan-Pan Chi-Yiao (A SUMMARY OF ROC'S EXTERNAL TRADE CONSULTATION IN 1989)* (June, 1990).

Yet, it would be wrong to think that there are other similar reports. I had tried to ask my other friends whether there were other trade consultation reports of different years, and the answer was no. There could only be two possibilities. First, there really were none because the 1989 report contained an overall review of United States-Taiwan trade relations until 1989 -- the year Taiwan had most troubles with the United States. Second, they lied to me (probably because our relations were not strong enough), fearing that I might expose the materials in a way they did not appreciate.

Many publications by the Board of Foreign Trade (BOFT) of the Ministry of Economic Affairs are also used for two reasons: (1) they reveal the standpoint of the government; and (2) they also contain some useful information (particularly statistics). Interestingly enough, when viewed from a different perspective, as this thesis does, this information provides a good factual basis to debunk the government's policies.

As Taiwan is so economically successful in the eyes of Western nations, English contributions concerning Taiwan are not lacking. In fact, some of them are written by "world-class" scholars such as Samuel Huntington. In addition, many articles were written in English by Taiwanese legal scholars who received education in the United States. In an outward-looking society like Taiwan, the phenomenon is that those who can publish their works in English are regarded as "real" or "heavyweight" scholars. Indeed, the trend is so evident that even those who hold Ph.D.s from German or Japanese universities have tried to write their papers in English. One way of doing this is to translate their Chinese

works into English or vice versa. This saved me a lot of work and time because I did not need to spend too much efforts pinpointing and analysing Chinese works. Nevertheless, I still included some important books and articles which I thought should not be neglected.

As this thesis involved United States-Taiwan trade negotiations, I thought it might be helpful to talk to some officials and ex-officials of Taiwan who had the experience of participating in the trade negotiations. Three persons were interviewed and they have also provided me with valuable information. The first one is Mr. Lu, Y.L. who used to be an official of the Ministry of Interior in charge of copyright affairs. He has been one of the major negotiators of Taiwan. The second one is Mr. Kao, Y.C., a senior official of the Ministry of Economic Affairs. Both Mr. Lu and Mr. Kao resigned several years ago, and are now in private practice. Their choice of career more or less reflects their frustration over the trade talks. The last one is Ms. Wu, Julian, senior project manager of the Institute for Information Industry (III). Recently, III was assigned the work of promoting the policy of the government with regard to intellectual property protection. She was in charge of planning and coordinating this. It was also Julian who revealed that the head of Taiwan's negotiating team fell asleep during one of the negotiations, and woke up looking for documents to sign. Of course, apart from this story, she, Mr. Lu, and Mr, Kao also provided much useful material.

2. The Text of ROC Laws

This thesis includes the analysis of more than forty ROC laws, regulations, and administrative orders. Most of them are collected in the *Hsin-pien liu-fa chuan-shu* (*Complete Book of Six Laws*), published in Chinese by San Ming Publishing Company, Taipei. The *Complete Book of Six Laws* also contains, in abstract form, relevant court precedents and judicial interpretations. As such, it is the most widely used law book in Taiwan. However, some of the administrative orders can only be found in the *Ching-hua-min-kuo hsien-hsing fa-kuai hui-pien* (*A Collection of Current Laws and Regulations of the ROC; CCLRRC*), published by the Taiwan government. The CCLRRC is a loose-leaf set with a total of thirty seven volumes, updated quarterly. Unlike the *Complete Book of Six Laws*, it contains no court precedents or judicial interpretations. Instead, it provides thousands of administrative orders issued by the "competent authorities".

For the sake of clarity, unless otherwise stated, all laws, regulations, administrative orders, court cases, and judicial interpretations as used in this thesis are cited from the *Complete Book of Six Laws*.

3. Chinese Ideographs

As there are at least four romanization systems (Wade-Giles, Yale, *Kuo-yu-chu-in-fuhao*, and *Pinyin*) actually in use, rendering Chinese ideographs into a

romanized form has been problematical. In this thesis, the Wade-Giles romanization system is used unless a Chinese word has been conventionally rendered in another system or it is the name of a person who has adopted a particular romanization for his or her name. The choice of the Wade-Giles system is twofold. First, it is the system generally employed in Taiwan.⁴¹ Second, the English version of the *REPUBLIC OF CHINA YEARBOOK* uses this system. Accordingly, it seems sensible to choose the Wade-Giles romanization system as this thesis is concerned with the study of Taiwan.

E. ORGANISATION OF THE THESIS

This thesis is divided into nine chapters. Chapter 2 clarifies the definition of terms and the analytical framework. By agreeing with some prominent scholars that Taiwan is characterised as an authoritarian corporatist state in transition to the Western-based constitutional democracy, our theoretical setting is thus established. This is extremely useful in the understanding of all kinds of policy and legal responses on the part of Taiwan to United States pressures.

Chapter 3 studies Taiwan's policy changes as a means to resolve American pressures. Emphasis is placed on the "top-down" formation of policies -- a process in which democracy plays no part. Despite Taiwan having lifted the

⁴¹ *REPUBLIC OF CHINA YEARBOOK 1989*, p.1.

martial law and thus entered a rapid democratic transformation, the party-executive *par excellence* with regard to trade policy and measures is still obvious. Two special traits can also be found in the newly enacted *Foreign Trade Law*, they include the "bilateralisation" of the Law, and the "managed trade" conception. As such, the policy of trade liberalisation is still far from being substantiated. This chapter concludes that even until the 1990s, the authoritarian corporatist policy and practices remained intact.

Chapter 4 is an analysis of major commodity trade issues which took place in the last decade. Issues selected include agricultural trade, wine, beer, and tobacco, government procurement, voluntary restraint arrangements (VRAs) on textiles and machine tools, and the tariff system. A common point among all these issues is that they appeared as single, individual trade matter from the start, but then developed into some kind of political issue and even unrest on the part of Taiwan. Here, one sees the direct thrust of American pressures on Taiwan. The KMT government was, on many occasions, forced to violate, manipulate or bend its own laws, and improvise in the name of administrative discretion in order to accommodate United States demands. In the end, markets were open, but at the expense of cost-inefficiency and the legal system.

Chapter 5 discusses how Taiwan opened its service markets, namely, the banking and the insurance sectors, under the pressures of United States government. Different from commodity trade issues, United States pressures were not unwelcome by the public in general. The reason was partly due to the

public's growing discontent toward the KMT government's long and protective banking and insurance policies, and partly due to the rapid accumulation of capital as a result of continuous trade surplus. But such a liberalisation of Taiwan's financial markets by no means credited the KMT government, because the process of market opening under American pressures had projected an image of the KMT government as not only vulnerable, but also unpopular. In addition, one finds the old practices of "black-box" decision making and massive manipulation of laws by means of regulatory discretion. All these further expose the functioning of the authoritarian regime.

Chapter 6 deals with Taiwan's intellectual property law and institutional "reform" conducted under the Special 301 threats. The reform can be comfortably characterised as an imposed one for it is not difficult to perceive the reluctance and even resentment of the legislative organ during the whole process. On the other hand, the KMT party machine was fully mobilised to the extent that even the courts were required to take uniform actions. The undemocratic nature of the reform is obvious. The outcome was that IPR laws gave up its traditional "low standards" of protection and followed the so-called "high standards". Enforcement organs and actions were also impressive in that disproportional personnel and resources were involved. These actions saved Taiwan from trade retaliation. Yet, a close look at Taiwan's IPR regime will soon discover that it has achieved neither "high standard", nor "low standard", but "no standard" at all.

Chapter 7 studies the impact of American pressures on Taiwan's democratisation by drawing on constitutional and administrative law theories. It shows that after so many years of facing United States pressures, a political cycle built on the remains of the old authoritarian framework is eventually formed. The operation of this political cycle undermines the constitutional design of separation of powers, encourages unchecked delegated legislations and administrative discretion, and disregards the individual's right to judicial protection. It also strengthens the role of the KMT in the decision-making process. This political cycle is thus hostile to the establishment of constitutional democracy -- the most important task of Taiwan's democratisation as committed by President Lee, Teng-hui.

Chapter 8 demonstrates the efforts of Taiwan to resolve (avoid) American pressures by appealing to the international level. It also reveals how Taiwan seeks to find a place in the new international order. It is the official belief that by forming an Free Trade Area (FTA) with the United States, and/or rejoining GATT, Taiwan would be free from United States trade threats. The first proposal was formally dead as the United States showed little interest. The second one received a positive response from the United States government. But as the United States is still not ready to give up its hegemonic unilateralism, rejoining GATT helps little in avoiding the application of United States trade laws to Taiwan.

Chapter 9 summarizes all the arguments by presenting them in an orderly form. The main argument is that since the 1980s, parallel to the democratisation efforts, a strong political cycle aiming at resolving American pressures has formed and operated at the expense of democratic participation and the rule of law. In the long-run, the continuation of this political cycle would render the building of constitutional democracy a contradictory effort. Several implications based on this conclusion are also made.

CHAPTER 2. DEFINITIONS AND ANALYTICAL FRAMEWORK

As the subject matter of this thesis covers a very wide area of law (international economic law and domestic law), and politics (democracy and democratisation), it is necessary to define clearly some of the important terms and establish an analytical framework. True, in the world of social science, defining terms is not an easy task, but is essential to ensure clarity for the reader. The construction of an analytical framework is important because it necessarily affects the postulation of goals and the performance of intellectual tasks. As this thesis involves significantly the democratisation process of Taiwan, inevitably, we need to identify two issues. First, what kind of government Taiwan was before its democratic transition? Second, what is the ultimate goal of Taiwan's democratisation? The last issue is evident, for the President of Taiwan Dr. Lee, Teng-hui has already made it clear that he wants Taiwan to be a constitutional democracy free from the tangled legal inventions which have kept the KMT in power since 1949.¹ In other words, Taiwan is to transform into the Western-based constitutional democracy, for which the Constitution of 1947 was originally designed.

The first issue is more problematic, and thus requires us to borrow the works of political scientists. Indeed, the KMT government's authoritarian rule has its unique features, and therefore requires a framework to explain it. The

¹ "Rough Ride to Reform," *Far Eastern Economic Rev.*, No.151, pp.22-24 (11 April, 1991). Recently, President Lee, during his "private" visit to the United States, re-asserted his determination. He said, "... what people concern most is democracy and development. Democracy must include respect for individuals' freedom and social justice, and the feeling of direct participation in national affairs...." (translated by this writer) *Central Daily News* (Chung-yang jih pao), p.1 (11 June, 1995).

theory chosen as the analytical framework of this thesis is "authoritarian corporatism". It is chosen not only because it is widely recognised as an appropriate "model" for Taiwan by many Western and Taiwanese scholars, but also because it reflects quite satisfactorily the functions of law and the legal system under such a political system. The last idea is based on my knowledge as a legal academic in Taiwan. In brief, Taiwan is transforming itself from an authoritarian corporatist state to the Western-based constitutional democracy. Based on this framework, we shall see the extent to which American pressures has borne impacts on the whole democratisation process.

A. DEFINITION OF TERMS

1. Democracy and Democratisation

Democracy, an immensely popular political theory, can have a very complex and different meanings. To one, "democracy" means a Christian society; to another, a society with liberty and justice for all; still to others, an economic system of private enterprise or of socialism; or even a "way of life".² Precisely because of its inflationary use, its common meaning "government or rule by the people" is often neglected. I do not wish to argue further about the "real" definition of the term "democracy" here. Instead, for the purpose of our analyses, it will suffice to confine the term as referring to a form of government

² H.B. Mayo, *AN INTRODUCTION TO DEMOCRATIC THEORY* p.23 (1960).

in which the people rule.³ In addition, as noted by Samuel Huntington, implicit in the concept of democracy are limitations on power.⁴ In democracies, elected decision makers do not exercise total power, they share power with other groups in society. It is this belief of limitations on powers that gave rise to modern constitutionalism -- a system designed to control the exercise of governmental power.⁵ In other words, democracy has its institutional concerns, it must be accompanied by a constitution committed to the separation of powers and, of course, the rule of law. Thus, when discussing Third World countries' democratic development, democracy is often identified positively by the existence of developed representative institutions and by the establishment of "constitutional government".⁶

The term "democratisation" stands for a rather dynamic notion. It means the process of change toward more democratic forms of rule which guarantee the above functions and rights. It thus involves the breakdown of non-democratic rules set up by previous authoritarian regimes and the establishment of a democratic order.⁷ It should be noted here, that the process of democratisation must involve the end objective of establishing Constitutionalism or the rule of law. In other words, democratisation is viewed as complete only when democratic

³ Georg Sørensen, *DEMOCRACY AND DEMOCRATISATION* p.3 (1993); B.K. Nehru, "Western Democracy and the Third World," 1 *Third World Quarterly*, No.2, p.53 (1979).

⁴ Samuel Huntington, *THE THIRD WAVE: DEMOCRATISATION IN THE LATE TWENTIETH CENTURY* p.10 (1993).

⁵ E.C.S. Wade & A.W. Bradley, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* p.8 (1993).

⁶ David L. Sills (ed.), *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* p.113 (1968).

⁷ Sorensen, *supra* note 3, p.158.

procedures, rights, and rules of the game of the democratic process have been clearly delineated and widely accepted.⁸ As mentioned above, this is exactly the blueprint of Taiwan's democratisation according to President Lee, Teng-hui. In other words, his notion of democratisation can be completely interpreted in terms of this Western definition.

2. Authoritarian Era and Democratisation Era

The term "authoritarian era" and "democratisation era" are used many times in this thesis for the purpose of identifying the background of our study. Here, authoritarian era refers to the period before the lifting of martial law in July 1987. Although one may have witnessed a certain political liberalisation before 1987, legally speaking, the nation was still in the state of emergency, and was ruled by a one-party state (the KMT). It was not until July 1987 when the KMT government had planned and started to substantiate its democratisation commitments that we may say Taiwan had entered a new era. Note the term "authoritarian era" is used interchangeably with "martial rule era" in this thesis.

Democratisation era refers to the period from July 1987 till today. It is still an unfinished task. In this period, a series of political and legal reform were conducted. They include, *inter alia*, comprehensive re-election of parliamentarians, ending of the "Period of Suppression of Rebellion" (thus

⁸ Adam Przeworski, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* p.26 (1991).

repealing many special laws), and constitutional amendments restructuring governmental institutions.⁹

3. American Trade and Economic Pressures

Generally speaking, American trade and economic pressures denote the kind of force imposed on Taiwan according to its various Trade Acts by the United States Trade Representative (USTR). The most notable one being the so-called section 301 of the *Trade Act of 1974* which gives the President greater authority to retaliate against foreign "unfair trade practices".¹⁰ Subsequent amendments to the law further provided a mandate to the President to conduct bilateral negotiations, and granted the power to retaliate. The most recent amendment to section 301 was the *Omnibus Trade and Competitiveness Act of 1988*. The Act contains more than a thousand pages of legislation, but the centerpiece is to give "teeth" to section 301. It expanded the definition of unfair trade and created the so-called Super 301 and Special 301 to strengthen the implementation of United States laws against unfair trade and violations of intellectual property rights (IPR). The Act requires the USTR to conduct investigations, establish a "priority list" of countries and detail their unreasonable practices or absence of adequate and effective protection of IPR, then set deadlines for their compliance by the foreign countries. Should they fail to comply, mandatory retaliation would

⁹ See Appendix I.

¹⁰ The Trade Act of 1974 19 U.S.C. § 2101 (central to international trade policy).

be imposed.¹¹ As the Act makes the United States play the role of both the judge and jury, it is termed "aggressive unilateralism",¹² which places greater emphasis on trade retaliation than reciprocity.

In addition, although there are certain laws which do not authorise the President to retaliate, they still constitute immense pressures on Taiwan due to Taiwan's special relations with the United States. For instance, the *International Banking Act* of 1978,¹³ which requires foreign countries to grant American banks "equality of competitive opportunity" in similar circumstances, does not have the coercive powers of the Trade Acts. Nonetheless, it is as effective as the Trade Acts when applied to Taiwan.

An issue that needs to be clarified concerns the relationship between the United States and Taiwan. Despite the fact that no formal diplomatic relations have existed between the United States and Taiwan since 1979, there is no difficulty with regard to the application of United States trade laws to Taiwan. The *Taiwan Relations Act*¹⁴ -- a municipal law of the United States made to maintain "unofficial" relations with Taiwan, expressly states that for the purpose of United States laws, Taiwan is treated as a sovereign nation[Section 4].

¹¹ The Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C.A. § 2242.

¹² The term was invented by Professor Jagdish Bhagwati. He opined that section 301 trade policy was basically GATT-illegal and had no place in a world trading regime reflecting the rule of law and a necessary symmetry of rights and obligations. He strongly opposed the United States playing the role of a self-appointed "trade cop" and "trade czar". Jagdish Bhagwati & Hugh T. Patrick (ed.), *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* p.37 (1990); Jagdish Bhagwati, "Multilateralism at Risk: The GATT is Dead. Long Live the GATT," 13 *World Economy*, p.158 (1990); see also Pierre Martin, "The Politics of International Structural Change: Aggressive Unilateralism in American Trade Policy," in Richard Stubbs & Geoffrey R.D. Underhill(ed.), *POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER* pp.439-452 (1994).

¹³ 12 U.S.C. § 3101 (1978).

¹⁴ See Chapter 1, n.12 and accompanying text.

B. THE ANALYTICAL FRAMEWORK -- FROM AUTHORITARIAN CORPORATISM TO CONSTITUTIONAL DEMOCRACY

Western and Taiwanese political scientists generally agree that the KMT government was an authoritarian regime on Taiwan before it committed itself to democracy. They do, however, have different views as to the kind of authoritarianism it was.¹⁵ Recently, however, more are convinced that the state of Taiwan can be explained in terms of the notion of authoritarian corporatism. Before discerning their insights, perhaps it is appropriate to know more about the concept of corporatism. According to Philippe Schmitter,

"Corporatism can be defined as a system of interest representation in which the constituent units are organised into a limited number of singular, compulsory, uncompetitive, hierarchically ordered and functionally differentiated categories, recognised or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective category in exchange for observing certain controls on their selection of leaders and articulation of demands and supports. The organised interests of civil society are linked with the "decisional structures" of the State."¹⁶

Robert Wade, after making a resourceful study of Taiwan's economic policy-making and development, suggests that Taiwan fits quite well into the corporatist framework.

"Taiwan's economic bureaucracy fits into a wider set of political arrangement of an "authoritarian corporatist" kind. The rules for selecting the rulers give little scope for the expression of popular preferences, and

¹⁵ Edwin Winckler prefers to use the term "soft authoritarianism" to describe KMT; while some suggest that it was a military regime, emergency regime, Leninist regime or corporatist regime. See for instance, Edwin A. Winckler, "Institutionalisation and participation on Taiwan: From Hard to Soft Authoritarianism," *The China Q.*, No.99, pp.482-499 (Sept., 1984); and Chou, Yangsan & Andrew Nathan, "Democratising Transition in Taiwan," 27 *Asian Survey*, No.3, pp.277-299 (March, 1987); Edwin A. Winckler & Susan Greenhalgh (ed.), *CONTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN* (1988).

¹⁶ Cited by Andrew Cox & Noel O'Sullivan, *THE CORPORATE STATE: CORPORATISM AND THE STATE TRADITION IN WESTERN EUROPE* p.49 (1988).

specifically, do not allow competition between political parties (prior to 1987). Interests groups are not voluntary associations, but are chartered or even created by the government. They function more as dependent auxiliaries of government than as autonomous aggregators of member's interests. This type of political system enables the political leaders to articulate a public philosophy and broker political demands within the framework of that philosophy. In particular, it enables them to exercise much influence over public investment and policy choices."¹⁷

Cheng, Tun-jen and Stephan Haggard also employ the concept of corporatism to characterise the KMT regime. They even provide an explanation for the emergence of corporatism in Taiwan. It was the defeat of the KMT regime on the mainland which motivated a thorough political reform in 1950-1951, through which the party increased its organisational capacity and developed a semi-corporatist structure.¹⁸ Professor Tien, Hung-Mao also agrees with this view by adding "(t)he structural configuration and functional relationship of the KMT, the state, and organized groups in the Republic of China's political system are essentially corporatist."¹⁹ All these suggest not only the interlocked ties between the party and the state, but also that the party-state creature serves as the main actor that directs the organisation and activities of various civic groups. As such, the model of authoritarian corporatism comfortably explains the

¹⁷ Robert Wade, *GOVERNING THE MARKET: THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALISATION* p.228 (1990).

¹⁸ Cheng, Tun-jen & Stephan Haggard, "Regime Transformation in Taiwan: Theoretical and Comparative Perspectives," in Tun-jen Cheng & Stephan Haggard (ed.) *POLITICAL CHANGE IN TAIWAN* p.4 (1992).

¹⁹ Tien, Hung-Mao, "Taiwan's Evolution Toward Democracy: A Historical Perspective," in Dennis Fred Simon & Michael Kau, Y. M. (ed.), *TAIWAN: BEYOND THE ECONOMIC MIRACLE* p.6 (1992).

"developmentalist" or "state-led" character of Taiwan in its economic development.²⁰

What is lacking in their study is the impact of this state structure on law and the legal system of Taiwan. To be more precise, how did law and the legal system function under authoritarian corporatism? What are their special characteristics? Unfortunately, legal academics on Taiwan are not able to answer these questions with their traditional comparative law approach as suggested by Roscoe Pound.²¹ Nor is the explanation that the ROC on Taiwan was originally a constitutional state, but troubled by internal commotion, a comforting one.²² To put it simply, their problem is the lack of a political theory to explain the relationship between political structure and law. More to the point, legal studies regarding Taiwan fail to realise that the very difference in the political power structure means that law must function differently.

²⁰ Gordon White, for instance, argues that Taiwan is a capitalist economy with a Leninist state which has acted as a key agent in the process of capitalism accumulation. Gordon White, "The Developmental State," in Yash Ghai, Robin Luckham & Francis Snyder (ed.), *THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER* p.436 (1989).

²¹ During his stay in China between 1945 and 1946, Roscoe Pound was convinced that the new legal system of China was in line with Western Ideas of law, and that if a favourable environment was given, China would eventually see the operation of a Western legal system in the country. He therefore expressed his strong confidence in the future progress of new Chinese legal system. Undoubtedly, Pound's influence on Taiwan's legal academics is profound. Yet, the comparative approach has become very rigid in the authoritarian era. Roscoe Pound, "Progress of the Law in China," 23 *Washington L.Rev.*, p.345 (1948); "Comparative Law and History as Bases for Chinese Law," 61 *Harv.L.R.*, pp.749-762 (1948).

²² For instance, a European scholar suggests that Taiwan was a constitutional state, but in an emergency situation. He claims that, due to the internal commotion of the nation, the Constitution was prevented from being entirely put into effect, and "(t)he prevalence of Executive power in political life has turned out to be a constitutional reality in Taiwan". Gottfried-Karl Kindermann, *SUN, YET-SEN: FOUNDER AND SYMBOL OF CHINA'S REVOLUTIONARY NATION-BUILDING* pp.143-172 (1982).

The adoption of the theory of authoritarian corporatism thus suggests a new approach to understanding Taiwan's law and the legal system. It does not emphasise the significance of comparative law, although Taiwan does emulate laws from other countries. Rather, it assumes the existence of a strong link between the authoritarian corporatist structure and law. By the same token, democratisation on Taiwan certainly bears significant meaning to law and the legal system as a whole. Accordingly, we are able to comprehend whether the law changes as democratic transformation takes place.

This approach of the study of law and the legal system provides us with interesting insights on the law of Taiwan. This can be viewed from three aspects.

First, authoritarian corporatism assumes the prevalence of state over individuals. Accordingly, the state runs as a planned, organised and corporatist system, justified by its ability to achieve collective ends. In the circumstances, the legal system must, by necessity, be operated to serve the national goals. The biggest impact of this belief is on the institutional design of the Constitution. Thus, the party-state of Taiwan was provided with special powers either through the making of many "special laws" (which normally bore the title of "XYZ Law for the Duration of Suppression of Rebellion"), or through deliberate suppression of the legislative and judicial branches. The latter was done by

making the legislative organs a rubberstamp of the party-executive,²³ and subjecting the courts under the Executive branch.²⁴ Important policies are decided by the so-called "Tang-cheng-kao-tseng" ("High Level Party-government"; 黨政高層) which is composed of senior KMT members, big businessmen, and technocrats. In fact, it is this composition of top policy makers that prompt Wade to regard Taiwan as an extreme example of economic corporatism.²⁵ As such, the meaning of the separation of powers, a deliberate adoption of Western Constitution, has totally changed.

Second, authoritarian corporatism favours the expansion of party-state power. In Taiwan, one way of achieving this was to allow the government to exercise power through delegated legislations and, if not, regulatory discretion. In fact, the government was often free to create administrative orders without proper statutory basis. As noted by a commentator, this has become one of the

²³ This was, in turn, accomplished in two stages. First, by directing the National Assembly to make a special law called "Temporary Provisions for the Duration to Suppress the Rebellion", most of the members of the National Assembly, the Legislative Yuan and the Control Yuan elected in 1947-48 on the mainland were able to retain their offices permanently. Second, to have the Grand Justice Council confirmed such a law. On 29 January, 1954, Council Interps No.31 was delivered (*Ssu-Fa Yuan Ta-fa-kuan Hui-yi Chieh-shih Di 31*). The main reason provided by the Grand Justice Council was that it was factually impossible to hold re-election of members of the National Assembly, the Legislative Yuan and the Control Yuan due to the illegal occupation of mainland China by the communists. Yet in order to maintain the constitutional system of the nation, presently members of these three parliaments must be allowed to hold their offices until the mainland was recovered. Lin, Chi-tung, *Ta-fa-kuan hui-yi hsien-fa chieh-shih shi-luan (AN ANALYSIS OF GRAND JUSTICES COUNCIL'S CONSTITUTIONAL INTERPRETATIONS)* pp.44-55 (1983).

²⁴ This was achieved through several ways: (1) the post of Grand Justice has been used as a reward to those loyal but old KMT members; (2) district court decisions were subject to the review and correction of the Chief Judge of that court before announcement; (3) decisions made by the courts were not open to the public. This avoided the possibility of public and academic criticisms; (4) the Judicial Yuan and the Ministry of Justice were keen to give "letters" recommending trial judges and prosecutors in handling certain kind of cases; (5) bar associations are controlled by those lawyers who have served as military judges or prosecutors in the martial court.

²⁵ Wade, *supra* note 17, pp.294-295.

biggest problems in the democratic transition.²⁶ A consequence of this almost unlimited power of the party-state is that the distinction between public law and private law became vague. In addition, since the legislature had already become a rubberstamping body, legislative control of delegated legislations virtually did not exist.²⁷

Third, authoritarian corporatism prefers order, harmony, and seeks to avoid open conflict. Accordingly, laws were largely punishment-centered to suppress non-conformist human behaviour. Police power was significantly expanded.²⁸ More dramatically, this notion of severe punishment was applied to economic and financial activities. The most notable example being that the drawer of a "bounced" cheque could be sentenced up to three years imprisonment according to Article 141 of the old *Law of the Negotiable Instruments*.²⁹ Control was indeed pervasive.

²⁶ Edwin A. Winckler, "Taiwan Transition," in Cheng & Haggard, *supra* note 18, p.234.

²⁷ Legislative control of delegated legislations in Taiwan will be discussed in detail in Chapter 7B.

²⁸ For instance, according to the old *Police Offence Law*, a person maybe placed under detention or fined if, *inter alia*, he "engages in commercial activities in violation of laws", "sells goods at a price higher than the one fixed by the government", "sells restricted publications", "forces people to buy or sell goods", "(as a landlord or manager of a house) fails to report to the police about the moving in or out of the residents", fails to pay respect to the national flag, the picture of the Founding Father (i.e. Dr. Sun, Yet-sen) or the Head of State, "dresses indecently", "loiters about in the streets, has "no proper job", "singing or performing in an obscene or inhuman manner", and "speaking obscene language or act to provoke opposite sex".(Art.54-78) The Police Offence Law was promulgated on 3 Sept., 1943, amended on 19 June, 1946, 16 July, 1947, 18 Jan., 1949, and 23 Oct., 1954. The Law was abolished in 1991, but a similar law named Social Security Maintenance Law was promulgated on 29 June, 1991. For a discussion of Taiwan's enormous police power, see Tao, Lung-sheng, "Reform of the Criminal Process in Nationalist China," 19 *Am. J. Comp. L.*, pp.747-765 (1971); and Heinrich Scholler & Barbara Wagner, "Police Power in the Republic of China," *Third World Leg. Stud.*, pp.153-165 (1990).

²⁹ This article was abolished in 1986.

For the sake of understanding, these attributes of Taiwan's law reflect Fuller description of law as "a one way projection of authority". In fact, more often than not, it is more like *managerial direction*.³⁰ In the circumstances, one is bound to conclude that Taiwan's law existed in a very rudimentary form under the camouflage of an adopted code law system, and this is due to the existence of an authoritarian corporatist regime.

Note the difference between the functions and purposes of law under authoritarian corporatism and constitutional democracy. The former places more emphasis on the consolidation of state power, social order, and national goals; while the latter lays more stress on separated powers, judicial protection of individuals' rights, and the rule of law. As such, democratic transformation or democratisation not only involves political reforms, but also a comprehensive review of the role of law.

In sum, the so-called democratisation process of Taiwan means the transformation from an authoritarian corporatist state to a Western-based constitutional democracy. As a matter of law, it means the dismantling of the party-state regime, and the realisation of the separated powers system and the rule of law as originally designed by the Constitution of 1947. Based on this analytical framework, we shall see what the impact of American economic pressures has been on such a transitional process.

³⁰ Lon L. Fuller, *THE MORALITY OF LAW* p.207 (1969).

PART II. POLICY AND LEGAL CHANGES UNDER UNITED STATES PRESSURES

CHAPTER 3. TAIWAN'S TRADE POLICIES IN RESPONSE TO UNITED STATES PRESSURES

A. INTRODUCTION

One of the main outcomes of the expanding United States-Taiwan trade since the 1980s has been Taiwan's large trade surplus. In an era which scholars and commentators have branded as "neo-protectionist",¹ this bilateral trade imbalance is intolerable, and the economic logic is that the bigger the trade surplus, the bigger the degree of intolerance. Indeed, a glance at the United States - Taiwan trade figures is sufficient to understand why the United States government has been so obsessed with using bilateral negotiations as a means of trimming its trade deficits.

	Trade surplus with the United States (US\$ 100 million)	Foreign reserves of Taiwan (US\$ 100 million)
1981	34	72.4
1982	42	85.3
1983	66.9	118.6
1984	98.3	156.6
1985	100.3	225.6
1986	135.8	463.1
1987	160.4	767.5
1988	104.6	739

¹ The so-called neo-protectionism is characterised by rising trade restrictions, subsidies, explicit or tacit exemptions from competition or antitrust laws for the purpose of protecting domestic industries. I draw this concept mainly from Jan Tumlrir. For a discussion of Tumlrir's neo-protectionism, see Jan Tumlrir, *PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES* pp.38-55 (1985).

1989	120.3	732.2
1990	91.3	724.4
1991	82.1	824.1
1992	78	823.1
1993	67.6	835.7

Table 1. United States - Taiwan trade statistics 1981-1993.

Source: CEPD, *INDUSTRY OF FREE CHINA*, Vol.LXXXII, No.1, p.10 (1994).

From the above table, it is easy to conclude that Taiwan is getting rich and benefiting more than the United States in terms of its accumulation of foreign reserves, and the main reason is United States - Taiwan bilateral trade. This is not totally true. American scholars have repeatedly argued that trade imbalance reflects only a small part of a much more complex set of links between the two countries, and that therefore it tells nothing of a nation's economic well-being and the character of its international economic interactions.² Yet, American politicians have made the issue of trimming trade deficits its main objective.³ To ensure the achievement of this objective, the American Congress granted the Executive a broad negotiating mandate, and gave teeth (such as section 301) to its Trade Act to ensure the reaching of agreement. They believed that bilateral agreement was the best way to achieve this objective because the GATT mechanism had failed, bilateral negotiation facilitated the reaching of an

² T.J. Pempel, "The Trade Imbalance Isn't the Problem," 22 *Cornell Int'l L.J.*, pp.439, 444 (1989); See also, John Greenwald, "Protectionism and U.S. Economic Policy," 23 *Stan. J. Int'l L.*, pp.232-261 (1987).

³ For instance, in 1987, the United States House Ways and Means Committee decided that if any of America's trading partners had a trade surplus with the United States of 75%, and that there existed a pattern of unfair trade practices, the United States must initiate negotiations. If those negotiations failed, or if an agreement was reached but did not bring any result, the President must take action to reduce the surplus, in essence, by the value of other nations' unfair trade practices. Representative Richard Gephardt even proposed an amendment which required a reduction in the surplus of 10% a year as long as the pattern of unfair trade practices continued. Gephardt's view was also made clear during the 1988 Democratic primary election. See Sander M. Levin, "The Need and the Prospects for a Trade Bill in 1987," in Claude E. Barfield & John H. Makin, *TRADE POLICY AND U.S. COMPETITIVENESS* p.59 (1987).

agreement in a shorter time, bilateral agreements provided a flexible forum for addressing economic problems, and so bilateral agreements guaranteed success.⁴

Taiwan has, on several occasions, expressed its reservation about America's Trade Act,⁵ but also expressed its willingness to cooperate. There are reasons to explain this ambivalence. First, let us consider the official standpoint. Vincent Siew, Vice Chairman of the Council for Economic Planning and Development of Taiwan, whilst attending an official luncheon meeting in the United States once said,

"(w)e in Taiwan, I can assure you, are acutely aware of just how critical an issue the trade deficit is to the United States and how anxious your country is to resolve it. I can also assure you that we are just as determined as you are to find a solution, not only because we feel obliged to help an old friend in difficulty-- and we do consider the United States a very good friend-- but also because the persistent surpluses in our overall trade as well in our bilateral trade have given rise to a number of very serious problems in Taiwan, problems that threaten the long-term health and stability of our economy."⁶

⁴ Max Baucus, "A New Trade Strategy: The Case for Bilateral Agreements," 22 *Cornell Int'l L. J.*, pp.1-24 (1989). Max Baucus was a senator in the United States when he wrote this article, in which, interestingly enough, with the exception of Taiwan, all America's trading partners that enjoyed trade surplus with the United States (notably Japan, South Korea, Brazil, India, Mexico etc.) were under attack. Even when he mentioned the NICs (newly industrialising countries), he omitted Taiwan. The word "Taiwan" appeared only once in the section "Other Bilateral Candidates". This, of course, was a deliberate omission because Baucus was a long-term close friend of Taiwan. Senator Baucus was a successful politician no doubt. This also reflects, more or less, the friendly relationship between Taiwan and American Congress. For more about Baucus's support of Taiwan, see Chapter 8C, n.13.

⁵ For instance, Mr. Chiang P.K., the then Vice Minister of the Economics Ministry, once said in a conference, "(m)y own experience of holding consultations with the United States indicates that some issues, such as trade in certain items with a small trade volume, ought not to become a concern for the United States. However, issues of such kind have been raised often, and in some cases, have pushed the two sides into a corner, with resulting harm to the relationship of the two countries. It could have been even worse when section 301 was wielded as a weapon to seek compromise from our side often provoked emotional reaction from our people and made the problem even more complicated". For the contents of the whole speech, see Chiang, P.K., "The Impact of U.S. Trade Law on Government Policy Making in the Republic of China," 11 *Mich. J. Int'l L.*, pp.279-287 (1990).

⁶ Siew, Vincent C., "A New Era for US-ROC Trade and Economic Ties," *Industry of Free China*, Vol.LXXI, No.6, p.3 (1988).

So, officially, it was friendship and Taiwan's huge trade surplus that prompted Taiwan to help the United States in resolving its trade deficits and declining competitiveness. Using friendship in terms of bilateral economic relations, however, was merely a face-saving gesture, for Taiwan simply did not have the capacity and strength to resist United States pressures. As for the second reason, it is only half correct. Indeed, as a nation that has a strict foreign exchange control system, tremendous accumulation of foreign exchange would mean that the Central Bank must issue the equivalent sum of NT dollar and inject the money to society should the foreign exchange owners (Taiwanese businessmen) needed them domestically.⁷ This, in turn, was likely to cause internal inflation. But it was wrong to say this internal problem could be solved by eliminating trade surplus with the United States. The problem actually was a matter of macroeconomics, not bilateral trade. In addition, as a mercantilist state, accumulation of foreign exchange has to be a central objective, and can never be given up. Thus, one has to conclude that Siew actually did not mean what he said. Whether Siew's speech was in accordance with any economic logic was not important, the message was clear enough: Taiwan would do something to "remedy" the situation. Accordingly, United States-Taiwan bilateral trade has been adjusted so as to achieve the biggest extent of eliminating trade imbalances and to resolve trade pressures. In the late 1980s, focus was turned to the issue of intellectual property protection (IPR) for it was alleged that counterfeiting and piracy in Taiwan had caused even greater losses to American business than traditional trade barriers.

⁷ For further discussion of Taiwan's foreign exchange control system, see Chapter 5B,2.

On the other hand, some important facts should not be neglected. The 1980s may be regarded as one of the most successful decades of Taiwan's economic development. The success also gave confidence to the ruling party and the state bureaucracy that their highly interventionist or corporatist trade policies were the key to such achievements. Therefore, it was unrealistic that the government (party-state) would abandon its policies or practices solely under the pressure of the United States, though, in order to resolve American pressures, a certain degree of "compromise" was deemed necessary. As a matter of fact, if one is to understand the evolution of Taiwan's trade and economic policies, it is important to bear in mind that it has never been the intention of the state to withdraw from the market, nor is it ready to give up its state-led policy. This insight is shared by some prominent scholars such as Robert Wade.⁸ Indeed, if one agrees with Gordon White's theory of "developmental state" which suggested that the pervasive involvement of state in the industrial and economic development was characterised by reasonably efficient *administrative* institutions,⁹ there was no point in Taiwan surrendering its political control network. On the contrary, one may even argue that, on many occasions, the state, in order to maintain its high rate of economic growth, has sought every opportunity to expand its influence in economic activities.

⁸ Robert Wade is perhaps one of the few Western scholars who has conducted in-depth study of Taiwan's economic developments. His opinion is quite anti-neoclassical because he argues that Taiwan's openness and outward orientation trade and industrial policies have not been based on free trade. Government intervention is based on the considerations of promoting certain sectors, raising government revenue, strengthening interstate alliance, and serving certain diplomatic objectives. See Robert Wade, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALISATION* pp.113-158 (1990).

⁹ Gordon White, "The Developmental State," reprinted in Yash Ghai, Robin Luckham & Francis Snyder (ed.), *THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER* p.435 (1987).

As such, United States economic pressures and the traditional political control over the economy have made Taiwan's trade and economic policies very complicated in the sense that it is quite difficult to reason out a coherent theory behind all its actions.

This chapter is an attempt to outline those trade and economic policies of Taiwan made between 1981-1993 in responding to the United States pressures. It should be noted that during this period the general issues of Taiwan's trade policy are too great to permit thorough and systematic analysis. Because of this limitation, selections based on the writer's own judgments about what is relevant and what is important are unavoidable. Therefore, this chapter does not give a full picture of Taiwan's trade policies. Emphasis is placed on how Taiwan sought to accommodate the American demands through the making of its trade policies. The writer argues that in order to strike a balance between American protectionist trade pressures which persistently demand "free trade" or "fair trade", and the maintenance of its traditional corporatist control over the economy, the power of the party-state, by dint of its delicate manipulation of various trade and economic policies, is slowly increasing its powers. Collateral to this expansion of state power is the "bilateralisation" of its liberalisation policy and relevant laws. The trend is evident in the recently promulgated *Foreign Trade Law* of 1993. On the whole, a general observation is that the foreign trade policies of Taiwan still maintain a high degree of "managed" nature as the state is inclined to adhere to the corporatist way of ruling; while on the other hand, it maybe said that the United States, at least indirectly, endorses it.

B. THE "LIBERALISATION" PROGRAMME, THE "TRADE ACTION PLAN" AND THE ACCOMMODATIVE POLICY

As foreign trade has been regarded as a tool to pursue diplomatic objectives, and that the maintenance of good relations with the United States has always been Taiwan's diplomatic priority, granting special favours to American businessmen is thus justified on political grounds. Therefore, it is not surprising that, in the early years, Taiwan chose to purchase from those American states where the senators were pro-Taiwan or which had sister-city or sister-state ties with Taiwan.¹⁰ In concrete cases, for instance, import license for beef was granted subject to certain fat and hormone contents so that only United States beef could pass; while on many occasions, no reason, not even a technical one, was provided for such discriminatory treatments. This was, in fact, the general picture of the United States - Taiwan trade pattern up to the early 1980s.

Then, as Taiwan was under increasing pressures from the United States to open more of its domestic markets and to take more American products, Taiwan, for the first time, considered the option of liberalising its markets. This could not be achieved without the making of a large scale liberalisation and internationalisation programme. So, in the 1983 Economic Reforms Committee -- an *ad hoc* organ composed of selected government ministers, big entrepreneurs, academics, and lawyers (a typical corporatist combination)-- consensus was formed that if Taiwan was to further develop its economy, liberalisation of

¹⁰ Wade, *supra* note 8, p.134.

industrial, financial and public sectors must be carried out.¹¹ This was indeed the first time that the idea of economic liberalisation was officially brought to the government. In 1986, a new economic programme based on the principles of "Liberalisation, Internationalisation and Institutionalisation" was enacted.¹² This programme was a grand policy of opening Taiwan's market to the world. To use the words of one of the original planners,

"Liberalisation allows the economy to be increasingly regulated by the free market. Thus, administrative intervention in private economic activities is being reduced in order to create an equitable and competitive environment for the efficient allocation and utilisation of resources. Internationalisation expands economic activities by opening up home markets and allowing foreign competition with a view towards encouraging economic, technological, and cultural exchange with foreign countries. Institutionalisation streamlines and systematizes economic activities by means of legislation and regulation and is a prerequisite to successful liberalisation and Internationalisation."¹³

Therefore, according to this programme, Taiwan was, presumably, to march toward a free-market economy where supply and demand would be the principal driving forces of the market. Law, on the other hand, served only as a framework to cope with "market imperfection" and to ensure competition, economic growth and justice.

¹¹ See "Taiwan: Is the Miracle Faltering," 15 *Asian Finance*, No.6, pp.56-58 (15 June, 1989).

¹² See CEPD, Executive Yuan, *PERSPECTIVE OF THE TAIWAN ECONOMY UP TO THE YEAR 2000* (1986).

¹³ Chien, Frederick F., "Liberalisation, Internationalisation and Institutionalisation," 3 *J. Chinese L.* p.187 (1989). Frederick F. Chien was a cabinet minister of Taiwan, and held the position of the Chairman of the Council for Economic Planning and Development (CEPD), the Executive Yuan in the late 1980s.

To substantiate the programme of "Liberalisation, Internationalisation and Institutionalisation", important targets were listed. They included reducing trade surplus, privatising state-run enterprises, increasing public expenditure, upgrading the cultural environment, improving welfare system, and amending laws etc.¹⁴ While the plan was still waiting to be implemented, the emergence of American bilateral trade pressures changed the whole picture.

In order to ease the trade tensions with the United States, Taiwan was forced to steer this grand programme by making some special policies and practises. Of particular importance was the "Trade Action Plan" which intended to reduce trade surplus with the United States and the "Accommodative Policy" - a direction to Taiwan's law reform in IPR areas. For the next several years, these two policies essentially became the highest guidelines of Taiwan to respond to America's trade pressures. And precisely because of these two pro-American policies, the ambitious programme of "Liberalisation, Internationalisation and Institutionalisation" had to be substantially narrowed down to the target of trade surplus reduction.¹⁵ I call this a "bilateralisation" of the original policy in the sense that the objectives of the liberalisation policy have undergone a qualitative change. The main feature of these two policies was that they were initiated largely at the request or under the pressures of the United States, and their ultimate purpose was to provide economic gains for the United States, thus

¹⁴ *Id.*, pp.188-192.

¹⁵ Though it may be argued that time and effort are required to accomplish all the targets set forth in the "Liberalisation, Internationalisation and Institutionalisation" programme, the truth is that, apart from the efforts of reducing trade surplus with the United States, other targets have been substantially delayed. See *supra* note 11.

remedying the "trade imbalances" between the two countries. This, of course, does not fit exactly into the original idea of liberalisation or internationalisation. As these two policies are so important in their functions, they deserve detailed discussion.

The "Trade Action Plan"

In early 1989, in order to enhance trade and economic relations with the United States and to "cope with" the "Liberalisation, Internationalisation and Institutionalisation" programme, the Executive Yuan of Taiwan produced a four-year "Plan for Enhancing Trade and Economic Relations with the United States" (the "Trade Action Plan"). After consulting with the United States,¹⁶ the Council of Economic Planning and Development (CEPD) of Taiwan announced the details for implementing the "Trade Action Plan" in March 1989.¹⁷ Some of the most important items of the Plan included:

- (1) increase American imports by means of tariff reduction in industrial and agricultural products; pro-American procurement missions (at least 3 to 4 times a year); simplification of importation procedures etc.;
- (2) further relaxation of restrictions on foreign banks, insurance and securities companies;
- (3) encourage American investments in Taiwan; encourage Taiwanese investments in Mexico and Canada so as to exploit the North American free trade area;
- (4) diversification of the market, so that by the year 1992 imports from and exports to the United States could be reduced to less than one-third of Taiwan's total annual trade volume;
- (5) improvements in IPR legislations and enforcements.¹⁸

¹⁶ In March 1989, Mr. Vincent Siew, the then Vice-Commissioner of the Council of Economic Planning and Development flew to the United States to consult with the United States government about the details of the "Trade Action Plan". He returned to Taiwan on 21 March with a package of the plan. See *Liberty Times* (Tzu-yao jih pao), p.3 (22 March, 1989).

¹⁷ *Id.*

¹⁸ *Id.*

The above items were considered important because they were what the United States was particularly concerned with. Other items, such as establishing an United States-Taiwan Free Trade Area, establishing a trade dispute settlement institution, and relaxation of American export controls etc. received only little attention as they did not have immediate effects on the reduction of America's trade deficits.¹⁹ As a matter of fact, the USTR has officially characterised the "Trade Action Plan" as a programme intended only to reduce Taiwan's trade surplus with the United States.²⁰ As a result, it was a sheer departure from the "Liberalisation, Internationalisation and Institutionalisation" programme, for a grand liberalisation programme could not possibly be bilateral in nature. Instead, it had become an independent plan of its own, served to grant United States more trade privileges and to avoid American retaliatory actions. According to this policy, various legal measures were adopted in favour of the United States. This will be discussed in detail in the following chapters.

The "Accommodative Policy"²¹

The "Accommodative Policy" was employed to resolve America's demands on IPR improvements. The issue of IPR protection has become particularly critical

¹⁹ Obviously inspired by the idea of the North American Free Trade Agreement (NAFTA), the government of Taiwan had been keen on persuading American policy-makers and influencing American public opinion on the establishment of an United States-Taiwan Free Trade Area. The issue of United States-Taiwan Free Trade Area will be further discussed in Chapter 8B.

²⁰ According to an official report of the United States, "(i)n early 1989 Taiwan implemented a "Trade Action Plan", in effect through the end of 1992, that is intended to reduce its trade surplus with the United States". See USTR, 1993 *NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS*, p.247. (Hereinafter NTE Report)

²¹ "Accommodative Policy" is not an official term, nor is it my invention. But it is employed by an economic bureaucrat of Taiwan when discussing Taiwan's intellectual property rights protection. Li, Chih-Cheng, *THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AS A STRATEGIC COMPONENT OF THE REPUBLIC OF CHINA'S ECONOMIC POLICY* (Ph.D. thesis, Kansas University, Sept., 1991) Dr.Li worked for the Central Trust of China (Taiwan), a component of the Ministry of Finance.

since the late 1980s following the passage of the 1988 Omnibus Trade and Competitiveness Act.

