

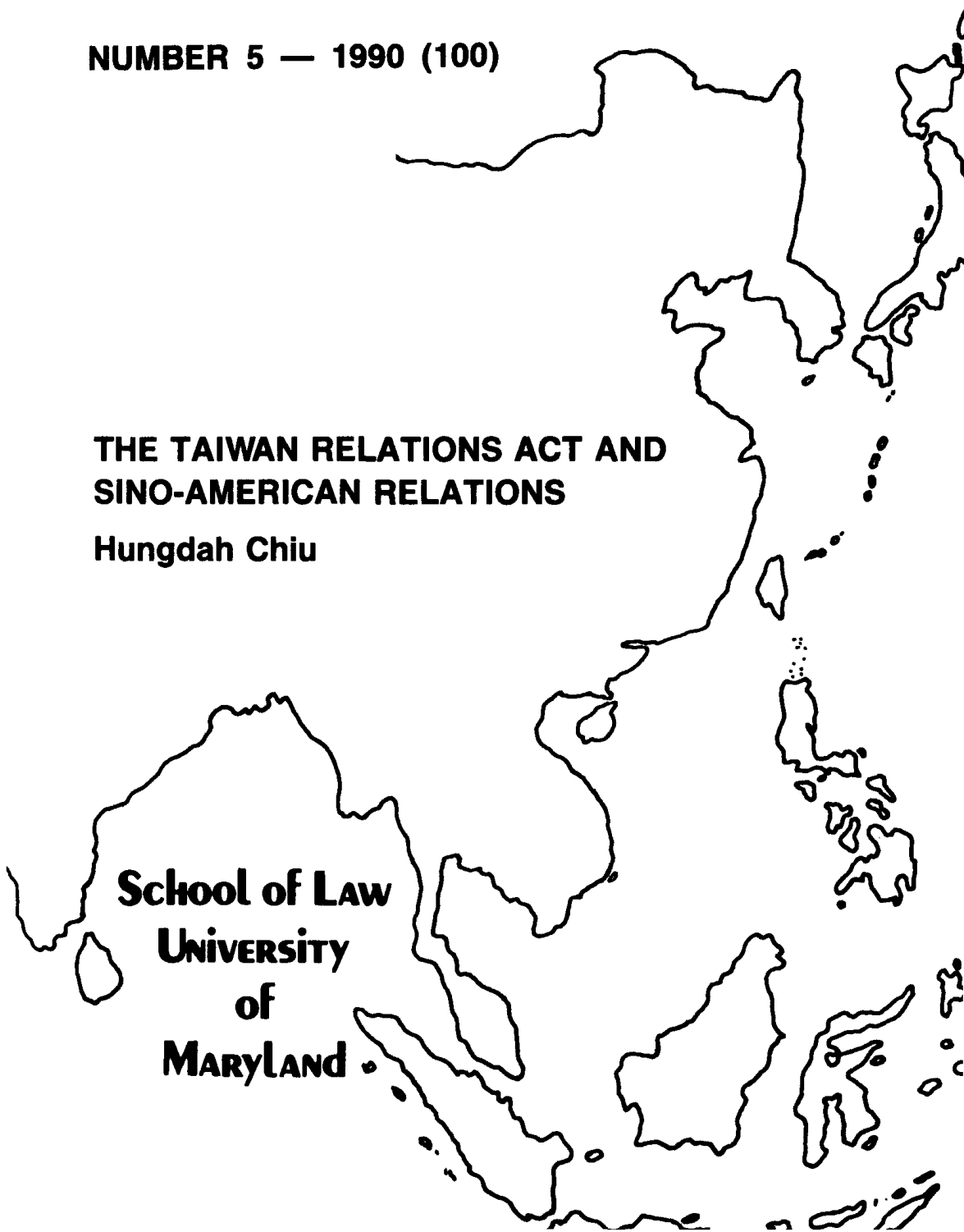
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**THE TAIWAN RELATIONS ACT AND  
SINO-AMERICAN RELATIONS**

**Hungdah Chiu**

**School of LAW  
UNIVERSITY  
of  
MARYLAND**



***Occasional Papers/Reprint Series  
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*Hungdah Chiu\**

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## I. INTRODUCTION

On January 1, 1979, the United States, for the first time in the history of American diplomacy, de-recognized and severed diplomatic relations with a friendly country and a long-time ally—the Republic of China (ROC). At the same time, the United States decided to recognize and establish full diplomatic relations with the People's Republic of China (PRC),<sup>1</sup> which had sent more than one million military personnel to intervene in the 1950-1953 Korean War and provided massive aid to North Vietnam to assist the latter's intervention in the Republic of Vietnam. These actions contributed to thousands of American casualties from those U.S. forces who were sent to help the Republic of Korea and the Republic of Vietnam repel aggression. Moreover, in recognizing the PRC, President Jimmy Carter accepted the PRC's three conditions for establishing diplomatic relations: severance of diplomatic relations with Taiwan; abrogation of the mutual defense treaty with Taiwan; and, withdrawal of U.S. troops from Taiwan. He did not get a promise from the PRC on the non-use of force against Taiwan. President Carter's decision disturbed the conscience of the American people and their elected representatives—the Congress of the United States. Public opinion in the United States before President Carter's recognition of the PRC clearly demonstrated that the PRC's three conditions for accepting the U.S. recognition were unacceptable. A poll conducted by Harris-ABC News survey between June 27 and July 1, 1978, indicated that by a 66 to 19 percent margin, Americans were opposed to a U.S. withdrawal of recognition of the ROC government in Taiwan, and by 64 to 19 percent an almost identical majority wanted the United States to maintain its Mutual Defense Treaty with the ROC.<sup>2</sup>

On the Congressional side, a poll conducted by the American Conservative Union (ACU), released on October 12, 1978, indicated that 56 senators were opposed to the severance of diplomatic relations and the termination of the mutual defense treaty with the ROC, as conditions for normalizing relations with the PRC. Eight other senators were leaning toward such a policy. Only 3 senators favored accepting the PRC's conditions, while 23 were undecided and 9 refused to answer the poll.<sup>3</sup> An earlier poll by the ACU showed that 264

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1. The Joint Communiqué on Establishing Diplomatic Relations between the PRC and the United States was released on December 15, 1978 and entered into force on January 1, 1979. "East Asia: U.S. Normalizes Relations with the People's Republic of China," *Department of State Bulletin*, Vol. 79, No. 2022 (January 1979), p. 25.

2. Released on September 11, 1978 (ISSN 0046-6875).

3. Information supplied by the American Conservative Union.

members of the House opposed any change in U.S.-ROC relations, while only six favored accepting the PRC's conditions; the remaining members were undecided or refused to answer the poll.<sup>4</sup> On September 12, 1978, Congress, by an overwhelming majority, also adopted the Dole-Stone Amendment to the International Security Assistance Act of 1978 Concerning the Mutual Defense Treaty with the ROC. The Amendment states that "it is the sense of the Congress that there should be prior consultation between the Congress and the Executive Branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."<sup>5</sup>

After President Carter's December 15, 1978 announcement of his decision to recognize the PRC on January 1, 1979, at the expense of de-recognizing the ROC, more than 80 percent of the general public's letters, cables, or phone calls to the White House expressed disapproval of the President's act, especially his failure to assure the security of Taiwan. A *New York Times*-CBS survey conducted the weekend after President Carter's December 15 announcement found that Americans opposed closer ties with China at the expense of Taiwan by a 45 percent to 27 percent margin. The same poll found the public believing that the PRC would benefit more from increased trade than the United States.<sup>6</sup> Even after more than a month of publicity and explanation by the Carter administration, a substantial plurality of the American people still disapproved recognizing the PRC at the expense of relations with Taiwan by a 46 percent to 32 percent margin, according to a *New York Times*-CBS survey conducted from January 23 to 26, 1979.<sup>7</sup> Many members of the Congress also criticized the secret diplomacy of President Carter, his unilateral decision to terminate the security treaty with Taiwan, and his failure to provide assurance for Taiwan's security.

According to the Constitution of the United States, it is the President's sole power to recognize and to establish diplomatic relations with a foreign country or its government.<sup>8</sup> Despite the public and

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4. *Ibid.*

5. Section 26 of Public Law 95-384, September 26, 1978. *United States Statutes at Large*, Vol. 92, Part 1, p. 746.

6. Associated Press, Washington, D.C., "Chinese concession reported," *The Sun* (Baltimore), January 5, 1979, p. A4.

7. "Poll Finds 46 Percent Still Oppose Ties with China at Taiwan's Expense," *New York Times*, January 29, 1979, p. A8.

8. Article II, Section 3 of the U.S. Constitution provides that the President "shall receive ambassadors and other public ministers. . . ." This power, as commented on by a scholar, "carries with it the power to recognize new governments or to refuse them recognition." Edward S. Corwin, *The Constitution and What It Means Today*, revised by Harold

Congressional disapproval of President Carter's policy of de-recognizing the ROC, there was no way for the Congress to overturn the President's decision. However, through its legislative power, Congress enacted the Taiwan Relations Act (TRA) of 1979,<sup>9</sup> which essentially maintained the substance of relations between the United States and the ROC. This paper begins with a review of important events leading to President Carter's decision to recognize the PRC and Congressional adoption of the TRA; then to analyze the TRA within the context of international law and relations, the *de facto* amendment of the TRA by the U.S. executive branch in 1982, subsequent efforts by the executive branch to remove the undesirable impact of the *de facto* amendment on Taiwan, and the unexpected influence of the TRA on the reduction of tension between the ROC and the PRC. The final part of this paper will make an overall assessment of the TRA as a substitute for formal diplomatic relations and also deal with certain future problems in implementing the TRA in light of recent political development in Taiwan.

## II. THE DE-RECOGNITION OF THE REPUBLIC OF CHINA

On July 15, 1971, after a secret visit by Secretary of State Henry Kissinger to Peking, President Nixon suddenly announced that he had reached agreement with Premier Chou En-lai to visit the PRC at an appropriate date before May 1972 for the purpose of seeking "the normalization of relations between the two countries and also to exchange views on questions of concern to the two sides."<sup>10</sup> Many interpreted Nixon's move as one that would ultimately lead to the abandonment of the ROC by the United States. The term "normalization" was simply the euphemism for the "recognition and establishment of diplomatic relations."

