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The Effects of Derecognition of Taiwan on United States Corporate Interests

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I. INTRODUCTION

On December 15, 1978, President Jimmy Carter announced that the United States would normalize diplomatic relations with the Peoples’ Republic of China (PRC) and that present diplomatic relations with the government of the Republic of China (Taiwan) would cease as of January 1, 1979.¹ The establishment of diplomatic relations with the PRC was the culmination of a series of objectives set out by President Richard Nixon under the Shanghai Communiqué in 1972.²

President Carter’s announcement aroused controversy in the United States Congress³ and in the Taiwan government. The people and government of Taiwan, as well as American businesspersons, were alarmed at this sudden announcement to sever diplomatic relations with Taiwan. Among the many questions regarding the decision, American businesspersons expressed concern with the potential adverse effects on their investments in Taiwan and the protection of these interests by the U.S. and Taiwan governments.

This note will examine the extent to which American investments in Taiwan have been adversely affected by the change in Taiwan’s diplomatic status and review the legal barriers to continuing business relations presented by future “‘unofficial’⁴ relations between the United


². 66 DEP’T ST. BULL. 435 (1972) [hereinafter cited as Shanghai Communiqué].

³. Goldwater v. Carter, 444 U.S. 996 (1979) (Senator Barry Goldwater and other Congressmen sued to enjoin President Carter from abrogating the mutual defense treaty with Taiwan without Senate approval). Although the timing of the announcement was a surprise, it must be emphasized that the United States and the PRC had been engaged in the gradual process of normalizing relations since the Shanghai Communiqué, a period of eight years. Nevertheless, members of Congress were still angered by the President’s unilateral decision to simultaneously terminate diplomatic relations with Taiwan and to abrogate the Mutual Defense Treaty of 1954.

⁴. TRA Issues, Feb. 1979, supra note 1, at 134. The President stated: “In the future, the American people and the people of Taiwan will maintain commercial, cultural, and other relations without official government representation and without diplomatic relations.”

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States and Taiwan. Additionally, this note will examine the role of the American Institute in Taiwan as established under the Taiwan Relations Act and assess its past performance and predict its future effectiveness. Finally, this note will analyze the economic, political and strategic concerns brought on by derecognition, in order to provide helpful background for potential American investors. Questions which will be considered include: whether derecognition means that existing treaties and agreements affecting commercial relations will not be protected under U.S. law; what is the status of Taiwan under international law; and whether there are remedies for contract disputes which may arise between American and Taiwanese nationals.

II. BACKGROUND OF THE TAIWAN RELATIONS ACT

When President Carter established diplomatic relations with the PRC, he met the PRC’s preconditions to normalization of relations enumerated in the Shanghai Communiqué.5 These preconditions were the severance of diplomatic relations with the government of Taiwan, the removal of all United States military personnel and installations from Taiwan, and the abrogation of the U.S.-Republic of China Mutual Defense Treaty of 1954.6

The PRC insisted in the Shanghai Communiqué that the United States acknowledge that there is only one China and that Taiwan is but a part of China.7 The United States’ acknowledgement altered a long-standing position which had recognized the government of Taiwan as the de jure government of China.8 With the establishment of diplomatic relations with the PRC, the United States recognized the PRC government on the mainland as de jure while the government on Taiwan as only a de facto political entity.

However, Taiwan continues to be recognized under international law, having satisfied the requirements necessary to acquire international legal protections.9 Under international law, the existence of a governmental entity or state is separate from recognition of that

6. Id. at 931-33.
7. The President stated: “The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.” TRA Issues, Feb. 1979, supra note 1, at 133.
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A state must meet specific requirements for it to retain a legal identity under international law. The state must have (1) a government which is in “effective control” of its defined territory; (2) the “bulk of its inhabitants possess sufficient political stability and provide allegiance to whatever national symbols there might be;” (3) leadership which possesses “sufficient administrative capability to carry out . . . internal government functions and its international obligations under international law and the United Nations Charter;” and (4) no “massive and systematic interference in its domestic affairs by a foreign power.”

Because Taiwan has satisfied these requirements, the PRC has not insisted that all existing treaties and agreements between the United States and Taiwan be terminated. In fact, as Senator Edward Kennedy noted, the PRC no longer feels compelled to object to official U.S. relations with Taiwan. Rather, the PRC has agreed to permit the United States and Taiwan to continue relations on an unofficial basis.

Diplomatic recognition of a country by other countries in the international community is usually based on the pursuit of mutual benefits or on the existence of common interests. A country might subsequently withdraw its recognition if antagonistic relations developed or if there was a change in its national interests. Historically, American withdrawal of de jure recognition of a foreign government has been the result of either unfriendly relations or for political reasons. For example, the PRC was recognized as a state under international law but the United States did not grant it de jure recognition until 1978. This was not the case with the derecognition of Taiwan. The withdrawal of the United States’ de jure recognition of Taiwan merely dismissed Taiwan’s claim to be the sole government.