From the start, the government of Taiwan was not left with much choice to face American pressures. The situation was clear since the beginning of the 1980s: an accommodative IPR policy had to be formed, or the booming United States-Taiwan trade would be hampered. In its essence, the so-called accommodative policy means a one hundred percent cooperation with the United States to curb the IPR problems. The consensus was first formed in a cabinet-level meeting held on 7 September 1982, which announced many measures to combat IPR infringements.²² They included the ban on export of counterfeit goods, revision of the Trademark Law and the Patent Law and the strengthening of judicial actions etc.²³ Then in 1984, the late President Chiang Ching-kuo instructed the government,

"Counterfeiting is a serious problem which affects not only our national reputation but the future of our foreign trade. Uprooting this problem is an important task for the Ministry of Economic Affairs and requires the combined efforts of the entire government, particularly those of the judicial and security branches. Total eliminating of counterfeiting is a major responsibility in our present economic development."²⁴

It should be noted that the IPR policy was made during the martial law era, thus it is not surprising that "security branches" (i.e. police and

²² Lin, Ruey-long, "Protection of Intellectual Property in the Republic of China," 6 *Chinese Yb. Int'l L. & Aff.*, p.123 (1986-1987).

²³ *Id.*

²⁴ Research, Development, and Evaluation Commission, Executive Yuan, *Chi-Shih-Ssu Nien-Tu Yu Yuan Lieh-Quan 'Fang-Chih Fang-Nau Shang-Pin' Shih-Ti Cha-Cheng Pao-Kao (FACT FINDING REPORT ON ANTI-COUNTERFEITING PROGRAMME UNDER THE EXECUTIVE YUAN IN 1985)* (March, 1985) cited by Lin, *Id.*

intelligence units) were included in President Chiang's mobilisation order. This, nonetheless, reflected the degree of urgency of the matter. President Chiang's statement marked the beginning of a systematic and total mobilisation of the government to fight commercial counterfeiting based on United States claims. Since then, the issue of IPR protection has become a priority of the national goal even after the lifting of martial law. Though no mention of American pressures could be found in the government's IPR policy statements, it had always been America's intention to have the highest authority of Taiwan announce his determination to protect IPR. For instance, in the 1989 IPR consultation, the United States demanded the announcement of a "White Paper" statement by President Lee, Teng-hui, emphasizing his commitment to protect IPR and to enforce IPR laws vigorously.²⁵ The accommodative policy can best be understood by quoting an academic work of a Taiwanese bureaucrat,

"(t)o round out Taiwan's IPR reform, it should not only continue to accommodate United States IPR initiatives, but most importantly, live up to its commitments engaged with the United States... to solve all these (IPR) problems simultaneously, the ROC's three government branches need to work in tandem."²⁶

For these reasons, "modernising" Taiwan's IPR laws in accordance with the American standards became a priority. According to this policy various IPR measures, including the establishment of special organs, new custom system, and special enforcement actions, were taken. All these will be discussed in detail in Chapter 6.

²⁵ BOFT, *Wuo-Kuo 78 Nien Tuei-Wai Mao-Yi Tsu-Shang Tan-Pan Chi-Yiao (A SUMMARY OF ROC'S EXTERNAL TRADE CONSULTATION IN 1989)* (Taipei: BOFT, 1990), Title I (9), p.8 (June, 1990). [Hereinafter the 1989 Consultation Report] The proposal was politely rejected as the government of Taiwan claimed that President Lee had already made a similar statement in the 2nd Plenary Session of the KMT Central Standing Committee held earlier that year.

²⁶ Li, *supra* note 21, pp.107-108.

It should be borne in mind that legally all these policies were implemented through the exercise of the so-called administrative powers. The statutory basis of this administrative discretion was, however, highly questionable. For over two decades, all trade regulatory powers were made according to the *Organic Statute of the Board of Foreign Trade (BOFT)*, the *Ministry of Economic Affairs (MOEA)*.²⁷ Article 2 of the Statute authorised the BOFT to regulate imports and exports, and accordingly, the *Screening Criteria for Export Application and the Screening Criteria for Import Application* were promulgated.²⁸ These two administrative orders have also become the bases of over thirty "third-generation" regulations. It was these administrative orders that constituted the backbone of Taiwan's trade regime. Needless to say, this Executive-created trade regime significantly violated the Constitution which stated that the power to decide matters involving foreign trade and economics rested in the hands of the Legislative branch.²⁹ As such, it became a living embarrassment of the government which had repeatedly claimed that it was transforming to constitutional democracy. Eventually, the Taiwan government decided to follow the United States by creating a trade law.

²⁷ The *Organic Statute of the Board of Foreign Trade* was promulgated on 24 December, 1970. The text of the Statute can be found in CCLRRG, Hsin-cheng 10-01-028, pp.{1292-5}-{1292-7}.

²⁸ These two administrative orders are collected in CCLRC, Ching 100-2, pp.1793-1794.

²⁹ Article 107 of the Constitution states, " (i)n the following matters, the Central Government shall have the power of legislation and administration: 11. Foreign trade policies; 12. Financial and economic matters affecting foreigners or foreign countries...."

C. THE "MANAGERIAL" POLICY --- THE FOREIGN TRADE LAW OF 1993

1. Legislative Intentions

On 5 February, 1993, the government of Taiwan promulgated the *Foreign Trade Law*. The Law represented an effort to put Taiwan's trade affairs under proper statutory basis in the democratic era. As usual, the Law adopted many of the principles and rules in the GATT and the United States Trade Acts.³⁰ Thus, in some way, the *Foreign Trade Law* is a vital development in Taiwan's trading history. Not only is it the first comprehensive piece of legislation on foreign trade, but it also injects needed legitimacy into existing regulatory machinery.³¹

Two additional reasons explain why Taiwan would promulgate such a law. First, bilateral negotiations with the United States have created tensions between the Executive and the Legislative branches. On many occasions, especially in the democratisation era since 1987, the newly elected legislators have accused the Executive branch of acting *ultra vires*, or usurping the Legislative power. Clearly, a law demarcating the two powers on the question of foreign trade affairs was necessary.

Second, though the Law was initiated by the Executive Yuan in the early 1980s, it was not until the 1990s that Taiwan decided to join the GATT and had

³⁰ For instance, Article 18 of the Law states, when a rapid or sudden increase in the amount of importation has caused or is like to cause material damages to domestic industry which produces identical or directly competitive products, the industry may apply for investigation and import relief from the competent authority. This article is a copy of Article 19 of the GATT and Section 202 of the United States Trade Act.

³¹ Yen, Ching-Chang & Wu, Sui-Yu, "International Trade and Custom Duty," in Mitchell A. Silk, *TAIWAN TRADE AND INVESTMENT LAW* p.80 (1994).

received positive response from the United States³² that the making of the Law became a serious matter. For a law which establishes a trade regime based on the rule of law is certainly a prerequisite to GATT application. Unfortunately, as will be seen, this law could not escape being "bilateralised" because of the special trade relationships between the United States and Taiwan, and Taiwan's reluctance to give up its traditional corporatist and interventionist way of ruling.

2. Policies Behind the Law -- Accommodating the "International" Needs and the Extension of Corporatist Control Over the Economy

Although it is not the appropriate place to discuss in detail the contents of the Law, understanding the policy behind the Law through some of the significant provisions is deemed necessary.

As soon as the *Foreign Trade Law* was promulgated, commentators had noticed that it was just another attempt of the Taiwan government to compromise its newly proclaimed "free trade" policy with its traditional protectionist and interventionist policy.³³ This is not surprising considering that Article 145, section 3 of the Constitution states that, "foreign trade shall receive encouragement, guidance and protection from the States." No doubt, this article provides a strong legal basis for government intervention. Thus, on the one hand, one sees some "free trade" Articles in the Law, for instance, Article 11 states "(a)ll goods shall be permitted to import or export freely....". On the

³² On 19 July, 1991, United States President George Bush declared that he would fully support the application of Taiwan to join the GATT. See Chapter 8C, n.13 for detail.

³³ "Taiwan's First Comprehensive Foreign Trade Legislation," *East Asian Executive Report*, Issue:15, p.9 (Apr., 1993).

other hand, exceptions to this free trade principle, which aim at "guiding" and "protecting" foreign trade can be found almost everywhere in the Law, to the extent that it might be more appropriate to say that the Law is a legitimation of the interventionist and corporatist practices of the old trade regime. The "managerial" nature of the Law was so obvious that a legislator even suggested that the Law be called *Management Regulation Regarding Imports and Exports*³⁴. Nonetheless, throughout the whole legislative process, no legislator challenged the rationale that foreign trade affairs should be properly managed by the state. This, nonetheless, reflects the survival of the interventionist and corporatist mentality of the government, both in the Legislative as well as in the Executive branches.

Categorically, the Law provides several means of controlling or managing foreign trade. First, it contains several exceptional rules. Article 11 states that restrictions may be imposed due to national defence, social security, culture hygiene and sanitation, environment and ecology and policy needs. Though any ban or restriction as such is subject to the approval of the Legislative Yuan in order to prevent "democratic deficit", interpretation of these terms falls within the administrative discretion of the "competent authority" which is, as expected, the BOFT.

While the above exceptions maybe be applied universally to all countries' imports or exports, there are some provisions which are specifically designed for

³⁴ The opinion of legislator Chen, Shui-bian. Economic, Judicial Committee, Legislative Yuan, *LEGISLATIVE YUAN GAZETTE*, No.161, p.62 (1993). (Hereinafter *LEGISLATIVE YUAN GAZETTE*)

the United States. Article 6(4) states that the competent authority is authorised to ban temporarily import or export or take other necessary measures when there exists a chronic and huge trade imbalances between Taiwan and its trading counterparts. A main feature of this provision is that the so-called "chronic and huge trade imbalances" cannot possibly be decided by the competent authority, but has to be a result of bilateral negotiations with the trading counterpart in question. Thus, naturally, the bigger or stronger the trading counterpart (that is, the United States), the more likely it is that the term "chronic and huge trade imbalances" will be loosely interpreted. Indeed, this Article is the best reflection of Taiwan's political economy under the pressures of the American hegemony. It is thus not an exaggeration to say that it is a "safeguard clause" made for future bilateral arrangements with the United States.

If Article 6 can be treated as a general exception to the law, then one might be interested to know whether there is any specific exception as well. The answer is positive. An Article 16 was made to allow the BOFT to impose quantitative restraints (quota), on either a gratuitous or a charged basis, on import or export for the sake of implementation of trade agreement or the needs of trade negotiation. This is an article that openly sanctions voluntary restraint arrangements (VRAs). Despite the fact that VRAs have been strongly criticised by legal scholars and economists,³⁵ the *Foreign Trade Law* of Taiwan recognises its validity and necessity. Obviously, it was an attempt by the Taiwan government to legitimise the practice of voluntary restraint agreements between Taiwan and the United States, and pave the way for the future.

³⁵ For a discussion of voluntary restraint agreements, see Chapter 4E.

It maybe argued that all these exceptions are not in accordance with GATT rules, particularly Article XIX which is commonly known as the "escape clause". This argument is compelling, but dangerous. The reason for concern is simple. While adopting international rules seems to justify those articles, a far more important point is to see their operation in the context of national legal and political systems. In an authoritarian state, legal rules and exceptions do not mean so much as they do in Western democracies based on the rule of law, for the regime, without the need to look after the general public, can always manipulate the law and even the circumstances to which the rule or exception applies.³⁶ In other words, by adopting an internationally sanctioned rule and exception, the regime is, ironically, provided with more room for manipulation. Especially in the case of Taiwan which is not even a member of GATT, the application of these exceptions is likely to be used as a means for bilateral trade arrangements which certainly is not the original intention of GATT.

In addition, the Law also recognises the expansion of administrative discretion. As has been mentioned before, prior to the promulgation of the *Foreign Trade Law*, Taiwan's international trade regime was basically built on administrative orders which gave the competent authority wide regulatory discretionary powers. The situation has not improved much following the enactment of the Law. While in principle Article 7(3) states that bilateral or

³⁶ It is in this sense that I think the West has a just cause in seeking and promoting democracy in developing countries. For only a democracy based on the rule of law can, through the operation of checks and balance, ensure that the making and application of laws are always subject to domestic legal control. Without such a system at the national level, the international legal system simply cannot function properly. But then the Western nations must rethink their own systems with regard to foreign trade and economic policies. As pointed out by Tumlrir, they are not so democratic in this regard. See Chapter 7B,3 for further discussion.

multilateral trade agreements should obtain approval from the Legislative Yuan, the exception is that those agreements which fall within the Executive discretion of the competent authority do not apply. This article was, in fact, based upon the United States practice of Presidential Executive Agreements according to which no participation of Congress is required.³⁷ Accordingly, it gives the Executive branch enormous power to dominate trade negotiations and results. Thus, during the course of legislative debate, opposition parties claimed that it was just another "game of words" played by the KMT to avoid legislative control of treaties.³⁸ Their worry is sanctioned. While it maybe true that this American practice did not lead to Executive abuses in the United States, the fear is there.³⁹ When this system is transplanted to Taiwan -- a nation which still carries many authoritarian attributes, it, no doubt, sows the seeds of potential abuse by the Executive branch of Taiwan. This also implies that transplantation or imitation of foreign laws do not necessarily produce desirable results.

One of the most severe criticisms of discretionary powers exercised by Western democratic nations is that they are always non-transparent in nature,

³⁷ Executive agreement refers to those international agreements made by the President of the United States without the advice and consent of the Senate given by the two-third majority requisite for the conclusion of a treaty under the Constitution. The power of the President to make such agreements with and without the authorization or approval of Congress has been recognised by the Supreme Court. See Louis Henkin, Richard C. Pugh, Oscar Schachter & Hans Smit, *INTERNATIONAL LAW: CASES AND MATERIALS* pp.214-219 (1987); Louis Henkin, *FOREIGN AFFAIRS AND THE CONSTITUTION* pp.173-176 (1972).

³⁸ Opinion of legislator Chen, Ding-nan. *LEGISLATIVE YUAN GAZETTE*, *supra* note 33, pp.160-161, 177-180, 188-194, 199-204, 211-216,.

³⁹ *Id.*, p.216. See also Louis Henkin, "Treaties in a Constitutional Democracy," 10 *Mich. J.Int'l L.* pp.406-429 (1989). Some conservative commentators, however, argue that this fear does not exist, for the concerns about the roles of the two branches are precisely part of the competition envisioned by the Constitution. The concerns are, therefore, not constitutional. Jacques J. Gorlin, "Foreign Trade and the Constitution," in Robert A. Goldwin & Robert A. Licht (ed.), *FOREIGN POLICY AND THE CONSTITUTION* p.71 (1990).

thus abridging effectively domestic political discussion of the issue. To quote Jan Tumlir, "without transparency, it becomes impossible to monitor policy experiments, and the system breeds cynicism in those it favours as much as in those it discriminates against".⁴⁰ Accordingly, it is likely that the bigger the discretionary powers, the more undemocratic a process of decision making it would be. Unfortunately, further evidence shows that the problem of non-transparency is not solved by the new *Foreign Trade Law*. Article 8 of the *Foreign Trade Law* states only that the Executive branch in charge of trade negotiation "may" open public hearings before signing any trade agreements, which in practice is likely to be ignored by the competent authority due to bureaucratic resistance of "disturbing noises". Though one may contend that this is not so important as the agreements must be submitted to the Legislative Yuan for approval after all. The problem is that past experience has shown that the time for the Legislative Yuan to exercise approval was too short as American trade pressures were too imminent to make discussion meaningful. But would the competent authority submit the agreements in question to the Legislative Yuan earlier so that the Legislative Yuan could have full discussion? The answer is no. In fact, late submission to the Legislative Yuan for approval proved to be a useful strategy of the Executive branch to secure the trade agreements in its entirety and to avoid humiliations by legislators of the opposition parties. In other words, one has reason to believe that the self-seeking Executive branch would take advantage of American trade pressures to avoid its being checked and

⁴⁰ Jan Tumlir, "Economic Policy as a Constitutional Problem," *Fifteen Wincott Memorial Lecture* p.17 (1984).

thus embarrassed by the Legislative branch.⁴¹

Furthermore, one sees the possible intrusion of private economic activities by the state. The new trade regime created by the 1993 *Foreign Trade Law* establishes a "code of conduct" which may subject individual freedoms to the higher goals of "national interests" or "national image". Article 17 of the Law states that importers and exporters are not allowed to conduct the following: (1) infringement of ROC and foreign intellectual property rights; (2) mislabelling product origin; (3) performing private contracts in bad faith; (4) disrupting trade order by unjust means; and (5) damaging national image or creating trade barriers. While it remains ambiguous as to the meaning of terms such as "bad faith", "trading order", "national image", and "trade barriers", some of them are almost "mission impossible" and even uncomprehensible. For instance, as challenged by a legislator, how could the government know whether importers or exporters violate foreign intellectual property rights, considering that Taiwan has more than one hundred trading partners most of which do not have formal diplomatic relations?⁴² Moreover, how can individuals be so powerful to set up "trade barriers" to block foreign trade without the sanction of the government?

⁴¹ Note that this point necessarily rejects the Weberian notion of the public officials as being dedicated either to the government interest or to some concept of the public interest. As a matter of fact, I quite agree with the Virginia political economy programme which treats the Executive branch of the government and the bureaucrats as a special interest group which favours non-transparent policy initiatives, not only to conceal special interest allocations from electoral scrutiny, but also to maximise their own discretionary power. See Charles K. Rowley & Willem Thorbecke, "The Role of the Congress and the Executive in the U.S. Trade Policy Determination: A Public Choice Analysis," in Meinhard Hilf & Ernst-Ulrich Petersmann (ed.), *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* pp.353-354 (1993).

⁴² Opinion of legislator Wang, Ling-lin. *LEGISLATIVE YUAN GAZETTE*, *supra* note 34, p.74.

Nonetheless, the making of such a provision has a deeper concern. It was made to serve the interests of American multinationals for they have various associations and organisations in Taiwan which perform the function of investigating domestic intellectual property violations and informing the competent authority of them.⁴³ The reasons why Taiwan should pay attention to those American multinationals are not merely that they are economically significant, but also that, as noted by Thomas Gold, "they [multinationals] have taken the place of embassy in defining Taiwan's existence".⁴⁴ To show that the law means business, the administrative penalty for such behaviour is extremely severe.⁴⁵ This, nonetheless, further reflects the "punishment-centred" nature of the authoritarian corporatist law.

Enshrined in this code of conduct is the idea of "administrative guidance" according to which private importers and exporters are inevitably subject to the "instruction" or "moral suasion" of the competent authority. Accordingly, the

⁴³ Among them, the most notable are the International Intellectual Property Alliance (IIPA) which represents over 1500 computer companies; the Business Software Alliance (BSA), an association of American software companies; the International Anti-counterfeiting Coalition (IACC), a coalition of over 120 members which according to its own estimation, represents total sales of over US\$ 500 billion or approximately 10% of annual United States GNP; the Pharmaceutical Manufacturers Association (PMA), an entity that represents over 100 United States-based companies which research, develop and market a substantial portion of medicines throughout the world; and the United States Trademark Association (USTA), a United States-based association which also accepts memberships from other countries. A general feature of these associations is that they exert pressures on both the United States and Taiwan to pursue their goals of IPR protection. In the United States, they participate in the public hearings held by the Congress, prepare their own list of Special Section 301 "Priority Countries" and make recommendations to the USTR. In Taiwan, they "co-ordinate" with the government in sweeping counterfeiting and piracy. Summarised from Liu, Paul C.B., Hu, Han-chuan, Sun, Andy Y., Cheng, Shan-li & Pang, Ya-liang, *Mei-Kuo Chi-Yeah Twei Chih-Huei-Tsai-Chan-Chuan Hsiang-Kuan Li-Fa Tan-Pan Tso-Lueh Chi Ying-Hsiang (UNITED STATES INDUSTRIES AND GOVERNMENT INTERACTION ON TRADE AND INTELLECTUAL PROPERTY LEGISLATION)* pp.247-320 (1993).

⁴⁴ Thomas Gold, "Dependent Development in Taiwan," (Doctoral thesis, Harvard University) (1981), cited by Wade, *supra* note 8, p.154.

⁴⁵ According to Art.28 of the Foreign Trade Law, violation of Article 17 may be fined not less than NT\$ 30,000 (750 Sterling Pounds) but not more than NT\$ 300,000 (7,500 Sterling Pounds), and rescission of import or export licenses.

competent authority can always apply any one of the provisions to exclude private economic participants (the best of which is , of course, to invoke "performing contracts in bad faith" or "damaging national image").

This "code of conduct" no doubt gives the Executive branch additional powers to check private activities. Free flow of goods (Art.11) becomes meaningless if private participants can be excluded by the state according to vague legal rules.

To conclude, the *Foreign Trade Law* of 1993 represents the Taiwan government's effort to establish an international trade regime with a sound legal basis. Despite the fact that the Law was made in the proclaimed democratic era, it reflected the survival of many corporatist practices which put the state in a high and guiding status. The Legislative Yuan still delegated to the later substantial and broad powers to regulate foreign trade matters. Of particular importance is that, because of the highly manipulative potential and ambiguous language, one can hardly see a predictable, consistent and coherent trade policy. Tumlrir has pointed out that if law is to be used as an instrument of policy, clear legal rules must be made, so that the average citizen can understand.⁴⁶ His argument is that clear legal rules are the only means by which the average citizen can make any sense of the complex policy issues confronting him and form a view as to whether a policy is succeeding or failing.⁴⁷ By the same token,

⁴⁶ Tumlrir, *supra* note 40, p.14.

⁴⁷ *Id.*

clear legal rules are also important for the courts, for without them one simply cannot expect that the courts can do a better job than the bureaucrats in interpreting the law. Here the *Foreign Trade Law* is such a living creature which the average citizen and the court might find difficult to understand. Yet, there is one thing for sure: that all is subject to the flexible modification and manipulation of the "competent authority". More to the point, the new trade regime is an extension of the old one. In fact, one is bound to conclude that this was precisely the intention of the government. By concentrating power in the hands of the "competent authority", the government of Taiwan hopes to increase its bargaining chips in negotiating with foreign nations, the United States in particular. Only through this can its mercantilism be maintained.

Last but not least, the making of this *Foreign Trade Law* is not an innovation of Taiwan. Many of the principles, rules and exceptions were copied from various United States trade laws. Thus, if the United States trade laws represent laws of neo-protectionism, then the *Foreign Trade Law* of Taiwan is a restatement of them. It is pointed out that the characteristic features of neo-protectionism are the delegation to the President of broad discretionary authority to modify tariffs and other tariff barriers, to impose trade restrictions for security reasons, and to impose import restriction to protect domestic producers.⁴⁸ Among them, the President's power to negotiate voluntary restraint arrangements (VRAs) is the most notable and dangerous instrument of trade

⁴⁸ See for instance, Robert E. Hudec, "GATT Legal Status in U.S. Domestic Law," in Mein Hilf, Francis G. Jacobs & Ernst-Ulrich Petersmann (ed.) *THE EUROPEAN COMMUNITY LAW AND GATT* pp.240-241 (1986).

policy.⁴⁹ Here, as has been discussed above, all these features can be found in the *Foreign Trade Law* of Taiwan. Indeed, so many exceptions to the principle of free flow of goods in the *Foreign Trade Law* signifies the protectionist and the state-led mentality of Taiwan. An interesting and intriguing point is that this neo-protectionism provides the Executive with enormous discretionary powers which coincide with, and thus extend the traditional mercantilistic corporatist nature of Taiwan. Ernst-Ulrich Petersmann used to term the implementation of American foreign trade polices and laws as "a limited government with unlimited power",⁵⁰ and was thus a "Hobbesian state".⁵¹ The situation here is that this Hobbesian state seems to have been adopted comfortably by Taiwan through the promulgation of its *Foreign Trade Law*.

D. CONCLUDING REMARKS

Several conclusions can be drawn with regard to the trade policies of Taiwan made in the shadow of United States pressures.

First, the multilateral trade policy of Taiwan is bent to serve its trade relations with the United States. It is true that Taiwan has the determination to establish a rule-based trade regime so as to integrate into the world economy

⁴⁹ Tumlrir, *supra* note 1, pp.39-43.

⁵⁰ Ernst-Ulrich Petersmann, "Limited Government and Unlimited Trade Policy Powers: Why Effective Judicial Review and a Liberal Constitution Depend on Individual Rights," in Hilf & Petersmann (ed.), *supra* note 41, pp.537-561 (1993).

⁵¹ Ernst-Ulrich Petersmann, "National Constitutions and International Economic Law," *Id.*, pp.4-52.

and to resolve American pressures. The grand policy of "Liberalisation, Internationalisation and Institutionalisation" was such an effort. It shows that Taiwan was prepared to open its market on a non-discriminatory basis in the hope that it could join the GATT/WTO in the near future. As a matter of fact, joining the GATT/WTO has been considered the best way to resolve American pressures.⁵² Nevertheless, before that wish come true, policies and laws in favour of the United States have to be made. The "Trade Action Plan" was the most notable one. The multilateral trade policy of Taiwan was thus "bilateralised" in the sense that special consideration was given to United States nationals through bilateral negotiation. As a result, bilateralism remains a significant part of Taiwan's trade regime, regardless of the fact that it violates the very basic principle of most-favoured-nation (MFN).⁵³

Second, one has reason to believe that the United States is at least implicitly supporting a strong interventionist and regulatory state in Taiwan. As the United States has adopted a "result-oriented" approach in its bilateral trade talks, "measurable progress" on the part of its counterparts is considered a condition to avoid trade retaliations by the United States. Yet, as bilateral trade negotiations are conducted on a government-to-government basis, the government must be relied upon to achieve the so-called measurable progress. When a government is under external pressures to implement laws or to carry out strong enforcement actions to achieve certain objectives, the results have always been

⁵² This point will be further elaborated in Chapter 8.

⁵³ Michael C. Aho, "More Bilateral Trade Agreements Would be a Blunder: What the New President Should Do?" 22 *Cornell Int'l L.J.*, pp.25-38 (1989).

that the government becomes more intrusive not only in economic activities, but also in other areas. In other words, for the sake of its own interests, the United States will not object to the Taiwan government's intervention in the economy in the name of "maintaining good relationships with the United States", "avoiding trade retaliation", or "national image". This further encourages Taiwan to maintain control over the economy and society.

Third, the adoption of United States trade laws and principles in the *Foreign Trade Law* sustains Taiwan's corporatist control of the economy. The *Foreign Trade Law* is a combination of the old state-led policy and many American trade laws and principles. It openly discards liberal ideas by providing a corporatist mechanism for the "competent authority" to regulate the economy, and consolidates the various protectionist measures. Surely, though, one can still claim that Taiwan now has a trade law, and so, at least, the rules of the game are there. But the problem is that the trade law is largely a legal transplantation based on the condition that the state must remain dominant in the economy. As such, one finds not the idea of free trade, but a new breed of neo-protectionism.

CHAPTER 4. MAJOR LEGAL ISSUES AND IMPACTS REGARDING COMMODITY TRADE

A. INTRODUCTION

In Chapter 3, we discussed the various policies which Taiwan has implemented in respect to American trade pressures. It is argued that two main forces decide the trend of Taiwan's trade policy. On the one hand, American trade pressures have led to a market opening process, which ostensibly demand Taiwan's economy to be liberalised from state control. On the other hand, corporatist control by the regime remains, indicating that the state was reluctant to loosen its grip over the economy. Accordingly, the policy of liberalisation and internationalisation in the 1980s and the *Foreign Trade Law* of the 1990s have been highly "bilateralised" and the corporatist style of ruling continues. In addition, a strong argument is also made by claiming that efforts to accommodate American demands have, in fact, further strengthened the power of state in the sense that the Executive's "discretionary" powers are largely strengthened.

This chapter deals in detail with how Taiwan has handled United States pressures and demands. Some of the important trade issues which have occurred in the past decade are selected for discussion and analysis. The purpose is to provide a clear picture of United States-Taiwan trade relations through the discussion of concrete cases. These cases and issues are important not only because they involve legislative changes, which certainly are the concerns of lawyers, but also because they reflect significantly how Taiwan resolved American pressures in an authoritarian corporatist way. Important cases are discussed in

every selected issue and independent evaluation is made thereafter. This chapter shows that unequal negotiating power between the two states has resulted in unequal trade agreements. It also shows how, to avoid American pressures, laws are constantly disregarded. This, nonetheless, favours the continuation of authoritarian corporatism. In addition, it is argued that the United States relied very much on the mobilisation of state power on the part of Taiwan to meet its needs. Note also that most of these "liberalisation efforts" were conducted either shortly before or after the lifting of martial law. The practices of the Taiwan government, however, were highly questionable in terms of the democratic principles of participation and openness. Yet, the outcome is evident: a series of mistaken policies caused by irresponsible bureaucratic improvisation, which eventually led to public resentment.

B. TRADE IN AGRICULTURAL PRODUCTS

1. The World Food Surplus in the 1980s

One of the main international trade issues throughout the 1980s and the early 1990s was perhaps the liberalisation of agricultural trade. Not only industrialised nations, that is, the United States, EC (now European Union; EU) and Japan quarrelled among themselves about farm subsidies, developing countries were also suffering from tremendous pressures from the United States to open their domestic markets.

The reasons why the United States has been keen to liberalise world farm food products could not simply be explained in terms of the demand for "fair trade" or eliminating trade deficits. As noted by economists, a main factor was due to a shift in the trend of the world food markets. That is, industrial market economies had switched from being net importers to massive net exporters of food since the early 1980s, while the opposite happened for developing countries.¹ However, this food surplus in the developed countries did not meet the market demands. Because of the emergence of Third World debt crisis, many debt-ridden developing countries were forced to slow down their import demand.² In Asian countries, notably Japan and the NICs, though without debt burden, farm policies changed to subsidising their farmers as food import dependence increased.³ As a result, the 1980s witnessed a "crisis in world agriculture" characterised by plummeting agricultural prices, widespread economic stress in farming, and protectionism."⁴ Domestically, this generated a fiscal burden of farm subsidies in the United States.⁵ As such, they strained the fiscal capacity of the United

¹ Kym Anderson & Rodney Tyres, *GLOBAL EFFECTS OF LIBERALISING TRADE IN FARM PRODUCTS* pp.1-2 (1991).

² *Id.*, pp.4-5.

³ *Id.* p.87. The reason Asian countries protected their farmers was the desire to maintain a certain degree of self-sufficiency. Fluctuation in size of the global harvest or political events may prevent a nation relying on foreign supplies from obtaining "the food it needs, when it needs it". For problems concerning world farm trade, see also Jon G. Filipek, "Agricultural in a World of Comparative Advantage: the Prospects for Farm Trade Liberalisation in the Uruguay Round of GATT negotiation," 30 *Harv. Int'l L. J.*, pp.123-170 (Wint.1989).

⁴ William M. Miner & Dale E. Hathaway, "World Agriculture in Crisis: Reforming Government Policies," in William M. Miner & Dale E. Hathaway (ed.), *WORLD AGRICULTURAL TRADE: BUILDING A CONSENSUS* pp.37-43 (1988); Grace Skogstad, "Agricultural Trade and the International Political Economy," in Richard Stubbs & Geoffrey R.D. Underhill (ed.), *POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER*, pp.249-250 (1994).

⁵ According to a United States official statement, US\$ 25 billion were spent directly to support farmers in 1987; another US\$ 6 billion were transferred to farmers through programmes which maintain consumer prices for dairy and sugar-containing products well above world market levels. "Statement of the United States Delegation Presenting a Proposal for Negotiation on Agriculture," collected in Ernst-Ulrich Petersmann & Meinhard Hilf (ed.), *THE NEW GATT ROUND OF MULTILATERAL TRADE*

States attempting to reduce persistent budget deficit.⁶

Haunted by all these international as well as domestic problems, the United States sought to "liberalise" the world agricultural markets. The inclusion of agricultural trade issues in the multilateral trade negotiations under the auspices of the GATT was part of the effort.⁷ In addition, bilateral negotiations were also conducted in the same period by the United States and its trading counterparts. Needless to say, Taiwan was one of the main targets.

2. Trade Talks and Turmoil

Taiwan's agricultural policy has been driven by an intense desire to achieve self-sufficiency.⁸ Accordingly, various programmes, such as government rice purchase policy (to control the price of rice), price support system (paying cash to farmers producing dryland crops) have been carried out to ensure the

NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS p.266 (1991).

⁶ "Reforming World Agricultural Trade: A Policy Statement by Twenty-nine Professionals from Seventeen Countries," in Miner & Hathaway, *supra* note 4, p.6.

⁷ According to USTR Clayton Yeutter, United States proposal on agriculture in the Uruguay Round was to call for a freer and open trading environment in agriculture by the year 2,000. It planned to eliminate all trade barriers and trade distorting incentives while providing a safety net for farm incomes. Clayton Yeutter, "U.S. Negotiating Proposal on Agriculture in the Uruguay," in Petersmann & Hilf, *supra* note 5, p.265.

⁸ The reason, according to an official of Taiwan, is that "agriculture is a different kind of industry. We have to have some kind of security in our food production." Cited by "Taipei Under United States Pressures to Open Local Markets: Friction on the Farm," *Far Eastern Economic Review* p.73 (17 Aug., 1989). For a discussion of Taiwan's agricultural policy, see Wang, Y. T., "Agricultural Development in the Republic of China on Taiwan, *INDUSTRY OF FREE CHINA*, Vol.LXIX, No.2, pp.7-11 (1988); Lo, Minh-Chi & Hwang, Tsorng-Chyi, "Agricultural Trade Policy in Taiwan," *INDUSTRY OF FREE CHINA*, Vol.LXXX, No.5, pp.37-53 (1993); and Ronald D. Knutson & Lee, Yuan-ho, "Adjustment of Food and Agricultural Policy After the GATT Uruguay Round Agreement: Implications for Taiwan and the United States," *INDUSTRY OF FREE CHINA*, Vol.XXXII, No.3, pp.77-86 (1994).

security of food supplies and farmers' income.⁹ These systems were in many ways similar to the United States policies.¹⁰ Yet, on the whole, it is said that Taiwan's agricultural policy is still less protective than the United States.¹¹

United States - Taiwan trade talks concerning agricultural products included mainly the following products: vegetables (maize, mushrooms), fruits (apples, orange juice, raisins, peaches), grains (rice), and meats (beef, chicken, turkey).¹² The central concern of bilateral talks was about tariff reductions and the removal of nontariff barriers on the part of Taiwan. However, this was not always the case. In trade talks concerning rice, the purpose was mainly to protect American exports to developing countries. Also, with regard to negotiations of turkey imports to Taiwan, it was more a game of power politics than a matter of comparative advantage or free trade. These two cases, therefore, deserve more attention in the understanding of the nature of American trade pressures.

(1). The Rice Agreement

As rice is one of Taiwan's main agricultural products, it is not surprising that, inspired by the practices of many Western countries, rice production is heavily subsidized and strict import restrictions on rice are imposed. As a result, Taiwan, like the United States, has had an over-production of rice since the

⁹ Knutson & Lee, *Id.*, pp.79-83.

¹⁰ *Id.*, p.78.

¹¹ *Id.*, p.83.

¹² See Appendix II.

1980s.¹³ Naturally, Taiwan began to seek opportunities to export its surplus rice to other countries. This led to a conflict of interests with the United States. In 1984, the United States Rice Millers' Association filed a complaint alleging subsidized rice export from Taiwan. After a brief consultation between the two countries, Taiwan and the United States signed a *Memorandum of Understanding Between the AIT and the CCNAA Concerning Exports of Rice from Taiwan* on 1 March 1984.¹⁴ Under the *Memorandum of Understanding*, which was to last for five years, Taiwan agreed to export its rice only to countries with less than US\$ 795 per capita income, and that the total amount of export should not exceed 1.37 million metric tonnes.¹⁵ One may call this a special kind of voluntary restraint arrangement (VRA) in the sense that restraints were not directed against contracting counterpart, but to a group of other countries. This means that potential markets for Taiwan's rice were limited to some underdeveloped or developing countries in the Third World. In reality, this meant that the opportunity to export Taiwan's rice was virtually nil because countries with a per capita income of US\$ 795 seldom had the economic capability to buy rice from Taiwan. Apart from that, Taiwan was not to compete with the United States in other areas of the world. The most astonishing thing in the memorandum was that Taiwan also agreed to adhere to the "Buy American" policy, including the purchase of United States grains.¹⁶

¹³ Knutson & Lee, *supra* note 8, p.81.

¹⁴ *Memorandum of Understanding Between the AIT and the CCNAA Concerning Exports of Rice from Taiwan*, 1 March 1984, 4 *CHINESE Yb. Int'l L. & Aff.*, pp.334-340 (1984).

¹⁵ *Id.*, p.335.

¹⁶ *Id.*, p.340.

After one year, as Taiwan's domestic rice consumption continued to decrease which led to a sharp drop in the market price, Taiwan sought to re-negotiate the rice agreement with the United States, hoping that the United States could allow a certain degree of "flexibility" in the interpretation of the agreement regarding the areas for export. The United States rejected the suggestion by simply claiming that there was no need to re-negotiate the agreement.¹⁷

It is obvious that the rice agreement violated the spirit of free trade where buyers are free to choose sellers. It was, in fact, an arrangement of trade distortions. However, because of suffering from a trade deficit with Taiwan, it seems that the United States was justified in making such an arrangement for the benefits of its farmers but at the expense of Taiwan's right to trade. Also it seems that because it enjoyed a trade surplus, Taiwan should restrain itself from competing in the world agricultural markets. Nothing is more ridiculous than citing this as an effort towards liberalisation.

More dramatically, the rice agreement has caused chained internal problems for Taiwan. Having realised that it was impossible to gain any room for rice export, the government of Taiwan planned the following: (1) a Six Year Paddy Diversion Programme -- that is, to divert the use of riceland from the production of rice to alternative crops; (2) to promote rice consumption by encouraging the production of rice processing products (e.g. rice-made biscuits) and limiting the

¹⁷ Yen, Ching-chang, *Chung-Mei Ching-Mao Tan-Pan Yiu-Kuan Fa-Lu Wen-Ti Chih Yien-Chiu (A STUDY OF THE LEGAL ISSUES REGARDING US-TAIWAN TRADE NEGOTIATIONS)* p.530 (1988).

import of wheat; and (3) to blend rice with other coarse grains to feed animals and livestock.¹⁸ None of them was economically efficient and desirable. To achieve (1), the government had to increase tax on agricultural products, otherwise it simply would not have enough money to carry out the policy. The implementation of (2) led to a sharp rise in wheat price, benefiting only those wheat import-quota holders. (3) only created severe price fluctuation in the animal feeds market. Besides, the meat of those animals fed with rice tasted different, and was therefore unwelcome in the market.¹⁹

The whole story therefore reflects a chained distortion of Taiwan's farm policy and market. In order to honour the rice agreement, Taiwan's internal rice surplus problem had resulted in the diversion programme, and this in turn gave rise to distortions in the production and prices of other commodities. One commodity problem led to another. If American farmers benefited from the rice agreement, it was certainly due to these re-distributive arrangements between the two countries.

(2). The Turkey War

If the issue of the rice agreement represented an unequal "treaty" for Taiwan, the case of allowing the import of American turkey meat would mean sheer coercion. Since the mid 1980s, the United States has been keen to

¹⁸ *Economic Daily News* (Ching-chi jih pao), p.3 (24 Sept., 1986).

¹⁹ *Id.*

penetrate Taiwan's meat market. The 1988 "turkey meat" case later developed into political unrest on Taiwan.

Apart from the main purpose of reducing its trade deficits with Taiwan, two additional reasons explained why the United States had chosen "turkey parts" as the subject matter for trade negotiation. First, there had been a significant increase in applications for licences to import turkey parts²⁰ by Taiwanese importers since the end of 1987.²¹ As a result, the market price for domestic chickens fell drastically. In order to safeguard chicken farmers, the Taiwan government ordered that all applications for the import of turkey must acquire approval from the Council of Agriculture from 23 January 1988.²² The United States regarded this as the establishment of a nontariff barrier, thus violating the United States-Taiwan Trade Agreement of 1978. Second, there has been a sharp increase in turkey slaughter in the United States since the mid 1980s; while exports of whole turkeys and turkey parts have suffered a significant drop in sales in some countries, notably Egypt (-75%) and Japan (-35%).²³

²⁰ It should be noted that Taiwanese consumers generally prefer turkey parts (wings and drumsticks) to whole turkey.

²¹ Turkey meat belonged to the category of import control according to Taiwan's import regulation. This means that importers must apply to the government for permission (license) to import.

²² BOFT, *Wuo-Kuo 78 Nien Twei-Wai Mao-Yi Tsu-Shang Tan-Pan Chi-Yiao (A SUMMARY OF ROC'S EXTERNAL TRADE CONSULTATION IN 1989)* (Taipei: BOFT, 1990), Title I (1), p.1 (1990). [Hereinafter 1989 Consultation Report]

²³ 1988 CRB COMMODITY YEARBOOK p.276.

Under pressure from the United States, Taiwan reluctantly agreed to lift the restrictions.²⁴ This decision created political turmoil. On 20 May 1988, a demonstration by thousands of chicken farmers in Taipei erupted into the most violent incident since the riots in 1947 when the KMT government recovered the island.²⁵ Just eight months after the lifting of martial law, the event posed a serious challenge to the democratic government.²⁶ To remedy the situation, the government immediately announced that it would not "betray" the farmers; while on the other hand, it tried to seek a compromise with the United States by allowing a greater import quota for American turkey parts. However, in August the United States sent its ultimatum: lift the restriction completely or face retaliation.²⁷ On 1 December 1988, as an expedient measure, the government issued a permit license allowing an emergency import of 290 metric tons of turkey parts, hoping that this would ease its trade tensions with the United States. Taiwan's efforts proved futile. The toughness of the United States was underestimated and the threat of trade retaliation still imminent. Eventually, in the 1989 trade negotiation, Taiwan agreed to allow imports of turkey parts without any quantitative limitation starting from 1 September 1990; before that date import licenses for turkey parts in the amount of 950 metric tons would be

²⁴ "Taipei Under US Pressure to Open Local Markets: Friction on Farm," *Far Eastern Economic Review*, p.73 (17 Aug., 1989).

²⁵ Thomas R. Howell, Alan Wm. Wolff, Brent L. Bartlett & R. Michael Gadbaw (ed.), *CONFLICT AMONG NATIONS: TRADE POLICIES IN THE 1990s* p.320 (1992)(hereinafter Howell & Wolff); the event is also treated as part of Taiwan's constitutional history in Albert P. Blaustein & Gilbert H. Flanz (ed.), *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* binder XIX pp.xxv-xxvi (1994).

²⁶ There was a rumour that some KMT hardliner suggested re-imposing martial law to restore law and order, but President Lee rejected such a proposal.

²⁷ K.T. Hsueh, "A Review of ROC-US Economic and Trade Relations Since 1985," 4 *American Monthly Journal*, Issue 6, p.69.

issued.²⁸ Because of this agreement, it was estimated that the livelihood of up to 200,000 farmers was affected.²⁹

3. Evaluation

Trade talks concerning agricultural products violated almost every principle the United States has sought to accomplish in its grand plan of liberalisation. First, the negotiations were based on power, not on law or even basic principles of free trade. This has rendered the United States official statement for world agricultural liberalisation that "developing countries, in particular, will have an opportunity to compete in a free market, to earn through trade, the exchange needed to finance development, including their own agricultural production" unreliable.³⁰ Second, concessions on the part of Taiwan were made according to self-created executive discretion either without the knowledge of the public or against public opinion. The Executive branch of Taiwan, therefore, became a tool of United States policy insofar as it implemented and, thus legitimised, United States pressure in the domestic legal order. Consequently, this has further expanded the power of the Executive in the economy.

In addition, the rice agreement and the opening of agricultural markets for American products have led to the establishment of economically inefficient

²⁸ Article 2 of the *AGREED MINUTES*. The text is collected in 1989 *Consultation Report*, *supra* note 22, Title 1, pp.17-18.

²⁹ *Id.*, p.2.

³⁰ "Statement of the United States Delegation Presenting a Proposal for Negotiation on Agriculture," in *supra* note 5, p.266.

structural adjustments on the part of Taiwan. The government of Taiwan was not only blamed for its "soft" attitudes towards the United States, but also its massive policy failure. One may thus argue that through these coercive arrangements, the United States is exporting its domestic problems to Taiwan.

Moreover, it should be noted that all the trade agreements and subsequent arrangements were conducted in such an authoritarian way that public concern was deliberately put aside. In a democracy, the "altruistic" rice agreement and the "self-sacrifice" turkey agreements could never have been concluded, at least not without a proper planning in advance or a proportional consideration from the counterpart. True, the government did try to compensate the farmers by introducing news schemes, but that too was carried out brutally and proved to be unworkable. Yet, the omnipotence of the state meant that the government was not to be accused of any wrong doing. This reflects the other side of the "state-led" developmental state, that is, whether right or wrong, the government stays in power as it is. In an era when everyone (including the government) was talking about democratisation, the government was practising exactly the opposite, without even the slightest fear of losing power.

C. BEER, WINE AND TOBACCO

One of the most painful experiences of United States-Taiwan trade is perhaps the controversy over the importation of American beer, wine and tobacco happened between October 1985 and December 1986, precisely the period during which Taiwan was preparing to lift its martial law and marched for democracy.

Here, trade retaliation according to section 301 of the United States Trade Act was almost invoked for the purpose of opening Taiwan's wine and cigarette markets which were worth around US\$ 1 billion per year. In order to resolve the pressures, the government of Taiwan had to take a series of measures in line with the United States, thus, again, fully exposed its vulnerability to the economic hegemony. The United States' demands were straight-forward at the beginning -- Taiwan must open its markets for American beer, wine and tobacco. However, subsequent bilateral negotiation proved that the issue was wider in its scope and more sophisticated in its context. In brief, it became an issue of how to preserve the monopoly status of the Tobacco and Wine Monopoly Bureau (TTWMB) of the Provincial Government of Taiwan in order to maintain its revenue which constituted some 10% of Taiwan's annual budget,³¹ and to maintain the competitiveness of American wine and cigarettes in Taiwanese markets. The result was considered satisfactory in the eyes of the USTR in that United States cigarettes sales have increased rapidly since 1986, and that overall sales of products (tobacco, alcoholic and wine products) "have increased since it (the agreement) took effect."³² To understand the whole story and its implications, one needs to start from the legal and the institutional framework governing the sale of tobacco and wine in Taiwan.

³¹ The annual revenue of the TTWMB was around NT\$ 40 billion (1 billion Sterling Pounds) in 1989. It was the source for the salaries of the army, public officials, and teaching staffs and employees of public schools. See 1989 Consultation Report, *supra* note 22, Title II (1), p.7.

³² 1989 NTE Report, p.168.

1. State Monopoly of Tobacco and Wine --- A Colonial Heritage

One of the remaining systems that the government of Taiwan inherited from Japan during its occupation of Taiwan is the state-controlled manufacture, distribution and sale of wine and tobacco. To legalise the monopoly status of the state, a *Temporary Regulation Governing Tobacco and Wine Within the Province of Taiwan* was promulgated on 7 July, 1953. Though "temporary" in nature, the Law is still effective to date. According to the Law, the TTWMB is empowered to procure tobacco leaves, scrutinize the manufacturing of wine, distribute the products, and appoint retail sellers[Art.6, 17, 28, 19]. For over thirty years, the monopoly system has served three important functions: (1) as a main financial source for the Taiwan Provincial Government; (2) securing, in part, the income of the tobacco, grape and rice farmers by procuring their harvests; (3) regulating the market through price policy and limited advertisements to ensure that the market would not expand to a degree detrimental to health.³³ Thus, it can be said that in comparison with other state monopolies, the existence of the TTWMB has some rather positive purposes.