On February 27, 1972, when President Nixon concluded his visit to the PRC, a joint communique was issued at Shanghai; this historical document has usually been referred to as the Shanghai Communi-

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W. Chase and Craig R. Ducat, 13th ed., Princeton, New Jersey: Princeton University Press, 1973, p. 148.

9. Public Law 96-8, 22 U.S.C. § 3301 to § 3316, reprinted in *International Legal Materials*, Vol. 18 (1979), pp. 873-877; Hungdah Chiu, ed., *China and the Taiwan Issue*, New York: Praeger, 1979, pp. 266-275 and Lester L. Wolff and David L. Simon, eds., *Legislative History of the Taiwan Relations Act, An Analytic Compilation with Documents on Subsequent Development*, New York (now Columbus, Ohio): American Association for Chinese Studies, 1982, pp. 288-295.

10. "Transcript of the President's Statement," *New York Times*, July 17, 1971, p. 4.

que.<sup>11</sup> This document is peculiar in diplomatic history because it states, in the words of Nixon, “frankly the significant differences between the two sides on major issues rather than smoothing them over.”<sup>12</sup>

With respect to the question of Taiwan, the PRC stated its claim of being the sole legal government of China and its conviction that Taiwan was a province of China. It asserted that the liberation of Taiwan was China’s internal affair in which no country had a right to interfere and demanded that all American forces and military installations be withdrawn from Taiwan. The Communique concluded by stating that “the Chinese government firmly opposes any activities which aim at the creation of ‘one China, one Taiwan’, ‘one China, two governments’, ‘two Chinas’, an ‘independent Taiwan’ or advocate that ‘the status of Taiwan remains to be determined’.”

The wording of the U.S. section on Taiwan avoided a clash by stating simply: “The United States acknowledge that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States government does not challenge that position. It affirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.” The United States also stated its ultimate objective of withdrawing American troops from Taiwan but did not put any final date on that withdrawal, and it agreed in the meantime to reduce its forces and installations on Taiwan progressively “as the tension in the area diminishes.”

Despite the disagreement on the Taiwan problem, both the PRC and the United States agreed on improving their trade, cultural exchange, and other relations and they also agreed to move toward the normalization of relations. According to a reliable PRC source, Nixon promised the PRC that he would normalize relations in his second term,<sup>13</sup> i.e., after 1976, though Nixon’s memoirs do not confirm this.<sup>14</sup>

In February 1973, Secretary of State Henry Kissinger visited the PRC again. He told the Chinese authorities that the United States was prepared to “fully normalize relations with China along the Japa-

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11. *Peking Review*, Vol. 15, No. 9 (March 3, 1972), p. 5 and Department of State Bulletin, Vol. 64, No. 1708 (March 20, 1972), pp. 435-38.

12. *The Memoirs of Richard Nixon*, New York: Grosset and Dunlap, 1978, p. 576.

13. *Tang-tai Chung-kuo wai-chiao* (Diplomacy of Contemporary China), Peking: Chinese Social Sciences Press (for internal circulation), 1987, p. 225. This book is part of the “Contemporary China Series” and is in the nature of officially compiled contemporary history.

14. See *The Memoirs of Richard Nixon*, *supra* note 12, pp. 570-580.

nese formula [see below],” i.e., to establish diplomatic relations with the PRC, while maintaining people-to-people relations with Taiwan.<sup>15</sup> After the visit, Kissinger announced on February 23, 1973 that the United States and the PRC agreed to establish a “liaison office” in each other’s capital. Each “liaison office,” Kissinger said, “would handle trade as well as all other matters except the strict formal diplomatic aspects of the relationships.” Although “not a formal diplomatic office,” it “would cover the whole gamut of relationships,” he emphasized, and its personnel would have diplomatic privileges and immunities and facilities for communicating with their home country in code.<sup>16</sup>

In May, the United States and the PRC opened their respective liaison offices. The United States appointed David Bruce, one of the most distinguished American ambassadors, as chief of the liaison office in Peking. The PRC appointed Huang Chen, former PRC ambassador to France and then the only Chinese diplomat with membership in the Central Committee of the Chinese Communist Party, as chief of liaison office in Washington. Before his arrival on April 20, President Nixon approved S.1315 (Public Law 93-22), an act to extend diplomatic privileges and immunities to the liaison office of the PRC and to the members thereof.<sup>17</sup> The United States and the PRC for all practical purposes established semi-diplomatic relations.

In August 1974 President Nixon was compelled to resign as a result of the Watergate scandal, and Vice-President Gerald Ford succeeded to the presidency. According to a reliable PRC source, President Ford said he would normalize relations with the PRC during his term.<sup>18</sup> When Secretary of State Kissinger visited the PRC in November 1974, he told Vice-Premier Teng Hsiao-p’ing (Deng Xiaoping in Pinyin) that the United States was willing to adopt the “Japanese formula” to normalize relations with the PRC, but it intended to establish a “liaison office” in Taiwan, in view of the pro-Taiwan influence in the United States. He also said that the United States had not found an appropriate solution on the mutual defense treaty issue and hoped that the PRC would make a statement on the peaceful liberation of Taiwan so that the United States could consider abandoning its “mutual defense relations” with Taiwan.<sup>19</sup> Teng, however, insisted that the PRC could not accept the “reverse liaison office formula” and

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15. *Diplomacy of Contemporary China*, *supra* note 13, p. 325.

16. *New York Times*, February 23, 1973, p. 14.

17. *United States Statutes at Large*, Vol. 87, p. 24.

18. *Diplomacy of Contemporary China*, *supra* note 13, p. 226.

19. *Ibid.*



demanded that the United States sever diplomatic relations with Taiwan, abrogate its mutual defense treaty with Taiwan and withdraw U.S. troops from Taiwan. These were later referred to as the three conditions for normalization. He also considered that the Taiwan question was an internal affair of China.<sup>20</sup>

In December 1975, President Ford visited the PRC. Although nothing concrete regarding normalization was mentioned after the visit, it was disclosed later by Teng Hsiao-p'ing, then vice-premier of the State Council of the PRC, in an interview with directors of the Associated Press in Peking on September 6, 1977, that President Ford did "promise" in that visit that if he were reelected he would resolve the Taiwan problem and establish full relations with Peking in the same way as the Japanese.<sup>21</sup> Ford, however, had a different version of the story and said that he did suggest the so-called Japanese formula as "a possibility" for normalization, but he added that "any change toward normalization must be predicated on the peaceful solution of the Taiwan-People's Republic of China Situation."<sup>22</sup>

On June 30, 1977 President Carter said at a press conference that he hoped that the United States "can work out an agreement with the People's Republic of China, having full diplomatic relations with them, and still make sure that the peaceful life of the Taiwanese, the Republic of China, is maintained."<sup>23</sup>

Secretary of State Cyrus Vance visited the PRC on August 20-27, 1977, and, according to a Chinese source, told the Chinese that at the appropriate occasion, the U.S. government would issue a statement to reaffirm the American concern and interest in the peaceful settlement of the Taiwan question by the Chinese. He also hoped that the PRC would not issue a statement opposing the U.S. statement and thereby emphasize settlement of the question by force. Moreover, after normalization, he believed that the continuation of trade, investment, tourism, scientific exchange and other private connections between the United States and Taiwan should be ensured and that U.S. officials should be able to remain in Taiwan under an "unofficial arrangement." If the PRC Government was willing to accept these conditions, the United States was willing to recognize the PRC as the sole

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20. *Ibid.*

21. See Fox Butterfield, "U.S.-China Talks: Peking, While Rejecting Proposals, Still Appears Flexible on Taiwan," *New York Times*, September 8, 1977, p. A3.

22. "Ford Asserts He Called Severing Taiwan Ties Only a Possibility," *New York Times*, September 8, 1977, p.A3.

23. Excerpt from Paul Chan and James Reardon-Anderson, "Documentation, Chronology and Bibliography," *Contemporary China*, Vol. 2, No. 1 (Spring 1978), p. 65.

legal government of China, to let “diplomatic relations” with Taiwan and the mutual “defense treaty” lapse and to withdraw all military personnel from Taiwan. Teng Hsiao-p’ing, however, told Vance that the United States must accept the three conditions and the question of unification of Taiwan with the mainland would be resolved by the Chinese themselves.<sup>24</sup> Vance’s version of the discussion on normalization, however, was slightly different.<sup>25</sup>

In May 1978, President Carter’s National Security Adviser,

24. *Diplomacy of Contemporary China*, *supra* note 13, pp. 227-228.

25. Cf. the following excerpts from Vance’s memoirs:

[August 23, 1977 at first formal meeting] . . . I came quickly to the point. The president had authorized me to explore how the United States and China might normalize relations. “Provided we can find a basis that will not lessen the prospects for a peaceful settlement of the Taiwan question by the Chinese themselves and which would enable informal contacts to continue,” I said, “the president is prepared to normalize relations.” In accordance with the Shanghai Communiqué, which acknowledged the existence of only one China, we were prepared to recognize the PRC as the sole legal government of China. I stated that our defense treaty with Taiwan would “lapse” (we would not use the word “abrogate”), and we would complete the withdrawal of our military forces and installations from Taiwan.

I stated carefully that we had concluded that, “It would be necessary for U.S. government personnel to remain on Taiwan under an informal arrangement.” I stressed that such representation would be neither diplomatic in character nor have any of the characteristics or appurtenances of an embassy, such as flags or a government seal. I pointed to the negative reaction in the United States to Chinese statements about liberating Taiwan by force, and said that at the appropriate time we would make a public statement of our interest in a peaceful settlement. I stressed that it would be essential that China not contradict such a statement or make any new statements about liberation by force.

The next morning we met in the Great Hall of the People to hear Huang Hua’s not unexpected response. My presentation had been too much for him to accept. He reiterated the three Chinese conditions and said our position simply gave “lip service” to them. After tough words about liberating Taiwan, the foreign minister concluded that normalization would be further delayed. . . .