10. Id. at 324.
11. Id. at 325; see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §100 (1965), which states:
Before recognizing an entity as a new state, the recognizing state is required to make a determination, reasonably based upon fact, that the entity:
(a) has a defined territory and population;
(b) is under the control of a regime that satisfies the minimum requirements for recognition as a government under No. 101;
(c) has the capacity to engage in foreign relations; and
(d) shows reasonable indications that the requirements of Clauses (a)-(c) will continue to be satisfied.
13. Id.
14. Sheikh, supra note 9, at 325.
15. Id.
16. Li, supra note 8, at 18.
of China.\textsuperscript{17}

With regard to diplomatic recognition, United States relations with the PRC and Taiwan present an interesting and unique situation. The United States severed de jure diplomatic relations with Taiwan to establish normal de jure relations with the PRC. This was accomplished for practical as well as political reasons. Nonetheless, the severing of de jure diplomatic relations with Taiwan does not adversely affect U.S. dealings with Taiwan nor does it contravene the basic premises of international law. Professor Victor H. Li states that "there is no general or categorical statutory provision which prohibits or limits dealings with countries not recognized de jure by the United States."\textsuperscript{18}

After withdrawal of de jure recognition, President Carter provided the opportunity to recognize Taiwan as a separate political entity and to establish de facto recognition of Taiwan.\textsuperscript{19} In essence, it was suggested that all previous relationships with Taiwan continue on an unofficial basis. Since Congress permits dealings with de facto recognized countries, Congress could construct a new legal framework which would allow the maintenance of relations with Taiwan in the context of normalization of relations with the PRC.\textsuperscript{20} All agreements between the United States and Taiwan would have binding legal effect despite the recognition of Taiwan as a de facto instead of a de jure political entity.\textsuperscript{21} Thus, treaties would not lapse upon the withdrawal of de jure recognition or upon the transfer of recognition from one government to the other.\textsuperscript{22}

\textsuperscript{17} TRA Issues, Feb. 1979, supra note 1, at 22 (Statement of the Honorable Richard Holbrooke, Assistant Secretary of State for East Asian and Pacific Affairs).

\textsuperscript{18} Li, supra note 8, at 14.

\textsuperscript{19} The President stated:

[In the future, the American people and the people of Taiwan will maintain commercial, cultural, and other relations without official diplomatic relations. The Administration will seek adjustments to our laws and regulations to permit the maintenance of commercial, cultural and other non-governmental relationships in the new circumstances that will exist after normalization.]

TRA Issues, Feb. 1979, supra note 1, at 134.

\textsuperscript{20} Li, supra note 8, at 18-19.

\textsuperscript{21} Id. at 15-16. See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 161 & 4 (1965). The latter section states: "Except as otherwise indicated, 'state,' as used in the Restatement of this Subject, means an entity that has a defined territory and population under the control of a government and that engages in foreign relations."

\textsuperscript{22} Comment, supra note 5, at 962-63. Mr. Scheffer points out that "there is no principle of international law which would require that those treaties must lapse upon severance of diplomatic relations or transfer of recognition from one government to the other." Id.
then be regarded as remaining in force between the *de facto* government in Taipei and the United States government.\textsuperscript{23} Taiwan may continue to enter into binding international agreements without fear that the PRC would secede to all of the former's treaties and obligations.\textsuperscript{24} Based on United States treatment of *de facto* and *de jure* relations with other countries in the past as well as on principles of international law, no significant change in Taiwan's status or in U.S.-Taiwan relations is likely to result from derecognition.\textsuperscript{25}

Since normalization of relations between the PRC and the United States has been concluded, there is no longer political uncertainty regarding Taiwan's possible annexation by the PRC.\textsuperscript{26} While the Taiwanese may favor normalization, they do not necessarily favor unification.\textsuperscript{27} In fact, the people of Taiwan believe that there may be peaceful coexistence with the PRC since the choice between their government and that of the PRC is unrealistic.\textsuperscript{28} This would negate any immediate PRC threat to take over Taiwan.\textsuperscript{29}

The Taiwanese are directing their energies toward maintaining their economic viability in East Asia. The Taiwan Relations Act is one of the principle instruments through which this can be accomplished. The Act provided a smooth transition for the U.S. from withdrawal of *de jure* recognition to the establishment of unofficial *de facto* relations with Taiwan.