On the other hand, foreign wine and cigarettes were subjected to extremely high tariffs and control by the TTWMB. In fact, before 1986, domestic consumers could only buy foreign wine and tobacco in the branch offices of the TTWMB.

³³ *People's Daily News* (Ming-chung jih pao), p.2 (17 Aug., 1986).

This encouraged the emergence of a black market, though according to the Law severe criminal and administrative penalties might be imposed.³⁴

2. The Battle and Issues

The United States expressed its interests in opening Taiwan's cigarette and wine markets in 1985. After a brief negotiation, following the practices of Japan and South Korea, Taiwan denied the demand. In less than two months, the Reagan administration threatened to initiate a section 301 investigation of Taiwan's possible unfair distribution and sale of tobacco and wine. This surprised Taiwan for it took more than seven years for the United States to reach a wine and tobacco agreement with Japan.³⁵ In other words, Taiwan did not expect that United States would react in such an efficient and dramatic manner.³⁶ This caused internal panics in the cabinet of Taiwan. In October 1985, the Vice-minister of the MOEA flew to the United States and signed a brief agreement with the United States committing Taiwan to the opening of wine and cigarette markets for American companies. The only condition was that the status of the TTWMB remained unchanged, though Taiwan agreed in principle that

³⁴ According to Art.36 of the Law, the maximum criminal penalty for illegal manufacture of cigarettes and wine is an imprisonment of not more than three years. In addition, for illegal sale of cigarettes and wine, an administrative fine of three times the values of the genuine products may be imposed.

³⁵ *National Evening News* (Ming-tsu wen pao), p.2 (9 Dec., 1986).

³⁶ An interview with Mr. Kao, Y.C. and Mr. Lu, Y. L. suggests that there is one reason explaining the quick and relentless response of the United States -- the lousy performance of Taiwan's negotiating team. True, mastery of English was a problem, but the most fatal reason had to be the lack of co-ordination among different "competent authorities", namely, MOEA, MOF, and TTWMB.

"importation of American products should be depended on market demands".³⁷

So, the section 301 investigation was dropped, at least temporarily.

Negotiations for the detailed implementation of this agreement started in 1986. The negotiations were centered mainly on two issues: (1) calculation of monopoly tax; and (2) limitation of advertising. Other issues such as importation procedures, labelling and packaging, and warehousing were all technical and relatively unimportant matters which could be solved easily if the two foremost issues reached agreement. Nonetheless, the negotiations still proved to be a nightmare to the Taiwanese negotiating team.

With regard to the first issue, as the United States realised the structural functions of the TTWMB in Taiwan's agricultural sector, it agreed that the TTWMB had a right to charge a monopoly tax on American imports. A 185% of monopoly tax on the product was thus accepted by the United States. Compared with Japan's monopoly tax of 200% and South Korea's 190%, Taiwan's demand was lenient.³⁸ But then the issue was on what basis it should be calculated. Taiwan insisted that calculation be based on C.I.F. (cost, insurance and freight) times 185%, otherwise the Provincial Government would suffer from financial problems. On the other hand, the American side, based on competitiveness consideration, argued that it should be based on F.O.B. (free on board) times 185%.³⁹

³⁷ *United Daily News* (Lien-ho pao), p.2 (1 Nov., 1986).

³⁸ *Economic Daily News* (Ching-chi jih pao), p.2 (29 Aug., 1986).

³⁹ *People's Daily News* (Ming-chung jih pao), p.3 (24 Aug., 1986).

Obviously, according to the former, the sum reached would be higher than the latter. This issue was of particular significance with regard to cigarettes which were sold in small pack form.⁴⁰ In real terms, a pack of American cigarette would be charged NT\$ 32 (80 Pence) of monopoly tax according to the former's calculation, or NT\$ 20 (50 Pence) according to the latter's formula.⁴¹ The United States claimed that the C.I.F. formula would damage the competitiveness of American products in Taiwan, and therefore rejected the proposal. Later, Taiwan agreed to lower the monopoly tax to NT\$ 25 (62 Pence) per pack. But the United States still refused to accept, and claimed that NT\$ 20 of monopoly tax per pack was the bottom line. So, neither side could agree on this practical but technical matter.

As to the second issue, Taiwan insisted that no advertisement would be allowed on TV, radio or in newspapers because cigarettes, in particular, are hazardous to health. However, agents of American companies were allowed to do some promotional activities and limited advertisements in their branches.⁴² The United States rejected this proposal and argued that: (1) as there was no law governing the advertising of cigarettes and wine, advertisements should be allowed without being subject to any limitation; and (2) limitations on advertisements would put some not-so-well-known American cigarettes (such as PARAMOUNT, WEST, ASTOR, and KING GEORGE) in a very disadvantageous position

⁴⁰ As to beer and wine, the dispute was minor probably because the beer and wine products of TTWMB and that of the United States multinationals' belonged to different price range and were for different classes of people. As such, they would not compete with each other for consumers.

⁴¹ *Shin Sheng Daily News* (Shin-sheng jih pao), p.2 (27 Aug., 1986).

⁴² *People's Daily News* (Ming-chung jih pao), p.3 (24 August, 1986).

in competing with TTWMB's products and even with well-known American cigarettes (MARLBORO, KENT, MORE, 555 etc.). Therefore, as a matter of fairness in market competition, advertisements of whatever kind should be permitted so that consumers could make their right choice.⁴³

These two arguments, though not convincing, were difficult for Taiwan to rebut. First, as a state-monopoly, and an authoritarian corporatist state, regulating the TTWMB's advertising activities according to law was superfluous. Law, in the eyes of the authoritarian regime, was used to govern people, not to regulate the government itself. As far as the government was concerned, the TTWMB was empowered to decide the kind of advertising it deemed fit, and that was more than adequate. Yet, this explained only the nature and practice of the Taiwan government. As a nation committed to democracy and the rule of law, this rather exposed the legal weakness of Taiwan's democratic transition. Unfortunately, this legal weakness was immediately taken advantage of by the United States. Turning to the second point, if, for the sake of argument, its basic rationale is correct, then the best way to ensure the competitiveness of small firms is perhaps to grant advertising subsidies to the sellers of those not so well known cigarette brands, because the big firms are always capable of spending big money for big advertisements. But, of course, Taiwan was not in a position to make such an argument unless it wished for pointing fingers. In fact, the only argument Taiwan made was that even the United States government forbade cigarette commercials on TV. However, the United States claimed that its

⁴³ *Id.*

situation was different because there were laws regulating such activities whereas in Taiwan there were none.

Therefore, the negotiation broke down completely. At this juncture, the government of Taiwan made a serious misjudgment and miscalculation on the determination of the United States. As the United States had never invoked section 301 on any country regarding the opening of their wine and cigarette markets, the "High Level Party-government" of Taiwan thus believed that it was not likely to be applied to Taiwan, considering also that Taiwan's wine and cigarettes markets were not big enough. Its judgment was wrong. On 27 October, 1986, the United States Trade Ambassador Clayton Yeutter announced that it would seek trade retaliation according to section 301 of the Trade Act of 1974,⁴⁴ but he refused to give a retaliation list or to tell the size of retaliation. Suddenly, Taiwan realised that the United States was serious about the whole matter and trade retaliation of an unknown amount was indeed imminent. Facing such pressure, secret negotiations were immediately conducted in the United States. Knowing that Taiwan wished to seek a resolution, the United States increased its demands --- monopoly tax for cigarettes should be lower than NT\$ 20 (50 Pence) per pack. On 12 December 1986, an agreement was finally reached.⁴⁵ According to the agreement, Taiwan promised that, *inter alia*, the monopoly tax for each pack of American cigarettes would be NT\$ 16.6 (41 Pence),

⁴⁴ 51 *Federal Register* 39,639 (1986); *Economic Daily News* (Ching-chi jih pao), p.2 (9 December, 1986).

⁴⁵ *Agreement Between the AIT and the CCNAA Concerning Beer, Wine and Cigarettes*, 12 December, 1986. Text published in 6 *CHINESE Yb. Int'l L. & Aff.*, pp.440-445 (1987).

and that American wine and cigarettes could be advertised in magazines, with the former advertised additionally in newspapers.⁴⁶ Soon, American wine, beer, and cigarettes entered the Taiwanese market.⁴⁷ It was estimated that Taiwan's tobacco and grape farmers, particularly the latter, would suffer big losses due to the TTWMB's reduction in its procurement of their products. As grape trees belonged to long-term plantation, it was impossible to replace them for other crops.⁴⁸ As noted by a Taiwanese newspaper reporter, this agreement reminded people of the Opium War between China and the United Kingdom in the 19th century.⁴⁹

3. Evaluation

The issue of the importation of American cigarettes and wine reveals several crucial points. First, the disagreement over the calculation of monopoly tax shows that the United States does not hesitate to use its section 301 weapon even on minor technical issues. Second, the negotiation fully reflects the fact that the United States government was working for the economic benefits of its own tobacco companies and was deliberately ignoring its own anti-smoking

⁴⁶ *Liberty Daily News* (Tzu-yao jih pao), p.2 (10 Dec., 1986).

⁴⁷ "Moving into Taiwan's Open Wine, Beer, Cigarette Market," *East Asian Executive Report*, p.7 (15 May, 1987).

⁴⁸ *Id.*

⁴⁹ *Economic Daily News* (Ching-chi jih pao), p.2, (9 December, 1986).

policy.⁵⁰ In fact, one may suspect that this case was a way to compensate American tobacco companies' loss in the domestic market by opening overseas markets for them.⁵¹ In other words, this is a remarkable example of double-standard. Third, it shows that section 301 is a flexible policy instrument. Against strong countries, such as Japan, it is flexible. But when it was used in countries like Taiwan, it became an economic atomic bomb, ready to be triggered at any time. Fourth, this "blunt-instrument" approach of the United States has become exemplary model for other countries. Following the signing of the United States-Taiwan agreement, the EC demanded the same treatment from Taiwan for its wine and tobacco products, otherwise it would consider curtailing Taiwan's quotas for textile exports to the EC.⁵² This is indeed ironic because the EC has traditionally maintained that America's unilateralism disrupts world trade.⁵³ But it seems that when immediate economic interests are at hand, the EC does not

⁵⁰ In January 1987, an official document of the United States stated that, "(s)moking presents the largest single source of health risk in America. The fatality risk of smoking is more than 26 times greater than that of work... Life insurance companies usually charge higher premiums reflecting their greater immortality... The issue of smoking goes beyond matters of personal choice; secondary smoke affects others... 42 state and D.C. restrict smoking in public places, including government workplace. New rules for Federal employer were also made." See *PRESIDENT'S ECONOMIC REPORT*, pp.185-186 (Jan., 1987).

⁵¹ This is evidenced by the strong support of some United States Senators from states with major tobacco-growing interests. For instance, in 1992 when Taiwan planned to impose restrictions on cigarette marketing in legislation, Senator Jesse Helms of North Carolina and Mitch McConnell of Kentucky wrote letters to the Taiwan government protesting the proposed bill. They even threatened that Taiwan's application to enter the GATT could be impeded. See "U.S. Cigarette Firms are Battling Taiwan," *Wall St. J.*, p.13D (4 May, 1992).

⁵² Liu, Lawrence S., "Legal and Policy Perspectives on United States Trade Initiatives and Economic Liberalisation in the ROC," 11 *Mich. J. Int'l L.*, p.341 (1990).

⁵³ For instance, Corrado Pirzio-Biroli, the deputy head of the EC delegation in Washington D.C., when commenting on America's section 301 of the Trade Act, says, "(w)orld trade problems cannot be solved through forced settlements based on a unilateral determination of unfairness, unilateral time tables, and the threat of unilateral trade action if no agreement is reached. In particular, this cannot be done with respect to countries that possess substantial retaliatory power. Were the rest of the world to respond with their own 301s, GATT would seriously face collapse...." See Corrado Pirzio-Biroli, "A European View of the 1988 U.S. Trade Act and Section 301," in Jagdish Bhagwati & Hugh T. Patrick (ed.), *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* p.261 (1990).

hesitate to play the same trick. Power politics remains an essential ingredient in international trade.⁵⁴ Unwilling to sustain another stroke, on 1 January, 1987, Taiwan opened its wine and tobacco markets to other non-American companies.⁵⁵

D. PRO-AMERICAN PUBLIC PROCUREMENT ARRANGEMENTS

In order to reduce effectively Taiwan's huge trade surplus with the United States, and as part of the "Trade Action Plan", the government of Taiwan had, through various means, instructed and encouraged its public and private sectors to buy American products. One effective directive was to grant preference to American firms in Taiwan's public-procurement projects -- that is, the purchase of goods and services by public authorities, agencies and enterprises for governmental purposes. This, needless to say, was great news to the United States, as the Taiwan government was well-known for its heavy involvement in the country's economic activities. The Ten Constructions in the 1970s, and the recent Six-Year Plan all indicate that the government is the biggest "consumer" on the island.

Here, two questions arise. First, how could this kind of policy which is so discriminatory in nature escape the laws of Taiwan? Or, to approach it from another angle, how are the laws governing public procurement interpreted to meet the policy of the government? Second, what is the attitude of the United States with regard to the Taiwan government's legal or illegal arrangements? In order to answer these two questions, one must first try to understand the labyrinth of Taiwan's public procurement laws.

⁵⁴ I owe this point to my supervisor Professor Julio Faundez.

⁵⁵ Liu, *supra* note 52.

1. The Legal Labyrinth

Apart from the unregulated "Buy Domestic" policy which requires that all public enterprises and administrative agencies should procure locally if the goods and services can be manufactured in Taiwan or if acceptable substitutes are available locally, few people, even the responsible bureaucrats, know exactly the number of laws, regulations and administrative orders governing public procurement, let alone which should be applied in a specific case.⁵⁶ According to a recent government publication made for the preparation of Taiwan's joining the GATT,⁵⁷ there are forty two laws, regulations and administrative orders concerning public procurement of goods and services, and the number is increasing. More recently, the Ministry of Interior (MOI) has issued another order instructing that construction contracts for the Six-Year Plan may be awarded to the "most reasonable" bidder, instead of the one who offers the lowest price.⁵⁸ Therefore, it is quite impossible, and indeed unnecessary, to discuss all these laws and orders in detail. It will be sufficient to analyze their general traits and government practices with regard to international bidding.

⁵⁶ This writer has an experience of facing these intriguing administrative orders and practices. In the spring of 1990, I was employed by the Institute for Information Industry (III) to join a special project of designing a computerisation programme for the Judicial Yuan. As the project involved the procurement of computer hardware as well as software, an open procedure was decided. But then, I found that what really governed the whole process was not the *Regulation Concerning the Auditing and Monitoring of Project Construction, Repair, Purchase, Ordering and Selling of Property by Governmental Organs* (see below), as it should be, but some special orders which could only be found in the files of the project manager. And the project manager always complained that the orders were deficient because they were made by bureaucrats who knew little about computers. As a matter of fact, during the six-month period, IBM and McDonald Douglas, the two most ambitious potential bidders, had been trying to persuade the III and the competent authority that the procurement rules be changed in their favour.

⁵⁷ BOFT, Ministry of Economic Affairs, *GATT cheng-fu kuai-yuai tieu-wen chi wo-kuo cheng-fu tsai-ko shiang-kuan fa-kuai hui-pien (A COMPILATION OF GATT PUBLIC PROCUREMENT REGULATIONS AND ROC GOVERNMENT'S LAWS RELATING TO PROCUREMENT)* (December, 1992). [Hereinafter Procurement Regulations]

⁵⁸ "Creating the Legal Environment for Taiwan's Six-Year Plan," 13 *East Asian Executive Report*, pp.8, 15-18 (15 Dec., 1991).

Scholars and commentators might be interested to know that there is a proper legal source for these procurement orders. The basic law governing public procurement is the *Regulation Concerning the Auditing and Monitoring of Project Construction, Repair, Purchase, Ordering and Selling of Property by Governmental Organs* promulgated on 31 October, 1950. According to this law, public contracts may be awarded by open, compared or negotiated procedures [Art.6 & 7], roughly similar to the tendering procedures regulated by the GATT Procurement Code of 1979.⁵⁹ Open procedure means that the public contract is open for bidding and will be awarded to the bidder who offers the lowest price. This rule is indeed the general principle of procurement, and is in accordance with the GATT rules.⁶⁰ The aim of open procedure is to invite the greatest number of bidders so that vivid competition can be achieved. However, one rule not necessarily approved by GATT is that if the competent authority consider that the price is "obviously unreasonable", which might lead to inferior quality, then it is possible that the bidder who offers the second lowest price may be awarded the contract, or a new bidding procedure maybe re-opened[Art.15].

⁵⁹ The GATT Procurement Code was negotiated during the Tokyo Round and concluded for the purpose of opening to foreign trade the previously restricted market of government procurement. Each party that adopts the Agreement is required to follow the rules of non-discrimination, and transparency for the benefit of foreign suppliers of other Signatories countries. According Article V of the Code, there are three tendering procedures, namely, the open, the selective and the single. Open procedures are those under which all interested suppliers may submit a tender. Selective procedures allow entities to invite limited qualified suppliers for the bids. Single procedures mean suppliers contact suppliers individually. Selective and Single procedures are treated as exceptions. For full discussion of the GATT Procurement Code, see Morton Pomeranz, "Toward a New International Order in Government Procurement," 11 *Law & Pol'y Int'l Bus.*, pp.1263-1300 (1979); David V. Anthony & Carol K. Hagerty, "Cautious Optimism as a Guide to Foreign Government Procurement," 11 *Law & Pol'y Int'l Bus.*, pp.1301-1358 (1979); Joanne Fiaschetti, "Technical Analysis of the Government Procurement Agreement," 11 *Law & Pol'y Int'l Bus.*, pp.1345-1358 (1979).

⁶⁰ Article V, para.14(f) of the GATT Procurement Code.

Under certain conditions, the competent authority may choose the compared procedure -- that is, the invitation of limited qualified firms and compared the prices they offer. One of the conditions is "upon the prior designation by the Executive Yuan of specific procurement area"[Art.7(5)]. In other words, the Executive Yuan has the power to decide (limit) which country's firms are allowed to participate in the compared procedure. Negotiated procedure normally happens when there is only one qualified bidder who is willing to take the public contract [Art.11].

Accordingly, it is clear that the Executive branch, through the interpretation of the law, could easily disregard the open procedures. In addition, Article 35 further provides that in case of a natural calamity, or significant economic crisis, then upon the approval of the Executive Yuan, regulations concerning open, compared and negotiated procedures can be ignored. This is also recognised by the GATT Procurement Code[Art.VIII]. Here, it should be noted that the practical problem of Taiwan with regard to procurement is not that discriminatory procedures are commonplace -- arguably, even industrialised countries are keen on discriminatory practices,⁶¹ but that the procedures lack transparency and judicial remedies. With regard to the former, the crux of the problem is that it has been the practice of the bureaucrats to make *ad hoc* orders to solve specific procurement cases. To date, procurement concerning manufactured goods, natural resources, computer hardware and software, medical

⁶¹ EC, for instance, has a discriminatory policy in favoured of "national champions". Even the United States has the "Buy American Act"; 47 Stat. 1520 (1933), 41 U.S.C. 10a. For discussion of EC procurement laws, see Friedl Weiss, "Public Procurement Law in the EC Internal Market 1992: the Second Coming of the European Champion," *The Antitrust Bulletin*, pp.307-335 (Summer 1992); for the "Buy American Act", Pomeranz, *supra* note 59, pp.1264-1270.

apparatus, telecommunication equipment, public construction and services contracts etc. all have special rules to follow. With regard to public enterprises the administrative order *Measures for Application of Importation of Goods by Public Enterprises*,⁶² which allows that, due to trade policy, the BOFT may designate procurement areas[Art.6(1)], achieves the same objectives of qualifying the number and nationalities of the suppliers. In sum, principles and rules regarding special procurement projects are subject to modifications of the competent authority at any time and for any reason. Under this kind of system, foreign suppliers could never obtain full knowledge of the procurement information. Precisely because of this enormous power, the government is able to direct its organs to buy American goods and services.

For a full understanding of the problem of judicial remedy, one needs to know more about the existence of a special Constitutional organ -- the Control Yuan. Article 90 of the ROC Constitution states, "The Control Yuan shall be the highest control organ of the State and shall exercise the power of consent, impeachment, censure, and auditing." Accordingly, a Ministry of Audit under the Control Yuan was established to take charge of all matters relating to auditing, including the review of procurement projects. The complexity here is that the Control Yuan is traditionally regarded as a quasi-judicial organ, and this makes the overturning of its decisions by the court impossible. As a matter of fact, when faced with those incoherent administrative orders, one cannot expect that

⁶² The text of the *Measures* is collected in CCLRRC, Hsing-Cheng 10-11-08; reproduced in Procurement Regulations, *supra* note 57, pp.93-95.

the court can do a better job than the Ministry of Auditing.⁶³ In brief, judicial remedies for unfair or illegal bidding, though legally possible, are, in fact, meaningless.

In reality, the operation of the system of public procurement has culminated in the following results: bad quality, high costs, and delayed bidding procedures.⁶⁴

In the case of Taiwan joining the bidding procedure in the United States, the pro-American procurement policy can be implemented without difficulty. A special administrative order *Measures Regarding Procurement of Property in Foreign Countries*⁶⁵ states that the competent authority MOEA may designate procurement area[Art.6]. As such, all Taiwan has to do is offer an unreasonably high price to obtain the contract.

2. The "Achievements"

The pro-American procurement policy has been carried out to its fullest extent since the mid-1980s, even without pressures from the United States. The reason for such a seemingly "voluntary" action on the part of Taiwan is the hope

⁶³ The most unfortunate thing is that the Control Yuan, before the 1990s, was regarded as one of the dirtiest government organs. The problem was a structural one, for most of the members of the Control Yuan, who were supposed to hold their post through elections, were those old unelected persons loyal to the KMT party. As such, the Control Yuan became a place for clientilism.

⁶⁴ "Pro-American Procurement Policy: Hot Potato? Panacea?" *Economic Daily News*, p.2 (3 December, 1988).

⁶⁵ The text of the *Measures* is reproduced in Procurement Regulations, *supra* note 58, pp.82-83.

that the United States would be lenient to other sectors of trade. The facts speak for themselves. In 1988, for instance, among the 130 procurement cases opened for international bidding by the Taiwan government, 90 of them went to the United States companies.⁶⁶ As to the state-run public enterprises, out of a total of 67 procurement made by the Tai Power (Electricity) Company in the same year, United States companies were awarded 54.⁶⁷

In the international market where the bidding procedure is governed by foreign law, pro-American procurement policy is often carried out at the expense of economic efficiency. The procurement of Alaska crude oil provides the best example. In 1986, Taiwan participated in the international bidding for Alaskan crude oil. Before announcing the result, the United States had anticipated that Japan would offer the highest price and be awarded the contract. The reason was that as the United States had expressed its intention of reducing its huge trade deficits, of which Japan was the biggest "sinner", it was the United States' understanding that Japan would do something to remedy it. The result was astonishing. Taiwan's China Oil --- a state-owned corporation --- got the contract. By offering a price of 15% more than the international oil market price, even Japan could not compete with Taiwan. In real terms, it meant Taiwan would have to pay an extra US\$ 1.83 per barrel (in 1986, the oil price in the Asian market was around US\$ 13 per barrel).⁶⁸ It certainly seemed a noteworthy

⁶⁶ 1989 *Consultation Report*, *supra* note 22, Title I (4), pp.25-26.

⁶⁷ *Id.*

⁶⁸ *Economic Daily News* (Ching-chi jih pao), p.2 (9 Dec., 1986).

performance to the United States and even to the world. In effect, however, it meant nothing more than dumping cash on the richest country in the world. Similar cost-inefficient contracts can also be found in the purchase of American grains and other agricultural products.⁶⁹

3. The Attitudes of the United States

Supporters of the United States Trade Act, particularly section 301, claim that the legal rationale for imposing trade pressures and threats on the part of the United States is its commitment to a more liberal, open and rule-based market.⁷⁰ If this is the case, then it is logical for the United States to encourage the Taiwan government to adhere to the GATT principles, and even to abandon the pro-American policy.

Quite the contrary happened, the United States had been keen to make use of Taiwan's authority and existing laws to gain more business opportunities. Thus, instead of challenging the legality of those procurement laws, the United States cared more about what kind of preferences American firms could enjoy in the actual bidding process (for instance, under what circumstances would European and Japanese firms be excluded), and whether pro-American

⁶⁹ *Id.*

⁷⁰ For instance, Warren Maruyama, an officer of the White House, says, "(d)espite any appearance of unilateralism, the United States has sought to use section 301 in a constructive way, with the aim of strengthening the GATT and multilateral dispute settlement mechanism over the long-term." Warren Maruyama, "Section 301 and the Appearance of Unilateralism," 11 *Mich. J. Int'l L.*, p.395 (Winter 1990).

procurement policy would still be upheld in the future.⁷¹ Only when American firms became the disappointed bidders would the legal deficiencies of non-transparency or discriminatory treatment be brought to the negotiating table. Moreover, on several occasions, the United States even spoke on behalf of some of its industries of not being able to be awarded the contracts. For instance, in 1991, the United States protested against Taiwan's "discriminatory" procurement policy which foreclosed the highly competitive United States soda ash industry from selling to the TTWMB.⁷² In 1994, based on the so-called "United States sources", the United States government claimed that American firms "might be able to sell up to US\$ 100 million more per year to the Directorate General for Telecommunication if the "Buy Taiwan" policy were eliminated."⁷³ All these indicate that the United States seemed to have adopted a different negotiating strategy and standard with regard to the issue of public procurement. Practical self-interests override the commitment to the rule-based GATT; while the basic notion of free trade (and even fair trade) is in the process of being forgotten.

It was only until 1994 that the United States required Taiwan to adhere to the Government Procurement Code as re-negotiated during the Uruguay Round.⁷⁴ This change of attitude is certainly positive, yet it remains to be seen how the United States would react if the government of Taiwan, by complying with the

⁷¹ 1989 Consultation Report, *supra* note 22, Title I(4), pp.24-27.

⁷² 1991 NTE Report, p.208.

⁷³ 1994 NTE Report, p.256.

⁷⁴ *Id.*, p.257.

GATT rule of non-discrimination, openly abolish its pro-American public procurement policy.

4. Evaluation

Taiwan's regulations governing public procurement constitute the darkest area of law and legality. Not only do they bear the characteristics of non-transparency, discrimination and lack of predictability, very often they are subject to a high degree of manipulation by the government. Under these circumstances, all kinds of policies could be easily implemented without even amending a single law or explaining to the public. Nevertheless, these old practices survive and have successfully passed down to the democratic era, partly because the Executive branch need them to carry out the "Buy American Policy".

It remains to be seen how Taiwan would react to the American's latest demand of adhering to the GATT Government Procurement Code. Maybe all laws governing public procurement will need to be overhauled, and new non-discriminatory, transparent practices will be established. However, it is likely that as long as the United States does not object to Taiwan's "Buy American Policy", which surely will be strongly against its own interests, all possible legal changes would occur only on paper. On Taiwan's side, by seeing trade and economic policies as an extension of foreign policy, there is no reason to give up the present policy. In sum, this means that the government procurement practices, in spite of their deficiencies, are not likely to change because of this external factor. As to the legal deficiencies, it is better not to mention it.

E. VOLUNTARY RESTRAINT ARRANGEMENTS (VRAs) ON MACHINE TOOLS, TEXTILES AND OTHERS

1. A Brief Overview of the Development of VRAs

One of the most intriguing facts in international economics is perhaps the existence of hundreds of VRAs since World War II -- an era signifying the prevalence of global free trade. It is intriguing in the sense that VRAs' precise function is to destroy the idea of free trade by creating bilateral, secretive and non-transparent trade arrangements. Commentators and scholars, from economic and legal aspects have, since the 1970s, criticised the VRAs. They attacked VRAs as unwise trade policy,⁷⁵ a symbol of "neo-protectionism",⁷⁶ a new "non-tariff barrier" designed to placate domestic special interests groups,⁷⁷ illegitimate devices in stark violation of domestic laws,⁷⁸ and more seriously, the rule-based multilateral trade order created by GATT.⁷⁹ Nevertheless, it seems that VRAs are still the policy instruments favoured by the United States.

⁷⁵ Michael William Lochmann, "The Japanese VER on Automobile exports: an Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of the U.S. Antitrust Law," 27 *Harv. Int'l L. J.*, pp.149-153 (Wint.1986); Eric C. Emerson, "Voluntary Restraint Agreements & Democratic Decision-making," 31 *Virg. J. Int'l L.*, p.282 (Wint.1991).

⁷⁶ Jan Tumlr, *PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES* pp.38-43 (1985).

⁷⁷ Malcolm D.H. Smith, "Voluntary Export Quotas and U.S. Trade Policy -- A New Non-Tariff Barrier," 5 *Law & Pol'y Int'l Bus.*, p.10 (1973).

⁷⁸ VRAs violate U.S. domestic law as they largely bypass the import relief process (section 201) of the Trade Act. Section 201 requires a formal injury determination by the International Trade Commission before any import relief could be imposed. However, the United States administration, at this juncture, would negotiate with the exporting countries, and "persuade" them that the Congress might pass a bill mandating an import quota. But by voluntarily limiting the exports, the bill could be blocked in the committee. See Tumlr, *supra* note 76, pp.39-40; Emerson, *supra* note 75, p.289.

⁷⁹ To sum up the analysis of those international academics, a VRA has the potential to violate three separate GATT articles: (1) Article XIX which requires that any import relief measures be imposed pursuant to a finding of injury; (2) Article I which mandates equal treatment for any signatory's trading partners; (3) Article XI which limits the use of quantitative restrictions on trade. See Brian Hindley, "VER and the GATT's Main Escape Clause," 3 *World Economy*, pp.313-341 (1980); John Jackson, "The GATT Consistency of ERAs," 11 *World Economy*, pp.485-500 (1988); Michel Koestecki, "ERA and Trade Liberalisation," 10 *World Economy*, pp.425-454 (1987); Ernst-Ulrich Petersmann, "Grey Area Trade Policy and the Rule of Law," 22 *J. of World Trade*, issue 2, pp.23-44 (1988).

No doubt, the various VRAs have practical reasons for their existence. From the viewpoint of the exporting countries, as analyzed in Professor John Jackson's earlier book, VRAs are actions taken deliberately by exporting countries because of their concern that unilateral quotas would otherwise be imposed by the importing countries, and once unilateral quotas are imposed, they bear within themselves the seeds of their own continuity.⁸⁰ This argument does not, however, sound very convincing as VRAs, once established, also become difficult to terminate. The experience of VRAs on textiles is strong evidence of this. In the case of Taiwan, VRA on textile products can be dated back as early as 1978. It was then renewed, modified, and extended in 1980, 1982, 1986, 1990, and 1992.⁸¹ Today, it is still one of the main jobs of the Textile Federation -- a permanent quasi-governmental organisation of Taiwan -- to administer the country's system of textile export quotas. To use Lochmann's words, VRA is like Pandora's Box, once the lid is opened, it becomes increasingly difficult to close.⁸²

It is also argued that by agreeing to voluntary restraints, exporting countries maintain relatively more control over "voluntary" restraints.⁸³ This

⁸⁰ John Jackson, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* p.668 (1977).

⁸¹ *Agreement Relating to Trade in Cotton, Wool, and Man-Made Fibre Textiles and Textile Products*, 1978; *Implementing Agreement Relating to Trade in Cotton, Wool, and Man-Made Fibre Textiles and Textile Products*, 1980, 1 *Chinese Yb. Int'l L. & Aff.*, p.226 (1981); *Agreement Relating to Trade in Cotton, Wool, and Man-Made Fibre Textiles and Textile Products*, 1982, 3 *Chinese Yb. Int'l L. & Aff.*, p.295 (1983); *Exchange of Letters Between the AIT and the CCNAA Concerning the Amendments and Changes of an Agreement Relating to Trade in Cotton, Wool, Man-Made Fibre, Silk Blend and Other Vegetable Fibre Textile and Textile Products*, 1986, 6 *Chinese Yb. Int'l L. & Aff.*, p.415 (1986-87); *Agreement Between the AIT and the CCNAA Relating to Trade in Cotton, Wool, Man-Made Fibre, Silk Blend and Other Non-Cotton Vegetable Fibre Textile Products*, 1990, 10 *Chinese Yb. Int'l L. & Aff.*, (1989-90); and *Textile Agreement Between the AIT and the CCNAA*, 1992, 11 *Chinese Yb. Int'l L. & Aff.*, p.571 (1991-92). The 1992 Agreement will expire on 31 December, 1995.

⁸² Lochmann, *supra* note 75, p.152.

⁸³ According to Kostecki, the restriction is voluntary in the sense (i) that the exporting country formally has a right to eliminate or to modify it unilaterally and (ii) that it is essentially monitored and enforced at the exporting countries. Kostecki, *supra* note 74, pp.425-426.

point is also weak because one can hardly imagine that the exporting countries (normally developing countries) would dare terminate unilaterally the VRAs with the United States. Such an action might invite even grater hostility.

A more convincing argument is provided by Jan Tumlrir who suggests that America's negotiation of VRAs with exporting countries (particularly Asian countries) relies largely on coercion, bringing non-trade considerations and conditions into the negotiation.⁸⁴ More often than not, they involve the use of threat and bribes, thus bringing certain undeniable elements of voluntariness in the resulting arrangement.⁸⁵ Tumlrir's argument is also supported by another free-trade advocate, Professor Robert McGee, who based on natural rights theory, claims that the United States is keen to use threats and intimidation to get foreign governments to agree to "voluntary" restrictions.⁸⁶ Accordingly, it is unethical since the United States government functions to protect the special interests of minority groups at the expense of majority consumers.⁸⁷

Under these circumstances, it is often the consideration of exporting countries that through VRAs, they can at least preserve a portion of their exports to the importing countries.⁸⁸ This could be the only reason why the agreements contain a certain degree of voluntariness.

⁸⁴ Tumlrir, *supra* note 76, p.41.

⁸⁵ *Id.*, p.39.

⁸⁶ Robert W. McGee, "Trade Policy of a Free Society," 19 *Capital U. L. Rev.*, p.322 (Spr.1990).

⁸⁷ *Id.*, pp.338-339.

⁸⁸ Jackson, *supra* note 80, p.670.

The case is perhaps most obvious in the VRAs between the United States and Taiwan. Since the 1970s, Taiwan has concluded several VRAs (and the similar orderly market arrangements; OMAs⁸⁹) with the United States concerning textiles, machine tools, and colour television sets,⁹⁰ whereby Taiwan agrees to limit quantitatively its exports of these products to the United States. The reason for making such a self-restraint commitment is clear: Taiwan would face the threat of more restrictive measures by the United States if it refused to do so (such as the withdrawal of GSP). In addition, in the interests of maintaining political and economic harmony with the hegemony, it was simply not appropriate to challenge the United States initiatives. One might as well call Taiwan's acceptance of VRAs another kind of accommodative policy.

2. The Legal Complexities

(1). Legal Bases of VRAs

If one is to find a legal basis for the Taiwan government to conclude VRAs, then, reluctantly, the *National Mobilisation Law* -- which granted the government almost unlimited discretionary powers to regulate the economy during wartime,

⁸⁹ An OMA has similar effects as a VRA. The difference is that OMA is not made on a government-to-government basis, but between industries.

⁹⁰ *Arrangement Between the CCNAA and the AIT Concerning Trade in Certain Machine Tools*, 1986, 6 *CHINESE Yb. Int'l L. & Aff.*, p.445 (1987); *Understanding Between the CCNAA and the AIT Concerning Trade in Certain Machine Tools*, 1992, 11 *CHINESE Yb. Int'l L. & Aff.*, p.529 (1991-92); *Memorandum Concerning Extension of Self-restraint Measures for Exporting Colour Television to the United States* of 1980, 1 *CHINESE Yb. Int'l L. & Aff.*, p.240 (1981). For VRAs on textile products, see *supra* note 81, and accompanying text.

serves this purpose.⁹¹ Article 19 expressly states that the government, if necessary, may encourage, limit or restrict the importation or exportation of certain goods, and increase or decrease import or export taxes. It should be noted that the law was made in 1942 against the background of Sino-Japanese war. But it remained effective after the war as the KMT government needed it to "suppress" the "communist rebellion". The Constitution, which was made in 1947, had to be put aside.

Nevertheless, the lifting of martial law in 1987 and the ending of "the Duration to Suppress the Rebellion" in 1991 meant the demise of the *National Mobilisation Law*. This immediately gave rise to the problem of future VRAs. Wittily, the *Foreign Trade Law* of 1993 solved this problem. Article 7(III) states that apart from those belonging to the executive discretion, all agreements concluded after external trade negotiations must be referred by the Executive Yuan to the Legislative Yuan for approval. While this Article says nothing of whether VRAs belong to the area of executive discretion or agreements subject to legislative approval, Article 16 further provides that the competent authority, BOFT, could impose quotas on export goods as "a matter of necessity for trade negotiations or implementing trade agreements or accords". As the implementation of VRAs necessarily involves the setting up of quotas, these two Articles combine to give the Executive discretionary powers over the making of VRAs.

⁹¹ The *National Mobilisation Law* was made by the National Assembly on 29 March 1942 and promulgated on 5 May 1942. The legislative purpose of this law was to utilise effectively national resources to fight against the Japanese. The Law, however, remained effective after the war.

The result of this broad delegation of powers to the BOFT means that the Legislative and the Judicial branches are barred from questioning the illegality of the Executive's decisions concerning at least at the implementation stage.

(2). The Issue of Cartel-like Arrangements

A very sensitive issue surrounding the VRAs is their legality under the anti-trust law. In the United States, it is argued that VRAs usually involve naked restraint of trade, such as restriction on output and division of markets among producers which are considered *per se* illegal under section 1 of the Sherman Act.⁹² However, the current American practice is that if United States government is involved in the making of VRAs, anti-trust charges would be exempted.⁹³ Even if a party brings a suit against a VRA, an anti-trust suit against foreign exporter would still be blocked if the defendants assert the affirmative defense of foreign sovereign compulsion.⁹⁴

The problem of cartel-like arrangements is less complex in Taiwan. First of all, it is doubtful whether there exists any incentive to bring such an anti-trust claim by Taiwanese exporters. More often than not, Taiwanese manufacturers or exporters (particularly those bigger ones) in the industries involved were not against the export quota system arising from such VRAs.

⁹² Emersion, *supra* note 75, p.306.

⁹³ *Id.*, p.307.

⁹⁴ Lochmann, *supra* note 75, pp.141-145; *Id.*, pp.309-310.

Since quota was so "precious" due to its scarcity, very often the quota system allowed quota-holders to sit back and reap a premium for their quota without manufacturing anything.⁹⁵ The case is most obvious in Taiwanese textile quotas to the United States.⁹⁶ In other words, it is hard to tell if quota-holders earned less due to the VRAs.

Second, it is true that the *Fair Trade Law* of 1992⁹⁷ expressly prohibits enterprises in competition with each other from engaging in concerted actions to restrict prices, quantities, customers, territories, or otherwise restrict each other's commercial activities [Article 14]. Also, enterprises are prohibited from engaging in horizontal price-fixing, horizontal territorial allocation and output restrictions [Article 7]. Enterprises engaged in such cartels may be subject to a maximum three-year imprisonment and/or fines up to NT\$ 1 million (approx. 25,000 Sterling Pounds) [Article 35]. By looking at these regulations, one would not have the slightest doubt that VRAs are prohibited. However, the *Fair Trade Law*, in consideration of the various VRAs still in force, establishes an exception that such cartel like arrangements will be approved by the Fair Trade Commission

⁹⁵ Hindley, *supra* note 79, at 318.

⁹⁶ For instance, as early as the 1970s, VRAs on textiles have caused problems. In 1977, quota on category 221 (sweaters and cardigans, knit) from Taiwan was quoted at US\$ 11.3 a dozen. A local manufacturer with an order from New York, but without a quota, would pay the US\$ 11.3, and add it on to his price. So would the New York importer-wholesaler and the retail outlet. At 10,000 dozen, that is US\$ 113,000 into some Taiwanese textile manufacturer's pocket -- "and he has not even raised a finger". See *N. Y. J. Com.*, p.7 (21 Nov., 1977).

⁹⁷ The *Fair Trade Law* was promulgated on 4 February 1991 and came into force one year after promulgation. Generally speaking, the Law is an omnibus legislation which encompasses both the antitrust rules and the unfair competition law. For a critic of the Law, see Liu, Lawrence S., "In the Name of Fair Trade: A Commentary on the New Competition Law and Policy of Taiwan, the Republic of China," 27 *Int'l Lawyer*, No.1, pp.145-167 (Spr.1993); Liao, I.N., "Review and Discussion Regarding the Necessity of the Enactment of the Fair Trade Law, and Suggestion for Amending the Draft of the Fair Trade Law," a paper presented at the Symposium organised by the Chinese Human Rights Society (Dec., 1985); Neil L. Meyers, "The Republic of China's Fair Trade Law: A Brief Review of the Earliest Cases," 11 *Chinese Yb. Int'l L.*, pp.201-217 (1991-1992).

if they are found to secure or promote exports in overseas markets [Article 14(4)]. In other words, when cartel arrangements are organised by inter-governmental efforts, they will be shielded from prosecution. This further implies that the Executive branch of the government is able to conduct (managed) trade policies outside the framework of domestic law. Its corrosive effects on the national law is obvious.

3. The Case of Machine Tool as Paradigm

The conclusion of a VRA on machine tools between Taiwan and the United States on 15 December, 1986 offers a typical example of how "Accommodative Policy" works to cover up American protectionism without making a slight protest to its unsound rationale. In the mid-1980s, the collapse of a United States machine tool producer Houdaille shocked the machine tool industry, not only because it signified the decline of the industry, but also thousands of jobs were lost.⁹⁸ Ultimately, a case was brought under section 232 of the *Trade Expansion Act* of 1962, which permitted the imposition of import restrictions to protect industries deemed essential to the nation's security.⁹⁹ The United States President then initiated bilateral negotiations with Japan, Germany, Switzerland and Taiwan on the possibility of concluding VRAs on machine tools.

⁹⁸ For more discussion of the decline of the United States machine tool industry, see David B. Yoffie & Benjamin Gomes-Casseres, *INTERNATIONAL TRADE AND COMPETITION: CASES AND NOTES IN STRATEGY AND MANAGEMENT* pp.425-432 (1994).

⁹⁹ 19 U.S.C. § 1962.

The United States President's action was based on the finding of the Commerce Department which stated,

"(t)he actions were undertaken to facilitate the revitalisation of the United States machine tool industry, which (Commerce), in consultation with the United States Department of Defense, identified as a vital component of the United States defense base. Restraints on exports of machine tools were designed to limit the high levels of imports to allow the United States machine tool manufacturers to re-emerge as a reliable source of critical machine tool product lines."¹⁰⁰

To put it simply, the rationale was based on the protection of "national defense": that the United States had to be "war ready" in terms of the capability to produce enough craftsmen. This "national defense argument" is, in fact, not strange to economists. Adam Smith used to say that defense was more important than opulence.¹⁰¹ Naturally, this has become the highest guideline for the United States to conduct bilateral negotiations with its trading partners.

United States - Taiwan bilateral negotiations were soon held to discuss the issue. From the very first meeting, the USTR handed Taiwan a draft of the arrangement which required Taiwan to roll back its exports of six kinds of machine tools to the 1985 market share, and threatened that unilateral quotas would be imposed if Taiwan did not agree to the arrangement.¹⁰² Under this pressure, Taiwan had no choice but to agree to a five-year VRA with the United

¹⁰⁰ GATT, *TRADE POLICY REVIEW: UNITED STATES OF AMERICA* p.96 (1989).

¹⁰¹ Adam Smith, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* Vol.1, pp.464-465 (1976).

¹⁰² Chuang, M.H. King, Lin, K. Casey, W.S. & Tong, Alvin H., "Panel Discussion: The Impact of United States Trade Law Actions on Business Decisions in Taiwan," reprinted in 11 *Mich. J. Int'l L.*, p.294 (1990).

States.¹⁰³ The arrangement was further renewed in 1992 based on the same rationale of revitalizing United States machine tool industry.¹⁰⁴

While this is not the place to challenge the concept and scope of the so-called "national defense",¹⁰⁵ the argument looks extremely awkward when applied to Taiwan. First, the reasons seem to imply that had the United States allowed more imports of machine tools from Taiwan, its defense base would have collapsed. It is folly to say that those low-cost machine tools Taiwan produced had the technological capacity to corrupt American defense base. In no way could Taiwan's technology be compared with Japan, Germany, Switzerland or the United States. In fact, during the course of negotiation, Taiwan argued that it was actually supplementing, rather than competing against, United States manufacturers. In other words, it was benefiting rather than threatening United States national security.¹⁰⁶ The United States rejected this point by replying, with even greater folly, that Taiwan, nonetheless, had the tremendous potential.¹⁰⁷

¹⁰³ *Arrangement Between the CCNAA and AIT Concerning Trade in Certain Machine Tools*, made 15 December, 1986. Effective on 1 July 1987, the arrangement would last for five years. The text can be found in 6 *CHINESE Yb. Int'l L. & Aff.*, pp.445-460 (1987).

¹⁰⁴ In the 1992 agreement, the Preamble states, "(r)ecognizing the efforts of AIT to revitalize the machine tool industry in the territory represented by AIT..." For full text, see 11 *CHINESE Yb. Int'l L. & Aff.*, p.529 (1991-92).

¹⁰⁵ According to Professor McGee, at one time in the United States history, it was claimed that national defense required that Congress place a high tariff on the importation of gloves. So much the more, section 104 of the 1952 *Defense Production Act* restricts peanut imports in the interests of national defense. These absurd examples, nonetheless, reflect the vague and potentially flexible concept of "national defense". Thus, once an exception is made for one industry, there is no logical stopping point. McGee, *supra* note 86, p.326.

¹⁰⁶ Chuang, Lin & Tong, *supra* note 102, p.294.

¹⁰⁷ *Id.*, p.294.

Second, export of Taiwanese machine tools to the United States amounted to only around US\$ 140 million per annum, which constituted a market share of only 1.2% in the United States.¹⁰⁸ In terms of bilateral trade, this is almost a negligible sum. Why then did the United States still want Taiwan to limit its exports voluntarily? This point was raised during the negotiation, and the answer given by the United States was astonishing. The United States claimed that if Taiwan was allowed to grow at its current pace, Taiwan would eventually replace Japan as the main supplier of imported machine tools to the United States.¹⁰⁹ Therefore, the United States insisted on targeting Taiwan for a VRA. There is, however, an additional reason explaining why Taiwan was targeted. As noted by the chairman of a Taiwanese machine tool company, Dr. Chuang, K.C., it was due to the traditional hostility on the part of the United States Machine Tool Association towards some Taiwanese manufacturers.¹¹⁰ This also demonstrated the power and influence of American lobbying groups.

Last, the conclusion of this agreement was made under clandestine circumstances and in a non-transparent manner. It seemed that this kind of trade arrangement was a top national secret and the public should be barred from obtaining any knowledge of it. It was not until the agreement was reached and a detailed implementation administrative order was printed in the *CCLRRC* that the public could know its details.

¹⁰⁸ *Nationalist Evening News* (Ming-tsu wen pao), p.2 (10 Sept., 1986).

¹⁰⁹ Chuang, Lin & Tong, *supra* note 102, p.294.

¹¹⁰ *Id.* p.295.

4. Evaluation

Several conclusions can be drawn from the story of VRAs. First, VRAs are typical "power-oriented" products based on unsound rationale. They are achieved through the use of threats and coercion by the United States. Second, the whole process allows American interest groups to play an important role in deciding which country should be targeted. Small nations like Taiwan are likely to suffer most from this kind of arrangement. Third, VRA negotiations are conducted secretly so that the public and even the legislative organ only knows their existence after the agreements are published. As such, they are undemocratic in nature. However, Taiwan continues this practice by granting it a legal basis in the recent *Foreign Trade Law* of 1993. According to this Law, the Executive branch is given discretionary powers to regulate matters concerning VRAs. This means that the government is still able to conduct secret VRAs with the United States through non-transparent procedures. The codification of VRA practices says one thing: that since VRA is a system initiated by the United States, the issue of openness in democratic decision-making does not, and should not exist. More to the point, it is justified because it is sanctioned by the United States. In other words, the grip of the state is still there, as in the old authoritarian days. Thus while externally, Taiwan is weak in matters of VRA; internally, through the enactment of law, the Taiwan government is becoming so strong that it allows no challenge to the legality of VRAs.