I met Vice-Premier Deng Xiaoping that afternoon. . . . I briefly outlined our position again, stressing that I offered it as a starting point for discussion. Deng, an embodiment of Chinese courtesy, calmly termed my comments a retreat from the Shanghai Communiqué. He read me portions of a memorandum of a conversation in which Henry Kissinger had allegedly agreed that the United States owed a debt to China and that normalization would be in conformity with the Chinese conditions. He referred to a discussion with President Ford in December 1975, in which the president had stated he would be in a better position to normalize relations in accordance with the so-called Japanese formula after the 1976 elections. Deng omitted to note, though, that Ford had added a qualifying “if”—if the Taiwan issue was worked out. Deng characterized my proposal to Huang Hua as a retreat from the previous state of affairs.

Deng said that the most China could accept was the “Japanese formula.” He described what I had proposed as an embassy that would not have a sign or a flag at its door.

Cyrus Vance, *Hard Choices, Critical Years in American Foreign Policy*, New York: Simon and Schuster, 1983, pp. 81-82.

Zbigniew Brzezinski, visited the PRC and told the Chinese authorities that the United States was willing to accept the three conditions for normalization, but “hope[d] (not as a condition) that when the American side expresses the expectation that the Taiwan question, which is purely an internal affair of China, be settled peacefully, it will not be explicitly rebutted by China, so that the domestic difficulties of the U.S. may be more easily resolved.”<sup>26</sup> He also told the Chinese side that President Carter had authorized the Chief of the U.S. Liaison Office in China, Leonard Woodcock, to begin negotiations with the PRC on the normalization problem.<sup>27</sup>

On September 19, 1978, President Carter met with the Chief of the Chinese Liaison Office, Chai Tse-min, at the White House. The U.S. conditions for normalization with the PRC set by President Carter were:

1. an unofficial American presence in Taiwan after normalization;
2. the continuation of American commercial, cultural, and other relations with Taiwan;
3. selected defensive arms sales to Taiwan after normalization;
4. a public U.S. statement expressing hope for a peaceful solution to the Taiwan problem; and,
5. termination of the defense treaty with Taiwan in accordance with the terms of the treaty, which provided for termination upon one year’s notice by either party.<sup>28</sup>

On December 15, 1978, President Carter dramatically announced to the world that the United States and the PRC would establish diplomatic relations on January 1, 1979.<sup>29</sup> He also declared that he would sever diplomatic relations with the ROC on that date, terminate the Mutual Defense Treaty with the ROC a year from that date, and withdraw all U.S. forces from Taiwan within four months. There was

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26. *Diplomacy of Contemporary China*, *supra* note 13, p. 228. Cf. Zbigniew Brzezinski, *Power and Principle, Memoirs of the National Security Adviser 1977-1981*, New York: Farrar, Straus, Giroux, 1983; pp. 214, 218. According to Brzezinski, when asked about the U.S. unilateral statement on the peaceful resolution of the Taiwan issue, Teng “replied that each side could express its own opinion.” *Ibid.*, p. 218.

27. *Diplomacy of Contemporary China*, *supra* note 13, p. 228. Brzezinski’s memoirs did not mention this. See *Power and Principle*, *supra* note 26, pp. 209-219.

28. U.S. Department of State, “Diplomatic Relations with the People’s Republic of China and Future Relations with Taiwan,” *News Release*, Washington, D.C.: Bureau of Public Affairs, Office of Public Communication, December 1978, p. 2.

29. *Department of State Bulletin*, Vol. 79, No. 2022 (January 1979), p. 26.

neither a PRC commitment to refrain from using force against Taiwan nor a unilateral U.S. commitment to the security of Taiwan. The President's statement accompanying the Joint Communiqué on establishing diplomatic relations did state that "the United States continues to have an interest in the peaceful resolution of the Taiwan issue and expects that the Taiwan issue will be settled peacefully by the Chinese themselves." The PRC immediately issued a response to this statement, insisting that the decision as to the method by which Taiwan would be brought back to PRC control was part of China's "internal affairs" for "unifying the country."<sup>30</sup> It is elementary that a country may use force in its internal affairs, so the Carter statement on the peaceful resolution of the Taiwan issue was in fact and in law rejected by the Chinese. As a matter of fact, at a press conference held in Peking on January 5, 1979, Vice-Premier Teng Hsiao-p'ing publicly acknowledged that the Chinese cannot restrict themselves by renouncing the possibility of using force for the unification of Taiwan and the mainland. He also said the future of Taiwan "is entirely an internal Chinese affair" but that Peking would "take note" of President Carter's wish that the dispute be settled peacefully.<sup>31</sup>

### III. THE JAPANESE FORMULA AND THE ENACTMENT OF THE TAIWAN RELATIONS ACT

#### A. *The Japanese Formula for Normalization of Relations With the Chinese Communist Government and Its Implication on U.S.-Chinese Communist Government Normalization*

In the process of the normalization of relations between the United States and the PRC, the "Japanese formula" has been mentioned either in name or in substance. Therefore, it is necessary to discuss this formula briefly and to analyze to what extent this formula is applicable to the U.S.-PRC normalization issue.

On September 29, 1972, Japan established diplomatic relations with the PRC and terminated its diplomatic relations and other treaty relations with the ROC.<sup>32</sup> However, Japan and the ROC soon set up "unofficial" instrumentalities to handle their commercial, cultural,

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30. *Peking Review*, Vol. 21, No. 51 (December 22, 1978), pp. 8-9.

31. See "Relations with U.S. will grow fast, opening 'Wide Vistas,' Teng says," and "Teng Says 'nothing new,' State Department finds," *The Sun* (Baltimore) January 6, 1979, p. A2. The same position was reiterated on January 30, 1979, during Teng's visit in the United States. See Bernard Gwertzman, "Teng, on Capitol Hill, Says Peking Must Keep Taiwan Options Open," *New York Times*, January 31, 1979, pp. A2, A6.

32. See their joint communiqué on establishing diplomatic relations, *Peking Review*, Vol. 15, No. 40 (October 6, 1972), pp. 12-13.

tourist and other relations. On the Japanese side, a foundation (*zaidan hojin*) called the Exchange Association (Koruy Kyokai) was established under the aegis of the Ministry of Foreign Affairs and the Ministry of International Trade and Industry. Teizo Horikoshi, vice president of Keidanren, was named President; former Ambassador to the Republic of China Osamu Itagaki was named Chairman of the Board; and Shugen Takahashi, former chief of the Osaka Bureau of International Trade and Industry, was named Managing Director. Headquarters were set up in Tokyo and offices were set up in Taipei and Kaohsiung. The Association was charged with handling consular type work: protecting Japanese nationals and their property in Taiwan, educating Japanese children, issuing travel documents to serve in place of visas, maintaining economic relations, guaranteeing the safety of fishing vessels, promoting cultural and sports exchanges, etc.<sup>33</sup> The ROC side set up an East Asian Relations Association, with branches in Tokyo, Yokohama, Osaka and Fukuoka, to replace the former ROC embassy and consulates there. "Unofficial" agreements were concluded between these two nominally "unofficial organs" for commercial, cultural and other relations. Officials of both "unofficial organs" in fact enjoyed certain privileges and immunities in each other's country.<sup>34</sup>

This formula cannot be used to fully maintain the post-normalization relations between the United States and the ROC for several reasons. First, Japan is an executive-dominated government and there is wide administrative discretion in dealing with foreign affairs. On the other hand, the United States is a law-dominated government. As such, without clear legal authorization, it is not possible to maintain the substance of relations between the United States and the ROC after de-recognition. Second, the United States has security commitments to Taiwan, while Japan does not. Third, the U.S. Congress strongly opposed the acceptance of the PRC's three conditions and under the U.S. separation of powers system, the President cannot control the Congress. On the other hand, Japan is a cabinet system; the premier is the majority party leader of the Japanese Diet and there is

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33. See James William Morley, "The Japanese Formula for Normalization and Its Relevance for U.S. China Policy," in Hungdah Chiu, ed., *Normalizing Relations with the People's Republic of China: Problems, Analysis and Documents*, Baltimore: University of Maryland School of Law Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 2-1978 (14), pp. 129-130.

34. For details, see David Nelson Rowe, *Informal "Diplomatic Relations," The Case of Japan and the Republic of China, 1972-1974*, Hamden, Connecticut: The Shoe String Press, 1975.

no possibility of confrontation between the two. In view of these differences, it is necessary to enact a law in the United States to maintain existing relations with Taiwan in the post-normalization period and to adopt some parts of the Japanese formula into that law.

### B. *The Enactment of the Taiwan Relations Act*

Because of differences in the political and legal systems of the United States and Japan, it was necessary for the United States to enact necessary legislation to maintain the substance of relations with Taiwan. However, enactment of the law would take several months, and any legal vacuum created by the derecognition of the ROC on January 1, 1979 would severely disrupt the existing extensive relations between the United States and the ROC on Taiwan, since, under international law,<sup>35</sup> the ROC would be legally non-existent in U.S. eyes after that date. In order to avoid this undesirable situation, on December 30, 1978 President Carter issued a memorandum to all U.S. departments and agencies instructing them that all existing treaties and agreements between the United States and the ROC "shall continue in force" and "whenever any law, regulation, or order of the United States refers to a foreign country, nation, state, government, or similar entity, departments and agencies shall construe those terms and apply those laws, regulations, or orders to include Taiwan."<sup>36</sup> This memorandum in fact wiped out most of the legal effect of U.S. de-recognition of the ROC.

President Carter's sudden recognition of the PRC and his acceptance of virtually all the latter's demands, needless to say, were a shock to the ROC. While leaders of the ROC had expected President Carter's move sometime in the future, they could not understand why the president had acted abruptly at that time, giving them only seven

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35. Cf. § 205 of the Restatement of Foreign Relations Law of the United States:

§ 205. Effect of Nonrecognition: Law of the United States

Under the law of the United States:

(1) an entity not recognized as a state, or a regime not recognized as the government of a state, is ordinarily denied access to courts in the United States;

(2) a regime not recognized as the government of a state is not entitled to property belonging to that state located in the United States;

(3) courts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only.

*Restatement of the Law, The Foreign Relations Law of the United States*, 3rd rev. ed., Vol. 1, St. Paul, Minn.: American Law Institute Publishers, 1987, p. 85.