III. THE TAIWAN RELATIONS ACT

Many American businesspersons were concerned that their interests with Taiwan would be taken over by the PRC. They believed that the PRC might claim a right to all property and interests on Taiwan. There was uncertainty whether existing contracts entered into with citizens and the government of Taiwan would remain valid after the United States withdrawal of *de jure* recognition.\textsuperscript{30} President

\textsuperscript{23} *Id.* at 963.
\textsuperscript{24} *Id.* See also \textit{Restatement (Second) of the Foreign Relations Law of the United States} §§ 100 & 108 (1965).
\textsuperscript{25} See generally Sheikh, *supra* note 9, at 324.
\textsuperscript{26} See, *The U.S. rebuff fails to dampen the boom*, Bus. Wk., Oct. 8, 1979, 47, 51.
\textsuperscript{27} TRA Issues, Feb. 1979, *supra* note 1, at 73.
\textsuperscript{28} *Id.* at 74.
\textsuperscript{29} *Id.* Mr. Ming-Min Peng, Director of the Taiwanese-American Society and Director of Formosan Studies, testified that the majority of Taiwanese were in favor of the normalization.
\textsuperscript{30} *Id.* at 80-81 (statement of Robert Parker, President of the American Chamber of Commerce in the Republic of China representing American business interests).
Carter stated that we are "recognizing simple reality" by recognizing the PRC as "the single Government of China." This statement created anxieties and confusion over the legal framework under which American businesses would operate in Taiwan.\textsuperscript{31} American business interests and concerns were closely interrelated with Taiwan's military security. Business interests depended upon economic and political stability within the Taiwanese system of government and among the people of Taiwan. In order to adequately ensure stability, there had to be an assurance of military security from potential threats by the PRC. A major concern was the fact that the PRC could initiate a blockade of Taiwan's air and sea trade lanes, thereby jeopardizing its primary economic strength: in the import/export markets.\textsuperscript{32}

Some American companies refused to conduct business with Taiwan because of (1) the uncertainty over adequate protection of their interests and investments in Taiwan, and (2) the PRC's refusal to conduct business with those companies which operated in Taiwan. For example, American Express ceased doing business with Taiwan when the PRC refused to honor its traveller's cheques because of American Express' operations in Taiwan.\textsuperscript{33} The American business community in Taiwan called upon Congress to provide safeguards to protect their interests from PRC economic coercion and to protect U.S. credit, over $2 billion, to borrowers in Taiwan.\textsuperscript{34} Specifically, the American business community demanded assurance that all relevant treaties and agreements, if transformed into private contracts between two non-governmental entities, would continue to have full force and effect of law in either country.\textsuperscript{35} Furthermore, the business community insisted that the President consult Congress or the government in Taiwan before any additional international treaties and agreements between the United States and Taiwan were terminated.\textsuperscript{36}

It is important to note some of the primary concerns of American businesspersons with respect to the investments they sought to pro-

\begin{itemize}
\item \textsuperscript{31} Id. at 81.
\item \textsuperscript{32} Id. at 78. Such a blockade may be an alternative to the PRC's present inability to launch an effective amphibious assault while avoiding direct military conflict with fellow Chinese.
\item \textsuperscript{33} Id. at 79.
\item \textsuperscript{34} Mr. Parker remarked to the Committee that banks are "ultra sensitive to political and economic adjustments, and the imposition by Peking of economic sanctions against Taiwan could easily trigger an immediate credit freeze" thereby jeopardizing huge American investments. Id.
\item \textsuperscript{35} Id. at 81.
\item \textsuperscript{36} Id.
\end{itemize}
Derecognition of Taiwan

This may provide guidance for the potential American investor. The primary issues that concerned the American businesspersons were:

1. Whether the PRC would have jurisdiction over Taiwan as the sole government of all of China, to claim all existing contracts made between the U.S. and Taiwan and all rights to property in Taiwan;
2. Whether American courts would provide a sufficient forum for the settlement of claims and disputes between American and Taiwanese firms;
3. Whether the government of Taiwan would have the capacity to sue and be sued in American courts in the event of default of payments.

With these concerns in mind, Congress enacted legislation to keep current relations unimpaired between the U.S. and Taiwan, despite the change from official to unofficial recognition. On April 10, 1979, Congress adopted the Taiwan Relations Act, which President Carter signed into law. The purpose of this Act was to "help maintain peace, security, and stability in the Western Pacific and to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan." The Act provided that relations between the United States and Taiwan would remain virtually unchanged.

The introduction to the Taiwan Relations Act states that before any commercial, cultural and other relations can continue, Taiwan's military security has to be ensured. The Act removed previous uncertainties concerning the security of Taiwan's socio-economic system. Furthermore, the PRC acknowledged United States' interests in maintaining peace and stability in East Asia and assured the U.S.