Last but not least, while it has become a trend for the United States to conclude VRAs with developing countries, an extension of this protectionist logic means that any effort to promote export volume is considered evil. Thus, the United States was aggravated when in 1986 Taiwan sought to improve its disappointing automobile industry¹¹¹ by entering into an agreement with TOYOTA. The reason was that the joint-venture agreement included an export performance requirement, which required that export of automobiles would increase from 12.5% at the beginning to 50% by 1992.¹¹² This was considered a potential threat to the United States automobile industry. Accordingly, the Reagan administration announced that it would conduct an investigation of such an export performance requirement according to section 307 of its *Trade and Tariff Act* of 1984.¹¹³ Facing such a pressure, Taiwan, as expected, immediately dropped the export

¹¹¹ The government of Taiwan started to develop its automobile industry in 1967. In the following years, five automotive companies were allowed to set up. However, one of them failed to engage in production, and was thus dissolved. Two of them, with the help of two Japanese car companies, started to produce small vehicles in 1968. In 1972, FORD established a subsidiary in Taiwan and also started to produce small vehicles. In 1979, another domestic automotive company was given license to produce. Yet, all these were small scale companies in the sense that not much technology was obtained through the joint-venture agreements. By the beginning of the 1980s, the government announced "The Development Plan for the Promotion of Automotive Industry", intending to establish a large scale automotive company. Yet, Taiwan's automobile industry is still treated as small potatoes. Wade, for instance, discussed Taiwan's automobile industry only in bracket form, as a contrast to South Korea's success. In fact, it is not overstated that it constituted the biggest failure of Taiwan's state-led developmental policy. For a detailed discussion of Taiwan's automobile industry, see "Taiwan's Automotive Industry and Its Exports", in *Chinese Economics Monthly* No.438, pp.21-28 (Mar., 1987). Robert Wade, *GOVERNING THE MARKET: THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALISATION* pp.309-311 (1990).

¹¹² *China Times* (Chung-kuo shih pao), p.2 (6 April, 1986).

¹¹³ Initiation of Investigation under Section 307: Taiwan Export Performance Requirements in the Automobile Sector, 51 *Federal Register* 12,008 (1986). The 1984 trade act confers on the relevant authority in the United States the required legislative authority on the issue of foreign direct investment. Section 307 defines international trade so as to include both goods and services and foreign direct investments by United States persons, especially if such investment has implications for trade in goods and services. It further provides that if the USTR determines that action by the United States is appropriate to respond to any export performance requirements of any foreign country or instrumentality that adversely affect the economic interests of the United States, the USTR shall seek to obtain the reduction and elimination of such export performance requirements and may impose duties or other import restrictions on the products or services of such entities for such time as is determined appropriate, including the exclusion from entry into the United States of products subject to such requirements. See 19 U.S.C.A. 2114d.

performance requirements "in any future or pending investment applications".¹¹⁴ However, the evil of export performance requirements was not, from the start, recognised by the GATT panel,¹¹⁵ nor later, the Trade Related Investments Measures (TRIMs) of the Uruguay Round MTN.¹¹⁶ So, by juxtaposing the practices of VRAs and the case of export performance requirements, we find an intriguing phenomenon: Taiwan is forced to engage in the widely condemned practice of VRAs, while it must restrain itself from doing something which is internationally permissible.

F. ADJUSTMENT OF THE TARIFF SYSTEM AND RATES

1. Taiwan's Tariff System

Tariffs are, in principle, permitted under the GATT.¹¹⁷ The basic principle is that each member state must accord non-discriminatory, most-favoured-nation treatment to other members. Contracting parties are restrained in the use of

¹¹⁴ *Exchange of Letters Between the CCNAA and AIT Concerning the Export Performance Requirement Affecting Investment in the Automotive Sector, Oct. 9, 1986.* Reprinted in *6 Chinese Yb. Int'l L. & Aff.*, pp.415 (1986-1987).

¹¹⁵ In the 1982 United States-Canada FIRA case, a dispute was brought by the United States against Canada on FIRA (Administration of the Foreign Investment Review Act) to the GATT panel. The United States argued that the requirements imposed on the foreign investors by FIRA to purchase goods of Canadian origin in preference to imported goods, to manufacture goods in Canada which would otherwise have to be imported, and to export specific quantities of production were inconsistent with Articles III:4, III:5, XI,, and XVI:1(c). After resolving the issue of whether it was a subject covered by GATT, the Council nonetheless allowed the panel to proceed. However, the result turned out to be in favour of Canada. Except the first requirement, all the claims were dismissed by the GATT panel as not in violation of the GATT. For a discussion of the FIRA case, see The United Nations on Trade and Investment, *THE OUTCOME OF THE URUGUAY ROUND: AN INITIAL ASSESSMENT-- SUPPORTING PAPERS TO THE TRADE AND DEVELOPMENT REPORT, 1994*, pp.137-138 (1994).

¹¹⁶ The Uruguay Round of MTN on TRIMs reached the final agreement that export performance requirements remained permissible under the World Trade Organisation agreement. *Id.*, p.143.

¹¹⁷ Article II, III, XI:1, XVI of the GATT.

that instrument only if they have bound the tariff for a particular product, usually as a result of multilateral negotiations in the GATT.¹¹⁸ Taiwan was not a member of GATT, so in principle it had no obligation to follow the principles laid down by it. However, this was not totally correct. In 1978 and 1979, Taiwan promised the United States that it would adhere "substantially" to certain customs rules made by the Tokyo Round MTN.¹¹⁹ Apart from that, Taiwan was free to create a tariff system of its own. As a matter of fact, tariff was used as the principal instrument of early import-substitution policy.¹²⁰ This explained why tariff rates were so high at Taiwan's early developmental stage.

Generally speaking, the *Customs Law* is based on the principle of reciprocity, according to which a "double duty rate" system is created --- i.e. a general duty rate applies to goods imported from countries and areas; and a reciprocal duty rate applies to goods imported from countries and areas that have reciprocal treatment with Taiwan.¹²¹ The purpose of designing such a system was twofold: to promote trade, and to bargain for reciprocal treatment with trade partners. For a nation which has no link to GATT, this design certainly is acceptable.

¹¹⁸ Frieder Roessler, "The Constitutional Function of the Multilateral Trade Order," in Meinhard Hilf & Ernst-Ulrich Petersmann (ed.), *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* p.57 (1993).

¹¹⁹ The Republic of China committed to "observe substantially the same as those applicable to developing countries set forth in the non-tariff agreements concluded in the Tokyo Round, including agreements on subsidies and countervailing duties, customs valuation, licensing, government procurement, commercial counterfeiting, and technical barriers to trade". See Exchange of letters between Ambassador Robert S. Strauss, United States Special Representative for Trade Negotiations, and Political Vice Minister Wong, Yi-ting of the ROC's Ministry of Economic Affairs (29 Dec., 1978), reprinted in 30 U.S.T. 6440, T.I.A.S. No.9561.

¹²⁰ Chen, Tain-jy & Hou, Chi-ming, "The Political Economy of Tariff Policy in the ROC on Taiwan," *Industry of Free China*, Vol.LXXVI, No.5, p.43 (1991).

¹²¹ Yen, Ching-chang & Wu, Sui-yu, "International Trade and Custom Duty," in Mitchell A. Silk (ed.), *TAIWAN TRADE AND INVESTMENT LAW* p.73 (1994).

As a matter of internal finance, tariff revenues constitute a very important source of the government's finance. According to the official figure, tariff revenues amounted to more than 3% of the GNP from the year 1985 to 1990.¹²² Obviously, without this sum of money, the Taiwan government would have sunk into deep budget deficits, which was highly undesirable as a developing country. For this reason, it is always easier to talk about free trade in terms of elimination of tariffs than to actually convince developing countries to cut their tariffs by telling them tariffs are impediments to the growth of world trade, not to mention that the tariffs system is an important instrument for protecting a developing country's infant industry. The reality is this: when tariffs become an important component of national finance through decades of practice, as in the case of Taiwan, it is impossible to lower the tariff rates in a dramatic way. Otherwise, the government would have no choice but to increase tax or to shrink its size to accommodate its financial situation.¹²³ Neither of which is acceptable to the public at large. Accordingly, it is not surprising to find that the tariff rates in Taiwan before the 1980s were extremely high.

2. Main Issues

High tariff rates, however, were regarded as a major impediment to American exports to Taiwan. As such, they have accounted for the overwhelming

¹²² The amount of import duties in NT\$ million, and as percentage of GNP from the year 1985 to 1990 are 81,783 (3.31%), 92,387 (3.24%), 105,115 (3.26%), 117,238 (3.35%), 129,234 (3.33%), and 121,995 (2.89%) respectively. *Industry of Free China*, Vol.LXXXI, No.3 (1994). In terms of Sterling Pounds, the figures are approximately 1.6 billion, 1.9 billion, 2.3 billion, 2.7 billion, 3.2 billion, and 3.0 billion respectively.

¹²³ Chen & Hou, *supra* note 120.

proportion of United States firms' market access complaints. Almost every year, the USTR would make some negative comments on Taiwan's tariff rates.

In the 1980s, there were two tariff issues which infuriated the United States. They were, namely, Taiwan's shift to the customs valuation system, and its high tariff rates. In the former, the United States threatened to invoke section 301 of its Trade Act to punish Taiwan. The results of these two cases, particularly the former, represent just another "face-losing" compromise and naked violation of law on the part of Taiwan.

(1). The Case of Customs Valuation

It is perhaps necessary to outline the customs valuation systems of Taiwan and some of the background that led to the controversy. Generally speaking, Taiwan has a unique customs valuation system. Before 1974, Taiwan adopted the true C.I.F. value and wholesale price of the primary market at the imported port as the bases for customs valuation. In 1974 the *Customs Law* was amended to change its customs valuation method to reflect the true C.I.F. value.¹²⁴ Here, it must be clarified that Taiwan's customs valuation system should not be regarded as odd, because national customs valuation systems, even those based on a common approach like the Brussels Definition of Value, varied considerably.¹²⁵ It was precisely these national variations that led to the formation of GATT *Customs Valuation Code* in the Tokyo Round MTN.

¹²⁴ *Id.*, p.71.

¹²⁵ Stephen Zamora & Ronald A. Brand, 1 *BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW* p.193 (1990).

The *Customs Valuation Code* sets down rules by which Contracting Parties are to value imported merchandise for the purpose of levying *ad valorem* duties.¹²⁶ The primary principle is that the valuation of imported goods should reflect "actual value", not the value of local goods or any fictitious value[GATT, Article VII, para.2(a)]. According to Article 1 of the *Code of Customs Valuation* (Agreement on Implementation of Article VII of GATT), the customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation. The United States government's eagerness to implement this Code led to the 1979 bilateral trade agreement according to which Taiwan promised to adopt the GATT *Customs Valuation Code* based on "transaction values".

Several months after the signing of the 1979 trade agreement between Taiwan and the United States, the Reagan administration demanded Taiwan to overhaul its tariffs system by adherence to the GATT *Customs Valuation Code*. Taiwan responded by claiming that, according to GATT, developing countries enjoyed a five-year transitional period, and, as a developing country, Taiwan was entitled to put it aside until 1984. President Reagan, a long-term friend of Taiwan, accepted Taiwan's explanation.

Five years later, in the summer of 1984, the issue of the customs valuation was brought to the negotiation table again. This time, the United States threatened to cancel Taiwan's GSP if it still refused to adopt the new system.

¹²⁶ For text of the GATT Customs Valuation Code, see *Id.*, pp.193-232.

The United States thought that the use of such a threat was legitimate because GATT's five-year transitional period had already lapsed. Facing such a pressure, Taiwan promised that GATT's customs valuation code would be enforced not later than 1985. But until October 1985, Taiwan was not prepared to honour its promise. This time the explanation was that Taiwan needed more time to amend its laws, train its personnel, and establish a data base.¹²⁷ Already annoyed by Taiwan's delay, the United States demanded that the system be implemented on 1 January 1986.¹²⁸

After a secret negotiation, the United States agreed that Taiwan might postpone the implementation of the new customs valuation code but not later than 1 July 1986. An underlying reason for the United States government's "leniency" was that Taiwan promised that its customs authority would disregard the existing *Customs Law*, and apply the "transaction values" as the basis of customs valuation to all American imported goods from 15 January 1986.¹²⁹ This certainly was a dirty deal because it meant that the Executive branch and the United States had collaborated to bury the law.

This move of Taiwan demonstrated that it had no intention of adopting the *Customs Valuation Code* based on "transaction values", at least before the end of 1980s. The reason, as mentioned above, was that the MOF did not wish to lose

¹²⁷ *United Daily News* (Lien-ho pao), p.2 (3 August, 1986).

¹²⁸ *Id.*

¹²⁹ *Id.*, p.3 (6 August, 1986).

a possibly substantial amount of tariff revenue. More important, the cabinet was already entangled by the issues of political liberalisation and lifting of martial law during that period. Any material change in the economic system was regarded as highly inappropriate. So, at this stage, the tactic was to provide the United States with enhanced privileged custom treatment on the one hand, and to maintain the old system on the other. The cabinet of Taiwan routinely believed that the United States would accept such an arrangement. Unfortunately, the old trick did not work this time.

On 1 July, 1986, Taiwan promulgated its new *Customs Law*. According to the new law, customs valuation for American imported goods would be based on "transaction values" as stated in the GATT *Customs Valuation Code*; whereas for imported goods of other countries, a "duty paying list" was announced according to which 186 items of imported goods would be subject to a pre-determined tariff rates. The "duty paying list" would appear in the form of an administrative order. The MOF also stated that the "duty paying list" would last for five years because GATT allowed a five-year transitional period for developing countries.¹³⁰ In addition, the Finance Ministry explained that the making of the "duty paying list" was to prevent deliberate under-estimation of some foreign imported goods by importers for the purpose of evading tariffs. Therefore, it was a fair system to protect the welfare of the state.¹³¹

¹³⁰ *Economic Daily News* (Ching-chi jih pao), p.2 (3 August, 1986).

¹³¹ *Id.* p.2 (7 August, 1986).

Even now, it is still quite hard to understand why the MOF would make such an unwise explanation by re-applying GATT's five-year transitional period. Nonetheless, it is not difficult to imagine the reaction of the United States which strongly criticised the "duty paying list" as "artificial"¹³² and soon instituted a section 301 action against Taiwan in August, 1986.¹³³ The United States reaction was understandable, because the new dual-system would still include those goods manufactured by non-American companies invested by American multinationals in the "duty paying list", thereby eliminating their competitiveness in the Taiwanese market.

Facing such pressure, on 8 August, 1986, the Vice-Minister of Finance announced that the "duty paying list" would be abolished on 1 October, 1986, and that there would be no discrimination regarding the implementation of customs valuation based on "transaction valuations".¹³⁴ Accordingly, the section 301 investigation was terminated. Once again, the creditability and accountability of the Taiwan government was seriously damaged.

(2). Tariff Reductions

When the ratio of external trade to GNP (trade ratio) of a country is large, and when trade is concentrated in a limited number of trading partners, tariff

¹³² 1986 NTE Report, p.245.

¹³³ Taiwan Customs Valuation Unfair Practice, 51 *Federal Register* 37,528 (1986).

¹³⁴ *United Daily News* (Lien-ho pao), p.2 (9 August, 1986); see also David Simon, "Legal Development in United States-Republic of China Trade From July 1, 1988 Through December 31, 1990," 9 *Chinese Yb. Int'l L. & Aff.*, p.159 (1989-1990).

policy is likely to become a central item in bilateral negotiation.¹³⁵ The case of Taiwan is a typical example. First of all, Taiwan is probably one of the few countries that has an extremely high degree of reliance on external trade. According to an analysis made by two Taiwanese economists, by 1970, the trade ratio in 1970 was 53%. In 1980, it jumped to 96%, and fell to 78.8% in 1989.¹³⁶ On the other hand, Taiwan's external trade has been concentrated in two countries, namely the United States (export) and Japan (import). In terms of exports, the share of the United States in Taiwan's total exports was 48% in 1986. This culminated in a huge trade surplus with the United States. As such, it is not surprising that the United States began to exert significant pressure on Taiwan to lower its tariffs.

Nonetheless, compared with the issue of customs valuation, tariffs reduction was an easier case for both the United States and the Taiwan governments, for the "liberalisation" was conducted, as noted by Howell and Glenn, in piecemeal form instead of as a wholesale programme.¹³⁷ Naturally, the items on which such tariffs were to be reduced were often dictated by the United States.¹³⁸ One might be able to describe this as an effort to remove "trade barriers" and thus to achieve "free trade" or "fair trade". As a result, it has almost become routine work for Taiwan to reduce its tariffs to meet the needs of the United States. Up until 1991, after various negotiations, Taiwan had lowered its average

¹³⁵ Chen & Hou, *supra* note 120, p.45,

¹³⁶ *Id.*, p.43.

¹³⁷ Howell & Wolff, *supra* note 25, p.321.

¹³⁸ Chen & Hou, *supra* note 120, pp.65-66.

nominal and effective tariff rates to 8.89% and 4.97% respectively.¹³⁹ When compared with the average nominal tariff rate of 35.96% and effective tariff rate of 9% in 1980, it certainly was a significant concession.¹⁴⁰

Here, a certain degree of legal manipulation was involved. As a matter of law, any reduction of tariffs requires the consent and resolution of the Legislative Yuan, because it would affect the welfare of the people. Yet, submission of piecemeal tariff concession on only few commodity items each time to the Legislative Yuan for approval was certainly too trivial. Accordingly, the Executive branch had to rely on an Article 47-1 of the *Customs Law* made in 1971, which allowed the competent authority, MOF, to implement tariff cuts of up to 50% by means of administrative discretion.¹⁴¹ Obviously, this article was an imitation of the United States *Trade Expansion Act* of 1962 which delegated certain powers to the President to negotiate with foreign countries. But the problem here is that its application was more a passive response than a positive outcome of trade negotiation based upon reciprocity. As such, it became an expedient and convenient means to suit those piecemeal concessions. The fact that the aggregation of all these small concessions could amount to a huge difference in the long-term was neglected. Yet, the USTR liked it.¹⁴²

¹³⁹ 1993 NTE Report, p.247.

¹⁴⁰ Tsai, Chi-yuan, "The Causes of Taiwan's Current Account Surplus in the 1980s," *INDUSTRY OF FREE CHINA*, Vol.LXXX, No.3, p.52 (Sept., 1993).

¹⁴¹ Article 47-1, Section 1 states, "In order to tackle special domestic and international economic situation, to adjust commodity supply, and to maintain reasonable industrial management, customs for import goods as stated in the Customs Import Regulation may be adjusted within a range of 50%...."

¹⁴² For instance, when discussing Taiwan's import policy, the USTR emphasizes, "(t) Executive Yuan will implement these tariff cuts by means of the discretionary modification authority in Art.47-1 of the Customs Law or exert its best efforts to secure enactment of these tariff reductions by the Legislative Yuan...." 1994 NTE Report, p.253.

3. Evaluation

Statist scholars are keen to emphasize the "strength" of state, specifically its ability to provide stable and dynamic leadership for development. They claim that the so-called "developmental states" (Taiwan is, notably, one of them) contain a reasonably efficient administrative institutions responsive to political cues and the technical capacity to analyze problems, formulate feasible solutions and implement them in technically competent ways.¹⁴³ In concrete cases, however, this generalisation sounds too good to be true. The case of Taiwan's adjusting its tariffs system reflects quite another story. In a certain sense, it is not incorrect to say that Taiwan was quite effective in responding to the United States pressures. But this by no means implies that the solutions were necessarily wise and sensible. Now it is almost certain that the insistence on the old custom valuation system and the invention of the "duty paying list" were more than unwise. Decisions were made under very closed conditions in disregard of both the United States threats and societal needs in general. They reflect evidently the authoritarian mentality that the government could do or say whatever it wanted, because whatever the government did was in the national interest -- a notion which had never been democratically defined. But when the decisions proved to be unworkable, there was no such thing as political responsibility because it was the United States that pushed too far. In the end, rather than blaming itself, the government blamed the United States. In fact, it was only through creating this kind of self-comforting mentality that the self-induced humiliation could be justified. Nor was the adjustment of the tariff rates

¹⁴³ Gordon White, "The Developmental State," reprinted in Yash Ghai, Robin Luckham & Francis Snyder (ed.), *THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER* p.435 (1987).

according to the delegated legislation of the *Customs Law* a proper one, bearing in mind that the Law was made in the authoritarian era by the purely rubberstamping Legislative Yuan. If the KMT government was serious about constitutional democracy, then it could have claimed that it needed to review the law before agreeing to any tariff reductions. Surely, though, the outcome would not have been different as American pressures had proved to be too immense and imminent, but at least this would have received warm support from the public, and avoided non-sensible tactics invented by the bureaucrats. The entire story of adjusting the tariff system thus reveals one simple truth: that developmental states are not always competent enough and they do make serious mistakes. Yet, because of the lack of democratic control, policy failure and legal manipulation are forgotten (and thus forgiven) with the passage of time.

Chapter 5 MAJOR LEGAL ISSUES AND IMPACTS WITH REGARD TO TRADE IN SERVICES -- ACCESS TO BANKING AND INSURANCE MARKETS

A. INTRODUCTION

According to the official definition of the United States, "international trade" includes trade in goods and services.¹ The service sector is a heterogenous group of activities which include such industries as banking, insurance, transportation, communication, tourism, construction and engineering, retail trade, franchising, advertising, and professional services.² As service trade has become the most dynamic segment of America in recent years,³ bringing the issue of liberalisation of trade in services into bilateral as well as multilateral negotiations is therefore considered an important objective by the United States. It is said that the United States advocacy of liberalisation of service trade appears to have been the result of three factors: (1) response to pressures from multinational corporations; (2) its desire to strengthen the "free trade lobby" to offset the growing political power of protectionist interests; and (3) the recognition that services were of growing importance in the United States exports.⁴ The standard argument for opening service markets is based on Ricardo's well-known theory of comparative advantage where the growth of trade

¹ *Trade and Tariff Act of 1974*, section 102(g).

² OECD, *INTERNATIONAL TRADE IN SERVICES: INSURANCE*, p.7 (1983).[Hereinafter 1983 OECD]

³ International trade in services grew at an annual rate of 19% between 1970 and 1980. Growth continued through the 1980s. By 1988, United States companies alone had estimated foreign market sales of US\$ 150-200 billion. Terrence P. Steward, 2 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992)* pp.2342-2343 (1993).

⁴ The United Nations on Trade and Investment, *THE OUTCOME OF THE URUGUAY ROUND: AN INITIAL ASSESSMENT-- SUPPORTING PAPERS TO THE TRADE AND DEVELOPMENT REPORT*, 1994, p.145 (1994). (Hereinafter UN Assessment Papers)

leads to the kind of international specialisation in which each agent performs the tasks at which he is most effective.⁵ Accordingly, the *Trade and Tariff Act* of 1984 provided the mandate for the United States administration to negotiate on trade in services.

The significance of the 1984 *Trade Act* is that it introduced the concept of reciprocity, that of the "achievement of commercial opportunities in foreign markets substantially equivalent to those accorded by the United States", commonly known as "equal competitive opportunity". In the international forum, a specific and initial objective is the demand for national treatment on the part of the negotiating counterparts.⁶ Conceptually, the national treatment requirement is thus closely linked to market access.⁷ This objective was later reconfirmed in the *Omnibus Trade and Competitiveness Act* of 1988.

The issue of trade in services was first brought to the multilateral forum in September 1986 as part of the MTN of Uruguay Round.⁸ As expected, it generated much interest and dissent as the United States contended that the benefits of services trade liberalisation would enhance development and economic

⁵ Mario A. Kakabadse, *INTERNATIONAL TRADE IN SERVICES: PROSPECTS FOR LIBERALISATION IN THE 1990s* p.54 (1987).

⁶ Wedige von Dewitz, "Services and the Uruguay Round: Issues Raised in Connection with Multilateral Action on Services: A Comment," in Ernst-Ulrich Petersmann & Meinhard Hilf (ed.), *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS* p.491 (1991). Note the application of the concept of national treatment in transnational business activities, however, was based on the *OECD Declaration on International Investment and Multinational Enterprises* of 1976. See OECD, *DECLARATION BY THE GOVERNMENT OF OECD MEMBER COUNTRIES AND DECISIONS OF THE MULTINATIONAL ENTERPRISES, NATIONAL TREATMENT, INTERNATIONAL INVESTMENT INCENTIVES AND DISINCENTIVES, CONSULTATION PROCEDURES* (1979).

⁷ UN Assessment Papers, *supra* note 4, p.167.

⁸ *Id.*, p.146.

growth for both developed and developing countries.⁹ A Group of Negotiations on Services (GNS) was thus formed to address the relevant issues. On 15 December 1993, the General Agreement on Trade in Services (GATS) was finally reached.¹⁰ The GATS is said to have taken into consideration the demands of developing countries by incorporating the principle of "progressive liberalisation" which provides that the process of liberalisation will take place with due respect for national policy objectives and the level of development of individual parties, both overall and in individual sectors [Art.XIX:2].¹¹

However, it would be erroneous to conclude that the GATS is the first attempt of the United States and other industrialised countries to penetrate developing or other non-Western countries' service markets. In fact, more than a decade ago, the United States held negotiations regarding service trade with Taiwan and South Korea on a bilateral basis. In 1978, the United States first expressed its willingness to gain access to Taiwan's insurance market.¹² In the following years, it also sought the possibility of penetrating the banking, shipping, telecommunication, film, and professional business sectors. Also different from the GATT forum, the negotiation objective is clear and straightforward: to reduce or eliminate all barriers which deny United States corporations' establishment and operation in such markets to achieve liberalisation in the American sense.

⁹ Kakabadse, *supra* note 5, p.53.

¹⁰ *UN Assessment Report*, *supra* note 4, p.146.

¹¹ UNCTAD, *TRADE IN SERVICES: SECTORAL ISSUES* p.155 (1989). (Hereinafter *UNCTAD Project*)

¹² Yen, Ching-chang, *Chung-Mei Ching-Mao Tan-Pan Yiu-Kuan Fa-Lu Wen-Ti Chih Yien-Chiu (A STUDY OF THE LEGAL ISSUES REGARDING US-TAIWAN TRADE NEGOTIATIONS* p.451 (1988).

In reality, the task of achieving this objective through bilateral negotiation proves to be complex and difficult. First, there is always the fear that granting foreign market access to service sectors would dismantle or weaken the prudential regulations aiming at ensuring the integrity and stability of service sectors as well as effective supervision. As such, the economic well-being of the nation can be at stake. This argument is so strong that even industrialised nations (including the United States) have various kinds of limitations to block foreign entry.¹³ Indeed, the collapse of the Bank of Credit and Commerce International (BCCI) in 1991 and the Barings Bank in early 1995 has also revealed significant impacts on smaller financial markets.¹⁴ Second, financial services have traditionally been considered domestic matters owing to their pervasive relations with financing, payments, and economic activity.¹⁵ For example, as pointed out by Krommenacker,¹⁶ the regulation of banking and insurance services constitutes an instrument for implementing monetary or economic-development policies through the mobilisation of private savings. A de-regulation of national banking and insurance regulations would thus mean a loss of this policy instrument. It is, therefore, an extremely sensitive issue for bilateral

¹³ For instance, in order to prevent openness, in 1980 the United States imposed a temporary moratorium on all foreign takeovers of American banks. Also, in several states, there are residential or citizenship requirements, limitations in acquiring shares, and minimum assets requirement. In insurance, deposit requirement, and demonstrated experience requirement are commonplace. In France, insurance cannot be imported, while in Belgium only non-marine business with a premium of less than US\$ 1.5 million can be placed abroad. See Kakabadse, *supra* note 5, pp.63-64; OECD, *NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES*, pp.175-185 (1993).

¹⁴ It is estimated that the Barings has a total investment of around US\$ 600 million in Taiwan's stock market. Because of the "rogue dealer" scandal, the weighted price index of Taiwan's stock exchange dropped 3.07% on 26 February 1995. Japan and Singapore suffered similar situations. See *Central Daily News* (Chung-yang jih pao), p.1 (27 Feb., 1995).

¹⁵ UN Assessment Papers, *supra* note 4, p.179.

¹⁶ Raymond J. Krommenacker, "Multilateral Services Negotiations: From Interest-Lateralism to Reasoned Multilateralism in the Context of the Servicization of the Economy," in Ernst-Ulrich Petersmann & Hilf, *supra* note 6, p.491.

negotiation since it touches the very sovereign integrity and independence of the state. Moreover, these sectors often involve strategic considerations, as in the case of shipping in Taiwan,¹⁷ and thus further complicate the issue.

As mentioned above, the United States and Taiwan have engaged in bilateral talks concerning service trade since the late 1970s. Throughout the 1980s, as Taiwan's trade surplus with the United States continued to expand rapidly, pressures from the latter to open Taiwan's service markets became imminent. Different from the situations in the merchandise trade, American pressures did not arouse public discontent. The reason was due to the compatibility of American demands with the domestic demands of Taiwan for a more competitive service industry and of gaining greater access to overseas financial services. In fact, it is true to say that the pressures from inside and outside Taiwan culminated in the significant relaxation of regulations governing service industry in the late 1980s and early 1990s.¹⁸ On the other hand, the threat of trade retaliation was still regarded as extremely offensive, while the efforts forcing Taiwan to appreciate its currency for up to 50%, thus causing painful re-adjustment in the manufacturing sector, were unforgettable.

This chapter is an attempt to discuss United States efforts in opening Taiwan's banking and insurance markets. Although it is true that service trade

¹⁷ The United States was once interested in gaining access to Taiwan's inland shipping transportation service, but soon dropped the idea because Taiwan warned that all vessels sailing between the inland ports were subject to expropriation should a war break out with Communist China.

¹⁸ Jane Kaufman Winn, "Banking and Finance in Taiwan: The Prospects for Internationalization in the 1990s," 25 *Int'l Lawyer*, no.4, pp.907-952 (1991); "Taiwan Faces Up to Maturity -- Trade Forced to Quieten Down a Bit," *Financial Times*, p.5 (12 July, 1989).

includes more than these two sectors, it is these two sectors which have aroused serious controversies and significant legal interest.¹⁹ To ensure a fuller understanding of the issues, a brief description of Taiwan's banking and insurance industries is provided. There follows the responses and changes on the part of Taiwan to United States pressures.

In the course of the analysis, two significant inter-related arguments are made. First, United States legal demands for national treatment and liberalisation, in the context of bilateral negotiations, served mainly to benefit American multinationals. This is evidenced by the selective, piecemeal, and expedient administrative measures taken by Taiwan to grant American firms special privileges in such markets. These measures, whether made for prudential or liberalisation purposes, were not only highly discriminatory in nature, but also arbitrarily made. This observation leads us to the second argument. It is conceptually misleading to say that the United States has played a constructive role in Taiwan's recent financial liberalisation. As far as the regulations governing foreign financial institutions are concerned, relaxation of limitations on establishment and operation requirements were carried out under the old corporatist framework, which meant the whole process was dominated by administrative discretion unchecked by the legislative and the judicial branches.

¹⁹ Other issues such telecommunication, American films quota, and professional services still remain unsolved. As a matter of fact, viewed from the recent *NTE Reports*, the issue of telecommunication is likely to become the centre of future negotiations. See 1991 and 1992 *NTE Report*, pp.238, 255-256 respectively. With regard to United States films, Taiwan found no difficulty of lifting the limitations. For instance, before 1990 Taiwan limited to eight the number of prints which could be imported of each film title. In June 1990 Taiwan increased this limit to twelve. See 1991 *NTE Report*, p.197. As to professional services, focus was mainly on the profession of public accountants and attorneys. The issue was cooled down largely because Taiwan insisted that foreign professionals should have a basic understanding of the Chinese language. This requirement is reasonable but difficult for United States CPAs and attorneys. It is not the purpose of this thesis to predict future development, the discussion of these issues at this moment is thus premature.

Thus, it might be more appropriate to suggest that the development is a flexible adjustment of administrative measures, but not liberalisation. As a matter of law, liberalisation necessarily involves the adherence to clear rules (transparency) and predictability of law based on coherent policy and legal principles. And only through this can the legal system be integrated into the financial fabric. Here, however, one finds bureaucratic measures taken in response to United States pressures. To summarise, the granting of more economic rights to foreign nationals does not necessarily constitute economic liberalisation. What is more important is the often neglected issue of whether the state still maintains a high degree of freedom for discretionary management -- an issue of significant democratic concern.

B. ACCESS TO THE BANKING INDUSTRY

1. The "Pawn Shop" Style Banking System and the Financial Liberalisation on Taiwan

Largely due to historical lessons,²⁰ the banking industry of Taiwan has traditionally been under strict control. As noted by a commentator, the policy of Taiwan has been for the government to dominate the banking system, and for the banking system to dominate the financial system.²¹ Before 1990, not only

²⁰ One of the reasons that the KMT government lost its fights against the Communists was the uncontrollable hyper-inflation which occurred between 1948 and 1949 in the mainland. An important reason accounted for this phenomenon was due to the over-issuance of currency. Therefore, taking this event as a lesson, the first thing to do as soon as the KMT moved to Taiwan was to strictly regulate banking and financial activities. For a history of the financial collapse of China, see Witold Rodzinski, 2 *A HISTORY OF CHINA* pp.256-257 (1983).

²¹ Winn, *supra* note 18, p.908.

were all domestic banks owned by the government,²² their activities were strictly limited. Government ownership facilitated government control, and the smaller the number of banks, the easier the control. Government control appeared not only by means of strict legal limitations in the establishment and scope of business, but was also virtually under the direct management of the Central Bank. For instance, all banks had to report all their transactions to the Central bank weekly; foreign exchange transactions had to be reported daily. In fact, even today, the Central Bank only allows selected banks to carry out foreign exchange transactions. These privileged banks were called "Foreign Exchange Appointed Banks".²³ Moreover, the banks' senior staff were appointed by the government. Chairmen were mostly ex-Ministers or Central Bank officials, while shareholders included government officials. Under this structure, banks' independent legal status²⁴ was only nominal. This reflected the nature of a corporatist state -- active control of civil entities to achieve the collective ends of maintaining economic and financial stability.

Accordingly, a narrow concept of banking prevailed. Banks operated like pawn shops, the main concern of which was to protect the security of their lending, let alone diversification and expansion of their activities. Thus, in spite of their lack of professional banking knowledge, they made huge profits which

²² According to the ROC Constitution, the government is divided into three levels, namely, the Central, the Provincial, and the Hsien [Art.112, 121].

²³ The statutory basis for such an appointment is Article 5(2) of the *Statute for the Administration of Foreign Exchange*.

²⁴ According to Article 52 of the *Banking Law*, a bank is a legal person registered in the form of a company limited by shares -- i.e. a company organised by seven or more shareholders; the total capital stock of the company is divided into shares and each shareholder is liable to the company for his subscribed shares.

were a result of the banking cartel managed by the Central Bank.²⁵ The significance of foreign banks was marginal, not only in terms of their numbers, but also their limited scope of business. Before 1980, there were only seven foreign banks permitted -- one office each. Regulation of these foreign banks was thus relatively easy. To ensure the controlling role of domestic banks, foreign banks' establishment, location, scope of activities, and operating assets etc. were all subject to the review of the competent authorities, namely, the MOF and the Central Bank.²⁶ This was done through an administrative order *Guidelines for Screening and Approval of Establishment of Branches and Representative Offices by Foreign Banks (Foreign Banks Regulations)* promulgated on 23 August 1983. The *Foreign Bank Regulations* is typically delegated legislation made according to the *Banking Law*.²⁷ As it was made in the authoritarian era, not much attention was paid to its appropriateness, particularly the enormous management discretion of the competent authorities.

In the eyes of liberal economists, the banking and financial system of Taiwan is rigid, protectionist and unresponsive to market forces, and is therefore disproportionate with its economic development.²⁸ Yet, this is not totally right

²⁵ Robert Wade, *GOVERNING THE MARKET: THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALISATION* p.164 (1990).

²⁶ Art.116-124 of the *Banking Law*.

²⁷ Article 121 of the *Banking Law* states that the scope of foreign banks' business shall be decided by the central competent authority in the form of (administrative) order, after consultation with the Central Bank, and within the purview of Article 71, 78, and 101(I). With regard to foreign exchange business, approval must be obtained from the Central Bank.

²⁸ Academic writings criticising Taiwan's banking system and demanding liberalisation or deregulation is not lacking. See, for instance, Liang Kuo-Shu, "Financial Reform, Trade and Foreign-Exchange Liberalisation in the ROC," *Industry of Free China*, Vol.LXVIII, No.6, pp.7-21 (1987); Liang Kuo-shi, "The Taiwan Economy and Financial Markets," *Industry of Free China*, Vol.LXXI, No.4, pp.1-9 (1989); Yu, Tzong-shian, "Prospects for Taiwan's Economic Development," *Industry of Free China*,

in the sense that they seem to imply that this pawn shop banking system has few links with Taiwan's economic development. Wade challenges this point and develops an interesting argument: that somehow these qualities of Taiwan's financial system had helped the government to develop its industrial policies, and thus, from a larger spectrum, economic development.²⁹ Nevertheless, this argument is only partly true, for the anachronistic banking system did fail to cope with the fast growing economy. The reason is that because of the rapid accumulation of trade surplus in the 1980s, there was a large increase in money supply.³⁰ This sudden increase of money together with surprisingly stable prices meant a significant lowering of interest rates by the banks. As the financial market failed to meet the needs of society, the trend encouraged people with "entrepreneur spirit" to seek investment or play risky monetary games unregulated by law. This led to some financial disasters which almost destabilised the entire financial system.³¹ Clearly, the government had to do something to

Vol.LXXI, No.5, pp.9-17 (1989); Shieh, Samuel C, "Financial Liberalisation and Internationalisation in the ROC -- Current Status and Future Policy Direction," *Industry of Free China*, Vol.LXXII, No.6, pp.9-17 (1989); Hsu, Paul S.P., "Jurisprudence in Taiwan," 11 *Mich. J. Int'l L.*, p.387 (1990); Liang Kuo-shu, "The Banking System and Financial Reform in Taiwan," *Industry of Free China*, Vol.LXXVIII, No.3, pp.25-46 (1992).

²⁹ Wade argues strongly that the illiberal nature of the financial system has helped create the "curb" market. The curb market is an unregulated, semi-legal credit market in which loan suppliers and demanders can transact freely at uncontrolled interest rates. It facilitates small business not only because it provides financial flexibility, but also by supplying information. See Wade, *supra* note 25, pp.159-161.

³⁰ For instance, from the year 1985 to 1990, the supply of M1 as a percentage change from the previous year are +12%, +51.4%, +37.8%, +24.4%, +6.0%, and -6.6% respectively. For M2, the figures are +23.4%, +25.3%, +26.6%, +17.9%, +15.3%, and +9.9% respectively. See *Industry of Free China*, Vol.LXXXI, No.3 (1994). For analysis of Taiwan's then financial situation, see *The Economist* (London), pp.19-22 (28 March-2 April 1987).

³¹ Three major financial crises happened in the 1980s which led not only to financial instability, but also a cabinet re-shuffle. (1) The Tenth Credit Cooperative Corporation scandal: In February 1985, a mega-scandal erupted when the Cathay Plastics Co. and the Tenth Credit Cooperative Corp. both collapsed after receiving huge sums of money from investors. Cathay Plastics Co. absorbed an equivalent of US\$ 120 million from the public, while improperly borrowing an equivalent of US\$ 190 million from the Tenth Credit Cooperative Corp. The President of the Cathay Plastics Co., Mr. Tsai, Chan-chou, also a KMT-supported legislator, was then convicted of bouncing 5,565 checks for the equivalent of US\$ 47 million. The case ended when the government took over the

alleviate the situation. Financial "liberalisation" seemed to be a good idea. Accordingly, in 1989, the *Banking Law* was amended which, for the first time, allowed privately held banks to set up.³² Various other measures such as deregulation of interest rates and relaxation of the business scope of banks were also taken to facilitate financial activities.³³ During this period of policy shift, the United States came into the picture, not only to demand financial liberalisation, but also in the hope that this would alleviate bilateral trade.

2. United States Policies and Efforts

It is said that the United States played the role of a catalyst in Taiwan's financial "liberalisation".³⁴ When making this important comment, however, one must be sure about the basic standing of the United States with regard to

Tenth Credit Corp., followed by the death of Mr. Tsai due to liver disease. See "Discredited Policies," *Far Eastern Economic Review*, p.70, (11 April, 1985); "The Never-Ending Story," *Far E. Econ. Rev.*, p.94 (12 Sept., 1985); "Taiwan Notes," *Asian Wall St. J.*, p.1 (3 Feb., 1986).

(2) **Underground Investment Companies Crisis:** The underground investment companies rose to prominence in 1986 and 1987. Within few years, more than 170 of them were established. As no law governed their activities -- offering sky high interests rates for depositors, they soon absorbed a large share of the hot money in the economy. The largest of them, Hung Yuan, was estimated to have taken the equivalent of US\$ 8 billion in five years. By 1989, the government could no longer tolerate this situation. Following the amendment to Banking Law in 1989 which made these investment activities illegal, the government began the sweeping action. See "Fate of a Grey-Market Behemoth in Taiwan Could Cause Financial and Political Tremors," *Asian Wall St. J. Weekly*, p.1 (20 Nov., 1989).

(3) **The Rise and Fall of the Stock Market:** From 1986-1990 the stock exchange market enjoyed unprecedented popularity as a large number of people such as housewives, taxi drivers, and even full time workers became speculators. Illegal lending provided by brokers with access to "curb" market increased the volume of speculation. As such, the market hit an all-time high weighted index of 12,495.37 on 10 Feb., 1990. Then it collapsed. In less than eight months time, it became 2,560.47 on 1 Oct. 1990. Stein, "The Search for Ways to End Financial Anarchy," *Asian Finance.*, p.29 (15 July, 1990).

³² "Banking and Big Business," *Far Eastern Economic Review*, pp.36-37 (4 April, 1991).

³³ "New Amendment Liberalizes Taiwan's banking Sector," *East Asian Executive Reports*, Vol.11, Issue 8, pp.16-17 (Aug., 1989).

³⁴ Winn, *supra* note 18, p.908.

Taiwan's banking system, and what actions it has taken. Here, two significant policies which became two different forces on the part of the United States can be distinguished. First is the demand for market access according to the principle of national treatment to Taiwan's banking industry. Next is the United States pressuring of Taiwan to appreciate its currency, the New Taiwan Dollar (NT\$), by accusing it of manipulating the exchange rate to gain unfair competitive advantage in international trade. As will be seen, it is these two forces that contributed partly to the later financial "liberalisation" on Taiwan.

(1) National Treatment and Market Access

In 1978, the United States enacted the *International Banking Act* (IBA).³⁵ According to this Act, the standard of national treatment was adopted, which required foreign countries to grant United States banking operations equality of competitive opportunity in similar circumstances. The national treatment approach was supported by most of the large United States banks.³⁶ The concept of national treatment does not, however, include a threat of retaliation like the section 301 of the *Trade Act*.³⁷ Instead, the IBA requires that the Secretary of the Treasury report periodically on the treatment of United States banks in foreign markets, and that the President or his designee conduct discussions with

³⁵ 12 U.S.C. § 3101-3108 (1988).

³⁶ Paul M. Horvitz & R. Richardson Pettit, "Financial Service in the European Community and the Implications for the United States," in Claude E. Barfield & Mark Perlman (ed.), *INDUSTRY, SERVICE, AND AGRICULTURE: THE UNITED STATES FACES A UNITED EUROPE* (U.S.: American Enterprise), p.322 (1992).

³⁷ Winn, *supra* note 18, p.929.

the governments of countries that are major financial centres. Winn claims that this lack of coercion seems to place United States efforts to encourage Taiwan to open its domestic banking market on the level of moral suasion.³⁸ This observation obviously neglects the existence of a national treatment clause in *The Treaty of Friendship, Commerce and Navigation Between the Republic of China and the United States of America* of 1948 (FCN Treaty).³⁹ In other words, it is not only a matter of moral suasion, but also the possibility of treaty violation should Taiwan refuse to take any positive actions. As a matter of fact, the demand for national treatment according to the FCN Treaty was precisely the United States basic standing in the bilateral negotiations since 1986. For instance, according to the complaint made by the USTR in 1986, "Taiwan does not provide national treatment for foreign banks. Local branches of United States banks must operate within a restricted scope of business that puts them at a serious disadvantage compared to their Taiwanese competitors."⁴⁰ [Emphasis added] National treatment, together with the long term lobbying efforts of American banks in Taiwan⁴¹ have culminated in the promulgation and amendment of the *Foreign Bank Regulations*.

³⁸ *Id.*

³⁹ Article III (3) of the *United States - ROC FCN Treaty* states, "The High Contracting Parties, adhering generally to the principle of national treatment... agree that corporations and associations of either High Contracting Parties shall be permitted... to engage in and carry on commercial... financial activities...." The text of the treaty can be found in State Dept., *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949*, Vol.6, pp.761-786 (1971).

⁴⁰ 1986 *NTE Report*, p.247.

⁴¹ Mitchell A. Silk, Liu, Lawrence S. & Lester Ross, "Banking: The Regulatory Aspect," in Mitchell A. Silk (ed.), *TAIWAN TRADE AND INVESTMENT LAW* p.372 (1994); and Liu, Lawrence S., "Financial Developments and Foreign Investment Strategies in Taiwan: A Legal and Policy Perspective," 25 *Int'l Lawyer.*, p.83 (1991).

Here, one significant point must be clarified. Though it is true that in most countries, national treatment represents a substantial liberalisation of the treatment of foreign banks, this was not the case in Taiwan. Instead, two seemingly contradictory developments can be found. First, even after the major amendment to the Banking Law and the *Foreign Bank Regulations* in 1989,⁴² foreign banks are still subject to several limitations. Take the establishment requirements for example, apart from those prudential regulations which require onerous capitalization [Art.3,4,5], some of the limitations still run counter to the national treatment principle. For instance, only three foreign banks are allowed to be established each year, and in principle only one branch office in each city [Art.7, 9]. Compared with domestic banks which have extensive networks of branches across the island, this certainly is not national treatment or equal competitive opportunity. With regard to the scope of business, foreign banks' New Taiwan Dollar (NT\$)-denominated deposits may not exceed 15 times of the branches' registered operating capital in Taiwan [Art.13]. More, as foreign banks are still not allowed to establish subsidiaries in Taiwan, American banks cannot take full advantage of engaging in securities transactions.⁴³ Last, the competent authorities may tighten their activity if the conditions deem necessary [Art.16].

Second, in certain areas, foreign banks receive better than national treatment. The most notable of which being that foreign banks are allowed to

⁴² Some Taiwanese and American academics and commentators prefer to call this 1989 amendment as a major step in financial liberalization and adherence to national treatment. However, in their contributions, they also admit that "completely open market access for foreign banks to participate in Taiwan's financial market is not likely in the foreseeable future". See Silk, Liu & Ross, *Id.*, p.372.