36. *Federal Register*, Vol. 44, No. 3. (January 4, 1979), p. 1075.

hours' notice.<sup>37</sup> They were particularly upset by the lack of U.S. assurance on the security of Taiwan. Thus, when President Carter sent a delegation headed by Deputy Secretary of State Warren Christopher to Taiwan on December 28-29, 1978, to discuss post-normalization U.S.-ROC relations, the ROC made several basic demands, namely, that future U.S.-ROC relations be maintained on a government-to-government basis, that the United States take concrete and effective measures to assure the security of Taiwan, that the United States continue to supply adequate arms to the ROC, and others.<sup>38</sup>

The Christopher mission did not succeed in reaching an overall agreement with the ROC on the future of U.S.-ROC relations, though both sides agreed to hold further negotiations in the United States on the subject. They also agreed that pending the final agreement on principles and concrete arrangements concerning their future relations, existing cultural, commercial and other relations should be continued without interruption until March 1, 1979.

U.S.-ROC negotiations on maintaining trade, cultural and other relations in the post-normalization period were resumed in Washington in early January 1979, but no substantive progress was made for several weeks because the ROC insisted on having official, that is, government-to-government, relations with the United States while the latter insisted, at least formally, on unofficial relations. According to the U.S. proposal, a new American Institute in Taiwan would be created to take over all functions of former U.S. embassy and consular services in Taiwan. The Institute would be a nonprofit private corporation, incorporated under District of Columbia law, but would be staffed by veteran diplomats or other civil servants "temporarily" on leave of absence from the U.S. government.<sup>39</sup> Despite the ROC's objection, the U.S. State Department incorporated the Institute on January 10, 1979,<sup>40</sup> and urged the ROC to create a similar unofficial organ to re-

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37. The State Department instructed U.S. Ambassador Unger in Taipei to give the ROC only one-hour advance notice of the President's surprise move. Ambassador Unger, however, disregarded the instruction and informed the ROC leaders as soon as he received the message, so the ROC Government received a seven-hour advance notice of the President's dramatic action.

38. See President Chiang Ching-kuo's five principles on U.S.-ROC relations in the post-normalization period, December 29, 1978, in *News from China*, December 29, 1978, p. 78-1348, reprinted in Chiu, *China and the Taiwan Issue*, *supra* note 9, pp. 262-263.

39. See S.245, submitted to the Senate by the Carter Administration on January 29, 1979. Text in *Taiwan*, Hearings before the Senate Committee on Foreign Relations, 96 Cong., 1st Sess. on S.245 (February 5, 6, 7, 8, 21, and 22, 1979), Washington, D.C.: U.S. Government Printing Office, 1979, pp. 3-10 [hereinafter *Taiwan Hearings*].

40. Text of the Articles of Incorporation of the American Institute in Taiwan can be

place its embassy and consular services in the United States.

After several weeks of deadlock over this issue, the United States sent an ultimatum to Taipei, calling for an agreement to nongovernmental relationships by February 10 or a complete rupture in U.S.-ROC ties.<sup>41</sup> A few days later, however, the United States made a minor concession by agreeing to let the ROC issue an executive order to create a Coordination Council for North American Affairs (CCNAA) to serve as a counterpart of the American Institute in Taiwan (AIT). The council would have an office in Washington and branch offices in New York, Chicago, Atlanta, Houston, Seattle, San Francisco, Los Angeles and Honolulu. The United States would call the Council an "unofficial" organ, while the ROC could maintain that it was of an "official nature."<sup>42</sup>

The United States also agreed to grant the following privileges and immunities to the Council and its personnel on the condition that similar privileges and immunities be extended to the American Institute in Taiwan and its personnel by the ROC: the privilege of a secure pouch; the right to send and receive coded messages; customs courtesies, involving such matters as freedom from customs inspections and duties; tax exemption of the Council and its personnel; inviolability of the premises of the Council; and immunity of appropriate members of the Council from criminal and civil liability for any acts committed in the performance of their duties.<sup>43</sup>

With respect to the ROC demand for a security guarantee for Taiwan, which was supported by many members of the Congress, the Carter administration asserted such a guarantee was unnecessary,

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found in *Taiwan Enabling Act*, Report of the Senate Foreign Relations Committee on S.245, Washington, D.C.: U.S. Government Printing Office, 1979, pp. 69-71 [hereinafter *Taiwan Enabling Act Report*].

41. Bernard Gwertzman, "Senate Panel Balks at Letting U.S. Shift Funds to New Office in Taipei," *New York Times*, February 13, 1979, p. A6.

42. See "Taipei to Set Up New Organization to Continue Its Ties with the U.S.," *New York Times*, February 16, 1979, p. A3, and "Coordination Council for N. American Affairs to Start Operation March 1," *News from China*, February 27, 1979, p. 79-0260.

According to Harvey Feldman, the Director of the ROC Desk at the Department of State, he suggested to ROC Vice-Minister of Foreign Affairs, H.K. Yang, who was responsible for the negotiation, that while the United States necessarily must describe the new relationship as being entirely unofficial, it had no way of preventing the ROC from describing it otherwise when it became clear the Congress would not write an explicit official relationship into the TRA, the suggestion was accepted by the ROC. See his "Political and Diplomatic Relations," in William B. Bader and Jeffrey T. Bergner, ed., *The Taiwan Relations Act: A Decade of Implementation*, Indianapolis, Indiana: Hudson Institute; Menlo Park, California: 1989, p. 20.

43. See *Taiwan Enabling Act Report*, *supra* note 40, pp. 29-30.



whether in the form of a presidential declaration or a congressional resolution.<sup>44</sup>

On January 29, 1979, the Carter Administration sent a bill to the Congress to maintain the substance of relations with Taiwan after normalization with the PRC.<sup>45</sup> This bill did not have any provision on Taiwan's security guarantee, arm sales, privileges and immunities of unofficial organs and other important items which were later incorporated in the TRA; therefore, it was, in the words of Senator Frank Church, Chairman of the Senate Foreign Relations Committee, "woefully inadequate to the task, ambiguous in language, and uncertain in tone."<sup>46</sup>

After extensive discussions in the Congress, the Taiwan Relations Act was adopted by an overwhelming majority of Congress on March 29, 1979 and signed into law by President Carter on April 10, 1979.<sup>47</sup> The original bill proposed by the Carter Administration was in fact discarded and replaced by the one adopted by the Congress. The Act was effective retroactively to January 1, 1979.

#### IV. THE MAIN CONTENTS OF THE TAIWAN RELATIONS ACT AND ITS IMPLICATION IN INTERNATIONAL LAW

The Taiwan Relations Act has 18 sections.<sup>48</sup> Section 2 ("Findings and Declaration of Policy," 22 U.S.C. 3301) states in paragraph (a) that, since the President terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, Congress finds enactment of the act necessary to help maintain peace, security and stability in the western Pacific and to promote the foreign policy of the United States by authorizing continuation of commercial, cultural and other relations between the people of the United States and the people on Taiwan.

Section 2(b) (22 U.S.C. 3301(b)) states that it is the policy of the United States:

- (1) to preserve and promote extensive, close and friendly commercial, cultural and other relations between the people

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44. See Deputy Secretary of State Warren Christopher's statement at Senate hearings on Taiwan, February 5, 1979, *Taiwan Hearings*, *supra* note 39, p. 24.

45. See *Taiwan Hearings*, *supra* note 39, pp. 3-10.

46. *Ibid.*, p. 11.

47. See *supra* note 9.

48. The summary is generally taken from Marian Lloyd Nash, ed., *Digest of United States Practice in International Law 1979*, Washington, D.C.: U.S. Government Printing Office, 1983, pp. 162-169.

of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;

(2) to declare that peace and stability in the area are in the political, security and economic interests of the United States, and are matters of international concern;

(3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;

(4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;

(5) to provide Taiwan with arms of a defensive character; and

(6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.

Section 2(c) (22 U.S.C. 3301(c)) provides that nothing in the act shall contravene the interest of the United States in human rights, especially with respect to those of "all the approximately eighteen million inhabitants of Taiwan"; the preservation and enhancement of these rights are reaffirmed as U.S. objectives.

Section 3 ("Implementation of United States Policy with Regard to Taiwan," 22 U.S.C. 3302) states, in paragraph (a), that the United States will make available to Taiwan defense articles and services "in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability," and provides, in paragraph (b), for their nature and quantity to be determined by the President and Congress. Paragraph (c) reads:

(c) The President is directed to inform the Congress promptly of any threat to the security or the social or economic system of the people on Taiwan and any danger to the interests of the United States arising therefrom. The President and the Congress shall determine, in accordance with constitutional processes, appropriate action by the United States in response to any such danger.

Section 4 (22 U.S.C. 3303) covers the continuing application of U.S. domestic law, both federal and state, regarding Taiwan, "as if

derecognition had not occurred.” This section effectively wipes out all the international legal consequences of U.S. de-recognition of the ROC. Among the provisions under this section, § 4(8)(c) is of particular significance. It states:

(c) For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

With regard to Overseas Private Investment Corporation (OPIC) investment projects in Taiwan, section 5(a) of Public Law 96-8 (22 U.S.C. 3304(a)) suspended for a 3-year period from enactment the \$1,000 per capita income restriction [Taiwan already exceeded that limit in 1978] applicable in its determinations whether to provide reinsurance, loans, or guaranties for a project.

The provisions of section 6 through 9 (22 U.S.C. 3305-3308), and 11 and 12 (22 U.S.C. 3310, 3311) are directly concerned with the American Institute in Taiwan, or a comparable successor nongovernmental entity to be designated by the President. Sec. 6(b) (22 U.S.C. 3305(b)) provides:

(b) Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute.

Section 6(c) (22 U.S.C. 3305(c)) declares that the Taiwan Relations Act preempts any law, rule, regulation, or ordinance of the District of Columbia, or of any State or political subdivision thereof, which impedes or otherwise interferes with the Institute’s performance of its functions.

Section 7(a) (22 U.S.C. 3306(a)) authorizes Institute employees on Taiwan to perform the services which customarily were performed by American consular officers for U.S. citizens on Taiwan.

Section 7(b) (22 U.S.C. 3306(b)) declares that such acts shall be valid, and of like force and effect within the United States, as if per-

formed by any other person authorized under the laws of the United States to perform such acts.

Section 8 (22 U.S.C. 3307) governs the tax-exempt status of the Institute, section 9 (22 U.S.C. 3308) its dealings with U.S. Government agencies, and section 11 (22 U.S.C. 3310) the employment of United States Government agency personnel by the Institute.

Section 12 (22 U.S.C. 3311) sets out reporting requirements to Congress, both as to agreements and transactions to which the Institute is a party and as to economic relations between the United States and Taiwan. It provides:

(a) The Secretary of State shall transmit to the Congress the text of any agreement to which the Institute is a party. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.<sup>49</sup>

Sections 13 and 14 (22 U.S.C. 3312, 3313) also relate to Congressional oversight of the operation of both the Taiwan Relations Act and the American Institute in Taiwan.

Section 10 ("Taiwan Instrumentality," 22 U.S.C. 3309) provides in paragraph (a) that U.S. Government dealings with Taiwan shall be conducted through an instrumentality established by Taiwan "which the President determines has the necessary authority under the laws applied by the people on Taiwan to provide assurances and take other actions on behalf of Taiwan in accordance with this Act." Section 10(b) (22 U.S.C. 3309(b)) requests the President to extend to the Taiwan "instrumentality" the same number of offices and personnel complement that "the governing authorities on Taiwan recognized as the Republic of China prior to January 1, 1979" previously operated in the United States. Section 10(c) (22 U.S.C. 3309(c)) authorizes the

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49. This, in fact, applies the Case Act, August 22, 1972, Public Law 92-403, *United States Statutes At Large*, Vol. 86, p. 619, to the agreements with Taiwan. The Act requires the President to transmit to Congress all international agreements other than treaties within 60 days after their conclusion. If the President deems public disclosure of the agreement prejudicial to national security, he shall transmit it instead to the foreign affairs committees of both Houses of Congress under an injunction of secrecy, to be removed only upon due notice from the President.

President to extend to the Taiwan “instrumentality,” and its appropriate personnel, such privileges and immunities as may be necessary for effective performance of their functions, subject to the granting by Taiwan of comparable privileges and immunities to the Institute and its appropriate personnel.

Section 15 (22 U.S.C. 3314) defines, for purposes of the Taiwan Relations Act, “laws of the United States” and “Taiwan.” The latter term

includes, as the context may require, the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities (including political subdivisions, agencies, and instrumentalities thereof).

The TRA does not deal with the legal issue of the international legal status of Taiwan, because the Senate Foreign Relations Committee considered addressing that issue was “unnecessary.”<sup>50</sup>

Under the TRA, the United States nominally accepted the PRC’s three conditions for establishing diplomatic relations—severance of diplomatic relations with Taiwan, abrogation of the mutual defense treaty and withdrawal of troops from Taiwan, but in fact the first two conditions were replaced effectively by the TRA. Needless to say, the PRC was not satisfied with such an arrangement, as will be discussed in the next section.

The December 15, 1978 Carter announcement on de-recognition of the ROC on January 1, 1979, was a shock to the people and government of the ROC. Though they expected the United States to take such an action in the indefinite future, they were surprised that no security guarantee was arranged for Taiwan. The financial market was for some time at a standstill and some confusion existed until the adoption of the TRA. After the enactment of the TRA, everything gradually began to return to normal.

The implementation of the TRA in 1979-80 under the Carter Administration was not without difficulty for the ROC on Taiwan. Basically, the Administration was hostile to Taiwan, implementing the

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50. See *Taiwan Enabling Act, Report of the Committee on Foreign Relations United States Senate Together With Additional Views on S.245*, 96th Congress, 1st Session, Report 96-7, Washington, D.C.: U.S. Government Printing Office, 1979, p. 17 [hereinafter *Taiwan Enabling Act Report*].

TRA to the minimum extent possible, over-sensitive to any possible adverse reaction from the PRC. For instance, Section 10(b) of the TRA provides that the "President is requested to extend to the instrumentality established by Taiwan [CCNAA] the same number of offices and complement of personnel as were previously operated in the United States by the governing authorities on Taiwan recognized as the Republic of China prior to January 1, 1979," but the Carter Administration insisted that the ROC close its consulates in Guam, Kansas City, Portland, Boston, and Calexico (in California, bordering Mexico). The Administration also interfered in other ways; for example, it made it difficult for the CCNAA to have decent license plates made for the cars of CCNAA representatives.<sup>51</sup>

#### V. THE CHINESE COMMUNIST RESPONSE, ITS PEACE OVERTURE TO TAIWAN AND THE 1982 *DE FACTO* AMENDMENT TO THE TAIWAN RELATIONS ACT

##### A. *The Chinese Communist Response to the Taiwan Relations Act*

Officials of the PRC Embassy in Washington, D.C. closely watched the hearings and debates on the TRA when the bill moved through Congress, yet it only made a perfunctory protest against the bill on March 16, 1979, shortly before the bill's adoption on March 29, 1979. At that time, Huang Hua, then PRC Foreign Minister, told U.S. Ambassador to the PRC, Leonard Woodcock, that "if the bills [sic] are passed as they are worded now, and are signed into law, great harm will be done to the new relationship that has just been established between China and the United States."<sup>52</sup> However, between the period when the bill was passed on March 29 and signed by President Carter on April 10, 1979, the PRC did not protest. On April 19, 1979, Vice-Premier Teng Hsiao-p'ing told a visiting Senate Foreign Relations Committee delegation that:

The political foundation of Sino [PRC]-American normalization is only one China, now this foundation has been disturbed; China is not satisfied with the "Taiwan Relations Act" adopted by the Congress and the most essential problem of this bill [sic] is it in practice does not recognize one

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51. For a study of the first year experience, see generally, *Taiwan: One Year After United States-China Normalization*, A Workshop Sponsored by the Committee on Foreign Relations United States Senate and Congressional Research Service, Library of Congress, Washington, D.C.: U.S. Government Printing Office, 1980.

52. "Huang Hua Reiterates China's View," *Beijing Review*, Vol. 22, No. 13 (March 30, 1979), p. 8.

China. President Carter indicated that when he executes this bill [sic], he will comply with the agreement on establishing diplomatic relations between China and the United States, we are watching the future behavior of the United States.<sup>53</sup>

On April 28, 1979 the PRC secretly protested to the United States by saying:

The Chinese government's position of opposing "Two Chinas" or "One China, One Taiwan" is firm and steadfast. If the United States side does not comply with the agreement reached on the Taiwan question at the time of establishing diplomatic relations and continues to harbor attempts to interfere in the internal affairs of China, this can only bring damage to Sino-American relations and will not benefit either.

This protest was kept secret from the press until the spring of 1982 when it was partially disclosed in a PRC publication, entitled *Journal of International Studies*, published under the auspices of the PRC Foreign Ministry.<sup>54</sup>

A little more than two months later, on July 6, 1979, the U.S. Embassy in Peking replied to the Chinese protest of April 29, 1979. The U.S. note stated:

The United States shall comply with various understandings reached with the People's Republic of China on establishing diplomatic relations . . . The Taiwan Relations Act finally adopted by the Congress does not comply with the wishes of the [U.S.] government in every detail; however, it provides full discretionary authority to the President in dealing with [difficult] situations and enables the President to implement this Act in a manner fully consistent with the normalization formula. It is on that basis that the President signed this bill and made it law. The United States Government has ensured that the language used in this Act will not impair the understanding reached with your government or compel our government to take action deviating from such understanding.<sup>55</sup>

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53. *Diplomacy of Contemporary China*, supra note 13, p. 234. See also Fox Butterfield, "Senators Cautioned on Taiwan by Deng," *New York Times*, April 20, 1979, p. A9.

54. Special Commentator of the Journal, "Where Lies the Crux of Sino-U.S. Relations," *Kuo-ch'i wen-t'i yen-chiu*. See also *Diplomacy of Contemporary China*, supra note 13, pp. 234-235.

55. Translated from *Diplomacy of Contemporary China*, supra note 13, p. 235.

This note was kept secret until 1988 when the PRC published it in an internally-circulated book.<sup>56</sup>

Apparently assured by the above secret U.S. note, the PRC did not make the TRA a public issue during the Carter Administration, exception in two instances. In January, 1980, when the New China News Agency reported a U.S. announcement on the resumption of arms sales to Taiwan,<sup>57</sup> its only comment was, “[i]t is recalled that the Chinese government had stated its opposition to the position of the U.S. Government to continue to sell weapons to Taiwan.”<sup>58</sup> In October, 1980, when the AIT and CCNAA concluded an agreement granting each other privileges and immunities,<sup>59</sup> the PRC protested.<sup>60</sup>

Chinese Communist writers, however, consider the TRA a violation of international law.<sup>61</sup> Some argued that because the U.S. recog-

56. *Ibid.* The United States has not yet released the text of this note. It is not even mentioned in *Digest of United States Practice in International Law 1979*, *supra* note 48.

57. At the time of normalization, the Carter Administration agreed not to sell any arms to Taiwan in 1979. “U.S. Agreed to Ban Arms to Taiwan,” *Facts on File*, Vol. 39, No. 1993 (January 19, 1979), p. 27.

58. Feldman, “Political and Diplomatic Relations,” *supra* note 42, p.22.

59. Agreement on Privileges, Exemptions and Immunities Between the American Institute in Taiwan and the Coordination Council for North America Affairs, October 2, 1980, text in *Chinese Yearbook of International Law and Affairs*, Vol. 1 (1981), pp. 235-240.

60. See *Hsin-hua Yueh-Pao* (New China Monthly), 1980, No. 10 (October 1980), p. 173.

61. *E.g.*, see the following comments made by two PRC international lawyers. Professor Liu Fengming wrote:

The municipal law of a state should not violate the international obligations assumed by itself. The “Taiwan Relations Act” (April 10, 1979) passed by the U.S. Congress and signed by the President of the United States provides “[in Section 4(b)(1)]: “Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.” This in fact attempts to view Taiwan as a “state” and the Taiwan authorities as a “government.” This is inconsistent with the spirit of the “Sino-American Joint Communiqué on the Establishment of Diplomatic Relations” which was announced in advance on November 16, 1978. The Communiqué states: “The United States of America recognizes the Government of the People’s Republic of China as the sole legal government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.” The “Taiwan Relations Act” of the U.S. violated the principle of establishment of diplomatic relations between the two countries and the international obligation assumed by the U.S. Liu Feng-ming, *Hsien-tai kuo-chi-fa kang-yao*, (Essentials of Modern International Law), Peking: The Mass Press, 1982, p. 8.