⁴³ 1993 NTE Report, p.253.

engage in foreign exchange transactions. In other words, they automatically become "Foreign Exchange Appointed Banks" [Art.12(6)]. In addition, foreign banks enjoy the exclusive privilege of pre-sale foreign exchange export loans, and are also able to own financial leasing companies [Art.12(16)]. As Taiwan admits, these arrangements have, in effect, resulted in "supra-national treatment".⁴⁴

In sum, as a response to the American demand of national treatment in banking, Taiwan relaxed its *Foreign Bank Regulations*, but in a rather imbalanced way. Thus, it can hardly be said that the principle of national treatment is fulfilled. In fact, the results are also below and above national treatment. Of course, one may always argue that they were made for prudential or other good reasons, but this misses the point. What is to be questioned is that the outcome was a result of administrative manipulations made without public knowledge. In other words, there were no clear principles or rules governing this so-called foreign banking liberalisation. All decisions were made by the competent authority in the name of administrative discretion according to a very general delegated legislation of the *Banking Law*. Nonetheless, this non-transparency was sanctioned due to the still effective *Standardization Law* which offered almost no checks to administrative orders or discretion.⁴⁵ It should be borne in mind that, according to a court precedent, the exercise of administrative discretion is

⁴⁴ BOFT, *Wo-kuo 78 nien duai-wei mau-i tsa-shang tan-pan chi-yau (A SUMMARY OF ROC'S EXTERNAL TRADE CONSULTATION IN 1989)* Title I(4), p.31. (1990).[Hereinafter 1989 Consultation Report]

⁴⁵ See Chapter 7B,3.

not subject to review of the court.⁴⁶ It follows that one cannot be sure it was a consistent effort of "liberalisation" because the competent authority was still given the management discretion to withdraw or tighten foreign banks' scope of business, be it due to prudential or other reasons, not to mention the appropriateness of the regulations. All these convey one important message: that the relaxation of banking regulations was conducted under the corporatist framework with a siege mentality, and the purpose was purely to make concessions with the United States. The legal system is thus still insulated from the financial sector. We shall further elaborate this point in the final evaluation of this chapter.

(2) Exchange Rate Manipulation

Another American effort that led Taiwan to relax its traditional control over the financial system was its persistent pressure to force Taiwan to appreciate the New Taiwan Dollar (NT\$) between 1985 and 1988 -- precisely the period when Taiwan was suffering from an expansion of money supply in the domestic economy. The mixing of these two internal and external forces gradually left the government no choice but to overhaul its financial and banking policies.

From a broader perspective, the demand for NT\$ appreciation was an inevitable consequence of the *Plaza Agreement* and the *Louvre Accord* reached in the mid-1980s by the industrialised nations, which recognised that US\$ was

⁴⁶ See Chapter 7B, 4.

overvalued.⁴⁷ The agreements endorsed the intervention of the central banks of the trading nations in foreign exchange markets, in order to achieve a so-called "managed float" system. The overvalued dollar also gave rise to a theory that America's trading partners might be manipulating the exchange rate so as to gain an unfair competitive advantage in international trade, which, in turn, was a cause of the nation's large trade deficits. This theory is substantiated in the *Exchange Rate and International Economic Policy Coordination Act* of 1988 (*Exchange Rate Act*), which authorized the President to enter into negotiations with countries found to be manipulating their currency and having a significant trade surplus with the United States.⁴⁸

Nevertheless, negotiations with Taiwan regarding the value of NT\$ started before the enactment of the *Exchange Rate Act*. While it is true that the Central Bank of Taiwan did play a strong role in maintaining the stability of the exchange rate,⁴⁹ it is still arguable whether it was manipulating it for the

⁴⁷ In September 1985, the United States Treasury Secretary, and the finance ministers of Japan, West Germany, France, and the United Kingdom met at the Plaza hotel in New York to discuss the problem of US\$. In the resulting Plaza Agreement, the ministers announced that the dollar was overvalued and that coordinated action was necessary to push down its value. However, no commitments were made to alter the macroeconomic policies. Then, in February 1987, a *Louvre Accord* was signed in Paris by these G-5 countries plus Canada. The central objective of the agreement was to stabilise the US\$ value through equilibrating changes in macroeconomic policies and to prevent undue volatility in exchange rates through market intervention. Franklin R. Root, *INTERNATIONAL TRADE AND INVESTMENTS* pp.493-494 (1990).

⁴⁸ *Exchange Rate and International Economic Policy Coordination Act* of 1988, 22 U.S.C. § 5301 (1988).

⁴⁹ To ensure the stabilisation of the NT\$, it has been the practice of the Taiwan government to follow the Bretton Woods system by pegging NT\$ to the US\$ at a fixed rate. This, however, would require the intervention of the Central Bank of Taiwan in the foreign exchange market. The method of intervention was not complicated. By using the international reserves, the Central Bank sells US\$ when NT\$ is depreciating, and buys US\$ when NT\$ is appreciating. Legally speaking, such an intervention was not without any statutory basis. Article 2 of the *Central Bank Law* states that the objectives of the Central Bank are to promote monetary stability, promote a sound financial and banking system, and maintain internal and external stability in the value of the currency. In addition, Article 33 and Article 34 further empower the Central Bank to hold international reserves, and depending on the conditions of balance of payments, to adjust the demand and supply of foreign exchange, so as to maintain an ordered foreign exchange market. This broad delegation of power

purpose of trade. Regardless of this issue, however, in 1985 it seemed that consensus had been reached that NT\$ should appreciate. From that time on, NT\$ appreciated against the US\$ at a rate of approximately NT\$ 0.01 per day. Until 1987, NT\$ had appreciated for more than 40%.⁵⁰ Intriguingly, NT\$ hardly moved against the US\$ in 1988. This was due to the fact that Taiwan slashed its trade surplus with the United States by importing over one hundred tones of gold.⁵¹ However, as trade deficits remained large, the United States still claimed in an official report that Taiwan was seeking a competitive advantage for exports to the United States by keeping its currency at artificially low levels against the US\$.⁵² The United States thus demanded further liberalisation of foreign exchange market. As a result, Taiwan amended its *Statute for the Administration of Foreign Exchange* in 1989 to allow greater freedom for the banks to determine the exchange rate.⁵³ In 1990, the attitude of the United States seemed to have softened. The United States claimed that although no evidence existed of direct exchange rate manipulation, Taiwan's external surplus was so large that there was a need for further liberalisation of its exchange rate policies.⁵⁴

enables the Central Bank to do almost everything it can to cope with the State's economic situation.

⁵⁰ "Candidates for the U.S. Blacklist -- the Little Dragon," *Financial Times*, p.VI, (25 May, 1989).

⁵¹ *Id.*

⁵² Treasury Department, *REPORT TO THE CONGRESS ON INTERNATIONAL ECONOMIC AND EXCHANGE RATE POLICY*, pp.16-17 (15 Oct., 1988).[Hereinafter Treasury Report]

⁵³ These measures included: (1) permitting outward remittance of up to US\$ 5 million a year; (2) inward remittance of up to US\$ 2 million; (3) transactions above US\$ 30,000 were to take place at a freely determined rate.

⁵⁴ 1990 *Treasury Report*, *supra* note 52, p.19.

The artificial appreciation of NT\$ deliberately manipulated by the Central Bank has had several significant effects. First, as 70% of Taiwan's foreign reserves were deposited in US\$ in United States banks, it was estimated that by the beginning of 1989, the net exchange loss incurred as a result of NT\$ appreciation had amounted to US\$ 10 billion.⁵⁵ Second, a re-structuring of the manufacturing sector took place. Less competitive business had to either fold up or re-locate their manufacturing operations overseas.⁵⁶ On the other hand, while there is no clear evidence to show the existence of clear causal links, the mid-1980s was the period of mass counterfeiting and piracy of foreign goods on the island -- an easier way for businessmen to start a new venture.⁵⁷ Third, large Taiwanese businesses were able to cancel off or delay the effects of NT\$ appreciation by resorting to US\$ pre-export loans and sold forward dollars to hedge exchange-rate risks.⁵⁸ The NT\$ appreciation thus created an anti-competitive effect by squeezing out small and financially weak firms. Taiwan has, therefore, paid a great price to liberalise its exchange rate system under the pressure of the United States.

⁵⁵ *China Times* (Taiwan), p.6, (20 March, 1989).

⁵⁶ Liu, Lawrence S., "Legal and Policy Perspectives on United States Trade Initiatives and Economic Liberalisation in the Republic of China," 11 *Mich. J.Int'l L.*, p.342 (1990).

⁵⁷ For discussion of intellectual property issues, see Chapter 6.

⁵⁸ For instance, on 30 October 1987, the spot rate was US\$ 1 = NT\$ 29.91, but exporters, having known that appreciation of NT\$ was unavoidable, sold their US\$ six months earlier at the forward rate of US\$ 1 = NT\$ 32.31, thus gaining the difference of NT\$ 2.4. As a result, the forward cover offered by the Central Bank and the authorised commercial banks provide a cushion to exporters and allow them considerable delay in facing up to the full impact of the rapid NT\$ appreciation. See Liang, Kuo-shu & Liang Hou, Ching-ing, "ROC-US Trade Relations from a Financial Perspective," *Industry of Free China*, Vol.LXIX, No.4., pp.7-8 (1988). Dr. Liang was the Governor of Taiwan's Central Bank.

While these are the unexpected effects of NT\$ appreciation policy, the expected outcome -- to alleviate bilateral trade in favour of the United States -- did not happen. In fact, Taiwan's trade surplus with the United States remained large even after 1989. Ironically, an important reason for such a failure, as noted by the former Governor of the Central Bank of Taiwan, was the compensating effects of many VRAs between the two countries.⁵⁹ According to Mr. Liang, Kuo-shu,

"VRAs provide an assured sales outlet and enables exporters to capture rents arising from their ability to raise the export price by the difference between the international price and the higher domestic price in the importing country. At the microeconomic level, VRAs thus offer greater security to trade flows than would be obtainable under an unrestricted trade regime."

Liang's analysis clearly demonstrates how futile it is to try to solve the problem of trade deficit with a trading relation based on "managed trade" rather than free trade, and how dangerous it is to rely on a theory to carry out a policy without considering the effects of other policy tools. Tumlr heavily criticises the inefficiency of the United States government's redistributive economic policy. He argues that the resource costs (specialists' brainpower, lobbying costs, compliance by the private sectors etc.) themselves were part of the reason.⁶⁰ The case of forcing Taiwan to appreciate NT\$ provides a concrete example.

⁵⁹ *Id.*

⁶⁰ Jan Tumlr, "Economic Policy as a Constitutional Problem," *Fifteen Wincott Memorial Lecture* p.9 (1984).

C. ACCESS TO THE INSURANCE MARKET

1. Overview of the Insurance Market on Taiwan

The modern form of insurance appeared towards the end of the seventeenth century, but it was mainly during the last century that insurance became an institutionalized activity.⁶¹ In the industrialised nations, the annual increase in premiums collected in the second half of the twentieth century is far greater than the increase in gross domestic product.⁶² The significance of insurance is recognised in the 1964 UNCTAD session which acknowledged that "a sound national insurance and reinsurance market is an essential characteristic of economic growth".⁶³ This background explains why national insurance laws have been keen to limit the operation of foreign companies in a highly discriminatory manner. The United States, for instance, has a very complicated state system of insurance regulation, which operates substantially as a foreign entry barrier.⁶⁴

While it is not difficult to realise the economic significance of insurance, and thus to tighten control over foreign insurance companies through licensing and operational limitations, it is not easy for less developed countries to establish a sound insurance regulatory and supervision system. A famous Taiwan legal

⁶¹ UNCTAD Project, *supra* note 11, p.158.

⁶² *Id.*

⁶³ *Id.* p.159.

⁶⁴ Robert L. Carter, "Insurance Trade Between the United States and the European Community," in Barfield & Perlman (ed.), *supra* note 36, p.304. For a study of discriminatory treatment on foreign insurance companies in industrialised nations, see 1983 OECD, *supra* note 2, pp.12-24.

expert, Mr. Hsu, Paul S.P., once said, "Taiwan did not have much of a service industry in the modern sense".⁶⁵ His comment is absolutely correct in terms of Taiwan's insurance market. Before the 1980s, the market, both life and non-life insurances, were virtually dominated by a few domestic companies.⁶⁶ This cartel-like insurance market was caused by the protective measures of the government which had frozen the issuance of new licences since 1964. Accordingly, foreign insurance companies, which had once maintained offices before World War II,⁶⁷ had no access to Taiwan's insurance market after 1945.

On the other hand, the regulation and supervision of insurance companies were extremely loose to the extent the quality of their service was far from satisfactory.⁶⁸ To use a rather satirical term to describe, the insurance industry was still a "30 year-old infant".⁶⁹

⁶⁵ Cited by "The Economic World of the 1990s and Taiwan's Place in It," in Harvey J. Feldman (ed.), *CONSTITUTIONAL REFORM AND THE FUTURES OF THE REPUBLIC OF CHINA* p.112 (1991) Mr. Hsu is a law Professor of the National University as well as senior partner of Taiwan's largest law firm, Lee & Li Attorneys at Law.

⁶⁶ By the end of the 1980s, the life insurance market was an oligopoly dominated by two firms, namely the Cathy Life and the Shin Kong Life. The two of which controlled almost 80% of the market. In non-life insurance, the first three big firm, to wit, Cathy, Mingtai, and Shing Kong enjoyed a market share of over 50%. Huang, C.Y., "Insurance Law in Taiwan," in Silk, *supra* note 41, p.409.

⁶⁷ The first foreign insurance company to establish a representative office was the Liverpool Insurance Company of the United Kingdom in 1836. Then in 1895, following the cessation of Taiwan to Japan, Japanese insurance companies entered the Taiwanese market. During the peak years of colonial rule, there were in total 31 non-life and 34 life Japanese insurance companies in operation. The recovery of Taiwan by the KMT government in 1945 also ended the Japanese insurance business in Taiwan. The KMT government also assumed control of all the Japanese offices. *Id.* pp.407-408.

⁶⁸ The situation was worst in life insurance where insurance companies used to hire ignorant old people, housewives, and even prostitutes as their agents. Their responsibility was to persuade people to buy insurance. However, due to their lack of professional training, those insured were always ill-informed of the details of the contracts. This gave the insurance companies ample opportunities to rescind the contracts when the perils insured occurred. Insurance companies were keen to invoke Article 64 of the Insurance Law which required full disclosure from the insured. This phenomenon is heavily criticised by Shih, Vincent W., presently a Grand Justice of the Judicial Yuan. See Shih, Vincent W., *Pao-Hsien fa kai-lun (AN INTRODUCTION TO INSURANCE LAW)* (1993).

⁶⁹ Cited by Winn, *supra* note 18, p.914, n.42.

The reason which accounted for the backwardness of Taiwan's insurance industry was not that Taiwan did not have an insurance law. As a matter of fact, the Republic of China has an *Insurance Law* promulgated as early as 1929, but that the law has never been whole-heartedly enforced. The underlying reasons for such non-enforcement are due to non-legal factors. First, traditional Chinese dislike the idea of planning for future misfortune because, as a matter of superstition, they believe life will get worse if you think something "bad". This made life insurance extremely difficult to develop. Second, the economy of Taiwan in the early years was still at its development stage, which meant the significance of non-life insurance amenable to commodity trade was marginal. Third, the economic bureaucrats lacked general knowledge about insurance.⁷⁰

However, as Taiwan was transforming to a modern society accompanied by fast economic growth, the need for insurance, both life and non-life, became imminent. This is reflected by the fact that the number of people buying insurance increased rapidly since the mid-1980s.⁷⁰⁻¹ It follows that those old domestic insurance companies, which earned their fat profits through cartelization and inequitable contractual terms, could not meet the needs of society. All these

⁷⁰ Here is an interesting story revealing the ignorance of Taiwan's government officials. Professor Shih, Vincent, an expert in insurance law, once met formally with the Minister of Transportation and Communication. During the meeting, Professor Shih handed a recent book of his concerning automobile insurance. Professor Shih wrote the book because he understood the terrible deficiency in Taiwan's third party car insurance system. The Minister reacted with surprise by saying, "oh, I do not know that there is so much about car insurance". That Minister is presently the Premier of the Executive Yuan. Professor Shih was elected as a Grand Justice in 1994. The story was told by Professor Shih during his lecture at the National Chengchi University in 1984. This writer was his student.

⁷⁰⁻¹ According to a recent official statistics, the insured persons as percentage of total population from 1986 to 1994 is 31.44, 34.95, 40.12, 46.95, 49.03, 51.73, 56.43, 58.30, and 59.52 respectively. See Directorate General of Budget, Accounting and Statistics, Executive Yuan, *MONTHLY STATISTICS OF THE ROC* Vol.XXI, No.,1, pp.20-21 (Jan., 1995).

point to the fact that when the United States expressed its demands that Taiwan's insurance market be opened, the society welcomed it with silence and expectation. Compared with the "Great Turkey War",⁷¹ this time the United States was on the side of the people of Taiwan. In addition, probably because of this "popular support", the pressures exerted on the Taiwan government were immense. The section 301 trade retaliation was almost invoked twice to force Taiwan to allow more American insurance companies to enter.

2. Negotiations and Concessions

The first United States - Taiwan negotiation that touched the issue of insurance was held in December 1978, just before the severance of diplomatic relations between the two countries. A *Bilateral Trade Agreement Between the ROC and the United States* was made on 29 December 1978.⁷² According to the measures regarding the concession of non-tariff barriers, Taiwan promised to allow American insurance companies, both life and non-life, to establish branch offices, without limitations on the number, to operate in Taiwan.⁷³

To substantiate the agreement, on 17 February 1981, the MOF promulgated an administrative order called the *Guidelines for Reviewing United States Insurance Company Applications for Establishing a Branch in the ROC (Insurance*

⁷¹ See Chapter 4B,2.

⁷² Yen, *supra* note 12, p.450.

⁷³ *Id.*, p.451.

Guidelines). The statutory basis of this order is Article 137(5) of the *Insurance Law* which authorises the competent authority to regulate matters concerning foreign insurers. In other words, it is another broad delegated legislation. In the following years, this *Insurance Guidelines* have become the sole regulations governing the establishment and operation of American insurance companies. As this administrative order regulates only American insurance companies, it is thus discriminatory in nature. Third-country insurers (e.g. Japanese and European insurance companies) do not enjoy the same right of market entry as United States insurers. Some Western commentators thus found it objectionable.⁷⁴ True, it can be argued that Taiwan is not a member of any international economic organisation, and therefore has no obligation to commit to the principle of most-favoured-nation principle. But this bilateral arrangement does reveal at least one thing: that granting licenses to American insurance companies is not based on Ricardo's theory of comparative advantage, but on special bilateral relations. The problem is that the United States, the world's free trade promoter, did not oppose such discriminatory *Insurance Guidelines*, but sought to play the game of market access under this administrative framework.

Regardless of this special favour, American insurance companies are still subject to an array of establishment and operations requirements. The 1981 *Insurance Guidelines* set out the following requirements for American firms who wished to establish branch offices in Taiwan: (1) the paid-in capital of the United States companies must be the equivalent of NT\$ 100 million (approx. 2 million

⁷⁴ Carter, *supra* note 64, p.307.

Sterling Pounds) or more; (2) the United States companies must have engaged in (reinsurance) business with Taiwan's insurance firms for at least five years. In addition, the scope of activities was also limited. American insurance firms could only write policies covering United States citizens and risks located in Taiwan. Marine insurance and joint venture enterprises were excluded. Because of these limitations, only two American insurance firms established branch offices in Taiwan before 1985.⁷⁵ Obviously, the establishment requirements are set for prudential reasons, in spite of the fact that they may be too strict. On the other hand, limitations on their scope of activities are purely protectionist. As this *Insurance Guidelines* was far away from the national treatment principle, the United States disapproved of it and thus sought to convince Taiwan to amend it. Bilateral negotiations, therefore, became a bargain of these limitations.

In the 1986 trade negotiation, the United States first threatened Taiwan with the use of section 301 of its Trade Act if Taiwan refused to grant national treatment to United States firms.⁷⁶ The threat, however, disappeared when Taiwan promised to approve the application of an American firm CHUBB for the operation of non-life insurance before November 1986, and to allow two more life insurance firms to expand their scope of business, such as to cover cancer illness.⁷⁷ It thus appeared that the use of trade threats was but a strategy on the part of the United States to serve the interests of a few insurance firms who

⁷⁵ The Insurance Company of North America (CIGNA group) and the American Insurance Underwriters (AIG group) both established their branch offices in Taiwan in 1982.

⁷⁶ *China Times* (Chung-kuo shih pao), p.2, (19 January, 1987).

⁷⁷ Yen, *supra* note 12, pp.573-574.

had their applications pending in the office of Taiwan's competent authority. In the same year, the *Insurance Guidelines* was also amended to allow American firms to issue policies to United States wholly-owned subsidiaries and to Sino-United States joint-venture companies. In addition, a quota was set regarding the opening of American insurance companies in Taiwan each year: to wit, at most two life and two non-life insurance companies.⁷⁸ These opening measures immediately invited many American insurance firms. By the end of 1989, there were already 12 American companies that had been given approval to do insurance business in Taiwan.⁷⁹

The threat of section 301 trade sanction reappeared in the April 1990 trade talks as the United States once again demanded more national treatment and more quota for American firms. The demands were met, but still with some reservations. On 20 July, 1990, the *Insurance Guidelines* was amended again. The quota was changed to three life licences and three non-life licences, and with the allowance that utilised quota in one category could be allocated to applicants from the other category.⁸⁰ Moreover, American firms were allowed to establish additional branches upon the fulfilment of certain conditions.

The whole story of opening Taiwan's insurance market raises the doubt of whether it was the *Insurance Guidelines* that governed the establishment and

⁷⁸ 1989 *Consultation Report*, *supra* note 44, Title I(4), p.28.

⁷⁹ *Id.* p.25.

⁸⁰ 1991 *NTE Report*, p.210.

operation of American insurers, or it was bilateral negotiations that governed the *Insurance Guidelines*. As a matter of law, a legislation or administrative order must have a firm and clear policy behind it so that the average citizen can follow it.⁸¹ A good policy requires consideration of all internal and external conditions, and balancing of different interests. Thus, if it is a legislation, a democratic procedure which provides meaningful debate by the parliament is considered the best way. If it is in the form of an administrative order, then the requirement of transparency should be fulfilled. Only through these procedures can clear rules be made to implement a policy. Here, however, one notices that the *Insurance Guidelines* was modified according to United States pressures. As a matter of fact, it was precisely for the purpose of eliminating bilateral trade surplus with the United States that Taiwan agreed to increase the quota for the entrance of United States insurance companies.⁸² This, of course, was not the reason provided by the government of Taiwan. The trouble is that the government provided no reason at all, as if it was something that had nothing to do with the general public. Why is it that a year ago a quota of two American insurance companies was considered appropriate, and this year three is alright? Are there any quantifiable economic reasons behind such a change? On what rationale are American insurance firms allowed to keep flooding in while European insurers are denied the opportunity to enter? Does that imply all the American insurance companies are better than European? When a government is preoccupied by the "mission" of eliminating trade surplus, this kind of question,

⁸¹ Tumlar, *supra* note 60, p.14.

⁸² This is the reason provided by Taiwan's negotiating team to the EC during the EC-Taiwan trade consultation held on 13 July 1989 in Bangkok, Thailand. See 1989 Consultation Report, *supra* note 44, Title II (1), p.10.

which should have been taken seriously when the issue of liberalisation is concerned, simply means nothing. One therefore has reason to believe that the so-called liberalisation in the insurance sector actually means granting special favour to American companies. The United States, on the other hand, remained silent at this point, and kept on dealing with Taiwan in this way. The acquiescence of the United States thus, in effect, encouraged state-control and discriminatory treatment on the part of Taiwan.

D. OVERALL EVALUATION

It is generally recognised that the so-called national treatment is a long-term objective within the liberalisation process.⁸³ In other words, no nation should expect that the application of national treatment would achieve market access once and for all. Concessions and compromises with the protective regulations of the host country are unavoidable. It is in this sense that the concept of national treatment can be associated smoothly with the so-called "progressive liberalisation" which gives due respect to national objectives and the level of development. When these concepts and principles are used in MTN such as GATT, member states, based on the principle of equality, are able to interpret the meaning of their obligations they have accepted, and can thus take into consideration all relevant factors and plan in advance their liberalisation policy. Through this, international obligation of national treatment becomes part of the national policy. And there is no fear that the MTN will serve to legitimise

⁸³ UNCTAD Project, *supra* note 11, pp.172-173; Krommenacker, *supra* note 16, p.467.

the objectives of bilateral negotiation which is infamous for its power-oriented nature. National laws, regulations and administrative guidelines relating to the establishment and operation of foreign service companies can be made according to the established international rules. In addition, foreign companies are also assured the access to these laws and practices because of the adherence to the principle of transparency.

In the context of bilateral negotiations, however, the application of the concept of national treatment loses its meaning completely, as does the principle of "progressive liberalisation". In its essence, as the above analysis has demonstrated, the meaning of national treatment in bilateral trade talks is boiled down to how many, which and why specific American banks or insurance companies should be granted permissions to establish and operate in Taiwan. The result of the negotiation directs the law. This makes the role of the United States government a *de facto* surrogate of the American multinationals. On the Taiwan side, as trade talks are held on regular basis, it becomes impossible to make sensible planning of liberalisation in advance. Instead, the so-called "liberalisation plan" is disintegrated into many small items to be used as bargaining chips with the United States. Worse, this largely increases the possibility of trade-off in exchange for United States mercy at other issues (e.g. intellectual property protection) in the course of negotiation. The so-called "progressive liberalisation" thus evaporates.

When bilateral negotiations involve such complicated considerations, it is natural that the competent authority finds it difficult to explain to the general

public why certain legal arrangements are made afterwards. So the best thing is to remain silent, which means a "black-box" policy. Conveniently, the authoritarian corporatist machine provides such a path. Arrangements are deliberately made in the name of administrative orders because control of them is virtually non-existent under the present administrative law.⁸⁴ The result is that improvised administrative discretion decides American multinationals' access to Taiwan's market. The whole issue of liberalisation of service trade thus sinks to the hands of certain bureaucrats who receive high orders from the "High Level Party-government". When all these have become bureaucratic practices, the requirement of due process is forgotten. This, in turn, further strengthens the corporatist framework of the state. Power is still concentrated in the hands of the few who act in the name of "national interests". As a result, the legal system is insulated from the issues of service trade. Instead, what can be found is the proliferation of many *ad hoc* guidelines with no clear legal rules. Eventually, the so-called "liberalisation" of the service sector becomes incomprehensible to the average citizen; as such, they are in no position to pass judgment on whether the policy is succeeding or failing. Thus, Tumlr's nightmare of an undemocratic society does not apply only to America.⁸⁵

⁸⁴ See Chapter 7B for a detailed discussion.

⁸⁵ In the later years of his life, Tumlr's writing can be said to be focused on the analysis of adverse consequences of America's protectionist trade policies on the constitutional structure. He viewed the rise of protectionism in the 1970s and 1980s as the most dangerous element which undermined the United States constitution. See Tumlr, *supra* note 60; Jan Tumlr, *PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES* (1985). For an assessment of Tumlr's theme, see Robert Hudec, "The Role of Judicial Review in Preserving Liberal Foreign Trade Policies," in Meinhard Hilf & Ernst-Ulrich Petersmann (ed.), *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* pp.503-518 (1993).

It would be naive to assume that the United States was unaware of the legal manipulations on the part of Taiwan, or to assume that Taiwan was doing everything in accordance with the spirit of law. On the contrary, when legal manipulations are working to the interests of American multinationals, it is better to put aside law. Most important of all, on the face of it, the arrangements fit quite well into the concept of "progressive liberalisation". The question of whether this further encourages undemocratic practices in Taiwan is therefore only of marginal significance, because the American multinationals do not care. As a matter of bilateral trade negotiation, it is not a topic open for discussion anyway.

Last but not least, the relaxation of banking and insurance regulations was carried out since the mid-1980s. Even until today, the objective of liberalisation is yet to be achieved. Note that the whole process covers the martial rule and the democratization era. Here, as has been demonstrated, as part of the liberalisation effort, the way the government handled the United States with regard to the opening of its service market has not changed a bit. An undesirable development is that the public, though not appreciated by its aggressive unilateralism, seems to be on the side of the United States. This, as explained, is largely due to the growing needs of society for more and better banking and insurance services. The reluctant, slow, and bureaucratic manner of the government, albeit sometimes with good cause (e.g. prudential reasons), thus generates public dissatisfaction and resentment. The point is that this immediately creates the effects of demoralising and de-legitimizing the authority of the government. The positive efforts of lifting martial law, and re-electing

parliamentary members have been cancelled out by the highly unwelcome but immovable bureaucratic practices. Here, it is necessary to repeat that all this is due to the rampant powers of the party-executive inherited from the authoritarian corporatist era.

CHAPTER 6. THE IMPOSED LAWS AND INSTITUTIONS: TAIWAN'S IPR PROTECTION SYSTEM

A. INTRODUCTION

In Chapters 4 and 5 we analyzed the various legal changes conducted by the Taiwan government under the United States pressures. It has been shown that complex legal manipulation for the purposes of avoiding trade retaliation and maintaining the state's control over the economy was found to be necessary, though, more often than not, inappropriate. In addition, the legal changes were conducted mostly within the framework of administrative law and through some piecemeal amendments to the laws. In other words, legal changes were many, but not systematic. This, of course, is not the limit of United States pressures. As a matter of fact, past experience has also demonstrated that the United States was keen to establish a systematic legal framework for maintaining market order in Taiwan. The most important aspect of which is perhaps the "reformation" of Taiwan's intellectual property (IPR) regime.

In this chapter, we examine Taiwan's IPR regime, which has been overhauled to an enormous extent either directly or indirectly due to the United States Special 301 threats since the mid 1980s. The reform, as we used to call it, covers two main stages, namely, legislative amendments, and institutional reconstruction. Both of them involved large amounts of resources. The reason for the United States exerting pressures on Taiwan is understandable: since the 1980s, products that require strong IPR protection have contributed a growing

share of United States exports by manufacturers.¹ Overseas counterfeiting and piracy thus constitute a fear to the dynamic efficiency of the United States economy and to the technological hegemony of American companies. This, together with the growing trade deficits of the United States and the alleged losses of American multinationals² have made legal protection of American intellectual property in foreign countries one of the main concerns of the United States.

On the part of Taiwan, as a matter of face-saving, the imposed reform is justified by claiming that the "backwardness" of Taiwan's IPR laws is incompatible with modern trends.³ It is argued that if Taiwan is to become an industrialised nation, its intellectual property laws should also be "upgraded". Accordingly, Special 301 threats are in Taiwan's long-term interests. This official standing, evidently in line with American thinking, excludes many unsettled issues regarding the basic rationale of IPR and its relationship with the economic development of developing countries.⁴ Yet, as Taiwan needs the support of the

¹ For instance, in 1984, worldwide revenue of United States software firms was US\$ 18 billion. In 1992, the revenue of United States software packages alone amounted to US\$ 47.6 billion, and its share of world market was 44.7%. It is estimated that around 20% of its total revenue came from overseas users. In addition, the software industry has also become important in terms of employment. In 1983 the software industry employment was 247,000. By 1993, the figure jumped to 435,000. Generally speaking, United States hi-tech exports have increased since the 1980s. See United States Department of Commerce, *U.S. INDUSTRIAL OUTLOOK 1985* pp.{27-1}, {27-4}-{27-5} (Jan., 1985); *U.S. INDUSTRIAL OUTLOOK 1994* pp.{28.6}-{28-8} (Jan., 1994); and Franklin R. Root, *INTERNATIONAL TRADE AND INVESTMENTS* pp.34-35 (1990).

² See Chapter 3C, n.43, and accompanying text.

³ Lin, Ruey-long, "Protection of Intellectual Property in the Republic of China," 8 *Chinese Y.B.Int'l L. & Aff.*, pp.120-121 (1989-1990); Chen, C.V., "The Legal Protection of Industrial and Intellectual Property Rights on China Taiwan," *Proceedings of the Manila Symposium on Counterfeiting and Infringement and Licensing*, p.1 (1984).

⁴ For instance, Robert Sherwood, after conducting a comprehensive survey of recent contributions, suggests that there is still no satisfactory empirical study to support that there exists a clear link between economic development and IPR protection in the developing country

United States in joining GATT, it would be politically wiser to agree on Western nations' "high standard" IPR laws as enshrined in the TRIPs⁵ than to share sympathy with Third World nations.⁶ In a certain sense, this justifies the accommodative policy.

Again, what is often neglected is the fact that the whole process of the IPR reform under the shadow of American threats is conducted by Taiwan almost in the absence of public participation. This is partly due to the imminence of Special 301 threats which allows no compromise to the USTR's demands, and partly due to the continual existence of authoritarianism. Thus, as far as their contents are concerned, they are "imposed" laws and institutions in the sense that they are "imported" from foreign nations with a certain degree of coercion. As such, the whole process constitutes the most painful experience in Taiwan's

setting. This view reinforces the conclusion of a United Nations report made in the earlier years regarding the relationship between patent and economic process. Another commentator, Arvind Subramanian, even claims that the relations between IPR and R&D (research and development) is a Western myth, which is only true in certain countries. Robert M. Sherwood, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* pp.75-82 (1990); United Nations, *THE ROLE OF PATENTS IN THE TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES* 1964; Arvind Subramanian, "TRIPs and the Paradigm of the GATT: A Tropical, Temperate View," 13 *World Economy*, pp.516 (1990).

⁵ In an III report of which I was a co-author, it has been made clear that for Taiwan to join GATT successfully, Taiwan's IPR laws must be reviewed according to the international conventions (*The Berne Convention for the Protection of Literary and Artistic Works of 1886; The Convention of Paris for the Protection of Industrial Property of 1883; Universal Copyright Convention of 1952; and TRIPs*) and relevant American laws. In other words, a "high standard" has to be adopted as far as joining the GATT is concerned. III, *Yiu Wo-kuo Tzu-Hsun-Kung-Yieh Chih-Huei-Tsai-Chan-Chuan Ying-Yiung Tsien-Kuang Fen-Hsi Wo-Kuo Tsan-Chia GATT, TRIPs Kuei-Yueh Suo Ying Tsai-Chu Chih Tan-Pan Tso-Lueh Chi Fa-Kuei Hsiu-Cheng Chien-Yi (POSSIBLE STRATEGY AND RECOMMENDATIONS REGARDING AMENDMENTS TO RELEVANT LAWS IN JOINING THE TRIPs OF GATT)* (1991).

⁶ Generally, the opinion of Third World countries is that IPR should not be related only to trade matters but also the social, economic, industrial and technological needs of the country providing the protection, in the context of that country's broad range of other social goals which its use of intellectual property rights seek to promote. According to this view, a rigid and excessive protection of intellectual property rights might impede access of developing countries to the latest technological developments and hence restrict their effective and broad participation in international trade. For Third World nations' viewpoint of IPR, see Peter Gakunu, "Intellectual Property: Perspective of the Developing World," *Ga. J. Int'l & Comp. L.*, pp.358-365 (1989); T. Ademola Oyejide, "The Participation of Developing Countries in the Uruguay Round: An African Perspective," 13 *World Economy*, pp.427-444 (1990).

legal history. Worse, the reform also supports the revival of the omnipotence of the authoritarian corporatist state which, on the one hand, intends to maintain a strong control over society while, on the other hand, pretends that Taiwan is marching towards a free market economy characterised by receding government intervention and a better legal environment. The outcome of such an inherently conflicting mentality is the lack of a set of coherent theories behind the laws. As a result, the IPR laws and regime of Taiwan, I argue, achieve neither the "high standard" nor the "low standard", but no standard at all. All these reflect more the attributes of an authoritarian corporatist state than an improvement in the IPR regime.

This chapter is divided into two main parts: IPR legislative reform and institutional reconstruction. Legal details are discussed in relation to certain events which led to their existence. In addition, as the IPR regime covers too wide a scope, discussion and analyses have to be selective. On the whole, however, focus is placed on the influence of the American hegemony and effectiveness of the legal imposition. Finally, it is argued that legal imposition made in the shadow of a hegemony does not guarantee its successful operation in the future, but is most likely to be another set of perfunctory laws and institutions. Worse, it strengthens the present authoritarian corporatist framework, and thus provides another means for the state to exercise control over society.

B. IPR LEGISLATIVE STRUGGLE

Since the 1980s, under the "system of fear" or the "blunt-instrument" approach (in this case, Special 301 of the *United States Trade Act*) adopted by the United States, Taiwan has been engaging in a large scale IPR legislative reform. The three basic IPR laws, namely, the Trademark Law, the Patent Law, and the Copyright Law have been amended several times,⁷ while new law or draft bills such as *Cable TV Law*, *Integrated Circuit Layout Protection Law*, *Industrial Design Protection Law*, and *Trade Secret Protection Law* have been promulgated or are at different legislative stages.⁸

⁷ The Trademark Law was promulgated on 6 May, 1930, and amended in 1935, 1940, 1958, 1972, 1983, 1985, 26 May, 1989, The Patent Law was promulgated on 29 May, 1944, subsequently amended in 1959, 1960, 1979, 1986, and recently revised and promulgated in 28 December, 1993; the Copyright law was promulgated on 14 May, 1928, subsequently amended in 1944, 1949, 1964, 1985, 1990, and comprehensively revised and promulgated on 10 June, 1992. For English text of these laws, see 2 *MAJOR LAWS OF THE ROC ON TAIWAN* (Chinese and English Bilingual Edition, Taiwan) pp.1361-1388, 1320-1360, and 1389-1413 respectively. Overall, these three basic IPR laws have been amended eight times due to the Special 301 threats. For Contributions in English concerning Taiwan's IPR protection efforts in the 1980s, see Liu, Paul C.B., "A Review of the Intellectual Property Laws in Taiwan: Proposals to curb Piracy and Counterfeiting in a Developing Country," *Brigham Y.U.L.R.*, pp.619-642 (1988); "Copyright Update: Draft Law: Rental of Pirated Items; Software Protection," *East Asian Executive Reports*, pp.18-19 (1984); Elson Pow & Lee, John S., "Taiwan's Anti-counterfeiting Measures: A Hazard for Trademark Owners," 72 *The Trademark Reporter*, pp.157-161 (1983); Donald H. Shapiro, "Trademark Law Finalised-- Minus a Few Teeth," *East Asian Executive Reports*, p.24 (Feb., 1983).

⁸ The *Cable TV Law* was promulgated on 11 Aug., 1993. The initial drafting of the *Integrated Circuit Layout Protection Law* was commissioned by the Executive Yuan to the Institute for Information Industry (III) in 1989. Then, the National Bureau of Standard of MOEA took over the drafting responsibility. In 1991, a second draft was prepared. With regard to industrial design, a public hearing was held in June, 1991. A draft bill was distributed and discussed at the hearing. As to trade secrets, the MOEA is still researching the feasibility of enacting a special statute. See *LEGISLATIVE YUAN GAZETTE*, *Cable TV Law*, No.163(2), p.1088 (1993); and BOFT, *THE LEGAL STRUCTURE OF I.P.R. PROTECTION IN THE REPUBLIC OF CHINA ON TAIWAN* pp.20-26 (Nov., 1992). For more about *Cable TV Law*, see p.162.

Here, instead of presenting in detail all those legislative changes,⁹ I intend only to point out two grossly neglected consequences which are, nonetheless, relevant to our study. They are, namely, the triviality of bilateral negotiations which led to some legislative changes, and the pressure of Special 301 on the legislative branch of Taiwan.

1. Legislative Amendments: Trivial but Exclusive

Bilateral negotiations regarding IPR are conducted on an issue-by-issue basis. Each year, according to the information provided by the United States multinationals, the USTR would list the priority issues and set up deadlines for Taiwan to follow according to the Special 301 mandate. Certain specific issues are brought up because they are the most concerned issues encountering the United States multinationals in that very year. Therefore, what the Taiwanese team receives during the course of negotiation has always been some specific, and trivial legal issues which often required only minor amendments. Consider some of the United States demands in the 1989 IPR consultation: (a) reversal of the burden of proof in trademark and copyright infringement cases; (b) extension of patent's protection period to twenty years; (c) amendment of Art.62-3 of the Trademark Law concerning the forfeiture of counterfeited goods; and (d) more

⁹ See Appendix III (Table 5) for the legislative changes in the past decade. As there are already too many English contributions discussing the relationship between the United States and Taiwan's IPR laws, I see no reason to repeat their one-sided viewpoints. See, for instance, Andrew C. Stone, "Legal Aspects of Copyright Protection Between the United States and the Republic of China," 9 *Chinese Yb. Int'l L. & Aff.*, pp.197-223 (1989-1990); Mitchell A. Silk, "Legal Efforts of the United States and the Republic of China on Taiwan at Controlling the Transnational Flow of Commercial Counterfeit Goods," 5 *Chinese Yb. Int'l L. & Aff.*, pp.90-124 (1985); Edward S. Yambrusic, "The Status of U.S. Copyright Relations with Taiwan," *Int'l J. Leg. Info.*, p.5 (1985); Edward Han, "Protection from Commercial Counterfeits in Taiwan for United States Firms," 16 *Law & Pol'y Int'l Bus.*, pp.654-655 (1984).

severe criminal punishments for IPR infringers.¹⁰ None of these issues involved more than few Articles in the relevant laws. Yet this kind of issue often appeared in the annually-held IPR negotiation.

Legal changes were not confined only to substantive provisions in the IPR laws. To ensure that IPR laws could be fully utilised, special provisions were promulgated to give privileges to foreign companies upon the request of the United States, which otherwise would have been barred from access to the courts of Taiwan. For instance, Article 66-1 of the Trademark Law reads,

"(f)oreign juristic persons or entities, not limited to those recognised (by the government of Taiwan), may also file a complaint, initiate a private prosecution or institute a civil suit in respect of matters referred in this Chapter".

Note the so-called recognition of foreign juristic persons or entities means the provision of some basic documents regarding the name, nationality, total capital stock and articles of incorporation to the competent authority (MOEA).¹¹ It is a standard prudential requirement for foreign companies to do business in Taiwan. According to a Judicial Yuan interpretation, failure to obtain recognition would result in the loss of legal status under the procedure law.¹² Yet, it turned out that in the early 1980s, several unrecognised American companies whose

¹⁰ BOFT, *Wuo-Kuo 78 Nien Twei-Wai Mao-Yi Tsu-Shang Tan-Pan Chi-Yiao (A SUMMARY OF ROC'S EXTERNAL TRADE CONSULTATION IN 1989)* (Taipei: BOFT, Title I (5), pp.19-21 (1990). [Hereinafter 1989 Consultation Report]

¹¹ Article 370-377 of the *Company Law*.

¹² Judicial Yuan Interpretation No.533, 1931.

trademarks were counterfeited in Taiwan were denied their legal capacities to file private prosecutions in Taiwanese courts.¹³ The United States was aggravated by the courts' decisions, and so it made a request in the 1983 bilateral negotiation demanding a clear law regulating unrecognised companies' right to sue in courts regarding all IPR cases. Similar provisions also appear in the *Patent Law* [Art.88-1] and the *Copyright Law* [Art.102].

The immediate consequence of the triviality of IPR talks was that the Legislative Yuan was forced to make small scale IPR amendments almost every year. Moreover, they enjoyed the priority of examination over other draft bills. That is to say, in order to dissolve trade threats, the Legislative Yuan had to re-arrange its agenda of examining and discussing bills. This has, to a certain extent, caused a re-allocation of legislative resources which unavoidably squeezes out other bills of purely domestic nature. Take a look at the following statistics. There were in total 583 draft bills either initiated by the Executive Yuan, the Examination Yuan or the Legislative Yuan up until 1994.¹⁴ The significance of some of them could hardly be overridden by IPR laws. For instance, no one would doubt the importance of the draft *Consumer Protection Law*, but it had been pending in the Legislative Yuan for more than eight years since the mid-

¹³ The landmark case is the *Apple Computer, Inc., U.S.A. v. Lee et. al*, Taipei District Court, Criminal Judgment (No.71-Tzu-870, 897), 28 Jan., 1983; and *Apple Computer, Inc., U.S.A. v. Lee et. al*, Taiwan High Court, Criminal Judgment 72 Shang No.806, 14 March, 1983. For a detailed discussion, see Michael M. Hickman, "Protecting Intellectual Property in Taiwan -- Non-Recognised United States Corporations and their Treaty Right of Access to Courts," 60 *Washington L. Rev.* pp.117-140 (1984); Chiu, Hungdah, "The Right of American Corporations to Bring Suit in China," in *China Times* (Chung-kuo shih pao), p.3, (24 Feb., 1983).

¹⁴ Many of these bills were initiated by those old legislators who had either retired or died. See *Central Daily News* (Chung-yang jih pao) p.2, 12 Oct., 1994.

eighties and was only just passed in 1994.¹⁵ Equally important are the draft *Environmental Protection Law*, and the draft *Soil Pollution Prevention Law*, both of which share the fate of the draft *Consumer Protection Law*. However, during this period, IPR laws were repeatedly amended several times in piecemeal form. The exclusionary effects of American legislative demands debunk the argument that through the use of trade pressures, the United States is "helping" Taiwan to modernise its laws. For the sake of argument, one may cynically suggest that in order to have these important laws passed, it would be better to invite the United States to exert some pressure on Taiwan. As a matter of fact, with domestic supporters like Dr. Tsai, Ing-wen, who even claims that IPR law amendments are more important than constitutional reform,¹⁶ it is not surprising to find that IPR amendments are given priority in the Legislative Yuan.

Collaterally, the American-directed legislation has put the Legislative Yuan of Taiwan in pace with American negotiation strategy. Depending upon the circumstances (crucially the size of America's trade deficits and other domestic economic conditions), the pace may be fast or slow. The Legislative Yuan would then have to adjust its steps accordingly. Even if one assumes that the Legislative Yuan of Taiwan has the final say in the contents of the laws, it is, nonetheless, operating in the track pre-determined by the United States.

¹⁵ "Consumer Protection Law Enacted in Taiwan," *East Asian Executive Report*, p.9 (15 Feb., 1994).

¹⁶ Dr. Tsai says, "(i)t is difficult, if not impossible, to tell the law-makers and perhaps the public that IPR protection is a more important issue than constitutional reform and therefore should be given higher priority." Dr. Tsai has been the legal consultant of the BOFT since the late 1980s. Tsai, Ing-wen, "The Accession of the ROC to the General Agreement on Tariffs and Trade," *Soochow U. L. Rev.* p.294 (1992).

Members of the Legislative Yuan, of course, were not happy with the situation of constantly subjecting to the will of the United States. Especially to those new legislators elected after the lifting of martial law, they resented the weak performance of their negotiating teams, and the hegemonic mentality of the United States. For instance, in examining the draft *Cable TV Law* in 1993 -- another promise made under the threats of the United States -- a legislator of the opposition party openly criticised the Executive branch as "extremely incompetent";¹⁷ while another female legislator accused the United States as "imperialist".¹⁸ Indeed, the setting of its own deadline for Taiwan to comply without even considering whether the Legislative Yuan in session was too hegemonic.¹⁹

However, resistance on the part of Taiwan's Legislative Yuan proved to be futile, and very often fatal. The defiance of the United States-Taiwan *Copyright Agreement* of 1988 by the Legislative Yuan in 1993 is perhaps the best example of showing how an independent exercise of legislative power could be punished and buried by the United States.

¹⁷ Opinion of legislator Chen, Kwai-mieu. *LEGISLATIVE YUAN GAZETTE*, *supra* note 8, p.1035.

¹⁸ Opinion of legislator Chou, Chun. *Id.* p.1056.

¹⁹ For instance, on 23 June 1993, a group of Taiwan's legislators visited Washington D.C. to exchange opinions about IPR protection. The USTR expressed its wish that the *Cable TV Law* be enacted before 30 July 1993. In other words, the United States implied that there was still more than a month to go, and that should be enough. What the United States did not know, or did not care to know, was that the Legislative Yuan ended its session on 16 July every year. So the deadline of enacting the Law became, in effect, 16 July 1993. See *id.*, p.1043.