Professor Wei Min wrote:

Article 27 of the Vienna Convention on the Law of Treaties provides: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” After the establishment of diplomatic relations between the PRC and the U.S., the U.S. enactment of “Taiwan Relations Act” in disregard of the international obligation assumed by the U.S. toward the PRC embodied in the



nized the PRC's sovereignty over Taiwan, the TRA was a blatant interference in the PRC's "internal affairs."<sup>62</sup> As a matter of fact, this is not true. At the time of normalization in the U.S.—PRC joint communique, the English text stated that the U.S. "acknowledges the Chinese position that there is but one China and Taiwan is part of China."<sup>63</sup> In the Chinese text, the PRC purposely mistranslated the word "acknowledges" into *Cheng-jen* (*Chengren* in Pinyin), which, if retranslated into English, means "recognizes."<sup>64</sup> When the Senate Foreign Relations Committee held its hearing on the Taiwan bill in February, 1979, Deputy Secretary of State Warren Christopher assured the Committee that the United States adhered only to the English translation of the joint communique on normalization.<sup>65</sup>

**B. *Reopening of the Arms Sales Issues Under the Reagan Administration and the Chinese Communist Peace Overture to Taiwan***

Before normalization, the United States made it clear to the PRC that it would sell arms to Taiwan after normalization.<sup>66</sup> Therefore, it was on the condition of continuing U.S. arms sales to Taiwan after normalization that diplomatic relations were established and ambassadors were exchanged. The PRC was fully aware of this at that time. According to President Carter's diary of January 31, 1979, Vice-Premier Teng Hsiao-p'ing only told him "to be prudent in the sale of any weapon to Taiwan after this year [1979], and he let it be known that they were not in favor of any such sale."<sup>67</sup> Later, when President Carter announced in early 1980 that the United States would sell \$280 million arms to Taiwan, the PRC did not protest. In 1980, the Carter Administration sold a total of \$830 million in arms to Taiwan without

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joint communique on establishing diplomatic relations grossly violated the above stated principles of international law."

Wei Min, ed., *Kuo-chi-fa k'ai-lun* (Introduction to International Law), Peking: Kuang-ming Daily Press, 1986, p. 30. However, it should be noted that the U.S. has never considered the communique as a treaty. It is not listed in the *Treaties in Force* published annually by the State Department.

62. See, e.g., Chang Hung-tseng, "The U.S. 'Taiwan Relations Act' Viewed from an International Law Perspective," *Chung-kuo kuo-chi-fa nien-k'an* (Chinese Yearbook of International Law), 1982, Peking: Compiled by the Chinese Society of International Law and published by China Translation and Publishing Corporation, 1982, pp. 195-204.

63. See *supra* note 1.

64. Chinese text in *Jen-min jih-pao* (People's Daily), December 16, 1978, p. 1.

65. *Taiwan Enabling Act Report*, *supra* note 50, p. 9.

66. E.g., see Brzezinski, *Power and Principle*, *supra* note 26, p. 231.

67. Jimmy Carter, *Keeping Faith: Memoirs of a President*, New York: Bantam Books, 1982, pp. 209-210.

causing any diplomatic crisis with the PRC. By the time Reagan assumed office, the PRC might have felt that relations with the United States were sufficiently strong as to weather a diplomatic crisis on the issue of U.S. arms sales to Taiwan, and it decided to test the will of U.S. commitment to Taiwan by reopening the Taiwan arms sales issue. Despite Reagan's pro-ROC stance before he assumed the presidency, his first Secretary of State, Alexander M. Haig, Jr. and others in his Administration were convinced of the importance of a "strategic relationship" with the PRC vis-a-vis the Soviet Union in Asia. Therefore, they were susceptible to PRC pressure. Moreover, the PRC also took a giant step in adjusting its policy toward Taiwan after normalization, which helped to redirect U.S. dealings with Taiwan arms sales in the PRC's favor.

The main U.S. reason for continuing arms sales to Taiwan was the refusal of the PRC to commit itself to a peaceful resolution of the Taiwan issue. The PRC realized that unless it made certain concessions on this issue, it was not possible to undercut U.S. arms sales to Taiwan. Thus, on September 30, 1981, Marshall Yeh Chien-ying made a specific nine-point proposal to Taiwan with more concrete terms for unification. The essential parts of it are as follows:

- (2) . . . We propose that the two sides make arrangements to facilitate the exchange of mail, trade, air and shipping services and visits by relatives and tourists as well as academic, cultural and sports exchanges and reach an agreement thereupon.
- (3) After the country is reunified, Taiwan can enjoy a high degree of autonomy as a special administrative region and it can retain its armed forces. The Central Government will not interfere with local affairs on Taiwan.
- (4) Taiwan's current socio-economic system will remain unchanged, so will its way of life and its economic and cultural relations with foreign countries. There will be no encroachment on the proprietary rights and lawful right of inheritance over private property, houses, land and enterprises, or on foreign investments.
- (5) People in authority and representative personages of various circles in Taiwan may take up posts of leadership in national political bodies and participate in running the state.
- (6) When Taiwan's local finance is in difficulty, the Central government may subsidize it as is fit for the circumstances.<sup>68</sup>

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68. "Chairman Ye Jianying's Elaboration on Policy Concerning Return of Taiwan to

The proposal was immediately rejected by the ROC because it was preconditioned on the latter's giving up its sovereignty in favor of the PRC. Without such sovereignty, the PRC could change terms on unification after incorporating Taiwan into its territory.<sup>69</sup> However, on the surface, the PRC's proposal seemed very reasonable and was generally received favorably by U.S. public opinion.<sup>70</sup> The PRC did not relinquish its rights to use force against Taiwan on the unification issue, but it appeared superficially that it did not intend to change the social and economic systems of Taiwan, which were the main concerns of the TRA.

After the Cancun Conference of October, 1981, PRC Foreign Minister Huang Hua visited Washington to discuss the Taiwan arms sales issue with U.S. officials. The Chinese side pointed out that, after the nine-point proposal on unification, there was no reason or necessity for a foreign country to sell arms to Taiwan. Such sales could only increase the difficulties of the PRC government for seeking a peaceful resolution to the Taiwan question. The PRC also demanded that U.S. arms sales to Taiwan not exceed the quality and quantity of those made during the Carter Administration. Moreover, it insisted that the United States should reduce gradually its arms sales to Taiwan and ultimately terminate them within a specified period.<sup>71</sup>

Under strong PRC pressure, the United States relented and, on August 17, 1982, signed a joint communique with the PRC to restrict its arms sales to Taiwan.<sup>72</sup>

### C. *The De Facto Amendment to the TRA's Provision on Arms Sales to Taiwan*

In the August 17, 1982 joint communique with the PRC, the United States reiterated that it had no intention of infringing on Chinese sovereignty and territorial integrity, or interfering in China's internal affairs, or pursuing a policy of "two Chinas" or "one China, one Taiwan." It also understood and appreciated the Chinese policy of

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Motherland and Peaceful Reunification," *Beijing Review*, vol. 24, no. 40 (October 5, 1981), p. 10; "Text of Statement by Peking," *New York Times*, October 1, 1981, p. A6.

69. For an analysis of this issue, see Hungdah Chiu, "Prospects for the Unification of China, An Analysis of the Views of the Republic of China on Taiwan," *Asian Survey*, Vol. 23, No. 10 (October 1983), pp. 1081-1094.

70. E.g., see Robert Keatley, "Why Taiwan Should Enter Unification Talks," *Wall Street Journal*, November 9, 1981, p. 29; "Editorial: 10/10: The Broken Pieces of China," *New York Times*, October 10, 1981, p. 24.

71. *Diplomacy of Contemporary China*, *supra* note 13, p. 236.

72. *New York Times*, August 18, 1982, p. A12.

striving for a peaceful resolution of the Taiwan question as indicated in China's message to Compatriots in Taiwan issued on January 1, 1979 and the Nine-Point Proposal put forward by China on September 30, 1981. Such a "new situation . . . provides favorable conditions for a settlement of United States - China differences over the question of United States arms sales to Taiwan." The United States then stated

that it does not seek to carry out a long-term policy of arms sales to Taiwan, that its arms sales to Taiwan will not exceed, either in qualitative or in quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China, and that it intends to reduce gradually its sales of arms to Taiwan, leading over a period of time to a final solution.

This limitation in the quality and quantity of U.S. arms sales to Taiwan and the commitment to reduce sales constituted a *de facto* amendment to the TRA, which clearly stated in Section 3(a) that the U.S. "will make available to Taiwan such defense articles and defense services in such quality as may be necessary to enable Taiwan to maintain a sufficient self-defense capacity."<sup>73</sup> The Reagan administration, however, considered that the communique was "fully consistent with the Taiwan Relations Act."<sup>74</sup> The Administration also emphasized that its promise to gradually reduce arms sales to Taiwan was promised on a continuation of the PRC's peaceful policy toward a resolution of its differences with Taiwan.<sup>75</sup>

According to the ROC, on July 14, 1982, before the issuance of the Communique, the United States made known to the ROC that it:

- (1) Has not agreed to set a date for ending arms sales to the Republic of China,
- (2) Has not agreed to hold prior consultations with the Chinese Communists on arms sales to the Republic of China,
- (3) Will not play any mediation role between Taipei and Beijing,

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73. Cf. views of Senators John Glenn and Jesse Helms at the Senate Foreign Relations Committee's hearing, *U.S. Policy toward China and Taiwan*, Hearings before Senate Foreign Relations Committee, 97th Congress, 2nd Session, August 17, 1982, Washington, D.C.: U.S. Government Printing Office, 1982, pp. 18-27.

74. See "Statement on United States Arms Sales to Taiwan," August 17, 1982, *Public Papers of the President of the United States, Ronald Reagan, 1982*, Vol. II, Washington, D.C.: U.S. Government Printing Office, 1983, p. 1054.

75. Statement of Assistant Secretary of State for East Asian and Pacific Affairs Holdridge, at the August 17, 1982 Senate Foreign Relations Committee's hearing, *U.S. Policy Toward China and Taiwan*, *supra* note 73, p. 13.

- (4) Has not agreed to revise the Taiwan Relations Act.
- (5) Has not altered its position regarding sovereignty over Taiwan,
- (6) Will not exert pressure on the Republic of China to enter into negotiations with the Chinese Communists.<sup>76</sup>

While the United States did not deny such unilateral assurances, it did not make an official release of the alleged assurances.<sup>77</sup>

#### VI. MILITARY TECHNOLOGY TRANSFER AS A PARTIAL ALTERNATIVE TO ARMS SALES

The 1982 U.S.-PRC Taiwan Arms Sales Communique was very damaging to U.S.-ROC relations. As pointed out by Democratic Senator John Glenn: "[A]greeing to limit [the quality and quantity], gradually reduce and ultimately end arms sales put us [U.S.] in an impossible position. Soon the Chinese will return with more demands and insist that we finally resolve the issue. We will be in the unfortunate position of having limited our argument to when, not if, a cut off should occur."<sup>78</sup> A PRC source claimed that when then Vice President George Bush visited China in April 1982, he expressed the views that the U.S. disagreement on setting a date for termination of arms

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76. See Statement of Spokesman of the ROC Ministry of Foreign Affairs, August 17, 1982, in Hungdah Chiu, "Selected Documents Concerning United States Arms Sales to Taiwan," *Chinese Yearbook of International Law and Affairs*, Vol. 2 (1982), p. 226.

77. These six points were not published by the U.S. side, but at the U.S. Senate Committee on Foreign Relations hearings on August 17, 1982, Assistant Secretary of State Holdridge acknowledged the existence of these points and the conveyance of these points to Taiwan authorities. The following excerpts are reproduced from Senate hearings:

The Chairman [Senator Percy]. I would like to go back over the six points that you mentioned today just for necessary emphasis I think for all of us.

First, these are assurances to Taiwan that the administration has not agreed to a cutoff date for arms sales to Taiwan. Second, the administration has not agreed to amend the Taiwan Relations Act. Third, the administration will not pressure Taiwan into accepting the PRC reunification proposal. Fourth, the administration will not play a mediating role between the PRC and Taiwan. Fifth, the administration will not consult the PRC about future arms sales. Sixth, the administration has not recognized PRC sovereignty over Taiwan.

Were these items specifically furnished to Taiwan in advance, and were they discussed with them?

Ambassador Holdridge. Let me say, Mr. Chairman, over a month ago the people on Taiwan became aware through appropriate channels that these points which you have outlined . . .

Senate Committee on Foreign Relations, 97th Congress, Second Session, August 17, 1982, Washington, D.C.: U.S. Government Printing Office, 1982, p. 13. The U.S. press did not report these assurances until April 1984 when President Reagan visited the PRC. See "Reagan Said to Assure Taiwan on His China Visit," *New York Times*, April 26, 1984, p. 4.

78. *U.S. Policy toward China and Taiwan*, *supra* note 73, p. 4.

sales to Taiwan did not mean that it would sell arms to Taiwan indefinitely.<sup>79</sup>

Moreover, the Communique's reference to the PRC's "Nine-point proposal" on peaceful unification of Taiwan with the mainland, at least raises the spectre that the United States tacitly endorsed the proposal, which was conditioned on the elimination of the international personality of the ROC.

The Communique severely undercut the U.S. political and security commitment to the people of Taiwan under the TRA and made the people of Taiwan feel uncertain about their future. This was because the numerical inferiority faced by the ROC's armed forces in every category of military strength makes it essential for the ROC to maintain a military balance in the Taiwan Strait. With the U.S. commitment in the Communique to restrict the quality of arms sales to Taiwan, one can expect that the military balance in the Taiwan Strait would shift gradually to the PRC as Taiwan's weaponry ages and the PRC gains access to advanced U.S. and European weaponry.

The concern over Taiwan's future security by Chinese people there had an unfavorable impact on Taiwan's economy as reflected in the domestic investment rate. From 1971 to 1985, the national savings rate of gross domestic products increased from twenty-eight percent (28%) to thirty-one point six percent (31.6%). On the other hand, the domestic investment rate of gross domestic products decreased from twenty-six point thirty-nine percent (26.39%) to seventeen point nine percent (17.9%).<sup>80</sup> The rate of domestic investment began to decrease significantly after 1982 — the year the United States signed the Joint Communique. In 1982, the domestic investment rate decreased to twenty-five point seventeen percent (25.17%) and in the first quarter of 1986 further decreased to sixteen percent (16%).<sup>81</sup>

Moreover, between 1982 and the summer of 1986, the Reagan Administration took several steps that further undercut the confidence of the people of Taiwan in the U.S. political and security commitment to them. On October 11, 1984, Chinese Communist leader Teng Hsiao-p'ing (Deng Xiaoping) said that the PRC could institute a military blockade against Taiwan.<sup>82</sup> On May 10, 1985, the General Secretary of the Chinese Communist Party, Hu Yao-p'ang specifically pointed out that the PRC would use force against Taiwan in eight or

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79. *Diplomacy of Contemporary China*, *supra* note 13, pp. 237-238.

80. *Chung-yang jih-pao* (Central Daily News), international edition, June 2, 1986, p. 7.

81. *Lien-ho pao* (United Daily News), international edition, June 6, 1986, p. 1.

82. Deng Warns of 'Eruption' in U.S.-China Ties Over Taiwan," *New York Times*, October 12, 1984, p. A8.

ten years.<sup>83</sup> Despite the fact that a high official of the State Department stated, at the Hearing on Taiwan Arms Sales Communique of the Senate Foreign Relations Committee on August 17, 1982, that if the PRC changed its peaceful policy toward Taiwan, the United States would reexamine its position of limiting the quantity and quality of arms sales to Taiwan.<sup>84</sup> The United States, however, did not make a public challenge to the Chinese leaders' remarks on the use of force against Taiwan.

In May 1986, the Reagan Administration decided to sell \$550 million in radar and electronic weapons systems to the PRC for its high altitude fighter interceptor, the F-8, to provide 50 of them with an all-weather, day-night capability. The Administration asserted that these fighters would be used to strengthen the PRC's defense capability vis-a-vis the Soviet Union. The effect of 50 jet fighters with all-weather and day-night capability in the PRC's defense against the Soviet Union is almost nil, as the latter has thousands of jet fighters of similar and higher quality.<sup>85</sup> On the other hand, 50 such jet fighters would pose a serious security threat to Taiwan, which does not possess jet fighters of similar quality. This sale has cast further doubt in the minds of the people of Taiwan of the U.S. political and security commitment to Taiwan under the TRA.

In view of the severe concern of the ROC over its future security, the United States finally agreed to provide the assistance of U.S. private industry to develop an indigenous all-weather fighter.<sup>86</sup> In other words, both the ROC and the United States agreed to use military technology transfer as a partial substitute for arms sales restricted by the U.S.-PRC Joint Communique.

In an interview with Selig S. Harrison of the Carnegie Endowment for International Peace on April 23, 1986, Hu Yao-p'ang, then General Secretary of the Chinese Communist Party, spoke strongly against technology transfers to Taiwan and opined that arms sales and

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83. "Hu Yaobang Interviewed by Pai Hsing's Lu Keng," *Foreign Broadcast Information Service, Daily Reports, China*, June 3, 1985, p. W7.

84. See Statement of Assistant Secretary of State for East Asian and Pacific Affairs Holdridge made on August 17, 1982 at the hearings on U.S. Policy toward China and Taiwan, *supra* note 73, p. 13.

85. See "Editorial: Arms for China, Alms for Taiwan," *Wall Street Journal*, April 28, 1986, p. 24, where it questions why the U.S. is selling fighter technology to China when it won't sell new aircraft to Taiwan. Some conservatives fear that the sale of \$500 of advanced avionics to upgrade PRC's interceptor aircraft will tip the balance of power with Taiwan in China's favor. See *Wall Street Journal*, May 5, 1986, p. 32.

86. "U.S. Industry Aiding Taiwan in Developing National Fighter to Meet Threat from the PRC," *Aviation Week & Space Technology*, March 31, 1986, p. 31.

the transfer of technology for arms manufacture were the same thing.<sup>87</sup> In an article in the authoritative *Liao-Wang Chou-k'an* (*Liaowang Zhoukan* in Pinyin, *The Outlook Weekly*) magazine, it was alleged that private U.S. involvement in producing jet-fighters in Taiwan "seriously violated the principle of the August 17 communique."<sup>88</sup> During a visit to the United States in June 1986, PRC Vice-Foreign Minister Chu Chi-shen (Zhu Qishen) sought clarification of the U.S. position on technology transfer. It was reported that the PRC did send an inquiry to the United States, asking whether military technology transfer violated the spirit of the August 17, 1982 Communique. On August 15, 1986, the U.S. reply stated that the Communique stood on its own, and that there was no need to reinterpret or renegotiate it. A U.S. official reportedly stated: "The text is very clear. It talks of arms sales and not technology."<sup>89</sup> Because of the firm position taken by the United States, the PRC did not press this issue to make it a major diplomatic crisis. With the resolution of this basic security issue and the generally favorable response from indirect contacts with the mainland (as explained below), the ROC moved forward a more positive response to the PRC's peace overture of "three links" (mail, air and shipping services, and trade) and "four exchanges" (relatives and tourists, academic groups, cultural groups, and sports representatives) with Taiwan, launched in 1979<sup>90</sup> and reiterated in the PRC's 1981 "Nine-Points Proposal" for unification.<sup>91</sup>

The PRC's overture for "three links" and "four exchanges" has great appeal to many people in Taiwan. Those who have family ties with people on the mainland would naturally like to visit their relatives. For others, who only learned about China from books, there is a natural curiosity and nationalistic feeling to visit the Chinese mainland. Taiwan businessmen are attracted by the opportunity of opening a vast new market on the mainland. Under such circumstances, the ROC government was in a dilemma. If it categorically rejected the overture, this definitely would have caused popular discontent in Tai-

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87. Daniel Southerland, "U.S. Support of Taiwan Jet Fighter Cited by Peking as Violation of Pact," *The Washington Post*, April 25, 1986, pp. A32, A33.

88. Chang Ching-hsu (Zhang Jingxu in Pinyin), "A Preliminary Analysis of the Theory of Military Balance in the Taiwan Strait," *Liaowang Zhoukan* (*The Outlook Weekly*), overseas edition, No. 30 (July 28, 1986), p. 23.