2. The Defiance of the Copyright Agreement of 1993

The event dates back to 1989 when as an expedient measure to avoid trade retaliation by the United States government, Taiwan gradually agreed to sign an *AIT - CCNAA Bilateral Copyright Agreement* (hereinafter *Copyright Agreement*).²⁰ As the *Copyright Agreement* involved the granting of too many rights to Americans, which, nonetheless, could not be found in the then *Copyright Law* of Taiwan, it was frozen in the Legislative Yuan. It was not until 1993 that, as part of the commitment to the *United States - Taiwan Trade Agreement* of 1992, the Legislative Yuan of Taiwan reluctantly put it in the agenda for ratification.

In order to show its awareness, the Legislative Yuan held two public hearings in January 1993. Academics, legal practitioners, American representatives from AIT, government officials and representatives from the private sector were invited to express their opinion on the *Copyright Agreement*.²¹ Eventually, on 18 January 1993 the Legislative Yuan ratified the *Copyright Agreement* but reserved some eight provisions on the grounds that they violated the spirit of the *ROC Constitution*, the *United States-Taiwan FCN Treaty*, and the *Copyright Law*.²² The reasons the Legislative Yuan provided

²⁰ "Taiwan Fails to Appease Washington," *Financial Times*, p.6 (9 May, 1989).

²¹ *Central Daily News* (Chung-yang jih pao), p.7 (20 Jan., 1993).

²² The text of the Legislative Yuan's reservation is collected in Executive Yuan, *Ti 5 Tzu Pao-Hu Chih-Huei-Tsai-Chan-Chuan Tsieh-Tiao Huei-Pao Huei-Yi Tzu-Liao (Materials Regarding the 5th Coordination Report on IPR Protection)* (unpublished materials for internal circulation) pp.27-34 (29 Jan., 1993).

fully demonstrated their delicate thinking and their understanding of the whole issue.²³

It should be noted that as the matter involved serious economic and political consequences, the Legislative Yuan's resolution should not be regarded as a deliberate challenge to the United States, but rather a result of careful and rational consideration intending to balance different interests. As a matter of fact, a strong sense of compromise can be found. This is evident in the statement made by the Legislative Yuan,

"the Joint Examination Committee (of the Legislative Yuan), after examining the Copyright Agreement, thinks that it involves too many issues, and that upon the suggestion of Legislator Mr. S.S. Lin, after his discussion with the Diplomatic Committee (of the Legislative Yuan), this Committee agrees to ratify the *Copyright Agreement* with certain reservations according to the *Vienna Convention on the Law of Treaties* of 1966. The main reasons are that the Copyright Agreement violates the *American Constitution*, the *United States-ROC FCN Treaty*, and the municipal laws of this country. If the

²³ The eight provisions in question and the reasons for their reservations are: (1) Article 1, section 1 and 6, the extension of protection to copyright owners who succeed their copyrights from a third country. This exceeds the Berne Convention and is therefore deemed unacceptable. (2) Article 1, section 4, the extension of protection to subsidiaries or affiliates of a juridical person located in a third country. The Berne Convention remains silent on this issue. Moreover, as the U.S. does not offer same protection to ROC nationals and that it is not likely that the U.S. courts would apply this Agreement simply because it is not a self-executing agreement, there is no point for Taiwan to ratify it. (3) Article 2, section 1, the inclusion of "sound recordings" in the "literary and artistic works". Berne Convention does not protect sound recordings, and as a matter of world trend, sound recordings should be protected by the so-called "neighbouring rights". While the then Copyright Law did not have provisions regarding neighbouring rights, it should be reserved until the new Copyright Law had passed. (4) Article 8, the definition of the right of "public performance" is different from the term as defined in the Copyright Law. As a matter of legal consistency, it would be more appropriate to follow the latter. (5) Article 9, section 1, the scope of the right of broadcasting includes the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work. The level of protection of ROC nationals' works is lower than that of Americans'. It is a sheer "unequal treaty" and violates Article 141 of the ROC Constitution which emphasised "diplomatic equality and reciprocity". (6) Article 10, the scope of the right of recitation is different from the term as defined in the Copyright Law. The reasons for its reservations are same as (5). (7) Article 14, the prohibition of "parallel importation". The Berne Convention says nothing of parallel importation. Moreover, as the Uruguay Round of GATT negotiation has not reached a concrete solution to the issue, parallel importation of genuine work should not be made illegal. (8) Article 16, section 2, the retrospective protection of U.S. works. Retrospective protection of works long deemed as "public domain" violates the Berne Convention [Art.18], general principles of law and even the U.S. Constitution. *Id.* pp.35-37. Translated by the author.

Copyright Agreement is passed without reservations, it will generate many problems in the future; on the other hand, if it is rejected (in total), United States-Taiwan bilateral relations may be affected, trade retaliations according to the American Special 301 may also come about. Therefore, the best way to deal with it is to reserve those inappropriate articles in the *Copyright Agreement*, and to explain those controversial points in favour of this country."²⁴

Had it not been an issue concerning the United States trade interests, this scarcely-seen rational performance of Taiwan's parliament would certainly have received approbation from the United States. Unfortunately, the United States government did not accept such a result and warned that it would impose trade retaliations without further investigation according to section 306 of its *Trade Act*.²⁵ To make matters worse, the United States International Intellectual Property Alliance claimed that it lost US\$ 669 million in Taiwan in 1992 through piracy, and thus demanded sanctions against Taiwan.²⁶ Yet, in order to give Taiwan one last chance, an ultimatum demanding the reservations be withdrawn by the Legislative Yuan before 15 April 1993 was sent.²⁷ Earlier, the MOEA had also warned that, apart from imposing trade retaliations, the United States was likely to bring issues such as the sale of F-16 fighting jets and Taiwan's application to join GATT into the annual United States-Taiwan trade negotiations should the Legislative Yuan fail to endorse the *Copyright Agreement*.²⁸ So, negotiations with the USTR re-started again. The message from the United States

²⁴ *Id.* Translated by the author.

²⁵ *Central Daily News* (Chung-yang jih pao), p.7 (22 Feb., 1993).

²⁶ "U.S. Fury Over Piracy by Taiwan," *Financial Times*, p.7 (1 April, 1993).

²⁷ *Central Daily News* (Chung-yang jih pao), p.7 (14 March, 1993).

²⁸ *Central Daily News* (Chung-yang jih pao), p.2 (18 February, 1993).

was clear: the reservations made by the Legislative Yuan should be withdrawn and the relevant part of the *Copyright Law* amended before 15 April, 1993.²⁹

In April 1993, having recognised the rigidity of the situation, the Legislative Yuan eventually agreed to remedy its decisions. But a constitutional issue now emerged. How can a law or treaty which had passed the third reading in parliament be "rescinded"? According to Article 57 of the *Constitution*, the Executive Yuan may request the Legislative Yuan to re-consider its resolutions, statutory or treaty bills should it deem difficult to execute. Yet one of the conditions is that the request must be made within ten days after its transmission to the Executive Yuan. Unfortunately, the ten days requirement had already expired by the time Taiwan agreed to comply with the United States demands. Thus it was not possible for the Executive Yuan to invoke Article 57 of the *Constitution*. On the other hand, though it might seem possible for the Legislative Yuan to initiate an amendment to the treaty bill, procedurally it would take much longer than the American deadline would have allowed. To solve such an impasse, a consultation among the high level KMT members in the Executive and the Legislative Yuans was held. A consensus was made after the meeting: the Executive Yuan would, among others, initiate an emergency proposal of legal amendment to the Legislative Yuan concerning the eight reservations, thus bypassing the procedural deficiency.

²⁹ *United Daily News* (Lien-ho pao), p.4 (10 April 1993).

On 21 April 1993, through a successful mobilisation of KMT legislators, the Legislative Yuan passed the amendment of the Executive Yuan.³⁰ The eight provisions in the *Copyright Agreement* reserved by the Legislative Yuan were lifted. Pre-occupied by the strong "mission" of dissolving the crisis, all the legal reasoning and opinions previously provided by the academics and domestic interest groups in the public hearing were forgotten. It was certainly a serious blow to a parliament which had just started to learn the meaning and exercise of legislative control. International law scholars claim that it has become a nascent rule of international law which requires that international economic norms be accepted and ratified by states in accordance with their constitutional and legal requirements to be effective in relation to such states.³¹ This rule, however, was deliberately and substantially neglected by the United States when it was imposing its IPR protection standards on Taiwan.

C. THE INSTITUTIONAL "REFORM"

1. Coordination of the Judiciary

The attitude of the Judiciary toward IPR protection has always been crucial when foreign interests are involved in concrete trial cases. This was true even when Taiwan was still under martial rule. The reason is that judges in Taiwan enjoyed unimaginable power in the investigation and sentencing process. Thus,

³⁰ *China Times* (Chung-kuo shih pao), p.3 (22 April, 1993).

³¹ Palitha T.B. Kohona, "The Implementation of International Economic Agreements Within Municipal Legal Systems and Its Implications," 65 *Washington Uni. L. Quart.*, p.857 (1987).

if the courts were not fed with sufficient information or "advice" to deal with certain kind of cases, their "un-cooperative" attitude or inadvertence could ruin the national goals.

Having recognised the significant role played by the Judiciary and the need to yield specified results, the highest authority of Taiwan has employed without hesitation the corporatist practice of consolidating the Judiciary by giving guidelines and special training to judges. Coordination of the judiciary appeared in the form of some "letters" from the highest judicial organs, namely, the Judicial Yuan and the MOJ.³²

The first letter appeared in 1981 when the Judicial Yuan issued "precautionary items" to all levels of the courts regarding the sentencing of cases concerning IPR violations.³³ Then, a more detailed instruction appeared on 7 October 1982. On that day, the Secretary General of the Judicial Yuan³⁴ circulated a letter requesting that legal proceedings be expedited, proper penalties imposed on trademark, patent and copyright infringers, and, when

³² The Ministry of Justice is a component of the Executive Yuan. It has the power to supervise the Procuracy of the Supreme Court and direct the prosecutors in performing their duties at all levels.

³³ Yen, Ching-chang, *Chung-Mei Ching-Mao Tan-Pan Yiu-Kuan Fa-Lu Wen-Ti Chih Yien-Chiu (A STUDY OF THE LEGAL ISSUES REGARDING US-TAIWAN TRADE NEGOTIATIONS)* p.481 (1988).

³⁴ According to Article 77 of the Constitution, the Judicial Yuan shall be in charge of civil, criminal and administrative cases and cases concerning disciplinary measures against public functionaries. One should not be confused by this Article and draw the conclusion that the Judicial Yuan entertains civil and criminal litigations. In fact, the Supreme Court and various lower levels of court are responsible for trying cases. Moreover, since judicial independence is guaranteed in the Constitution, the Judicial Yuan is barred from intervening in lawsuits. This seems to leave the Judicial Yuan almost nothing to do, apart from some judicial administration affairs. Today, the Judicial Yuan mainly serves as the nominal leader of the judiciary. However, under certain circumstances, it also provides legal opinions and advises on some important legal issues to all levels of courts.

necessary, special judges appointed to handle IPR cases.³⁵ This action won the praise from the United States in the 1983 IPR negotiation.³⁶ In 1983, the Judicial Yuan further approved the *Plan for Strengthening the Function of Trials and for Preventing Such Crimes as Trademark Counterfeiting so as to Protect the Development of the National Economy*, originally drafted by the Taiwan High Court.³⁷ This Plan instructed the trial judges to consider the following factors when hearing IPR cases: (a) the far-reaching effect on national economic development resulting from damage to the nation's foreign trade reputation; (b) the damage directly or indirectly done to both the domestic and foreign injured parties; (c) the illegal profits obtained by the defendants; and (d) the damage to consumers.³⁸ For the next few years, this Plan became the most authoritative guideline for handling IPR cases. Then in 1992, five years after the lifting of martial law, when Taiwan was put in the "Priority Watch" list by the USTR, the Judicial Yuan issued another two similar letters further demanding trial judges to impose the heaviest penalty on IPR criminals.³⁹

The MOJ also took similar action to guide the prosecutors, the most notable of which appeared in 1992. The guidelines are summarised as below:

³⁵ Letter from the Judicial Yuan to the Ministry of Justice, (74) Mih-Tai-Ting(2) Tze-No. 01098, 14 Feb., 1985; See also BOFT, *POSITION PAPER ON THE PREVENTION OF COUNTERFEITING*, p.9, (Sept.1983).

³⁶ Yen, *supra* note 33, p.481.

³⁷ MOJ, *A COLLECTION OF CRIMINAL ADMINISTRATIVE ORDERS (Hsing-shih hsing-cheng ling-han hui-pien)* pp.121-122. [Hereinafter Criminal Administrative Orders].

³⁸ *Id.*

³⁹ BOFT, *PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN THE REPUBLIC OF CHINA ON TAIWAN*, p.6 (1992).

(a) instruct all prosecutors urging them to plead for severe penalties when handling IPR infringement cases and, when the crime is a serious one, to plead the court to impose the heaviest penalty, where legally appropriate. With respect to an appealable judgment, the prosecutor shall carefully review the judgment and appeal the case when he/she considers the penalty imposed is not severe enough or the application of law in that particular case is not appropriate;

(b) instruct all prosecutor to consider the adverse impact of counterfeiting activities on our economic development when indicting an infringer;

(c) instruct all prosecutors, when pleading for a jail sentence of less than six months, to also plead for the concurrent imposition of a fine so as to allow the use of a higher amount in computing the fine converted from the jail sentence, should the defendant opt to convert the jail sentence to a fine.⁴⁰

It should be noted that the contents of these letters issued by the Judicial Yuan and the MOJ have become more specific and detailed each time. At the beginning, the letters required only the "awareness" of trial judges and prosecutors when handling IPR cases, thus still, in theory, giving them plenty of room to interpret and apply the laws; the recent development is that heaviest penalty should be imposed and executed in all IPR infringement cases, thus implying that guilty judgments are preferred. In reality, this has amounted to a strong presumption of guilt. The concern about due process is lost, for every IPR trial procedure is given a political mission -- to show to the United States Taiwan's determination to fight against IPR violations.

It might be contended that as these letters do not have any legal binding force on judges and prosecutors, and that the Constitution expressly protects the independence of the judiciary [Art.80], their effects should not be exaggerated. The weakness of this argument is that it ignores the structural factor of

⁴⁰ See BOFT, *AN ACTION PLAN FOR PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN THE REPUBLIC OF CHINA ON TAIWAN* p.31 (1992).

Taiwan's judicial system. Although not legally binding, these letters do have *de facto* effects on prosecutors and judges, simply because the promotion, transfer and discipline of judges and prosecutors are in the hands of their superiors, that is, the Judicial Yuan and the MOJ.⁴¹ In other words, their lives and future in the judicial world would be considered "finished" if they dare act contrary to those instruction letters. It is precisely because of this structural factor which makes the letters of the Judicial Yuan and the MOJ so powerful.

How and why, as one might further ask, did the practice of giving letters to judges and prosecutors come into the IPR reform? As has been briefly mentioned in Chapter 2, the answer lies in the very authoritarian corporatist political arrangements created in the martial rule era. The issuance of this kind of "precautionary item" was but one of the judicial practices invented by the KMT government. Its main objective was to provide a clear guideline to judicial officials when applying various kinds of laws in cases involving bigger social implications.⁴² Its corporatist, state-control motivation and consensual nature was obvious. Thus, when United States pressures were considered a crisis, this practice was conveniently and justifiably employed to meet "international needs".

The most intolerable thing about these letters is their imposition on the trial judges and prosecutors. Why should the judges be told to impose the

⁴¹ See Chapter 2B, n.24 and accompanying text.

⁴² For instance, special guidelines have always been given to courts and prosecutors regarding serious offenses such as homicide, robbery, kidnapping and possession of firearms. The guidelines normally require the establishment of special courts to expedite criminal proceedings and to impose heavy penalty. See for instance, *Fa-yuan pan-li chung-ta hsing-shih an-chien su-shen su-chieh chu-yi shih-hsiang* (Precautionary Items Regarding the Courts' Expeditious Proceedings in Handling Serious Offences); collected in Criminal Administrative Orders, *supra* note 37, pp.116-117.

heaviest penalty if the law has provided otherwise? Are national economic development and trade matters supposed to be the concerns of the court when deciding criminal punishments? What about the weight of equality and justice? Why should individual defendants' right to a possible lighter penalty be deprived due to a reason for which he was not totally responsible? All these are questions that could easily be raised to challenge the government, but are, unfortunately, equally easy to forget and ignore.

Enshrined in the practice of issuing these letters is the deep distrust of the judiciary, the fear that they would be out of control, and the worry that judges do not have adequate knowledge of the adverse impact of not meeting the United States demands. This, needless to say, is authoritarian mentality. Though, as court decisions are not open to public, it is not sure how much these kinds of letters have influenced judges and prosecutors in Taiwan, available statistics reveal that courts' guilty decisions regarding IPR infringements have increased steadily since 1986.

YEAR	1986	1987	1988	1989	1990
COURTS' "GUILTY" JUDGMENTS	430	476	618	810	755

Table 2. Courts "Guilty" Judgments Regarding IPR Infringement Cases
Source: BOFT, *THE PROTECTION OF IPR IN THE ROC ON TAIWAN* p.15 (1991).

Note the number of "guilty" judgments in 1989 is significantly high because during that year the United States had exerted historic pressures on Taiwan to improve its IPR environment.⁴³

In addition, according to a MOJ report, IPR instances of offenders being allowed to commute their sentences to fines are decreasing.⁴⁴ Even more amazing is the fact that the government admitted that between the period of November 1992 and May 1993, there were 942 IPR cases which could have been given rulings not to prosecute, but were prosecuted nevertheless.⁴⁵ And this was regarded as an achievement in IPR protection. The corporatist mentality and anxiety of the government can be exposed in a clearer way by quoting the words of a ministerial-level official addressed to the United States-Taiwan IPR Consultation of 1989, "...(c) with regard to the coordinative measures of the judiciary: our country has an independent judiciary, but our government, through the use of different methods, is still trying its best to remind the judicial organs of the importance of intellectual property protection."⁴⁶ (Emphasis added)

⁴³ Taiwan was enlisted as one of the "Priority Watch Countries" by the USTR in the Spring of 1989. As this was the first time the United States applied its *Omnibus Trade and Competitiveness Act of 1988* to Taiwan, Taiwan reacted in a very cautious and accommodative manner. See 1989 *Consultation Report*, *supra* note 10, Title 9, p.1.

⁴⁴ MOJ, *Chung-Hua-Min-Kuo Pao-Hu Chih-Huei-Tsai-Chan-Chuan Chih Nu-Li Yu Cheng-Chiu (ROC'S Efforts and Achievement IPR Protection)* (unpublished material) pp.5-6 (Aug., 1993).

⁴⁵ *Id.*, p.6

⁴⁶ Quoted from the speech by Mr. Siew, Vincent C., the then Vice-chairman of the Council for Economic Planning and Development, in "A Report on the Sino-U.S. Intellectual Property Protection Consultation," in 1989 *Consultation Report*, *supra* note 10, p.4.

Ironically, these letters are welcome by the United States⁴⁷ -- a nation which is so proud of its judicial independence and the quality of the judiciary.⁴⁸ The reason is not difficult to comprehend: it indicated the reaching of consensus among different branches of the Taiwan government to cooperate fully with the United States. And it was precisely what the United States had wanted for. One can hardly imagine how the Judiciary branch could achieve a greater degree of autonomy if the Executive branch, backed by a hegemony, continued to send instructions to judges and prosecutors.

2. "Improvement" in Enforcements

It is widely believed by IPR scholars that the most important component of IPR protection lies in a strong enforcement regime. Robert Sherwood, for instance, claims that, "(a)ny regime for safeguarding intellectual property fails if effective enforcement is not practical".⁴⁹ To achieve effective enforcement, he suggests that, "enforcement under the advanced regime is practised in three ways: through private action, criminal action, and border monitoring measures."⁵⁰ While it seems quite superfluous to emphasise the significance of effective law

⁴⁷ For instance, in the 1983 IPR consultation, the United States openly praised the "precautionary items" issued by the court and the MOJ. See Yen, *supra* note 33, p.481.

⁴⁸ For instance, according to professor Bartholomew, "(p)robably no other portion of the American governmental scheme has so impressed the world of political science as has the judiciary. Here the Constitution is at its best from the viewpoint of originality. Here the Founding fathers made one of their great contributions- wittingly or not- to the science of government. The establishment of an independent judiciary to determine in an objective manner disputes arising out of the federal system of states and central government was as much a stroke of genius." Paul C. Bartholomew, 1 *AMERICAN CONSTITUTIONAL LAW* p.129 (1978). This "stroke of genius" is certainly not to be appreciated in Taiwan when American interests are involved.

⁴⁹ Sherwood, *supra* note 4, p.34.

⁵⁰ *Id.* p.35.

enforcement, Sherwood does point out that IPR enforcement requires civil, criminal and administrative actions. In fact, "advanced regimes" such as the United States provide enforcement of these three kinds. Here, to ensure that IPR laws would be effectively enforced, so as to fulfil what USTR Carla Hills has suggested, "good legislation must be accompanied by good enforcement to ensure real results",⁵¹ "improvements", particularly administrative measures, have been carried out energetically in several ways.

For analytical purpose, improvements in enforcement is categorised into three main efforts: (1). establishing new governmental organisations; (2). introducing a new enforcement system; and (3). carrying out *ad hoc* sweeping enforcement actions.

(1). Establishing New Governmental Organs

Although no causal relationships could be found between the "quantity" of enforcement organs and the "quality" of enforcement results, it is part of the bureaucratic culture to express its determination to improve enforcement actions by establishing new organs. Take the latest IPR protection network in Taiwan as an example, apart from the Prosecutor's Office (MOJ), the Investigation Bureau (MOJ)⁵², the Directorate General of Custom (MOF)⁵³ and the Government

⁵¹ "U.S.-Taiwan Reached Pact on Copyright, Patents, Ending Unfair-Trade Inquiry," *Wall St. J.*, p.5F (8 June, 1992).

⁵² The Investigation Bureau is a component of the Ministry of Justice which is empowered to investigate serious IPR crimes.

Information Office (GIO)⁵⁴ which had already been assigned more IPR enforcement actions, a new cabinet level unit named "Inter-Agency Coordination Task Force for IPR Protection" was organised in 1992 to coordinate and supervise all enforcement actions. An Anti-counterfeiting Committee (MOEA) was established in 1981 to eliminate counterfeiting and facilitating coordination in resolution of IPR complaints by foreign firms. In addition, an IPR Enforcement Task Force of the National Police Administration was established in 1989 to further coordinate its enforcement efforts with the Anti-counterfeiting Committee.⁵⁵ In 1992, the Fair Trade Commission was established to administer matters, *inter alia*, in respect of dilution of trademarks and false or misleading "places of origin". Finally, even the Institute for Information Industry (III), a quasi-governmental organisation under the supervision of the MOEA was authorised to carry out software checking in private factories.⁵⁶

Obviously, these new organs were created more to ease international tensions than to provide a better IPR environment. Yet, their expedient and perfunctory nature has not only resulted in fiscal burden,⁵⁷ but also raise

⁵³ In charge of inspections of alleged infringements of patents and trademarks by local exporters before their products are exported to their foreign destinations.

⁵⁴ In charge of audio-visual works protection, in particular, the legislation of Music Television (MTV) operations.

⁵⁵ BOFT, *THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN THE REPUBLIC OF CHINA ON TAIWAN*, pp.4-7 (1992).

⁵⁶ "Taiwan: Software Export Inspection System Aimed at Detecting Unauthorised Copies," *East Asian Executive Report*, pp.14-15 (15 March, 1994).

⁵⁷ For instance, according to a classified official report of Taiwan, the government of Taiwan put approximately 4,000 personnel and spent NT\$ 500 million (equivalent to 12.5 Million Sterling Pounds) in IPR enforcement actions. BOFT, *1993 Nien Chung-Mei Chih-Hui-Tsai-Chan-Chuan Tan-Pan Pao-Kao (A REPORT ON THE 1993 CCNAA-AIT TRADE TALKS ON IPR PROTECTION)* p.73 (1993). [Hereinafter 1993

doubts as to their statutory bases. According to Art.5(III) of the *Standardisation Law* of the ROC, matters relating to the organisation of the institutions of state shall be regulated by law. The establishment of these new organs under different ministries should, therefore, have their foundations on laws enacted by the parliament. Though the *Organic Law of the Executive Yuan* states that the Executive Yuan, upon the resolutions of the Executive Yuan Council and the Legislative Yuan, may establish, abolish or merge its ministries, commissions or other organs,[Art.6] surprisingly the establishment of these organs which involved the allocation of so much national resources and the authorization of police power did not arouse much debate either in the Executive Yuan or the Legislative Yuan. The government seemed to have taken for granted that these organs are necessary (for the sake of dissolving American pressures), and necessity justified their legality. Equally controversial is the role of the III in enforcement work. The III was basically a research, promotional and educational organisation on information industry, and was not designed as an enforcement organ. Now enforcement power was suddenly given to those employees who had not received any training in law and enforcement, and who were not even civil servants. Obviously, this was an expedient measure of the government -- an expediency in gross disregard of law.

An immediate result caused by the lack of consideration in the establishment of these organs is that they further complicate the institutional structure of the government. Lack of coordination, overlapping functions, and

confusing names have, in fact, contributed more to the degradation of enforcement quality and waste of national resources.⁵⁸ The reasons for this are simple. As a matter of bureaucratic culture, bureaucrats are keen to refer work and responsibility to others who also assume jurisdiction over the same subject matter. Moreover, a sudden and tremendous increase in the number of enforcement personnel means that most of them, if not all, lack professional training and legal knowledge. A natural consequence is that these poor quality enforcement agencies would only perform their functions in a time of crisis; as a result, counterfeiting and piracy are still popular in Taiwan.

(2). Introducing New System

When United States pressures accumulate to a degree that the government of Taiwan can no longer dissolve them through the existing system, something new has to be invented. The *Monitoring System for the Export of Products Related to Computer Programmes* (Monitoring System) is such a creation which is not merely new to Taiwan, but also the first (and still the only) one in the world.

The *Monitoring System* was established upon the request of the United States in the 1992 IPR consultation⁵⁹ and started its operation on 1 Nov., 1992.

⁵⁸ For instance, persons seeking counterfeiting remedies could make their claims in the following organs: (1) The Anti-Counterfeiting Committee of the Ministry of Economic Affairs; (2) The National Police Administration of the Ministry of Interior; the Prosecutors' Office; or (4) bring a criminal suit directly in the criminal court. See BOFT, *THE PROTECTION OF IPR IN THE REPUBLIC OF CHINA ON TAIWAN* pp.6-7 (1991). Apart from (4) they are only slightly different in their functions. Obviously, the intention of the government was to provide more remedial channels for the victims.

⁵⁹ III, *PROTECTION OF IPR IN THE INFORMATION INDUSTRY IN THE ROC* p.14 (1993).

Its objectives are to inspect those export products that contain computer software (e.g. computer hardware, videogame cartridges and compact disc etc.), making sure that their software components do not violate the *Copyright Law*. The inspection work is done by the Customs Office and the government-financed Institute of Information Industry (III).⁶⁰ They normally conduct on-site inspection at plants before the exportation of such goods. If any shipment of goods is found to have copyright problems, some 30% of the goods of that shipment will be subject to further examination. Export permits will be rescinded and copyright owners will be notified if preliminary examination shows that the goods are suspected of infringing copyrights. On the other hand, manufacturers who avoid inspections will be "disciplined" by the BOFT.⁶¹

After a year's operation, it was said that the system had achieved, quoting the words of the BOFT, "a considerable amount of success".⁶² According to an assessment made by the MOEA, from 1 Nov 1992 to 30 May 1993, a total of 72,506 export shipments were inspected. 436 shipments were thought to have problems and samples were taken for inspection. Of the 436 shipments, comparisons of samples was carried out on 341 shipments, of which 16 were found to be suspected of infringements and copyright owners notified. In seven of these cases the copyright owners took no action at all; in eight cases the copyright

⁶⁰ "Software Export Inspection System Aimed at Detecting Unauthorised Copies," *East Asian Executive Report*, p.14 (15 March, 1994). Noted that the III is not only government-financed, its head (Chief Executive) is also a retired general. Yet just another attribute of corporatist politics.

⁶¹ 1993 *Trade Talk Report*, *supra* note 57, p.73.

⁶² *Id.* at 115.

owners expressed no wish to make any further investigation into the matter and in one case the copyright owner and the exporter reached a private settlement through conciliation.⁶³

Whether these figures represent "a considerable amount of success" is arguable, but it certainly has created many problems. According to a public hearing conducted in the Legislative Yuan on 26 February 1994, government officials and representatives from Taiwan's computer industry expressed their discontent with the system.⁶⁴ First, they claimed that the operation of such a system had no proper legal basis. Since no existing law authorised such an inspection, and that enacting a new law would take too long a time, the government, as a matter of expediency, applied the *Commodity Examination Law* of 1976. But, interestingly, the legislative purpose of the *Commodity Examination Law* was only to ensure the quality of commodities, not to fight copyright piracy. In other words, it was simply unconvincing and even unlawful to ground the operation of such a system on the *Commodity Examination Law*.

Second, as a world pioneering system, there was no law instructing the Custom officials in detail to carry out inspection works. Under imminent pressures, however, the government of Taiwan had no time to design procedural rules. On the other hand, no foreign law could be found for reference. This necessarily created implementation difficulties for the Customs Office. To remedy

⁶³ *Id.*

⁶⁴ "American Nintendo v. Special 301," public hearing held in the Legislative Yuan, Taiwan, (26 February, 1994). (Hereinafter Legislative Hearing)

the situation, the Customs Office had to make its own rules through administrative discretion. However, because the system involved the rights and obligations of people, the operation of the system should have been guided by law,⁶⁵ and not administrative discretion. Thus, the result was a further expansion of administrative powers and more complaints by the companies involved. A law-abiding Customs officer complained with anguish in the public hearing by saying, "let the Americans be known that no matter how creative or constructive the system maybe, we (the Customs Office) cannot create law."⁶⁶

Third, it was said that the government should not provide intervention other than judicial remedies to copyright infringements cases. Indeed, violation of copyright cases belong to private law disputes, and under no circumstances should the government spend taxpayers money to provide extra service to copyright owners, let alone foreign ones. Representatives from the competent authorities, legislative members, and private computer associations thus urged the government to abolish the system.⁶⁷

Last but not least, the cost of maintaining such a system was extremely high. During the first year, the government spent US\$ 5 million in establishing and operating the system. It is expected that an annual amount of US\$ 4 million

⁶⁵ Art.5 subsection 2 of the *Standardization Law* states that matters relating to the rights and obligations of people should be regulated in a law. And according to Art.4 of the same law, "(l)aws are those bills passed by the Legislative Yuan and promulgated by the President."

⁶⁶ Legislative Hearing, *supra* note 64.

⁶⁷ *Id.*

will be spent in the next four years.⁶⁸ On the other hand, only three United States companies have provided a total of fourteen samples to the Taiwan government for comparisons during the first year operation. This means that most of the American companies did not make use of the system after all. In other words, the cost was disproportional to the results, and that only few United States companies benefited from the system. Having recognised these facts, during the 1993 trade talks, the government of Taiwan moved to draw a "sunset clause", stating its period of operation.⁶⁹

The United States government rejected such a proposal for two reasons. First, it claimed that although only three United States companies made use of the Export Monitoring System, as one of them was Microsoft -- one of the biggest software companies in the world, its reliance on the system proved that the system truly worked. Second, the existence of the system has had its inherent deterrent effect.⁷⁰ Therefore, the United States representative concluded that it was too early to talk about the abolition of the system.

In brief, the software export monitoring system, while its legal basis remains unsound, and its operation is guided by administrative discretion, will continue to exist as a special enforcement regime at a high cost and for the

⁶⁸ 1993 Trade Talk Report, *supra* note 57, p.7. It was estimated by UNCTAD that Bangladesh would need approximately US\$ 1.3 million for the first year, and approximately US\$ 1.15 million in subsequent years to strengthen its national capacity for the TRIPs agreement of the Uruguay Round. Compared with Taiwan, this certainly is not a big sum. See United Nations Conference on Trade and Investment, *THE OUTCOME OF THE URUGUAY ROUND: AN INITIAL ASSESSMENT -- SUPPORTING PAPERS TO THE TRADE AND DEVELOPMENT REPORT*, 1994, p.202.

⁶⁹ *Id.*

⁷⁰ *Id.* p.46.

benefit of only few United States companies. More, it is not sure whether it will be a temporary or permanent establishment for only the United States has the final say in its future.

(3). Carrying Out Special Enforcement Actions

One of the best ways to show the government's determination in protecting foreign IPR was to carry out some very sweeping enforcing actions in times of imminent trade threats. With the help of the local media, these special enforcement actions were broadcast to the world. A positive international image was thought re-established as soon as these large scale enforcement actions had been carried out.

For example, a large scale sweeping action was taken in the spring of 1993 when the United States threatened Taiwan with the use of Special 301 trade retaliation. From the period 22 February - 28 February, a special enforcement action targeting copyright infringements was carried out on the whole island. The result was said to be fruitful, 838 suspects (562 cases) were arrested and 45,547 video tapes forfeited.⁷¹ These statistics were then presented to the USTR officials during IPR negotiations as proof of Taiwan's efforts in fighting IPR offenses.

⁷¹ *Central Daily News* (Chung-yang jih pao), p.7 (3 March 1993).

It should be noted that enforcement action of this calibre is not uncommon practice in Taiwan. During the martial rule period, it was a way of maintaining order and security of society, particularly in the period before the Chinese New Year (around February).⁷² Hundreds of suspects were arrested and illegal property confiscated during each action. Then, according to the media, society was said to be "cleansed" and "everyone" was satisfied with the result. The police was rewarded and civilians clapped their hands with joy as if the whole nation had wanted it for a long time. Here, again, the goal of maintaining social order was said to have been shared by the public at large without even questioning how it was achieved. If one is to look into its nature, it hardly needs any explanation to conclude that it was the common practice of authoritarian governments to maintain social order and to suppress dissidents.

Nevertheless, it is only half right to say that these special actions of the government did not have legal bases. In fact, the *Martial Law* and the *Regulation for Control of Hoodlums* authorised these actions.⁷³ However, after the lifting of martial law in July 1987, it became extremely doubtful as to whether the police can still exercise such a power of large-scale arrests and investigations. The

⁷² Though not a religious belief, the Chinese believe that if they can live harmoniously during the New Year period (the first fifteen days of the year), they will have calm and safe days in the whole year. A reflection of this ideology from the government is the carrying out of special actions against certain offenses (e.g. larceny, kidnapping, fraud) and arrest of some un-welcome persons (e.g. the so-called gangsters, hoodlums, and criminal suspects etc.)

⁷³ According to the Martial Law, the Taiwan Garrison Headquarters, which was responsible for national security in Taiwan, may carry out a "security preservation inspection" at any appropriate time. During such inspection the police may take to the station for further investigation any suspicious persons found on the streets. Moreover, according to the Regulation for Control of Hoodlums, the police may conduct a "sudden inspection" (*lin-chien*) of an individual's property without obtaining a search warrant, so long as the person is considered as a hoodlum. See, Tao, Lung-sheng, "Reform of the Criminal Process in Nationalist China," 19 *Am. J. Comp. L.*, pp.747-765 (1971).

phenomenon is that the police still occasionally carry out special campaigns to deal with special problems, regardless of their ill-founded bases. Needless to say, this practice of the government is employed intensively for IPR protection purposes.

An argument against this kind of enforcement action is that it violates the rule of law. First of all, it shows that the government lacks consistency in enforcing laws. As a matter of fact, after so many years' experience, the public has already recognised that the so-called special campaigns are simply expedient measures aimed only at achieving certain short-term results. Therefore, after such intensive action, it is generally believed that there will be a so-called "legal holiday" in which law is set aside and people can do whatever they please again. This is particularly true with regard to trademark and copyright anti-counterfeiting actions. Counterfeited watches, sports wear, software and other luxuries reappear in the streets not very long after the police ends its campaign.⁷⁴ May be this is one of the reasons why the United States has become more anxious (and thus ruthless) about the determination of the Taiwan government in fighting counterfeiting. Yet, on the other hand, this legal short-termism corrupts the people's general belief in the legal system. How much worse could it be if people have their own version of law which is different from what it means to be?

⁷⁴ It is not difficult to ask people living in Taipei to tell you where and when to buy counterfeits or pirated goods. For instance, for computer software, go to the Kwang Hwa market. For watches, Yuan Huan and Wan Hwa districts have more. In February 1994, my friend and I visited a "company" situated in the Wan Hwa area. We were shown different models of "Rolex" counterfeits with prices ranging from NT\$ 200 (5 Sterling Pounds) to NT\$ 180,000 (4,500 Sterling Pounds).

Moreover, in order to cope with the policy, sweeping actions have to achieve some kind of measurable results. This would mean legal procedures which guarantee due process are often neglected. In addition, a sudden increase in criminal suspects surely gives extra burden and special difficulties to the courts. The courts simply cannot digest so many cases without lowering their quality of judgment. As such, it is doubtful whether the accused could have a fair trial at all. This certainly is not a good development when Taiwan is said to enter the era of full democracy based on the rule of law. Ironically, the United States often took into consideration the results of these enforcement actions as a factor to decide whether Taiwan deserved trade retaliations.⁷⁵ This system of measuring the enforcement progress of Taiwan leaves the government of Taiwan no choice but to carry on special campaigns. Re-establishing people's confidence in law is not to be mentioned at least in matters that concern IPR protection.

D. FINAL REMARKS

From the above discussion, several points must be stressed. First, Taiwan's IPR reform is typically an imposed system. As such, it bears the undemocratic attribute of imposed law.⁷⁶ Second, the reform is a result of the application of the American "blunt-instrument" approach. So far, however, the

⁷⁵ For instance, the 1994 NTE Report states, "...The improved statutory framework in conjunction with enforcement efforts appears to have helped decrease the amount of counterfeit goods....," USTR, *NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS* p.257 (1994).

⁷⁶ To this point, I agree with Okoth-Ogendo that legal imposition lacks democratic consensus from society. H.W.O. Okoth-Ogendo, "The Imposition of Property Law in Kenya," in Sandra B. Burman & Barbara E. Harrell-Bond (ed.), *THE IMPOSITION OF LAW* p.147 (1979).

result has proved to be a blunder. IPR laws were amended on *ad hoc* basis, regardless of whether the Legislative branch liked them or not; courts and prosecutors were instructed on how to handle IPR infringement cases; millions of dollars had been spent creating some legally ill-founded organs and system; sweeping enforcements took place only when trade pressures became imminent. All these demonstrated the failure of the IPR regime. As such, IPR laws achieved neither a "high standard" nor "low standard", but no standard at all. Naturally, the outcome was pandemonium. Counterfeiters knew when and where to sell their goods; courts were pre-occupied with the "obligation" to expedite the legal proceedings and to render guilty judgments. Even the bureaucracy complained about the very system it helped to create and enforce. Sherwood claims in a strong tone that "(e)nforcement of the law changed the culture, and quite efficiently at that," and that "(e)nforcement is not a matter of vendetta or revenge. In the case of the new traffic signal it becomes a teaching device."⁷⁷ Assuming he is right, then the phenomena of partial and selective enforcement in Taiwan certainly gives us a different mindset: the very principle of justice enshrined in the laws seems to be in the process of being forgotten.

Third, this observation should not lead to the conclusion that IPR laws are not important for Taiwan. On the contrary, they are extremely important in the sense that they are necessary in keeping a fair market order, and in advancing innovation. The message intended to be conveyed is that legislative efforts conducted under foreign economic pressures through one-sided bilateral

⁷⁷ Sherwood, *supra* note 4, p.196.

negotiation cannot be an appropriate way of establishing an IPR regime because the laws thus made are pre-occupied with external political factors, which are likely to render the laws precarious and partial in their enforcement. In other words, if the creation and operation of a law or institution does not consider the reaction or acceptability of society, but, to use Lon Fuller's words, a one-way projection of authority,⁷⁸ then a stereo-type image that it is just another bureaucratic manipulation is unavoidable.

⁷⁸ Lon Fuller, *THE MORALITY OF LAW* p.209 (1969).

PART III. POLITICAL AND LEGAL CONSEQUENCES: DOMESTIC AND INTERNATIONAL

CHAPTER 7. IMPACT OF AMERICAN PRESSURES ON THE BUILDING OF CONSTITUTIONAL DEMOCRACY

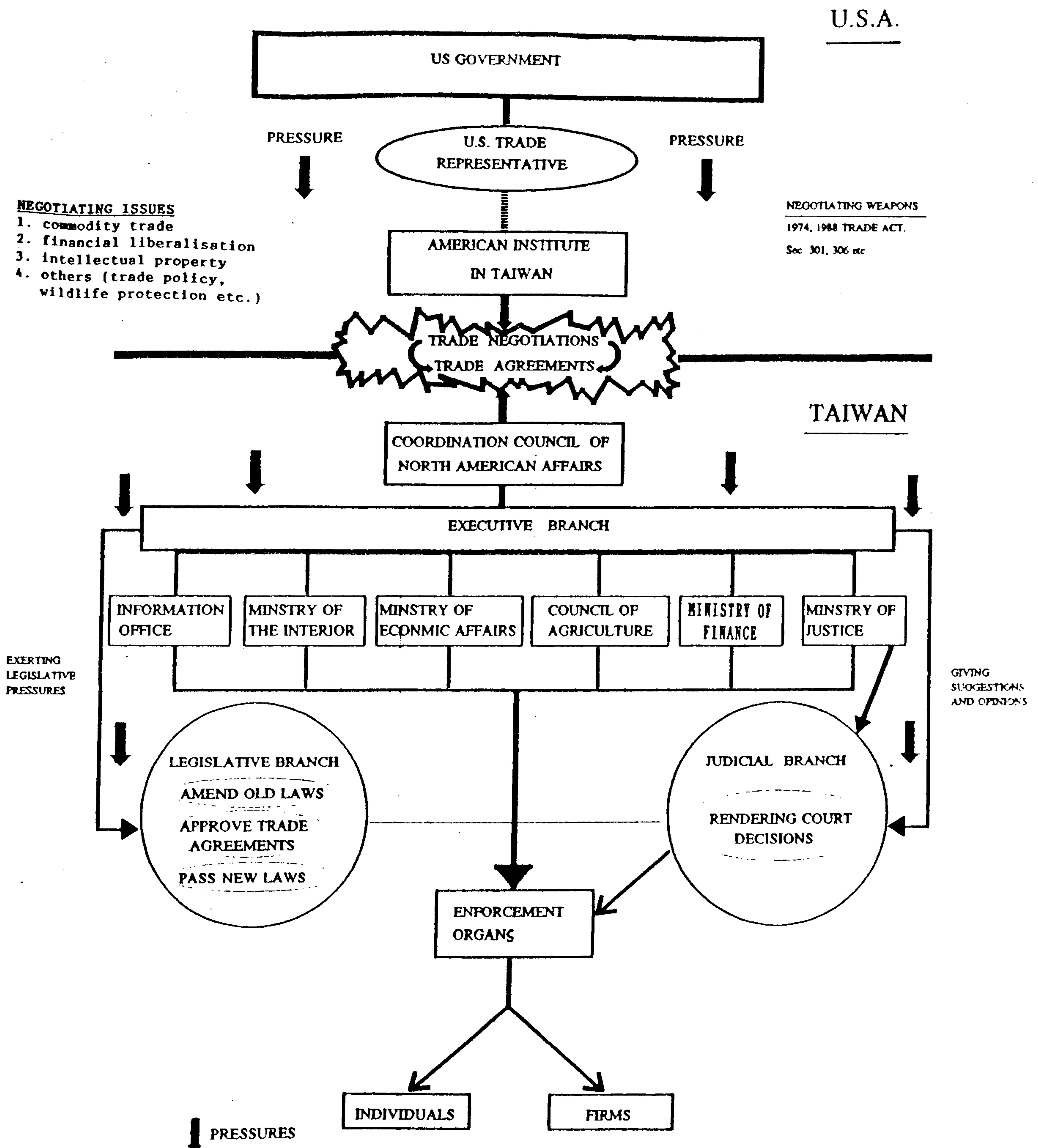
A. INTRODUCTION

In the previous chapters, we have discussed how Taiwan has adjusted its trade policies and laws to resolve American economic pressures. Specific issues regarding commodity trade, trade in services, and intellectual property protection were provided in detail to demonstrate the policy and legal changes on Taiwan. Apart from economic impacts which were mostly cost inefficient, massive legal manipulations were also in evidence. On the whole, a general argument is that Taiwan is forced to mobilise its party machine to meet the needs of the United States. Through the use of the almost unchecked regulatory powers devised and developed in the authoritarian corporatist era, the power of the party-state remains enormous. It is also shown that the United States was not unaware of the corporatist arrangements of Taiwan, but as a matter of economic interests, it indirectly endorsed these actions. In fact, on some occasions, the American government explicitly criticised Taiwan's legislative and judicial organs for their independent exercise of powers.

So far, our analyses and evaluation appeared to be piecemeal and unsystematic. As a result, grasping the whole picture of the distortive and corrosive effects of the United States trade and economic pressures might prove difficult. This chapter intends to link the arguments together by drawing on

constitutional and administrative theories. Through this, we shall understand how American trade and economic pressures have systematically rejected Taiwan's democratic process and law, and why Taiwan's effort to establish constitutional democracy may result only in a return to the old form of authoritarianism.

First of all, in order to achieve an easier understanding, it may be helpful to illustrate the penetrating power of American pressures by means of a diagram.



The above diagram shows how United States government pressure flows to different branches, organs and eventually to the individuals of Taiwan. Bearing in mind, however, that in the authoritarian era, the government was under the full control of the ruling party KMT. As an authoritarian corporatist state, the KMT was inseparable from the government. Therefore, this diagram shows only the "competent authorities" that are affected by United States pressures, and tells nothing of the real political configuration of Taiwan.

This chapter deals with the consequences on the process of democratisation. Arguments are presented in four aspects, namely, democratic policy-making, separation of powers, the issue of delegated legislations and judicial protection of individuals. The central argument being that, in order to resolve American pressures, a domestic political cycle was formed. This political cycle is characterised by the re-emergence of the party-state and the suppression of the legislative and the judicial functions. As a result, it works at the expense of the emerging constitutional democracy.

B. RESOLVING AMERICAN ECONOMIC PRESSURES AND THE TRANSITION TO CONSTITUTIONAL DEMOCRACY -- THE INCOMPATIBLE PROCESSES

1. Policy-making and the Role of the Legislature

To ensure that the government is *of the people, by the people and for the people*, democratic constitutions have assigned the Legislative branch two clear functions: to make decisions by majority vote (laws) and to supervise and control

the ways in which such decisions are carried out by the Executive branch.¹ Parliament is expected to function "creatively" and produce political and legislative decisions that are not programmed.² This notion of the role of the legislature is found in almost all modern constitutions, including the *ROC Constitution*. Article 63 of the *ROC Constitution* states, "(t)he Legislative Yuan shall have the power to decide by resolution upon statutory or budgetary bills or bills concerning martial law, amnesty, declaration of war, conclusion of peace or treaties, and other important affairs of the States," Accordingly, the Legislative branch, through the enactment of and amendment to laws, makes policies or endorses the policies of the Executive branch. Clearly, the role of the Executive assumed by the *Constitution* is not as dominant as it is in reality. The Executive should be told what to do or what direction to seek the objective the Legislative branch finds desirable. As to its supervisory function, Article 57(2) of the *Constitution* clearly states that if the Legislative Yuan does not concur in any important policy of the Executive Yuan, it may, by resolution, request the Executive Yuan to alter such a policy. The Executive Yuan may request that the Legislative Yuan reconsider. If, however, two thirds of the members of the Legislative Yuan still uphold the original resolution, then the Premier of the Executive Yuan should either abide by the same or resign from office.

This design of the *Constitution* fully recognised the significance of legislative debate. Legislative debate which requires the participation of

¹ Jan Tumlrir, *PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES* p.43 (1985); Edwin R.A. Seligman & Alvin Johnson, 9 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* pp.357-358 (1937).

² Gianfranco Poggi, *THE DEVELOPMENT OF THE MODERN STATE* p.139 (1978).

legislative members in the discussion of policies ensures that policies are not made in secret and to the disadvantage of the people. True, the policies thus made may not always be right, but as noted by a member of the British parliament, A. Posonby, the people will then "suffer for their own folly and pay for their own mistakes".³ Indeed, it is impossible for any government to guarantee that it will not make mistakes, but to suffer from one's own choice at least provides, using the words of Montesquieu,⁴ the largest degree of "tranquillity of mind".

This basic notion of the function of the legislature is indeed the essence of democratic policy-making. In the case of Taiwan where the Legislative Yuan has long performed the function of rubberstamping the policies of the Executive Yuan, a revival of its original functions and status has to be the most significant part of the entire democratic process. Otherwise it is simply meaningless to re-elect the Legislative Yuan members without giving them the substantive power to make policies and laws.

However, the cumulative impact of the various United States-Taiwan trade and economic arrangements has shunted the Legislative Yuan away from this effective centre of the nation's political life, leaving in control the Executive branch, or more precisely, the party-executive. Ironically, the continual weakening of the constitutional functions of the Legislative Yuan took place when

³ Cited by Ernst-Ulrich Petersmann, "National Constitution and International Economic Law," in Meinhard Hilf & Ernst-Ulrich Petersmann (ed.), *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* p.9 (1993).

⁴ Cited by Philip Norton (ed.), *LEGISLATURES* p.25 (1990).

Taiwan was on its way towards what Huntington called a "direct transition from a stable authoritarian system to a stable democratic system".⁵

In what follows we will show the process of how the legislative function is undermined by the United States-Taiwan trade negotiations and agreements, and how the Executive Yuan which is the first frontline of American economic and trade pressures has gradually replaced the Legislative Yuan to become the only policy-making organ. The whole process begins simply. There are routine bilateral trade negotiations between the two countries. During the course of negotiations, the American side uses its trade weapons according to its trade laws. Unable to resist American pressures and threats, the Executive branch of Taiwan makes certain promises (either in the form of bilateral agreements or memoranda) most of which are prepared by the United States negotiating team in advance. Naturally, the United States would thus expect Taiwan to honour them. However, what is wrong is that some of the promises are evidently *ultra vires* (for instance, the promise to amend certain laws within a particular period). The Legislative Yuan is, therefore, infuriated and refuses to endorse. Yet, the deadline set forth by the United States (normally of a few months) for compliance is approaching. This means that trade retaliation is becoming imminent.

In the circumstances, the ruling KMT enters the picture. Through its Leninist style party machine, a mobilisation order is given. This includes compelling those KMT legislators to accept the *fact*. The mentality of the party-

⁵ Samuel P. Huntington, *THE THIRD WAVE: DEMOCRATISATION IN THE LATE TWENTIETH CENTURY* p.43 (1993).

executive is understandable -- to secure its own prestige and to cloak its fear of offending the United States. Accordingly, voices from the legislators (whether they be newly elected or otherwise) are considered relatively insignificant. Sometimes, however, the mobilisation does not work well in the Legislative Yuan, especially for those newly elected legislators who are really conscious of their power and constituency interests. Indeed, regular elections have taught them the lesson that the interests of the voters should be catered for if they ever want to be re-elected. The party-executive realises this and understands that it would be foolish to put the KMT legislators into some kind of dilemma between state (party) policy and national (and constituency) interests. Thus, it becomes the job of the party-executive to use whatever means to convince the legislators to endorse those bilateral trade arrangements. The most commonly used strategy is to threaten the legislators that if they do not bow to American pressures, trade retaliation will follow immediately and damage Taiwan's economy. The message is that the Legislative Yuan is to be responsible for all the possible consequences. As a country which is only famous for its economic achievements, the threat is too important to be true. So the Legislative Yuan receives not only pressures from the United States, but also threats by its own government.

In addition, a structural factor which more or less "legitimises" the threats of the party-executive should be noted. That is, for over four decades, most of the well-educated elites (the so-called technocrats) have been concentrated in the party-executive. Their experience and professional knowledge have told the

legislators that it would be unwise not to listen to them.⁶ Indeed, compared with the legislators, the intellectual quality of the elites and even the bureaucrats are much better. All these have culminated in the fact that the Legislative Yuan is given no other option but to pass the bills drafted by the Executive branch and, because of the shortage of time, legislative debate for state policy and law has to be curtailed significantly. More accurately, policies and laws are, in fact, made exclusively outside the Legislative Yuan. Accordingly, as a matter of domestic politics, the Executive Yuan dominates everything.

Up to this stage, as a matter of comparative law, it can be argued that the situation is not that pessimistic for the legislatures in Western democracies also suffer from a decline. As early as the 1920s, Lord Bryce argued that there was evidence to indicate some decline from the admiration of and confidence in the representative government in England and the United States; while in other English-speaking overseas democracies, the level of legislatures was never high.⁷ Gianfranco Poggi also notices that the creativity of the parliamentary process of the Western democracies is diminishing.⁸ True, but at least the legislatures in these countries still possess an important function: to check and overturn the decisions of the Executive should they be found unacceptable. Yet, even this is not possible in Taiwan. The case of ratifying the *Copyright Agreement* is an

⁶ For a study of the role of Taiwan's elites in politics, see Li Cheng & Lynn White, "Elite Transformation and Modern Change in Mainland China and Taiwan: Empirical Data and the Theory of Technocracy," *China Q.* No.121, pp.1-35 (March 1990).

⁷ Norton, *supra* note 4, pp.47, 50.

⁸ Poggi, *supra* note 2, p.141.

example.⁹ The reservation of eight provisions of the *Copyright Agreement* was a deliberate correction of the Executive Yuan's inappropriate, illegal and unpopular decision to bow to the United States. However, this unprecedented democratic move received not applause, but a serious blow from the United States. As a result, the Legislative Yuan was forced to eat its own words and endorsed the American version of the Agreement. The defeat not only signified the victory of the United States, but also the failure of the Legislative Yuan to revive its status as a check to the government. Worse, the event has given the impression that the Legislative Yuan is as weak as it was in the authoritarian era. Now, consider also the impact on public opinion of such a parliament. No doubt, public confidence in the legislature was totally devastated.

In the circumstances, the Legislative Yuan can never be expected to perform its functions properly. Democratic transformation has, therefore, from the very beginning, opened a large loophole with regard to economic and trade policy-making.

2. Separation of Powers and the Corporatist Government

The very replacement of the functions of the legislature immediately raises the issue of separation of powers under the constitutional democracy and its relationship with the party. Before continuing our analysis, however, an important notion needs to be introduced. According to Samuel Huntington,

⁹ See Chapter 6B, 2.

"Implicit in the concept of democracy, however, are limitations on power. In democracies elected decision makers do not exercise total power. They share power with other groups in society. If those democratically elected decision makers become, however, a facade for the exercise of much greater power by a nondemocratically chosen group, then clearly that political system is not democratic... It is also, however, easy for critics of a government, whether from the left or the right, to allege that elected officials are simply the 'tool' of some other group or that they exercise their authority only on the sufferance of and within severe constraints set by other some other group. Such allegations are often made, and they may be true. But they should be judged to be true until they have been demonstrated to be true. That may be difficult, but it is not impossible."¹⁰

Two important messages are conveyed in Huntington's words. First, democracy does not allow concentration of political power. Second, it is possible that a formally democratic government becomes the tools of other groups, and thus becomes undemocratic. With regard to the former, the idea basically resonates with that of the *American Constitution* which advocates the exercise of separated powers (namely, the Executive, the Legislative, and the Judiciary). The latter is more problematic, not only in terms of the process of demonstration, but it also leaves the even more difficult question of what such a government *is*.

Indeed, it is not difficult to develop a broad argument that democracy may be toppled by an external force, or that there is no democracy because power is still concentrated in a few hands. In the case of Taiwan, the case appears to be more intriguing. On the face of it, Taiwan passes the minimum standards for democracy: fair elections, a certain degree of political freedom, and a Western-

¹⁰ Huntington, *supra* note 5, p.10.

based *Constitution* that adopted the notions of the separation of powers. Yet, as Huntington has suggested, the true and ultimate yardstick remains whether there is really a separation of powers; for when we come to the substance of democracy, the issue of institutional re-construction has to be encountered. Scholars and commentators have already noted that the biggest challenge in Taiwan's democratic process is the separation of the Leninist style KMT from the state and the establishment of democratic institutions.¹¹ Institutional challenge thus involves the abrogation of the leading role of KMT, and further, the revival of the constitutionally designed system of separated powers. On the contrary, if it is proved that the party remains a strong actor in the state's policy-making, then the so-called democratisation is nothing but an explanatory myth because political powers are not transferred to the properly elected government, not to mention separation of powers.

I do not suggest that this is an easy process. On the contrary, it involves plenty of self-denying efforts on the part of the Executive, and self-consciousness on the part of the Legislative and the Judiciary. Precisely because of this difficulty, undue foreign influence must also be avoided. Unfortunately, the United States trade and economic pressures proved to be that undesirable force pulling Taiwan back to the old form of authoritarian political structure, thus burying the realisation of separation of powers.

¹¹ *Id.*, p.117; Cheng Tun-Jen, "Democratizing the Quasi-Leninist Regime in Taiwan," 41 *World Politics*, p.495 (July, 1989); Chang, Parris H., "The Changing Nature of Taiwan's Politics," in Dennis Fred Simon & Kau, Michael Y. M. (ed.), *TAIWAN: BEYOND THE ECONOMIC MIRACLE* p.34 (1992); and "Eye on Asia: KMT must end Leninist Style and Become a Modern Party," *Far Eastern Economic Review*, p.30 (15 Apr., 1993).

This can be argued from two aspects. First, as mentioned above, Taiwan's response to the United States demands, whether in the form of policy or legal changes, often requires mobilisation of different branches of the government and society. And the one which gives the ultimate mobilisation order is the KMT. Needless to say, mobilisation involves high degrees of cooperation, coordination and consolidation, and this can only be achieved by appealing to the strict party edict. To put it simply, it is the political discipline of the KMT, not law,¹² that mobilise the government to take uniform actions. This implies that the Legislative branch should endorse the KMT's decisions and the Judiciary enforce the laws to achieve certain measurable results from society. The reason that mobilisation could be successfully carried out by the party-executive is, of course, due to the deeply rooted one-party system established in the authoritarian era. Effective mobilisation ensures efficiency because of its coercive power over society and individuals. This, in turn, as a feed back, supports the continual survival and operation of the strong Leninist style KMT even when Taiwan is on its way towards democracy. Professor Hayek clearly points out that the difference between a democratic society of free men and a totalitarian one lies in the fact that in the former governmental power applies only to that limited amount of resources that is specifically destined for governmental purposes; while in the latter it applies to all resources of society including the citizens themselves.¹³ When one considers that guilty judgments regarding IPR are made into statistics

¹² Ironically, the *National Mobilisation Law* of 1942 could reluctantly serve as the statutory basis for mobilisation in the authoritarian era. But the Law is no longer valid after the ending of the Period of Suppression of Rebellion in 1990. That means there is no law authorizing the Executive to mobilise the society.

¹³ F.A. Hayek, "The Division of Democratic Powers," in Andrew Levine (ed.), 1 *THE STATE AND ITS CRITICS* p.254 (1992).

for the United States to examine Taiwan's IPR enforcement achievements, it is hard to deny that even individuals are used by the state. A reasonable speculation, as has been mentioned in Chapter 6, is that due process of law and defendants' rights are likely to be sacrificed in order to boost the statistics.

Perhaps it is necessary to enquire further into the internal structure of the KMT in order to understand the undemocratic characters of the state. It should be noted that the so-called "High Level Party-government" lies in the Central Standing Committee the members of which are composed of representatives chosen either by the party chairman or the KMT Central Committee. As observed by Cheng, Tun-jen, the membership of the Central Standing Committee has not been opened to competitive election¹⁴ Nevertheless, it is the highest and most important decision-making body in Taiwan. According to a Western observer, "it forms an inner circle that has vast power in screening and approving all important government and party policies and the power of nomenclature -- naming political appointees to import government and party posts".¹⁵ Needless to say, United States-Taiwan trade issues must be passed by this Central Standing Committee before submitting to the Executive Yuan for formal approval. This strong KMT - weak government relationship suggests that the constitutional structure of separation of powers virtually does not exist. Therefore, one has reason to say that the government is a tool of the KMT.

¹⁴ Cheng, *supra* note 11, p.496.

¹⁵ Constance Squires Meaney, "Liberalisation, Democratisation, and the Role of the KMT," in Cheng, Tun-jen & Stephan Haggard (ed.), *POLITICAL CHANGE IN TAIWAN* p.112 (1992).

This leads us to our second point. That is, the way Taiwan reacts to the United States still reflects a perfect authoritarian corporatist model. The notion of authoritarian corporatism denotes that decision-making is based not on popular concern, but by some appointed elites chosen to represent the society. Policy is made on a "top-down" form according to the political philosophy and considerations of the leaders. Thus, more often than not, considerations involve more than economics. In other words, it is the party-state creature that decides the needs of society, and the future direction of state. The grand policy of "Internationalisation, Liberalisation and Institutionalisation" and the accommodative IPR policy were such products made by the ruling KMT. This decision-making structure, however, proves to be more vulnerable to American pressures, but easier to engage in changes. The reason is not difficult to comprehend. The ruling KMT, due to political and military concerns, is more sensitive and responsive to external pressures than the mass population. Thus, an imminent pressure in the eyes of the party-state may not necessarily be considered as that imminent by the general public. But decisions are often made before the public are ready to accept them.

Nevertheless, this does not mean that the party-state will always make wrong decisions because of their over-sensitivity. Indeed, the rice agreement was a big policy failure,¹⁶ so was the extremely inefficient pro-American procurement policy,¹⁷ and the unwise tactic of delaying the application of the

¹⁶ Chapter 4B,2(1).

¹⁷ Chapter 4D.

new customs valuation code.¹⁸ However, the opening of banking and insurance markets did benefit society as a whole. What is so undesirable is that the process of digesting American pressures was conducted under the authoritarian corporatist framework which assumed absolute power over state decision-making. The constitutionally designed policy-making organ, the Legislative Yuan, is left behind, and indeed only serves, as in the old days, as a rubberstamp. One needs only common sense to tell that there is no separation of powers.

3. Delegated Legislation

As a matter of self-justification, a seemingly strong argument is made to justify the dominance of the party-state. That is, the regulatory situations of the modern world are too complex; governments are too large and so legislatures cannot possibly know enough to make the kind of decisions needed. Therefore it is better and, in fact, natural that the Executive dominates. This argument was originally made to support the proliferation of delegated legislations in the Western democratic countries; it was, however, delicately borrowed by the ruling KMT party as the theoretical basis for justifying the rubberstamping function of the Legislative Yuan during the authoritarian era.¹⁹ The employment of such an

¹⁸ Chapter 4F,2(1)

¹⁹ For instance, in 1984 (before the lifting of martial law), Professor Chiu and Professor Fa, both Taiwanese scholars, maintained that it was the emergence of the welfare state, and the complexity of society as well as the limits of legislators that contributed the spread of delegated law-making. They made, however, no special analysis of Taiwan. Obviously, Taiwan was not a welfare state, the society (under authoritarian rule) was not complex, and legislators were not elected after all. But there were still numerous amounts of delegated legislations. Yet, by saying that Western nations have delegated legislations, they seemed to imply that Taiwan's delegated legislations, regardless of their legality, were, nonetheless, justified. In another book written in Chinese by a senior legislator, requirements for delegated legislations of various Western countries are discussed. But when Taiwan's law is concerned, nothing concerning the political-legal situation of Taiwan is mentioned. See Chiu, Hungdah & Fa, Jyh-Pin, "the Legal System of the Republic of China,"

argument is like saying since democracy cannot solve the problems of modern world, authoritarianism is thus justified. To a country which working towards democracy, this argument is not only unfit but also dangerous, for it has imposed an impression on the public that democracy *cannot* be efficient, and thus implies that it may not be a satisfactory system.

Still, one has to be extremely careful in handling this kind of argument. For, even in a democratic polity, it is not necessarily a bad thing to have delegated legislations or grant the Executive discretionary powers to regulate the economy. When the subject matter is technical in nature, or requires emergency actions, or needs flexibility,²⁰ there is no reason to raise them in the parliament for debate. In practice, according to Professor Hudec, American past experience has shown that discretionary power can be a better tool to promote free trade than laws passed by the Congress.²¹ Moreover, Manuel Guitianan remarks that a successful operation of international economic policy requires rules as well as discretion.²² His argument is that although a rule-based regime strengthens predictability, it lacks flexibility and adaptability and thus carries with it the seeds of its own destruction, unless observed with a measure of discretion.²³

in K.R. Redden (ed.), 2 *MODERN LEGAL SYSTEMS CYCLOPEDIA* (Pacific Basin) p.626 (1984); and Hung, Ching-lin, *Wei-jen li-fa yan-chien chih pi-chia yen-chiu* (A COMPARATIVE STUDY OF ESSENTIAL CONDITIONS OF DELEGATION) (1982).

²⁰ E.C.S. Wade & A.W. Bradley, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* pp.625-626 (1993).

²¹ Robert Hudec, "The Role of Judicial Review in Preserving Liberal Foreign Trade Policies," in Hilf, Meinhard & Petersmann, Ernst-Ulrich (ed.), *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* p.515 (1993).

²² Manuel Guitian, *Rules and Discretion in International Economic Policy* (IMF Occasional Paper, June, 1992).

²³ *Id.*, p.43.

The significance of discretionary power is further emphasised by an administrative law scholar who states that the strongest need and greatest promise for improving the quality of justice for individuals lie in areas where decisions necessarily depend more upon discretion than upon rules and principles.²⁴ These arguments suggest that in regulating international economic activities, an attitude in favour of delegated legislations and discretion is unavoidable.

In the case of Taiwan, we are concerned with the problem of delegated legislation and discretionary powers in the context of a democratic process. As the issue involves a political transition from authoritarian corporatism to democracy, it is necessary that we have a general picture in mind about just what delegated legislations (and the entailed discretionary powers) mean under the authoritarian system. Only after this are we able to tell what possible direction and attitude are compatible with democratisation, and why American economic and trade pressures are so damaging to the whole process.

First, however, it should be noted that the difference lies not in the form of law -- a law delegates the Executive to make administrative orders, rules, and exercise discretion, but rather in the way delegated legislation is used. D. J. Galligan has pointed out, albeit in a rather abstract manner, that "in the context of administrative discretion, corporatism has the effect of moving the focus of political power from the macro political system to the internal working of

²⁴ Victor G. Rosenblum, "On Davis on Confining, Structuring, and Checking Administrative Discretion," in Clark C. Havighurst, *ADMINISTRATIVE DISCRETION: PROBLEMS OF DECISION-MAKING BY GOVERNMENTAL AGENCIES* p.50 (1974).

corporate bodies, and to the agreements reached between them; the macro system is weakened, and may not be able to give administrative authorities the necessary direction and guidance. It may be able to do little beyond specify the problems that needed to be solved, while the only effective influence on administrative officials may come from the corporate bodies which have an interest in the matter."²⁵ Accordingly, at least two consequences, Gilligan argues, resulting from this weakening of macro political system can be seen: (1) that there may be a disjunction between the public interest and the corporate bodies; and (2) administrative discretion is more difficult to control.²⁶

Galligan's comment is indeed highly illuminating. In an authoritarian corporatist state such as Taiwan, the party-state is the largest and the strongest corporatist body. For more than four decades, policies were made and enforced by the part-state. Legally, to ensure that the government could act freely to achieve the policy goals, laws were enacted loosely to allow the bureaucrats to exercise wide discretion. Among Western scholars, Winn has an insight at this point. According to her observation, by enacting formal laws that are not always consistent with social realities, Taiwan's parliament tacitly sanctions the exercise of considerable discretion in their application. As such, Taiwan's law is a labyrinth, replete with ironies and inconsistencies.²⁷ The case is most evident in the area of banking and insurance where a mere provision in the *Banking Law*

²⁵ D. J. Galligan, *DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION* p.354 (1986).

²⁶ *Id.*

²⁷ Jane Kaufman Winn, "Relational Practices and the Marginalisation of Law: Informal Financial Practices of Small Businesses in Taiwan," 28 *Law & Soc. Rev.*, No.2, pp.202-203 (1994).

and the *Insurance Law* gives the competent authorities broad discretionary powers to regulate the industries. In addition, sometimes the goals were not expressly stated. For instance, an implied goal of the monopoly sale of tobacco and wine by the state-owned TTWMB was to limit and control the sales of cigarettes and wine through monopoly pricing, partly because they were hazardous to health.²⁸ These goals, whether expressed or implied, rationally sound or unsound, were carried out through the exercise of administrative discretion. Of course, as the goals were not made by a democratic government, there is reason to believe that public interests were not taken into account. This, to a certain extent, explains why public discontent was not aroused when the United States forced Taiwan to open its service industry. Moreover, as an authoritarian government, there was not the problem of procedural openness. In fact, it has been the bureaucratic practice to label everything as "national secrets" or "classified materials". To sum up, the mentality of the government of not subjecting to any check and control was obvious. Galligan's analysis is correct indeed.

Moreover, these vague and wide delegated legislations were insulated from legislative or judicial control. The *Standardization Law* requires the administrative orders to be issued in accordance with prescribed authority or authorised by statutes to be sent to the Legislative Yuan [Art.7]. In theory, the Legislative Yuan may instruct the responsible organ to conduct amendments to or abrogate the orders should it find they oppose, change or contradict the

²⁸ Chapter 4C.

statutes. Yet, no publication before or after enactment, nor a hearing, formal or informal, is legally required during the whole process.²⁹ Accordingly, administrative discretion can be, and, in fact, was exercised under clandestine circumstances. The basic procedural requirement of transparency is lacking. Compared with the British, German, and United States systems,³⁰ it is certainly easier for the Executive to conduct manipulation. Nor is the judicial control of administrative actions practical. Layers of laws, court precedents, and even the court personnel themselves have made judicial remedies unrealistic. As this touches the important issue of judicial protection, a detailed discussion will be left to the following section. Suffice it to say that unfortunately the authoritarian system of the past was a pervasive and rather systematic one which could not possibly let the courts challenge the Executive.

Today, Taiwan has determined to march towards democracy, the issue becomes how to characterise, regulate and control delegated legislations, and thus administrative discretion. From some of the important scholarly works, we know that for the exercise of discretionary powers to fit into democratic principles, the principles of participation and adherence to precise rules and openness must be

²⁹ Chiu & Fa, *supra* note 19, pp.626-627.

³⁰ It has been customary for a long time for British Parliament to preserve an oversight of delegated legislation by requiring that such legislation be laid before it in some form or another. The laying of an instrument is subject to affirmative and negative resolution procedure. The *Statutory Instrument Act* of 1947 sought to regularize these procedures and to ensure that the house had an opportunity of scrutinizing such legislation. However, in the majority of cases, an instrument is laid subject to negative resolution in which case it will obtain or more commonly retain the force of law unless it is rejected within a stipulated period of time by the House. Similarly, according to German law, the power delegated to the executive provides a "call back" mechanism giving the parliament the possibility to revoke any administrative measures taken by the executive within a period of three months. In the United States, the constitutional principle requires that the legislature itself must define policy to a certain degree of precision. See Wade & Bradley, *supra* note 20, pp.630-634; Hilf & Petersmann (ed.), *supra* note 3, pp.102-103, 233, 260 (1993).

fulfilled. Galligan, for instance, strongly argues that within the theory of democratic societies, participation is considered of such importance that each person has a right of an abstract political kind to participate in decisions which directly and seriously affect his interests.³¹ He further divides the form of participation into two kinds: (1) participation in the political process (including consultation), and (2) participation in the judicial trial.³² He argues that only through this can the outcome be achieved positively and arbitrariness be ensured against. On the other hand, Kenneth Culp Davis insists that in order to reduce injustice to individuals from the exercise of discretionary power, "agencies through rule-making can often move from vague or absent statutory standards to reasonably definite standards, and then, as experience and understanding develop, to guiding principles, and finally, when subject matter permits, to precise and detailed rules."³³ He thus urges openness as a means for structuring discretionary powers. He sees openness as the natural enemy of arbitrariness and calls for open plan, open policy statements, and open findings and reasons in situations warranting informal discretionary action.³⁴

Admittedly, the suggestions of these two scholars are not easy to achieve, but at least they have pinpointed a correct approach if we really want to have a meaningful democracy. True, even in Western democracies, the problem of controlling administrative discretion with regard to foreign economic and trade

³¹ Galligan, *supra* note 25, p.336.

³² *Id.*

³³ Cited by Rosenblum, *supra* note 24, pp.50-51.

³⁴ *Id.*

policies are not enough. Tumlr and other scholars, for instance, have continually criticised the arbitrary and undemocratic nature of the United States administration in making and regulating foreign trade policy (see below). But this does not mean Taiwan should give up pursuing them. If democracy is the only answer to a better form of governance, one should not be satisfied with achieving the Western standards. Indeed, what we want is a democracy in which the people can express their wishes on all issues which concern the actions of government, and not just the easy part of it.

So the job of the democratisation era in this arena is to substantiate the notions of participation and openness. Viewed from the significance of establishing a democratic tradition, it is the opinion of this writer that the first and the best thing to begin is to let the nation develop its own ideal kind of delegated legislations and discretion by encouraging legislative debates. The reason for this is simple, legislative debate contains the elements of both participation and openness. In practice, for instance, the *Foreign Banks Regulations* and the *Insurance Guidelines* could be submitted as draft bills to the Legislative Yuan for examination. Let the Legislative Yuan decide whether these two regulations are substantively sound, and contextually clear, what sort of guiding principles and rules are necessary, and what amount of discretionary power is appropriate. Indeed, economic efficiency may be at stake, and the Legislative Yuan may thus be jammed with draft bills. But this is not necessarily a bad thing, because it is a democratic phenomenon. And when all this economic inefficiency and heavy workload of the Legislative Yuan has culminated in a certain point, some solution will come out through democratic means. The result

may be that the Legislative Yuan may choose to curtail or further expand the discretionary powers of the Executive Yuan. No matter which result is achieved, at least the democratic principles of participation and openness are fulfilled. This, of course, would further guarantee clearer policies and rules to follow.

What is really unhelpful for Taiwan's democratic process is to employ the Western argument that parliament is incapable of solving the ever-increasing state affairs anyway, and so reach the conclusion that it should be deprived of the power in the first place. This is authoritarianism because it shows no trust and respect to the Legislative branch. If this argument stands, then Taiwan will be transforming from an authoritarian state to a *de facto* authoritarian state because the Executive branch of the "democratic" government is still vested with too many unchecked powers.

Sadly, looking back on the various policy and legal adjustments as a response to the United States, one has to conclude that this undesirable picture was exactly the phenomenon. In the process of meeting United States demands, one sees plenty of U-turn policy changes and a high degree of legal manipulation, all through the exercise of discretionary powers. Adjustments by means of administrative discretion or in the name of delegated legislations explain little to the public about the policy or internal economy but more about the pressures from the United States. Administrative orders and actions are made in an improvised and secret manner, filled with vague rules. In fact, even access to these administrative orders is not available easily, and the argument that the government cannot manage to solve these complex issues through

democratic legislative debates is so deeply implanted to the extent that any effort towards checking or curtailing the Executive powers is deemed unnecessary or unrealistic. This is probably the reason why, after so many years of democratisation, the government is still reluctant to improve the system of monitoring delegated legislation even by following either the British, German, or American system, no matter how unsatisfactory they may be. Obviously, the present system is too good and efficient to abandon.

It may be contended that the enactment of the *Foreign Trade Law* in 1993 was at least a positive development. It showed that the Executive branch was willing to establish a trade regime with a proper statutory basis, and bind itself by the law. Nevertheless, there is still the potential for Executive abuse due to the broad discretionary powers (one of which is the power to set export and import quotas) and, as a result, foreign trade remains basically a managed trade form characterised by a strong Executive.³⁵ Admittedly, this result was partly due to the ignorance of the legislators who failed to notice the tricks enshrined in the Law. But a significant reason is based on the very realistic consideration that countries like United States are not likely to give up their protectionist trade measures through bilateral agreements. Accordingly, even those newly elected legislators who committed themselves to democracy had to agree that the Law be made this way. The way this writer called the "bilateralisation" of trade policy and laws.

³⁵ Chapter 3C.

An authoritarian government does not exist by itself, it is the various attributes that constitute its authoritarianism. Enormous discretionary power which enabled the government to improvise is an important attribute. A refusal to look at the deeper roots of the problem could only achieve a superficial and even hypocritical democratic reform.

4. Individuals' Rights Under the Constitutional Democracy

Perhaps the most distinctive feature of Western constitutional laws is the emphasis on the supremacy of individual rights. In accordance with the principles of a limited government and of protection of individual freedoms, individuals are given the constitutional rights to sue against the government. This notion owes its root to Locke's notion of natural law that the fundamental rights of the people were recognised as being prior to government.³⁶ The spirit of the *United States Constitution* reflects this Lockean idea of natural rights.³⁷ Even in the civil law countries where positive law seems to prevail, individuals' rights are guaranteed by the written Constitutions. With regard to Taiwan, as noted by some scholars, though it followed the civil law tradition, the *United States Constitution* has had strong influence on the making of ROC's

³⁶ This writer draws Locke's theory of government and natural law mainly from Bertrand Russell, *HISTORY OF WESTERN PHILOSOPHY: AND ITS CONNECTION WITH POLITICAL AND SOCIAL CIRCUMSTANCES FROM THE EARLIEST TIMES TO THE PRESENT DAY* pp.584-616 (1946).

³⁷ For an excellent discussion of the relationship between Locke's natural law ideas and American constitutional law and theory, see Richard Ross (ed.), *CORWIN ON THE CONSTITUTION: THE FOUNDATIONS OF AMERICAN CONSTITUTIONAL AND POLITICAL THOUGHT, THE POWERS OF CONGRESS, AND THE PRESIDENT'S POWER OF REMOVAL* pp.119-127, 195-212 (1981).

*Constitution.*³⁸ There is no need to discuss the constitutional history of the ROC here as there are already too many contributions regarding this subject.³⁹ Suffice it to say that the ROC Constitution is based on the Western notions of a constitutional democracy which values individual rights and implies limitations on government powers.

Of course, there are laws to substantiate this constitutional right. In the realm of public law, individuals are allowed to bring suits against the state for damages resulting from the negligent or wrongful acts of the government according to the *Administrative Litigation Law* [Art.1] and the *State Compensation Law* [Art.1]. Moreover, individuals may petition for an interpretation from the Grand Justices Council⁴⁰ if they have unsuccessfully litigated a lawsuit in which a constitutionally protected right is wrongfully infringed.⁴¹ Also according to an interpretation made by the Grand Justices Council, individuals can use the said interpretation as a just cause for bringing a re-trial.⁴² As a result, the

³⁸ Ma, Herbert, "American Influence on the Formation of the Constitution and Constitutional Law of the Republic of China: Past History and Future Prospects," in Ma, Herbert (ed.), *SELECTED ESSAYS ON CONSTITUTIONAL LAW IN COMMEMORATION OF THE BICENTENNIAL OF THE UNITED STATE CONSTITUTION* pp.39-55 (1987).

³⁹ See for instance, Chen, Sheldon S.D., "A Study on the Temporary Provisions of the Constitution of the Republic of China," 13 *Chinese Culture* pp.38-57 (Dec., 1972); Fa, Jyh-Pin, *A COMPARATIVE STUDY OF JUDICIAL REVIEW UNDER NATIONALIST CHINESE AND AMERICAN CONSTITUTIONAL LAW* (1980).

⁴⁰ For a history of ROC's Grand Justices Council, see Fa, Jyh-Pin, "Constitutional Development in Taiwan: The Role of the Council of Grand Justices," 40 *Int'l Com. & L. Q.*, pp.198-209 (Jan., 1991).

⁴¹ Article 4 of the *Law Governing the Council of the Grand Justices of the Judicial Yuan*.

⁴² Interpretation No. 188. In this interpretation, the Council held that, unless otherwise set forth in the text of the interpretation, its interpretations should become effective on the date they were promulgated. Such interpretation should be applied in the immediate dispute at hand and they were promulgated. Such interpretation should be applied in the immediate dispute at hand and they were promulgated. Accordingly, a citizen could rely on the favourable interpretation to seek a similar disputes. Accordingly, a citizen could rely on the favourable interpretation to seek a retrial or extraordinary appeal in accordance with legal procedures. For a discussion of the significance of this interpretation see, Liu, Lawrence Shao-Liang, "Judicial Review and Emerging

function of the Grand Justices Council includes judicial review.

Although there have been a number of cases where individuals have successfully brought claims against the government and the Grand Justices Council seems ready to review economic regulations,⁴³ there was not a single case challenging the foreign trade powers or relevant international agreements or administrative orders of the Executive branch. This cannot be regarded as normal considering the numerous trade agreements and administrative orders which have not only caused substantial economic losses to certain groups in society⁴⁴, but also political unrest⁴⁵. There must have been some reasons that made the legal system so inert in this respect. This writer believes that the reasons include legal as well as political ones.

Legally, two constitutional provisions seem to imply that the government has the power to control and regulate the economy, and the principle of free flow of goods may not be applied to foreign economic and trade affairs. Article 145(III) states that private citizens' productive enterprises and foreign trade shall receive encouragement, guidance, and protection from the state. Moreover,

Constitutionalism: The Uneasy Case for the Republic of China on Taiwan," 39 *Am. J. Comp. L.* p.534 (1991).

⁴³ For instance, in recent years, the Council has made several interpretations striking down administrative actions. In Interpretation No. 210, the Council struck down the implementing rules for an investment incentive statute which limited the types of tax-free interest income by exceeding the statute's requirement. In Interpretation No. 218, the Council opined that a tax regulation of the Ministry of Finance governing the assessment of profit from the sale of property violated Article 19 of the Constitution which stated that taxes be paid in accordance with legislation. See Liu, *Id.* pp.535-536.

⁴⁴ For instance, farmers in the rice agreements, tobacco and wine agreements, and steel workers in the VRA arrangements. See Chapter 4B,3; 4C; and 4E.

⁴⁵ Notably the turkey meat case. See Chapter 4B,2(2).

Article 148 states, "(w)ithin the territory of the ROC, all goods shall be permitted to move freely from place to place". Viewing these two provisions together, it is possible to reach the logical conclusion that restraining the international free flow of goods belongs to the exercise of constitutional power of guiding or protecting private citizens. As such, all those United States - Taiwan economic and trade agreements (rice agreements, and various VRAs etc.) easily escape judicial review.

Of course, an opposite conclusion may be reached if the state holds a more liberal approach in interpreting these two constitutional provisions. That is, the extension and promotion of the concept of free flow of goods, and to eschew attempts to control and regulate directly the pattern and structure of economic activity. More, a judicial channel for remedying the state's wrong policies and laws could be opened. Unfortunately, the recurrent American economic and trade pressures does not allow that. In order to resolve pressures, the state is forced to take up its role as the omnipotent regulator of the economy. Thus, regardless of the fact that Taiwan has entered the democratisation era, and that there is an obvious need for improving the judicial protection of individuals against the state's policies and laws, such a liberal approach to the *Constitution* is still unlikely to be formed.

In addition, an interpretation of the Grand Justices Council seems to reveal the fact that where government actions are based on discretionary powers, the Grand Justices Council is less inclined to strike them down on constitutional

grounds.⁴⁶ As mentioned before, The Executive's foreign trade and economic affairs rely largely on the exercise of discretionary powers. In fact, even the recent *Foreign Trade Law* endorsed this Executive *par excellence*. Accordingly, it seems logical that the Grand Justices Council is reluctant to touch foreign trade and economic issues. This attitude of the Grand Justices Council is consistent with some of the Administrative Court decisions which have the status of precedent.

A series of court decisions made before the 1950s have conferred the administrative organ enormous discretionary powers.⁴⁷ For instance, in a decision made in 1935 (shortly before the outbreak of Sino-Japanese War), the Administrative Court held that anything which is not restricted by law belonged to the discretion of the Executive officialdom. As such, an exercise of discretion may only raise the issue of "appropriateness", but not "legality". Accordingly, the right of claim under Article 1 of the *Administrative Law* (which states that individuals may sue the government for damage arising from its "illegal" action) does not exist.⁴⁸ Taiwanese scholars call this "free discretion" (tzu-yao tsai-liang; 自由裁量), a concept said to be adopted from German administrative law.⁴⁹

⁴⁶ In Interpretation No. 214, the Grand Justice Council upheld several banking decrees halting the further establishment of credit co-operatives, noting that they were within the discretion of the Executive Yuan.

⁴⁷ 22 Pan 1; 22 Pan 3; 22 Pan 4; 24 Pan 73; 31 Pan 62; 36 Pan 39; 43 Pan 14; 45 Pan 31. These cases are collected in *A Complete Book of the Six Laws* (Hsin-pien liu-fa chuan-shu) in abstract form. The law book only excerpts the most important part of the courts' opinion and put them after the relevant articles of the *Administrative Litigation Law*. Facts of the cases are omitted.

⁴⁸ Hsing 24 Pan 73. Translated by the writer.

⁴⁹ Oong, Yuei-sheng, *Lun pu-cheau-ding-fa-liu-kai-nien yu hisn-sheng tsai-liang chih kuan-hsi* ("The Relationship between Unidentified Legal Concept and Administrative Discretion,") in Oong, Yuei-sheng, *Hsin-cheng-fa yu hsien-dai fa-chih kuo-cha (ADMINISTRATIVE LAW AND MODERN RULE OF LAW NATION)* p.63 (1979). Mr. Oong was a former Grand Justice and a law professor of National Taiwan University.

According to this concept, the administrative organ does not exercise its discretion through direct conferment by the legislative organ, but according to its "inherent power" for the pursuit of public interests.⁵⁰ An equally important precedent made in the same period also asserts that the damage as stated in the Law is limited to only direct ones, and does not include indirect ones.⁵¹ The impact of these precedents are far-reaching. They not only permit the Executive to exercise wide discretionary powers without statutory authority and without being subject to the review of the court, but also give individuals extra burdens to prove the existence of direct causality between the state action and damages.

In the case of a clear delegation of power (for instance, Article 47-1 of the *Customs Law*), or the so-called "regulatory discretion" (fa-kuei tsai-liang; 法規裁量),⁵² though it is possible to sue the government for *ultra vires* according to Article 1(II) of the *Administrative Litigation Law*, the possibility of making a successful claim is low. The reason for this is straightforward. Following the civil law tradition, the courts expect accurate statement of right of claim from the plaintiff, and formal documentation as evidence -- practices that made the courts as bureaucratic as the Executive branch. As such, it is simply too difficult to prove that the government had acted *ultra vires*. Probably just another emulation, this is exactly the practice of the Japanese court.⁵³

⁵⁰ *Id.* p.64.

⁵¹ Hsing 28 Pan 38. Translated by the writer.

⁵² Oong, *supra* note 49, p.63.

⁵³ Thomas J. Schoenbaum & Douglas S. Arnold, "Judicial Review of International Law Decisions: A Comparative Study," in Hilf, Meinhard & Petersmann, Ernst-Ulrich (ed.), *supra* note 3, p.500 (1993).

Tumlir has persistently argued that, in the United States, it was the *Carolene Products* case⁵⁴ that created a judicial "double-standard" which culminated in an acquiescence in the administrative power unconstrained by specific guiding standards.⁵⁵ In the case of Taiwan, the result seems to be the same without the emergence of such a landmark precedent.

Politically, perhaps due to the adverse international political situations, Taiwan is more eager to enter into more treaties and international agreements of whatever purpose with foreign countries in order to prove its *de jure* status. Indeed, nothing shows the *de jure* existence of the ROC more clearly than entering a formal treaty with a foreign nation. Under this conception, denying the effect of a treaty or an international agreement on constitutional grounds would seem rather offensive, both to the state's policy and the foreign counterpart. As most of these international treaties and agreements are largely economic ones, it is logical that the court and the Grand Justices Council remain silent on this issue.

⁵⁴ *United States v. Carolene Products Co.*, 304 U.S. 144-155; 82 L.ed. 1234-1243 (1937). The case involved the protection of public health to prohibit the transportation of "Milnut" -- a compound of condensed skimmed milk produced by the Carolene Products in interstate commerce. Carolene Products argued that the statute -- the *Filled Milk Act* -- went far beyond the power of Congress, and hence constituted an invasion of the Tenth Amendment of the Constitution. The Supreme Court, however, opined that prohibition of substitute food product thought to be injurious to health is a matter for the judgment of the legislature and not that of the courts. The Supreme Court also announced that henceforth the Supreme Court would exercise less stringent review over economic-regulatory legislation than over laws touching political rights. The Supreme Court would limit its scrutiny to ascertaining whether it permitted or precluded "the assumption that it rests upon some rational basis".

⁵⁵ See Jan Tumlir, "Economic Policy as a Constitutional Problem, *Fifteen Wincott Memorial Lecture* pp.15-16 (1984).

In addition, as pointed out above, an important attribute of a corporatist state is that a large part of state activity is displaced from the legal arena and occurs within the corporatist structures. Thus, when an international agreement is signed, say for instance a VRA memorandum on cotton, it is up to the competent authority to allocate the limited quotas to the domestic exporters. Any objections or disputes are settled within the domestic realm by the bureaucracy through corporatist arrangements such as informal consultation and mediation. In other words, an individual exporter may challenge the fairness of the government's allocating the quota, but not the legality of the VRA agreement on constitutional grounds.

In sum, in the so-called democratisation era, judicial protection for individuals in the area of foreign trade policies and laws is still lacking due to various legal and political reasons. From a more pragmatic viewpoint, the phenomenon is the price of maintaining a dominant Executive for the purpose of resolving American trade and economic pressures in a convenient and expedient way.

A yet further implication is that the Judiciary is placed in a subordinate position under the Executive. This is due to the fact that the United States has always expected a cooperative manner from Taiwan. Indeed, one only needs to glance at the United States *National Trade Estimate Report on Foreign Trade Barriers* to tell the American's "expectations" on the performance of Taiwan's courts with regard to IPR protection. To put it the other way, the United States government does not expect any rulings of Taiwan's courts contrary to its

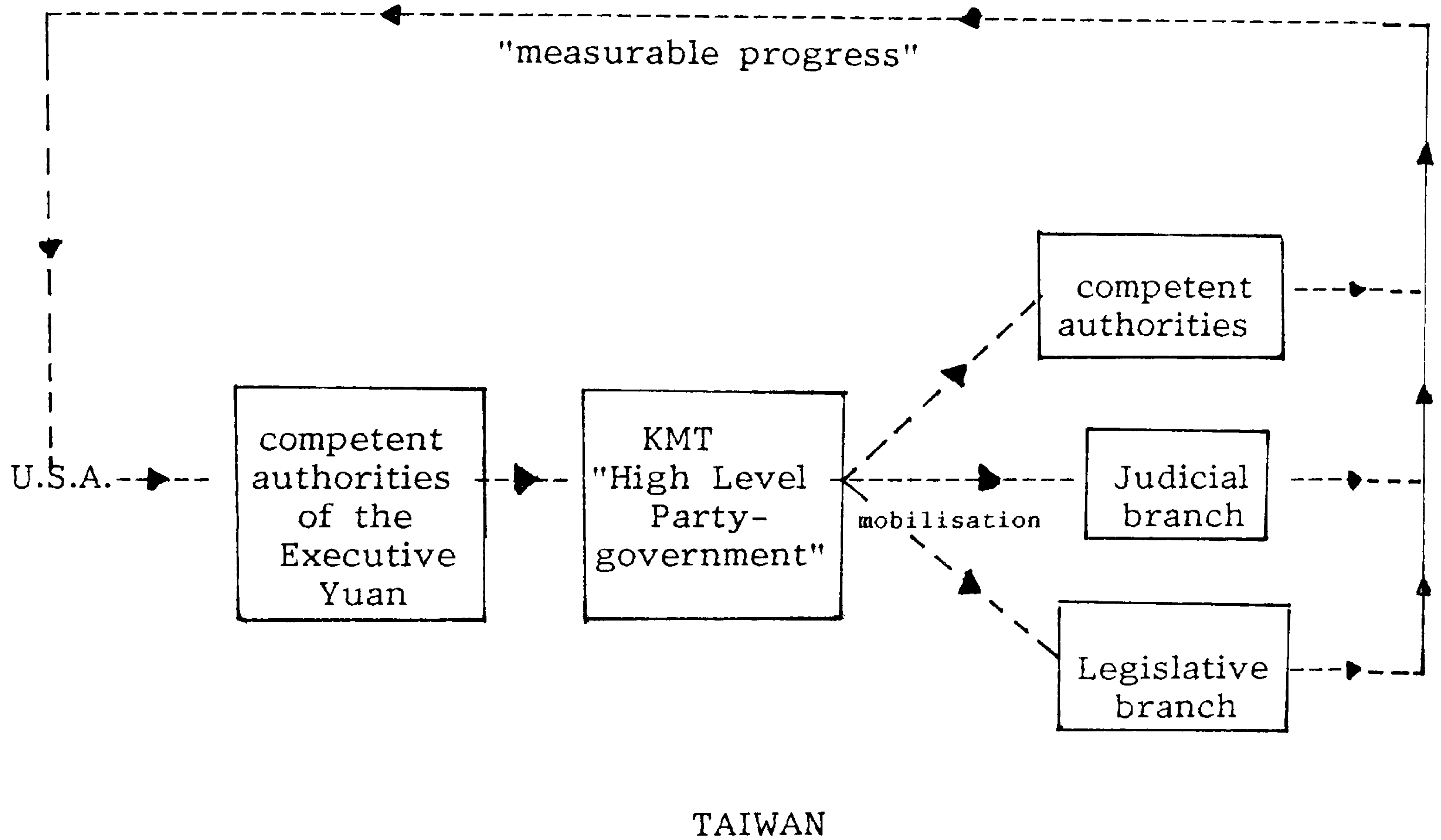
notions of IPR protection -- severe criminal punishment and heavy civil compensation. This message is clearly received by the Executive branch of Taiwan. As such, the party-executive of Taiwan, having received enough pressures and threats, must respond "positively" -- which means directing the courts to fulfil the United States needs. As a matter of expediency, the old practices of issuing "precautionary letters", instructions, and guidelines are employed. I have already discussed the damaging effects of these practices on the Judiciary.⁵⁶ Here, two further points can be added. First, there is the tendency to subject the Judiciary to the Executive permanently. If the Judiciary has opened the door for the party-executive interference in one aspect, there is no reason to believe that it will resist interference in other aspects. Second, there will be never be a day when the people will trust the Judiciary as it has shown itself so vulnerable to the party-executive. Professor Yash Ghai has succinctly pointed out that when confidence in the independence and impartiality of the Judiciary is impaired, a basic source of legitimacy of the legal system disappears.⁵⁷ In the end, the constitutionally designed function of the Judiciary is bound to be totally eradicated, and this process of degrading the Judiciary is seen in our great democratisation era.

⁵⁶ Chapter 6C,1.

⁵⁷ Yash Ghai, "The Rule of Law, Legitimacy and Governance," in Yash Ghai, Robin Luckham & Francis Snyder (ed.), *THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER* p.254 (1989).

C. CONCLUSION -- THE FORMATION OF A POLITICAL CYCLE

In response to American pressures, there is an institutionalised political cycle at work. For the sake of clarity, it is shown in a diagram below.



This political cycle is built on the old authoritarian system under which the party-state takes control of everything ranging from policy and law making to the control of enforcement works. It relies largely on the mobilisation order of the KMT, and the manipulation of KMT bureaucrats (technocrats) to achieve the goals. As such, the constitutionally designed government organs are absorbed into this cycle. Instead of exercising their powers according to the *Constitution*,

they perform the functions of "tools" of the party-executive. Thus, this political cycle not only strengthens the status of the KMT, but also frustrates the institutional re-construction of separating the party from the state, and the establishment of separated powers. As a result, it works at the expense of constitutional democracy.