89. Nayan Chanda, "A technical point, U.S. rejects China's stance on technology transfers to Taiwan," *Far Eastern Economic Review*, Vol. 133, No. 35 (August 28, 1986), p. 26.

90. See "N.P.C. [National People's Congress] Standing Committee Message to Compatriots in Taiwan," *Beijing Review*, Vol. 22, No. 1 (January 5, 1979), pp. 16-17.

91. See *supra* note 68.



wan. If it responded positively to this overture, it may have been viewed as impliedly acceding to the PRC's sovereign claim to Taiwan. There was also the security concern that extensive contacts with the mainland might facilitate the Communists' infiltration of Taiwan and undercut the people's anti-communist will and vigilance. This concern was especially important, from the ROC's point of view, because the Chinese Communists have refused to renounce the use of force against Taiwan and the August 17, 1982 U.S.-PRC Joint Communiqué limited the quality and quantity of arm sales to Taiwan. In view of this dilemma, the ROC has taken an indirect and limited, yet positive, response to the PRC's overture for "three-links" and "four-exchanges."

In the early 1980's, the ROC quietly allowed indirect trade between Taiwan and the mainland to develop and finally legitimized such trade in 1985. It also permitted scientists and others from Taiwan to sit down with their PRC counterparts at international meetings. The ROC allowed indirect mail exchanges and did not prosecute ordinary people who quietly visited their relatives on the mainland. On March 23, 1981, the ROC agreed to have the Republic of China's Olympic Committee renamed as the Chinese Taipei Olympic Committee,<sup>92</sup> thus making it possible for athletes from both the mainland and Taiwan to compete in international sports activities.

After the U.S. commitment to transfer military technology to Taiwan in 1986, the ROC government, on July 16, 1987, formally lifted the ban on direct tourist visits to Hong Kong to facilitate people from Taiwan meeting their relatives from the mainland.<sup>93</sup> On October 15, 1987, the Central Standing Committee of the ruling Nationalist Party approved a new policy to allow people living in Taiwan to visit their relatives on the Chinese mainland. On November 2, 1987, the Red Cross Society of the Republic of China began to handle the applications for mainland visits and to provide assistance to people who want to locate their relatives on the mainland.<sup>94</sup> Soon after, mail exchanges through Hong Kong were permitted. On June 10, 1989, di-

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92. See *Chinese Yearbook of International Law*, Vol. 1 (1981), pp. 145-146.

93. "Restrictions Lifted on HK Travel in Wake of ROC's 'Momentous Day,'" *The Free China Journal*, Vol. IV, No. 28 (July 20, 1987), p. 1.

94. See "Mainland Visits Policy Comes from 'Heart'" *FBIS, China* October 19, 1987, p. 38; "Red Cross Begins Mainland Contacts Service," *ibid.*, October 21, 1987, p. 30; Ma Hsia-mian, "Thousands of Taiwan Residents Packing for Trip to Mainland," *The Free China Journal*, Vol. IV, No. 42 (October 26, 1987), p. 1 and Mei Hsin-ti, "Red Cross Society Starts Check on Thousands of Mainland Kin," *ibid.*, No. 44 (November 9, 1987, p. 3.

rect mail exchanges with the mainland began.<sup>95</sup> In 1988, the ROC began to allow a limited number of mainland Chinese to visit their sick relatives in Taiwan or to attend their funeral services.<sup>96</sup>

Trade between the mainland and Taiwan has flourished since the early 1980's. The total volume of trade between 1979 and 1986 was about 4 billion U.S. dollars. In 1987 alone it was \$1.6 billion and in 1988 it jumped to \$2.4 billion.<sup>97</sup>

In April 1989, the ROC began to allow its reporters to visit the mainland and considered allowing mainland reporters to visit Taiwan.<sup>98</sup>

The PRC has also actively solicited people from Taiwan to invest in the mainland by offering generous terms and thus attracting many Taiwan investors, especially in the Fukien Province opposite Taiwan.<sup>99</sup>

This interchange across the Taiwan Strait has greatly reduced the tension and the concern of the Chinese people in Taiwan over the future security of their country. This change is also reflected in the domestic economy. In 1986, some banks refused to accept large deposits because of the difficulty in finding enough companies or individuals to apply for loans. Further, the stock and housing markets became stagnant. These situations gradually have improved since 1987 and Taiwan is now among the most active stock and housing markets in the world. Although in 1988-89, Taiwan's domestic investment incentive has again run into trouble, most observers consider that it has nothing to do with the security problem and it is primarily due to labor and environmental movements, crime and psychological factors tied into a "get rich quick" mentality generated by Taiwan's wild stock market.

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95. *Shao-nian chung-kuo cheng-pao* (China Daily News), Monterey Park, California, July 29, 1989, p. 4.

96. In 1988, there were 389 Chinese from the mainland who went to Taiwan to visit their sick relatives or attend funerals. See "Press Conference of Ding Guangen, Director of the Taiwan Affairs Office of the State Council," *Taisheng* (Voice of Taiwan), 1989, No. 3, p. 6.

97. *Ibid.*

98. After the Tiananmen Square Massacre of June 4, 1989, the ROC decided to postpone its decision to allow PRC reporters to visit Taiwan. After the massacre, it was clear to the ROC government that mainland reporters were under the total control of the PRC government and they could not report Taiwan's situation in a reasonably objective way. *Chung yan jih-pao* (Central Daily News), international ed., August 7, 1989, p. 1. However, the ban on PRC reporters to visit Taiwan was removed in the summer of 1990.

99. E.g., on July 3, 1988, the PRC's State Council promulgated "Regulations on Encouraging Investments by Taiwan Compatriots" *People's Daily*, July 7, 1988, p. 2. See also "Mainland Invites Taiwan Investors," *Beijing Review*, Vol. 31, No. 29 (July 18-24, 1988), p. 9.

With respect to the TRA, since the issuance of the August 17, 1982 U.S.-PRC Communique, U.S. arms sales to Taiwan have declined progressively by about U.S. \$20 million a year since 1982, when the total amount was \$780 million, to U.S. \$720 million for fiscal year 1987. The United States also refused to sell high performance jet fighters, such as the F-16 or the F-20, to Taiwan. With improved interchanges between Taiwan and the mainland, although the PRC routinely protests arms sales, it does not make them a major issue in U.S.-PRC relations. It appears that the PRC has come to realize that the TRA, despite its alleged interference in China's internal affairs, also plays a positive role by making increasing contacts with Taiwan possible.

#### VII. CONCLUSION AND CHALLENGES FOR THE FUTURE

The maintenance through the TRA of the substantive relations, including an alliance, between the United States and the ROC, without formal diplomatic relations, is unprecedented in international law. At the beginning of the implementation of the TRA, the Carter Administration insisted that the "AIT would have to act on behalf of the U.S. in reality as well as in theory" but this soon proved to be impractical, as the "AIT simply is not large enough to substitute for the myriad agencies of the U.S. government, nor can it be expected to acquire expertise on the entire range of governmental concerns from atomic energy to agriculture price support.<sup>100</sup> Therefore, it turned out that necessary action would still need to be taken by relevant U.S. government agencies and communicated by the AIT to the CCNAA.

During the Reagan Administration, direct contacts between the CCNAA or ROC officials became frequent, though they did not include certain official functions that were limited to officials of countries with which the United States had formal diplomatic relations. Working level CCNAA officials were and remain free to call on their U.S. counterparts so that official business between the ROC and the United States can be accomplished efficiently. The only exceptions to this practice are contacts between the CCNAA and the Department of State and the Executive Office of the President.<sup>101</sup> However, members of the ROC Legislative Yuan or National Assembly are allowed to call on State Department officials.

Since the U.S. Constitution recognizes the separation of powers, there is no restriction for the Congress and the Judiciary on contact

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100. Feldman, "Political and Diplomatic Relations," *supra* note 42, p. 29.

101. *Ibid.*, p. 30.

with ROC or CCNAA officials. As a result, the ROC and the United States actually maintain very close relations that are, for all intents and purposes, "diplomatic" except in name.

As for the security commitment in the TRA, since the introduction of military technology transfers to bypass the August 17, 1982 Communique's restriction on arms sales to Taiwan, it is no longer a major issue between the ROC and the United States. The improved and increased contacts between Taiwan and the mainland also caused the PRC to avoid any public attack on the TRA or any renewal of its armed threat to Taiwan in recent years. Therefore, under the current framework of the TRA, U.S. relations with the ROC and the PRC seem to work reasonably well.<sup>102</sup>

Be that as it may, the recent rise of the Taiwan independence movement in Taiwan has cast serious doubt on the future of U.S. relations with Taiwan and the PRC within the framework of the TRA. Before the December 2, 1989 election of the Legislative Yuan, the PRC issued several stern warnings through its officially-controlled media against this movement.<sup>103</sup> However, 8 of the 101 legislators elected are well known for their advocacy of independence.<sup>104</sup> If this movement continues to spread in Taiwan, which seems likely, the PRC may renew its military threat against Taiwan, attack the TRA and blame the United States for alleged support of this movement.

The crucial challenge to the TRA will come when the PRC considers that the Taiwan independence movement is out of the ROC's control and therefore it decides to take military action to prevent the spread of this movement in Taiwan. Under those circumstances, will the United States use force to prevent the PRC from taking such action, thus risking an almost total setback of its relations with the PRC? Moreover, would the American people support such a military confrontation with the PRC?

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102. The recent deterioration of U.S. - PRC relations is due to June 4, 1989 Tiananmen Square massacre by the Chinese Communist forces and has little to do with Taiwan.

103. *E.g.*, see Yao Yi-ping (Yao Yiping, in Pinyin) "Guarding Against the Ideological Trends of 'Taiwan Independence' on the Island," *The Outlook Weekly*, 1989, No. 48 (November 27, 1989), pp. 21-22; translated in "Liaowang Speculates on Use of Force," *Foreign Broadcast Information Service, China*, November 29, 1989, pp. 52-55.

104. See *World Journal*, December 3, 1989, p. 34 and Ku Pi-ling, "Taiwan Independence Advocates and anti-Taiwan Independence Advocates are All Elected with Higher Number of Votes," *Shih-pao Chou-k'an* (China Time Weekly), No. 250 (December 9-15, 1989), p.1