A significant outcome of this political cycle is that laws and regulations become highly manipulative. This is characterised by the lack of transparency of the administrative law-making process, and the symbolic existence of legislative and judicial control of delegated legislations. On the other hand, as the pressure from the United States government has always been imminent and immense, it provides no opportunity to review whether this "model" of response is constitutionally justifiable. In fact, the reverse seems to happen. That is, since the model proves to be efficient at resolving American pressures, laws must be made to facilitate the exercise of powers by the party-state. And when there are laws (albeit vaguely and badly made) which sanction the behaviour of the party-state, the issue of its constitutionality is officially undermined because those laws are "made" by the properly elected legislatures.

In addition, individuals' rights under the constitutional democracy are insignificant as far as resolving American pressures is concerned. For, more often than not, they are "impediments" to the KMT government in showing its enforcement results to the USTR. Layers of court precedents and practices have not only buried the right to judicial review in this regard, but have also made the court part of the bureaucracy whose job becomes using judicial powers to

"mobilise" the citizens. Therefore, one sees not evolution toward constitutional democracy as many political scientists have claimed, but a trend to the old form of authoritarianism sugar-coated in the beautiful rhetoric of democracy.

CHAPTER 8. TAIWAN IN THE NEW INTERNATIONAL ECONOMIC ORDER

A. INTRODUCTION

Facing American pressures is not a pleasant thing, especially for a government which is so proud of its past achievements in economic and political developments; its vulnerability to hegemonic trade weapons is a negation of its positive image as well as national confidence. Accordingly, seeking solutions which could resolve conflicts with the United States and thus end the constant humiliation by the United States becomes an urgent matter. One way of achieving this is to integrate further into the international economy, and thus become an important part of the new international economic order. Such is not only the view of the government, but also the mission of Taiwan's scholars and international lawyers. This is evidenced by the numerous articles published in both international and Taiwan's journals.¹

In this chapter, we shall analyze two most important proposals. They are, namely, establishing an United States-Taiwan Free Trade Area, and rejoining GATT. These two issues are of particular significance because they have been considered and implemented seriously by Taiwan, and have received responses

¹ See for instance, James V. Feiner, "Taiwan and the GATT," in Silk, Mitchell A. (ed.), *TAIWAN TRADE AND INVESTMENT LAW* pp.45-66 (1994); Wang, Lei, "Separate Customs Territory in GATT and Taiwan's Request for GATT Membership," 25 *J. World Trade*, No.5, pp.5-19 (1991). Tsai, Ing-wen, "The Accession of the Republic of China to the General Agreement on Tariffs and Trade (GATT)", *Soochow University* pp.277-300 (1992); Qin, Ya, "GATT Membership for Taiwan: An Analysis in International Law," 24 *N.Y. Uni. J. Int'l L. & Pol.*, pp.1059-1105 (Spring 1992); Judith H. Bello & Alan F. Holmer, "The GATT Uruguay: Its Significance for U.S. Bilateral Trade with Korea and Taiwan," 11 *Mich. J. Int'l L.*, pp.307-325 (Wint. 1990). For United States- Taiwan Free Trade Area, see Tsiang, S.C., "Feasibility and Desirability of a U.S.-Taiwan Free Trade Agreement," *Industry of Free China*, Vol.LXXI, No.2, pp.1-8 (1989); and Richard V. Allen, "Establishing a Free Trade Area with the ROC," in Roger A. Brooks, *THE U.S.- REPUBLIC OF CHINA TRADE RELATIONSHIP: TIME FOR A NEW STRATEGY* pp.60-71 (1988).

from the United States. They also represent the efforts and willingness of Taiwan to participate in the international economy. Note as the original objective of these two proposals was mainly economic, and partly diplomatic (achieving some kind of *de facto* recognition), the scope of their impact on the democratic process and law were not obvious. In other words, the concern bore no relevance to the bigger problem of the undemocratic political cycle. Nevertheless, this does not mean that these two proposals are purely economic initiatives, they do have their constitutional, legal as well as political implications on Taiwan. As such, they deserve special attention. In this chapter, focus is placed on their relevance in the context of Taiwan's democratic process and law, to see whether Taiwan's integration into the world economy can resolve American pressures on the one hand, and thus dissolve the malign political cycle triggered by United States aggressive unilateralism on the other.

The general observation is far from optimistic. The argument is that a further adherence to a declining economic hegemony, as it would be in the case of establishing an United States-Taiwan FTA agreement, would only subject Taiwan to more *informal control* by the United States. On the other hand, rejoining GATT (WTO), in which the United States has always been the most important promoter as well as violator, can by no means end America's unilateralism. As a result, they are not able to solve the bigger problem of the impairments to Taiwan's constitutional democracy and law.

B. ESTABLISHING UNITED STATES-TAIWAN FREE TRADE AREA (FTA)

According to the official definition of the United States, an FTA is an agreement between two or more countries to remove trade barriers among themselves, but to maintain separate barriers with respect to nonmember countries.² The idea of concluding free trade agreements with America's trading partners originated in the mid-1980s when the Republican government was increasingly dissatisfied with the deficiencies of the GATT mechanism.³ Therefore, it was regarded as a "Secondary Strategy" for liberalisation.⁴ Since then, the United States has concluded free trade agreements with Israel (1985), Canada (1988; 1994), and Mexico (1994).⁵ From this perspective, Taiwan's desire for an FTA at the same time with the United States was nothing but another episode. However, the proposal of United States-Taiwan Free Trade Area was never taken seriously by the United States, though an official assessment (see below) had been made after Taiwan expressed its willingness. As far as Taiwan is concerned, the door to negotiate such an agreement is still open.

Arguments for and against the establishments of United States-Taiwan FTA are not lacking,⁶ but perhaps the most comprehensive and authoritative one was conducted by the United States International Trade Commission (ITC) in March

² *ECONOMIC REPORT OF THE PRESIDENT TRANSMITTED TO THE CONGRESS* p.137 (Jan., 1987).

³ *Id.*, p.125 (Feb., 1985).

⁴ *Id.*

⁵ 1994 *NTE REPORT*, pp.27, 137.

⁶ See *supra* note 1.

1989.⁷ According to the ITC report, the advantages of concluding an FTA agreement were that it would: (1) avoid an "issue by issue" or "piecemeal" approach to handling trade disputes; (2) provide both sides with greater predictability and less acrimony in the bilateral trade relationship through comprehensive consideration of trade issues and establishment of a dispute settlement process for future trade issues; (3) help rectify the trade imbalances; (4) grant the United States the exclusive benefit of Taiwan's tariff reductions; (5) improve United States access to Taiwan's market at a relatively low cost in concession by the United States because Taiwan already enjoyed a high level of access to the United States market; (6) serve as a model for other bilateral FTAs in the region, and provide the United States with an important economic foothold in the region to the benefit of United States trade with other economies of east Asia; and (7) provide a necessary forum for bilateral trade negotiations with Taiwan since Taiwan is not a GATT member and cannot participate in that forum. The disadvantages were that it would: (1) be unnecessary since the current approach is already effective in persuading Taiwan to make tariff cuts and liberalise its market; (2) not end bilateral disputes because there will always be contentious bilateral trade issues to be dealt with, with or without an FTA; (3) allow Taiwan the opportunity to seek an exception to Section 301 sections, or, at a minimum, Taiwan would want special treatment regarding the antidumping and countervailing duty provisions of United States trade laws; (4) require a very long and difficult process for Taiwan's implementation of negotiated changes,

⁷ United States International Trade Commission (USITC), *THE PROS AND CONS OF ENTERING INTO NEGOTIATIONS ON FREE TRADE AREA AGREEMENTS WITH TAIWAN, THE REPUBLIC OF KOREA, AND ASEAN, OR THE PACIFIC RIM REGION IN GENERAL: REPORT TO THE SENATE COMMITTEE ON FINANCE ON INVESTIGATION NO. TA-332-259 UNDER SECTION 332 OF THE TARIFF ACT OF 1930* (March, 1989).

because the Taiwan economy would require significant structural reform; (5) provide the United States with very little expanded market access in Taiwan because of the relatively small size of Taiwan's market; and (6) contain exemptions of certain significant sectors, insisted upon by both the United States and Taiwan. Taiwan, because of structural adjustment problems, would most likely try to exclude sectors of interests to the United States such as agricultural products and services. Similarly, there could be pressure for the exclusion of some United States sectors, such as textiles and footwear, from an FTA. The end result would be that few important sectors would be left for inclusion in the agreement.⁸ In addition, there is also a disadvantage that the ITC report had discussed in detail but not stated in its conclusion: Taiwan's real motivation could be to seek *de facto* diplomatic recognition.⁹

Note that the considerations of the United States are based mainly on two things: comparison with the advantages and disadvantages of bilateral negotiations based on its trade laws; and political reasons. Though the ITC confirms the benefits of establishing an FTA with Taiwan, it seems to imply that the present system is not that unsatisfactory after all. In fact, it is clear that the ITC, as an enforcement organ, had to stick to the section 301 trade policy only just passed by the Congress. In other words, it is not to be blamed because it was not in a position to challenge the law. But it is unconvincing to argue that Taiwan's market was too small for the United States, and was thus not

⁸ *Id.*, vi-vii.

⁹ *Id.* pp. {1-2}-{1-4}.

worthy of establishing an FTA. Israel was in every way smaller than Taiwan, but it was the first country to conclude an FTA with the United States. In addition, the ITC seemed to imply that the "piecemeal" "issue by issue" approach of handling trade disputes with Taiwan, albeit not good enough, was better than an FTA because it would be difficult for Taiwan to implement a structural change. This is not persuasive for, as this thesis has demonstrated from political and legal aspects, Taiwan could not be worse off than under the present approach. More, the ITC suspects that Taiwan's proposal for an FTA contained strong political motive (gaining some kind of diplomatic recognition). In other words, it implies that Taiwan is trying to bypass America's "one China" policy by establishing closer trade relations. This further suggests that under the present situation, it is politically justifiable to maintain the present bilateral negotiation model based on United States trade laws. This excuse simply sounds too expedient and unpersuasive. Bearing in mind that the *Taiwan Relations Act* has already treated Taiwan as a country for the purposes of United States laws [Section 4], Yet, it has caused grave frustration to Taiwan which has tried so hard to democratise its political system and establish the rule of law to show to the world that it is a modern sovereign nation in the Western sense.

While disagreeing with the reasoning of the ITC, perhaps the failure of creating an United States-Taiwan FTA is not an unfortunate case for Taiwan when viewed in the context of Taiwan's national and international situations.

The argument is that though an FTA could avoid piecemeal handling of trade issues, it by no means implies that Taiwan would be exempted from

America's unilateral pressures. On the contrary, the reverse seems to be the case, for it may be argued that a closer trade relations with the United States are likely to subject Taiwan to greater American influence. The problem lies in the unequal strength between the two countries. On the one hand, Taiwan is politically, militarily, and economically a dependent of the United States. But as far as the United States is concerned, Taiwan's significance is mainly trade -- something that can be compromised or even sacrificed for other reasons (political, strategic etc.). So, with or without an FTA, Taiwan would have to behave softly toward the United States anyway. This may be the real reason why America did not take the issue seriously after all these years.

In addition, an FTA with the United States would actually mean certain discriminations against third countries. Note that Taiwan is not a member of any significant international political or economic organisation, an FTA would only pull Taiwan further away from international society, and thus expand, using the words of Professor Diner,¹⁰ the "informal control" of the United States. The result is, therefore, not only economic dependence, but a further loss of ability to shape policies in other aspects and to a greater extent. The implications on Taiwan's democratisation is that this closeness to a hegemony would inevitably limit the degree of participation in the policy-making of state affairs by the people. For a country which has just started to practice democracy, this is certainly not

¹⁰ Professor Diner's theory is based on the refined notion of imperialism which defines modern imperialism as an outflow of value due to a productivity differential between two societies involved in a capitalist process of exchange. Accordingly, the traditional, suprahistorical, and timeless concept of expansion of territorial state, or an empire is discarded. Modern imperialism is thus based on the penetration of capitalism dominated by the United States. The "empire" created is called *Informal Imperia*, and the control over the Third World is called *informal control*. Dan Diner, "Imperialism, Universalism and Hegemony: On the Relationship Between Politics and Economics in the World Community," 39-40 *Law and State*, pp.7-38 (1989).

appropriate. Here, it may be argued that this is not necessarily undesirable, for surrendering part of national sovereignty for mutual cooperation and benefits is actually something to be applauded. Not always; Professor Robert Gilpin has sharply pointed out that in times when the hegemony is suffering from a decline, one has reason to believe that it will be less willing to subordinate its own interests to its allies, and tend more and more to exploit its status for its own narrowly defined purposes.¹¹ Indeed, the ever-increasing aggressive unilateralism of the United States is a reflection of the continual shrinkage of its concern with the international society, and the growing of a self-seeking mentality.

C. REJOINING GATT

On 18 Sept., 1992, Taiwan formally applied for accession to the GATT under the name of the customs territories of Taiwan, Pescadores (Peng-hu Islands) and Quemoy (Kingmen and Matsu Islands).¹² This was a courageous move considering that Taiwan was forced to withdraw its membership in 1950 due to its loss of political control over the Mainland, and had its observer status terminated in 1971 following its expulsion by the United Nations. This time, however, Taiwan re-appeared as a NIC with strong economic strength and spotless international trade records. The application looked optimistic in 1991 when the United States President Bush declared that he would fully support Taiwan's application, and

¹¹ Robert Gilpin, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* p.345 (1987).

¹² GATT Focus, No.109, p.6 (July, 1994); "Taiwan's GATT Application: Working Party Formed," *East Asian Executive Report*, p.8 (15 Dec., 1992).

urge other countries to take the same position.¹³ Presently, the application is still pending because of China's insistence that it should obtain the membership before Taiwan.¹⁴

It is generally believed that if Taiwan becomes a GATT (WTO) member, the biggest advantages are that it will benefit from the MFN treatment and the dispute settlement mechanism.¹⁵ The former would help diversify Taiwan's export markets, thus reducing its trade reliance on the United States. This would further slash its trade surplus with the United States -- the central concern of

¹³ On 19 July, 1991, President Bush sent a letter to Senator Baucus, which stated, "... I share your interest in Taiwan's accession to the GATT. As a major trading economy, Taiwan can make an important contribution to the global trade system through responsible GATT participation. The United States has a firm position of supporting the accession of Taiwan on terms acceptable to GATT contracting parties. The United States will begin to work actively with other contracting parties to resolve in a favourable manner the issue relating to Taiwan's GATT accession..." Cited by Chiu, Hungdah, "Taiwan's Membership in the GATT," 10 *Chinese Yb. Int'l L. & Aff.*, p.204 (1990-91). According to Chiu, the reason that Bush would take such a big step was, however, due to political reason. It was in fact a trade-off by Bush in exchange for the Congress' support for renewing China's MFN status. Traditionally, American Congress has been extremely friendly to Taiwan and hostile to China. Later, Bush did act on what he had promised. He vowed to impose sanctions if China did not agree to support Taiwan's membership to the GATT. See "Bush Takes a Tougher Stance -- Foreign Trade: Human Rights Cast Shadow Over Talks with United States," *Financial Times*, p.III, (16 June, 1992); Sharon Lockwood, "Taiwan's Accession to GATT: A Washington Perspective," 28 *Colum. J. World Bus.*, pp.96-99 (Fall 1993).

¹⁴ GATT Focus, No.94, p.8 (Oct., 1992); "Survey of Taiwan (7): Under Washington's Eye -- Trade," *Financial Times*, p.39 (10 Oct., 1989); "Taiwan's Bid to Join GATT Hands World Trading Body a Hot Potato," *Financial Times*, p.3 (5 Jan., 1990). Chinese (PRC) scholars have different viewpoint on Taiwan's application. See Feng, Yushu, "Taiwan and GATT: The Political, Legal and Economic Issues Raised by the Possibility of Taiwan Joining GATT," 13 *World Economy*, pp.129-143 (1990); and Qin, Ya, "GATT Membership for Taiwan: An Analysis in International Law," 24 *N.Y. Uni. J. Int'l L. & Pol.*, pp.1059-1105 (Spring 1992). Mr. Feng's article, which strongly denies the necessity of Taiwan joining the GATT, is basically an interpretation of the official position of the PRC government. On the other hand, Mr. Qin's work is more practical and analytical. He argues that there is no point in not letting Taiwan become a member of GATT, considering Taiwan is such a big economic entity, and that joining GATT does not necessarily bear any political implications such as "Two Chinas" or an independent Taiwan.

¹⁵ Perhaps it is most appropriate to cite Dr.Tsai's words because she is both a university professor in Taiwan as well as a long-term legal consultant of the BOFT. Her opinion thus more or less represents the stance of the Taiwan government. Dr.Tsai says, "(t)he validity of multilateral treaty is not rested upon the existence of mutual diplomatic recognition among the signatories... When Taiwan becomes a (GATT) member, it will receive most-favoured-nation and national treatment from other members, despite the absence of diplomatic recognition which is normally required in a bilateral context...Taiwanese exporters have been the victims of excessive abuse of administrative measures of foreign governments, which in certain ways amount to non-tariff barriers. Except for taking judicial action in the importing country to rectify such practices, there is little remedy available in the international context. GATT membership will enable Taiwan to make use of the multilateral dispute settlement mechanism of the GATT." See Tsai, *supra* note 1, pp.282-284.

the hegemony. On the other hand, by resorting to the WTO dispute settlement mechanism, Taiwan may no longer need to negotiate on a bilateral basis with the United States, thus eliminating America's trade threats. Assuming, for the time being, that this is true, then logically, all the negative impacts of America's unilateralism on the democratic process and law of Taiwan are likely to come to a stop. Taiwan will then have the opportunity to concentrate on realising constitutional democracy without meeting any obstruction from the United States.

However, this expectation sounds too good to be true. First of all, whether Taiwan can diversify its market depends more on the market demands than the MFN treatment. Due to its huge consumption power, the United States is still the largest market in the world. Based on the established commercial ties between the two countries, an increase in the market demand in the United States is likely to increase its imports from Taiwan.¹⁶ Bearing also in mind many of the GATT members are debt-ridden nations, the only big markets left in the world are the EU and Japan. In other words, the MFN treatment is beneficial to Taiwan because it can be applied to EU and Japan. To date, however, even the United States has problems opening the EU and Japan's markets,¹⁷ not to mention Taiwan's chance of diversifying its market substantially to these two trading blocs. As a result, the MFN treatment may not mean so much as imagined.

¹⁶ For instance, Taiwan has increased its exports to the United States due to its economic recovery in recent years. According to BOFT, the United States is still Taiwan's largest trade partner in 1994, with Taiwan enjoying a trade surplus of US\$ 6.3 billion. Then, in the first four months of 1995, exports to the United States increased another 13.8%. *Central Daily News* (Chung-yang jih pao), p.7 (24 May, 1995).

¹⁷ For instance, just recently, the USTR has decided to take unilateral actions (100% punitive tariffs) against Japanese cars because of Japan's protectionist policy with regard to foreign cars. "Car wars: Mr. Kantor's Outrageous Gamble," *The Economist* (London), p.81 (20-26 May, 1995).

With regard to the dispute settlement mechanism, the future also seems gloomy. Whether GATT (WTO) becomes an internationally binding instrument, and thus foresees a retreat of America's unilateralism on countries such as Taiwan, depends on the attitude of the United States. That is, the United States must commit itself to the new trade rules of GATT reached in the Uruguay Round. More importantly, it should abstain itself from using the trade weapons according to its trade laws. Theoretically speaking, this requires what the "Leadership Theory" called "a hegemony with a liberal commitment".¹⁸

It should be noted that the United States has not made any commitment to the GATT that it would not use its trade weapons any more. On the contrary, it has been the official view of the United States to treat its trade laws (weapons) as complementary to the multilateral framework.¹⁹ Even in the Post-Uruguay Round era, the United States still regards bilateral negotiations as extremely important in opening markets, settling disputes, and protecting United

¹⁸ According to the Leadership Theory or the Theory of Hegemonic Stability, an open and liberal world economy requires the existence of a hegemonic or dominant power. "The hegemony itself must be committed to the values of liberalism or its social purpose and domestic distribution of power must be favourably disposed toward a liberal international order." Only with this commitment that other states would accept the rule of the hegemon because of its prestige and status in the international political system. see Gilpin, *supra* note 11, pp.72-73.

¹⁹ For instance, the United States Administration's 1985 policy statement noted that bilateral negotiations are no substitute for multilateral negotiations, but that "such agreements could complement our multilateral efforts and facilitate a higher degree of liberalisation, mutually beneficial to both parties, than would be possible within the multilateral context". See *supra* note 2, p.137. Then in May 1989, Carla Hills, the then USTR, stated that, "Super 301 and Special 301, like other trade tools at our disposal, will be used to create an ever expanding multilateral trading system based upon clear and enforceable rules." Recited from Jagdish Bhagwati & Hugh T. Patrick (ed.), *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* p.232 (1990). In sum, the United States has never limited its trade policy to GATT activity. When necessary and appropriate, the United States has sought to complement the effective functioning of the GATT with Plurilateral, bilateral, and unilateral undertakings. See Bello, Judith H. Bello & Alan F. Holmer, "The GATT Uruguay: Its Significance for U.S. Bilateral Trade with Korea and Taiwan," *11 Mich. J. Int'l L.*, p.307 (Wint. 1990).

States trading rights.²⁰ In addition, bilateral negotiations are often where new trade issues are first discussed or tested.²¹ Accordingly, as noted by Bello and Holmer, although the United States has agreed to use WTO dispute settlement procedures, it retains domestic legal authority to disregard this obligation when such disregard is warranted in the national interest.²² Thus, Special 301 is still there, while Super 301 was revived in 1994 by President Clinton.²³ In other words, GATT (WTO) membership does not guarantee the disappearance of America's trade threats. To make matters worse, viewed from the rather reluctant attitude of the United States in approving a former Italian trade minister as the director-general of the WTO, one has reason to suspect that the American government has created for itself a perfect excuse to oppose any deals or trade disputes rulings that it does not like.²⁴ This would mean the weakening of the WTO at the outset, and the return to the massive use of its aggressive unilateralism.

The real problem is that it is difficult for the United States to give up its traditional "power-minded" approach towards other countries -- especially to small countries. With this approach, GATT rules will be applied only when they coincide with the American interests, and discarded when they do not. A very undesirable development is that when this approach has become an element in

²⁰ See *supra* note 2, p.231 (Feb., 1995).

²¹ *Id.*

²² Judith H. Bello & Alan F. Holmer, "The Post-Uruguay Round Future of Section 301," 25 *Law & Pol'y Int'l Bus.* pp.1307 (1994).

²³ Super 301 was renewed on 3 March 1994 for another two years. See *Wall St. J.*, p.3 (4 March, 1994).

²⁴ "The WTO: A Rocky Start," *The Economist* (London), pp.122-123 (25 March-31 March, 1995).

economic or foreign relations, there is no ending point to its exercise. Worse, it will be relied upon to achieve other purposes. The most recent example is perhaps the trade sanctions imposed by the United States on Taiwan because of "its lack of progress in eliminating its illegal trade in tigers and rhinoceroses" in 1994.²⁵ Originally the complaint that Taiwan was one of the biggest buyers of tiger bones and rhino horns was raised by a private environmental protection organisation in Europe.²⁶ But as Taiwan was not qualified to become a member of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)²⁷ due to political reasons, and that European countries were reluctant to take actions against Taiwan, the job fell to the United States. So, upon the advice of the CITES -- in which Taiwan was never given a fair forum to speak,²⁸ the Clinton Administration announced trade sanctions according to the Pelly Amendment to the *Fishermen's Protective Act*.²⁹

In order to demonstrate the required "measurable, verifiable and substantial progress" in wildlife protection, the IPR protection story was

²⁵ "President Announces Trade Sanctions Against Taiwan for Illegal Trade in Endangered Species," Office of the Press Secretary, the White House (11 April, 1994).

²⁶ The whole story can be dated back to 1993 when the Environmental Investigation Association (EIA), United Kingdom branch presented a film about the trade and storage of rhino horns in China, Hong Kong and Taiwan. EIA strongly criticised Taiwan as one of the largest buyers of rhino horns in the world. *Central Daily News* (Chung-yang jih pao), p.7 (5 Sept., 1993).

²⁷ CITES was signed in the United States in March 1973, and entered into force in July 1975. The Convention aims at establishing world wide control over all trade in endangered wildlife and wildlife products. Ursula Wasserman, "Washington Wildlife Convention," 14 *J. World Trade*, pp.362-366 (1980).

²⁸ As Taiwan was not a member of CITES, it was not allowed to attend any of its meetings. However, due to the fact that Taiwan was a target this time, it was given an opportunity to participate in the 1994 annual meeting of CITES held in Israel, but in the name of a Non-governmental Organisation (NGO). *Central Daily News* (Chung-yang jih pao), p.7 (30 March, 1994).

²⁹ 22 U.S.C.A. § 1978.

repeated. The KMT government immediately took special enforcement measures to crush the illegal trade in tiger bones and rhino horns, and also symbolically prosecuted some of the sellers.³⁰ In the Legislative Yuan, the KMT mobilised its legislators to pass an amendment to the *Wildlife Conservation Law*,³¹ while the Executive Yuan promised to establish more enforcement organs and personnel.³² All these "achievements" were then presented to the United States in the hope that it would withdraw the trade sanctions. In a nutshell, there is no need to repeat the undemocratic practices and the brutal enforcements arising from these special actions as they are exactly alike to those IPR protection efforts.

This case shows that the United States is keen to use its aggressive unilateralism to deal with Taiwan, because it knows that, according to past experience, Taiwan will bow to it. In other words, when a system works, there is no reason to forsake it. Worse, such a power-based relation is deliberately used by other countries and even private organisations. Western countries have persistently criticised United States trade unilateralism, but then it seems that they are more willing to forget their criticisms and take advantage of America's

³⁰ As soon as the U.S. President announced the sanction against Taiwan, the competent authority, the Council of Agriculture of Taiwan immediately planned a special enforcement action to ban illegal trade in wildlife. From 19 April to 30 April 1994, with the help of the police, a manpower of more than 2,100 had been mobilised to carry out the action on the island. The result was said to be fruitful: of the 5,623 Chinese medicine shops being searched, 15 of them were found selling rhino horn powder (total weight 349 g.), 22 sold tiger bone (total weight 4,420 g.). In other words, 0.66 % of the medicine shops were found to have sold illegal wildlife products, a percentage very much lower than the March Campaign (6.5%). See *Central Daily News* (Chung-yang jih pao), p.7 (5 May, 1994).

³¹ *Central Daily News* (Chung-yang jih pao) p.7 (28 Sept., 1994).

³² They include: (1) to establish a Wildlife Protection Committee; (2) to raise the so-called "Wildlife Protection, Investigation and Supervisory Group" (established in early 1994) to cabinet level; and (3) to increase the number of "wildlife police" (organised in early 1994 with a total number of six) by another one hundred and thirty personnel. See *Central Daily News* (Chung-yang jih pao), p.7 (16 April, 1994).

approach when certain things arise. Nothing can be more hypocritical than to rely on something which is constantly condemned. With this kind of hegemonic mentality, one cannot be optimistic about Taiwan's prospect even if it joins GATT or other international trade agreement.

There is one more potential area of uneasiness with regard to the United States approach towards Taiwan. As a liberal society, the United States has many kinds of production (and consumption) which may not be readily acceptable by other countries. What causes concern is the marriage of these productions to the "blunt-instrument" approach of its trade laws. Just imagine what the situation will be like if Taiwan is forced to legalise and import handguns (already popular in the United States thanks to the promotion of the United States National Rifle Association) under the section 301 pressures? Though the issue is hypothetical, one has reason to believe that it is not impossible if America's trade deficits with Taiwan remains high, and its domestic economy keeps on worsening.

In sum, those who believe that joining GATT would solve Taiwan's trade problems with the United States have simply misplaced their attention. The centre of the problem remains whether the United States is willing to give up its "blunt-instrument" approach which is so deeply-rooted in its trade laws.

D. CONCLUSION

In a very influential book, Alan Wolff writes,

"(t)here is one other aspect of unilateral action worth mentioning. This is that a government, in the final analysis, has a responsibility to its people to protect national interests. In this regard, whether the interest is commercial, environmental, or of a foreign policy nature, it is an attribute of sovereignty that it may well believe that it must act regardless of international approval. True, it may have to pay a price for what others would see as rogue behaviour, although the GATT, like the Pope, has no army. Thus weighing the costs and benefits, any country, including the United States should not consider surrendering the option of acting unilaterally. Agreeing to submit to international rules must have some limits."³³

Wolff's words probably also represent the official conception of the United States government. His argument is straightforward; if international rules violate national interests, then every state has the right to disregard them and create rules of its own, because sovereignty is the highest and untouchable notion. Theoretically, this argument is based on the "dualist doctrine" of international law which suggests that municipal law and international law constitute two distinct and formally separate categories of legal systems. A state can decide to follow international rules or choose to disregard them.³⁴ This doctrine, as pointed out by Antonio Cassese, was inspired by nationalism; it endeavoured to face the reality of international society, but at the same time insisted on relying

³³ Thomas R. Howell, Alan Wm. Wolff, Brent L. Bartlett & R. Michael Gadbaw, (ed.), *CONFLICT AMONG NATIONS: TRADE POLICIES IN THE 1990s* p.583 (1992).

³⁴ Antonio Cassese, *INTERNATIONAL LAW IN A DIVIDED WORLD* pp.19-20 (1986).

on an "emergency exit" in case international law proved to be in harsh conflict with national interests.³⁵ Here, one sees the danger of this view; the identification of sovereignty with power, indeed unlimited power and virtual omnipotence: any social objective announced by the government is attainable by virtue of the sovereign will behind it.³⁶ When this view prevails, interaction of states simply becomes the patternless exercise of power, depending solely on the relative size of the nations in question. In concrete terms, it means that the relatively powerful state will impose its will on the powerless and force the latter to forsake international rules or to interpret them in a way the former seems fit. The result is not only a complete breakdown of the international legal system, but also an involuntary submission to the large state's power. Accordingly, this will work at the expense of the weaker nations.

In addition, Wolff seems to suggest that all nations in the world can behave like the United States whenever they find their national interests being violated. Here, again, we face an unrealistic argument. Just imagine the consequences of Taiwan rejecting the GATT rules and acting on its own? Not only will it face trade sanction by the United States, but also a possible worldwide retaliation -- something Taiwan cannot sustain. Wolff's point certainly cannot apply to Taiwan. Note also the contradiction of suggesting the use of unilateralism by the United States and the right of other countries to reject international norms. For America's trade unilateralism to work, it must involve the accommodation of its

³⁵ *Id.*, p.20.

³⁶ The view of Sir Karl Popper. Cited by Jan Tumlir, "National Interest and International Order," *Fifteen Wincott Memorial Lecture* p.5 (1978).

counterparts, which means the surrendering of their right to reject. On the other hand, if the United States recognises (and thus respects) other nations' right to resist America's unilateralism, then its trade weapon simply would not work.

The point to be emphasised is that as long as the United States holds the position Wolff suggested, the efforts of Taiwan -- the relatively powerless -- to integrate further into the international economic order is bound to be limited, for there is a hegemony which is too ready to preserve its own version of "national interests" at the expense of others'.

PART IV. CONCLUSIONS

CHAPTER 9. LESSONS FROM TAIWAN: CONCLUSIONS AND IMPLICATIONS

What conclusions may we draw from this study? And what does this study suggest about the prospects of Taiwan's democratisation and law? What lessons have we learned from it? This chapter seeks to summarise all the arguments that I have established, and to discuss some of the implications that the main theme of my argument has carried.

From the *economic* viewpoint, almost all United States-Taiwan trade and economic arrangements violate the basic principles of free trade -- principles that these two capitalist nations unequivocally support. More often than not, they are counter-productive, and have beget other fundamentally flawed policies on the part of Taiwan. The economic consequences have also caused a transnational redistribution of resources. Many of the American domestic problems are exported to Taiwan through various kinds of bilateral agreements reluctantly made. Liberalisation or opening of Taiwan's market is associated with coercion on the part of the United States. When it has become a significant policy of Taiwan to accommodate American demands, economic efficiency is often not the point under consideration.

From the *legal trade policy* viewpoint, the paramount goal of Taiwan's trade policies and legal measures is to secure the "friendly" relations with the United States. Trade frictions with the United States must be avoided at all costs. In

the circumstances, Taiwan's trade policies are made to secure and serve its future relations with the United States. However, as the making and implementation of these policies were conducted under American pressures, the whole process was filled with bureaucratic improvisation, broad and unchecked administrative discretion, and massive violation of laws and legal principles. Regulations in the form of delegated legislations proliferated without being subject to meaningful control; while even courts are required to yield certain expected performances which necessarily impair the legal system. As such, individuals' right of judicial protection under the *Constitution* is also compromised.

From the *domestic-political* viewpoint, commitments on the part of Taiwan means full support of the parliament and the courts. On many occasions, it ultimately requires the involvement of the KMT to mobilise the nation's resources, including the citizens. Government and society are, by necessity, unified and led by the "High Level Party-government" to take uniform actions. Eventually, a political cycle is formed to deal particularly with American pressures. This cycle is characterised by quick KMT-dominated "black-box" decision-making, and *ad hoc* mobilisation of the state -- all remains of authoritarian corporatism. It severely restricts the burgeoning democracy that comes out of the transition process, for the operation of which necessarily undermines the proper functioning of the Legislative branch. In sum, the political cycle is extremely hostile to Taiwan's democratisation. As a result, public discontent continues to generate; while the

United States is still dissatisfied with the Taiwan government's "protectionist" policy.¹ In the end, it has become a government that pleases no one.

The preceding consideration suggests that American pressures are undermining Taiwan's *constitutional* and *democratic* development. All these events and responses have made the Western-based *Constitution* of 1947 unworkable from both functional and institutional aspects. In fact, it has rendered the establishment of constitutional democracy a contradictory effort. Under these conditions, the government may still be regarded as effective in the sense that it is quick to respond to foreign pressures. But it is far from true to say that the responses are made in accordance with democratic principles and the rule of law. As a matter of fact, one can be sure to pass a judgment that Taiwan can never have a meaningful and functional constitutional democracy unless the United States abandons its present approach towards Taiwan. Professor Jagdish Bhagwati, when commenting on the retaliatory nature of the American Trade Act, says, "the United States trade threats can only be successful in countries where there is no proper democracy because the government need not worry about popular resentment at giving in to American bullying."² We may further elaborate his point here, by arguing that it is the United States trade threats that lead to the undemocratic practices of the government.

¹ Even after so many years of accommodative policy, Taiwan is still regarded as a protectionist trading state, and is reluctant to meet GATT requirements. A United States official thus concluded that, "aggressive anti-protectionism is the best way for Taiwan to acquire the political capital that it needs to accede to GATT." Sharon Lockwood, "Taiwan's Accession to GATT: A Washington Perspective," 28 *Colum. J. World Bus.*, p.99 (Fall 1993).

² "It's the Process, Stupid!" *The Economist* (London), p.89 (21 March 1993-2 April 1993).

The practice of responding to United States pressures thus suggests the revival of old authoritarianism in Taiwan, which is characterised by a strong party-state dominating both policies and law. Moreover, it is sanctioned by the United States for it always works in its interests, even at the expense of Taiwan and the situation is not likely to change even if Taiwan becomes a member of GATT (WTO). For the whole problem lies with the United States which presents itself as a victim of Taiwan's illiberal trade policies, laws and practices rather than as a beneficiary of unequal trade relationships. Although it is undeniable that in certain sense, Taiwan is democratising itself, it would be wrong to say that the policies of the government in Taiwan are leading towards constitutional democracy.

Several implications can be drawn from my conclusion. First, my analysis and conclusions inevitably concur with the "globalist" approach to national development. The essence of globalism is that it emphasizes the interpenetration power of the supranational structure in shaping national destinies.³ The supranational level itself is, in turn, more strongly organised by powerful states and multinational corporations.⁴ In this thesis, I have demonstrated that the link between American economic pressures and the internal legal-political system of Taiwan does exist. The most notable point with regard to Taiwan is that, due to its special international political status and the intriguing relations with the United States, the supranational structure can be comfortably narrowed down

³ Edwin A. Winckler, & Susan Greenhalgh, (ed.), *CONTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN* pp.22-23 (1988).

⁴ *Id.*

to the United States and American multinationals. While there seems to be a theoretical problem in explaining why trade with the American hegemony prospers Taiwan, the insight of this theory lies in the impact of the supranational structure on law and politics on the island. Accordingly, we may further expand Stephan Haggard's viewpoint by suggesting that not only do external forces have significant influence on the shaping of national policy,⁵ they also have vital consequences on national legal and political structures.

This observation further implies that a wide spread of international capitalism works to the detriment of domestic democracy of the "latecomers". This, in turn, would mean that Francis Fukuyama's evangelistic perception of "the end of history"⁶ is nothing but a myth. For most of the countries in the world have not yet achieved democracy and economic development. Nor is the "modernisation theory", which suggests that by following the "path" of those industrialised nations, a Third World nation can eventually upgrade itself and become a modern state, accountable. True, past experience of other nations is precious, but it would be ridiculous to assume that the present world economy is friendly to the "modernisation" of developing states.

As a matter of law, this opinion is not entirely new, for there is an international law theory which claims that international law is a system of power

⁵ Stephan Haggard, *PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN THE NEWLY INDUSTRIALISING COUNTRIES* p.21 (1990).

⁶ In his book *THE END OF HISTORY AND THE LAST MAN*, Francis Fukuyama remarkably argues that liberal democracy as a system of government had emerged throughout the world, and has constituted the "end point of mankind's ideological evolution" and the "final form of human government", and as such, constitutes the "end of history". Francis Fukuyama, *THE END OF HISTORY AND THE LAST MAN* p.xi (1992).

which operates against the developing and the underdeveloped nations.⁷ However, this observation is very different from traditional international law teaching in Taiwan where international law is said to be composed of fixed, recognised, and neutral principles and rules governing nation states. Here, I do not need to elucidate further the danger of holding this traditional approach: that it tends to separate international issues from domestic ones, and thus overlooks the significance of foreign influence on the national legal and political system.

The current problem is not that we do not have rules, on the contrary, we have too many rules. Unfortunately, many of these rules are based on ill-founded or even unsettled legal principles and practices, most of them are either unilaterally created by big states for their own sake, or through unequal bilateral agreements. Worst of all, when these rules and principles are found to be insufficient, big states improvise or forget them. So do small states as a response to big states' demands. Today, America's aggressive unilateralism has become a significant part of international economic relations and, whether other countries like it or not, it co-exists with the multilateral trade framework (GATT/WTO). This means that conflicts of different scale (depending upon the size of America's counterparts) would arise and thus further push the fragile GATT/WTO into a corner. In a world of this kind, we simply cannot foresee

⁷ Antonio Cassese, *INTERNATIONAL LAW IN A DIVIDED WORLD* p.119 (1986); Osvaldo Sunkel, "Transnational Capitalism and National Disintegration in Latin America," in Yash Ghai, Robin Luckham & Francis Snyder (ed.), *THE POLITICAL ECONOMY OF LAW: A THIRD WORLD READER* p.283 (1989).

"perpetual peace" as suggested by Immanuel Kant.⁸ Instead, what we may reasonably predict is the survival of the natural impulse of the love of power which leads the strong to oppress the weak, and big states to interfere with small states,⁹ something which is contrary to the United Nations Charter.¹⁰

⁸ According to Kant's "perpetual peace", the establishment of democracies in the world is a natural tendency. Once established, democracies will lead to peaceful relations because democratic governments are controlled by the citizens and therefore will not enter into violent conflict that may subject the citizens to bloodshed and war. Georg Sorensen, *DEMOCRACY AND DEMOCRATISATION* p.92 (1993).

⁹ Bertrand Russell, *ROADS TO FREEDOM* pp.9-10 (1954).

¹⁰ The preamble of the Charter of the United Nations reads, in part, "WE THE PEOPLE OF THE UNITED NATIONS... determined to reaffirm our faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small....AND FOR THESE ENDS to practice tolerance and live together with one another as good neighbours..."

APPENDIX I. POLITICAL LIBERALISATION AND DEMOCRATISATION IN TAIWAN
1982-1992 (Table 3)

YEAR	MAJOR EVENTS AND EFFORTS CONDUCTED BY THE KMT GOVERNMENT
1982	Both Amnesty International and Freedom House reported gains in human rights and a liberalization of political atmosphere.
1983	New electoral law was passed, but which still limited political campaigns. The opposition argued for the end of martial law and democratic politics.
1984	Cabinet reshuffle leading to more native born Taiwanese ministers and younger officials.
1985	Cabinet reshuffled again due to a major financial scandal caused by a KMT parliamentarian.
1986	A civilian was appointed as Defense Minister. Democratic Progressive Party was formed and tolerated by the KMT government.
1987	Lifting of the <i>Emergency Decree</i> (martial law), and the Replacement of which by the <i>National Security Law</i> ; opposition political parties formed; political prisoners released; ban on newspaper registration repealed.
1988	Reopening of new newspaper registration; enactment of the <i>Law on Assembly and Parade</i> .
1989	Amendment to the <i>Law on the Election and Recall of Public Officials</i> ; enactment of the <i>Law on the Organisation of Civic Groups</i> (which legalised the formation of new political parties); enactment of the <i>Law on the Voluntary Retirement of Senior Parliamentarians</i> ;
1990	First Constitutional Amendment.
1991	Ending of the Period of Suppression of Rebellion; Second Constitutional Amendment.
1992	Second Constitutional amendments; comprehensive re-election of parliamentary members.

Sources: Albert P. Blaustein & Gilbert H. Flanz (ed.), *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: Taiwan Vol. XIX* (1994).

APPENDIX II. MAJOR TRADE ISSUES OF UNITED STATES-TAIWAN BILATERAL NEGOTIATIONS 1982-1993 (Table 4)

YEAR	ISSUES
1982	tariff reductions on agricultural products (beef, maize can, orange juice, apples, frozen chicken etc.); Taiwanese rice exports and pricing; importation of petro-chemical products; American tariffs reduction on mushrooms; GSP on textiles; export of shoes to the United States and remedies; trademark and patent counterfeits.
1983	general consultation on industrial property rights (copyright not included) and enforcements.
1984	tariff reductions; custom valuation; GSP status review; remedies for steel imports under the United States trade law; importation of chemical products to Taiwan; trade dispute arbitration institution; pro-American procurement arrangement; trademark, patent, copyright protection; and unfair competition.
1985	tariff reductions; implementation of Taiwan's new custom valuation system; opening of insurance and leasing markets; importation of American films; importation of certain chemical products; lifting of restrictions on animal offals; review of US-Taiwan Rice export agreement; importation of tobacco, wine and beer; enactment of fair trade law; patent and copyright protection.
1986	VRA on machine tools and textiles; relaxation of limitations on foreign banks; pro-American procurement arrangement; importation for certain agricultural products (animal offals, pears, peach, peanuts); opening of insurance and leasing markets; simplification of custom inspection procedure; import quota on American films; labour welfare; and amendment to <i>Patent Law, Copyright Law, and legislation of Fair Trade Law.</i>
1987	VRA on textiles; amendment to <i>Patent Law, Trademark Law, Copyright Law, legislation of Fair Trade Law,</i> and signing of U.S.-Taiwan Bilateral Industrial Property Right Agreement.
1988	exchange rate adjustment (NT\$ appreciation); amendment to Copyright Law; protection of MTV; specific patent issues (micro-organism patent, shift of burden of proof in <i>Patent Law, enforcement etc.</i>), and enactment of <i>Fair Trade Law,</i> drafting Copyright Protection Agreement.

1989	tariff reductions; importation of American turkey parts and ducks; enforcement concerning VRA on machine tools; trade distorting practices on steel trade; enforcement details regarding VRA on textiles; strategic trade controls; protection of patent, trademark, copyright, semi-conductor chips and MTV.
1990	tariff reductions; import licensing; commodity tax; standards, testing, labelling, and certification; government procurement; service sector (insurance, entry and distribution of foreign films); investment barriers; monopoly practices (production and distribution of alcohols and tobacco, telecommunication etc.); and intellectual property protection;
1991	tariff reductions; import licensing; commodity tax; standards, testing, labelling, and certification; government procurement; service sector (insurance, entry and distribution of foreign films); investment barriers (monopoly practices in the production and distribution of alcohols and tobacco, telecommunication etc.); and intellectual property protection;
1992	tariff reductions; import licensing; commodity tax; standards, testing, labelling, and certification; government procurement; service sector (insurance, banking, securities, maritime, motion pictures); copyright; cable TV regulation; integrated circuits; and trade secrets protection; enforcement procedure and efficiency.
1993	tariff reductions; import licensing; commodity tax; standards, testing, labelling, and certification; government procurement; service sector (insurance, banking, motion pictures, contracting etc.); investment barriers (monopoly practices of alcohols and tobacco, and telecommunication); copyright issues (particularly parallel imports), and cable TV.

Sources: USTR, *NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS* (1986-1994); BOFT, *Wo-kuo 78 nien duai-wei mau-i tsa-shang tan-pan chi-yau* (A SUMMARY OF ROC'S EXTERNAL TRADE CONSULTATION IN 1989) (classified material, 1990); and Yen, Ching-chang, *Chung-mei ching-mau tan-pan yau-kuan fa-lu wen-te chi yen-chiu* (A STUDY OF THE LEGAL ISSUES REGARDING US-TAIWAN TRADE NEGOTIATIONS) (CEPD, Executive Yuan, ROC) (Taiwan, 1988).

APPENDIX III. TAIWAN'S IPR LEGISLATIVE CHANGES (Table 5)

YEAR	ENACTMENTS AND AMENDMENTS
1985	<p><i>Trademark Law</i>: advertising or promoting the trademarked goods are deemed as trademark in use; protection of non-registered "well known foreign trademark"; granting non-recognised foreign companies' right to sue in the courts of Taiwan; establishment of special court; increase penalty for trademark counterfeits.</p> <p><i>Copyright Law</i>: comprehensive amendments including the inclusion of Computer programs as subject matter of copyright; non-recognised foreign companies' right to sue.</p>
1986	<p><i>Patent Law</i>: expand the scope of patentable subject matter to include new species of animal, plants and micro-organisms; medical products; chemical products; and some process patents etc; shift of the burden of proof: i.e. a product identical with the product made by a patented manufacture process shall be inferred as having been manufactured by the same patented process; granting non-recognised foreign companies' right to sue in the courts of Taiwan; imposition of heavier punishments for patent infringements; establishment of special courts.</p>
1989	<p><i>Trademark Law</i>: redefining the "interested parties" of trademark; forfeiture of counterfeiting products. <i>Copyright Law</i>: the signing of Copyright Agreement.</p>
1990	<p><i>Copyright Law</i>: expand the scope of copyright violations; increase penalty for copyright infringements.</p>
1992	<p><i>Fair Trade Law</i>: protection against dilution of trademark, false indications, unrecognised U.S. companies right to sue.</p>

1993	<p><i>Copyright Law</i>: prohibition of parallel importation; retrospective protection of U.S. motion pictures; extension of the duration of copyright.(e.g. 30 years for motion pictures); establishment of minimum monetary compensation for copyright infringement.(i.e. 500 times the actual retail price of each of the infringed works); establishment of copyright intermediary (brokerage) organisation;<i>Trademark Law</i>: priority rights; relaxation of trademark licensing; increase fine penalty for violation of trademark rights; define service mark and its usage etc; <i>Cable TV Law</i>: new legislation.</p>
1994	<p><i>Patent Law</i>-- comprehensive amendment: priority right based on reciprocity; clarifying the patent right between employer and employee; defining the scope of "new utility model" and "new design"; delegate MOEA to make regulations for encouraging inventions etc.</p>

Sources: *A Complete Book of Six Laws (Hsin-pien liu-fa chuan shu)*; LEGISLATIVE YUAN GAZETTE (1992-1993); MOEA, *PATENT LAW OF THE ROC* (May, 1994).

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