37. Id. at 82-83. Mr. Parker also noted that it was essential that the United States recognize Taiwan as a sovereign so that commercial and financial relations between the two countries could continue smoothly. The United States could continue such relations with Taiwan and still respect all the attributes of sovereignty with respect to territory within Taiwan's control, as required under international law. See Sheikh, supra note 9, at 327.
38. The Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979)(codified at 22 U.S.C. §§ 3301-3316 (Supp. V 1981)). The President also issued Executive Order No. 12,143 two months after the passage of the Act, signifying his sincere intent to have relations between the U.S. and Taiwan continue without interruption and without significant change. TRA Issues, Feb. 1979, supra note 1, at 140.
40. TRA Issues, Feb. 1979, supra note 1, at 134, 140.
that it would not annex Taiwan by the use of military force.\textsuperscript{41}

With regard to the possibility of PRC abrogation of contracts made between the United States and Taiwan, it has been argued that debts and other contractual obligations between citizens and governments of the United States and Taiwan would not be adequately protected and enforced.\textsuperscript{42} Mr. Robert Parker of the American Chamber of Commerce in Taiwan concluded before the House Committee on Foreign Affairs that the Carter Administration’s attempts to “selectively transfer” some of the treaties and agreements into “unofficial status” would render them invalid in direct contravention of Congressional intent.\textsuperscript{43}

The Taiwan Relations Act removed doubts concerning the future of agreements, treaties and contracts entered into between American and Taiwanese firms. Section 4(a) of the Act provides that:

The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.\textsuperscript{44}

Section 4(a) also states that the President or any agency of the United States government is authorized to perform services through contracts with commercial entities on Taiwan in accordance with applicable United States law despite the absence of official diplomatic relations.\textsuperscript{45} In addition, the United States recognizes the validity of Taiwan law whenever application of United States law depends on it.\textsuperscript{46} Although the Mutual Defense Treaty of 1954\textsuperscript{47} was abrogated by the Taiwan Relations Act, this Act has maintained the intent of the former treaty.\textsuperscript{48} Furthermore, section 4(b)(3)(B) states that:

\begin{itemize}
  \item \textsuperscript{41} Sheikh, \textit{supra} note 9, at 330.
  \item \textsuperscript{42} Id. at 337.
  \item \textsuperscript{43} \textit{Implementation of the Taiwan Relations Act: Hearings Before the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 11 (1979)}[hereinafter cited as TRA Hearings, Oct. & Nov. 1979].
  \item \textsuperscript{44} The Taiwan Relations Act \textsection{4(a)}, 22 U.S.C. \textsection{3303(a).
  \item \textsuperscript{45} Id. \textsection{4(b)(2)-4(b)(3)(A), 22 U.S.C. \textsection{3303(b)(2)-3303(b)(3)(A).
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Mutual Defense Treaty of 1954, Mar. 3, 1955, United States-Republic of China, art. V, 6 U.S.T. 433, 436, T.I.A.S. No. 3178. The treaty between the United States and Taiwan pledges the two nations to mutual defense of Taiwan for the purpose of deterring aggressors and resisting communist subversion. Each party would act to meet the common danger in accordance with its constitutional processes.
  \item \textsuperscript{48} The Taiwan Relations Act \textsection{4(a)(8)(C), 22 U.S.C. \textsection{3303 (Supp. V 1981).}
\end{itemize}
For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the Peoples' Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan. 49

United States law has properly acknowledged that Taiwan is a separate legal and political entity with effective control over a specifically defined territory, and is protected from any legal or jurisdictional claims by the PRC. 50 The Taiwan Relations Act and principles of international law recognize that the PRC government is not now, and never has been, the government in control of Taiwan. The Taiwan Relations Act is based on the premise that for domestic purposes Taiwan is subject to specific legal treatment without reference to the PRC. 51 Taiwan may continue to autonomously manage its socio-economic affairs.

The Taiwan Relations Act also addressed the concern of providing a sufficient forum for the settlement of claims. Section 4(b)(7) of the Act states that “[t]he capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition.” 52 Taiwanese and American claim settlements in American courts would have absolutely no affect on U.S.-PRC relations.

An example of the principle that a foreign government, although not recognized by the executive or legislative branch of the United States government, may nevertheless have de facto existence which is juridically cognizable, is found in the case of Upright v. Mercury Business Machines Company. 53 In Upright, the plaintiff, an individual, was the assignee of a trade acceptance drawn and accepted by the defendant, Mercury Business Machines, in payment for business typewriters sold to it. Plaintiff’s assignor was organized by and was an arm and instrumentality of the East German government, 54 a

50. TRA Issues, Feb. 1979, supra note 1, at 117.
52. Id. § 4(b)(7), 22 U.S.C. § 3303(b)(7).
54. Id. at 41, 213 N.Y.S.2d at 421.
government not recognized by the American government.\textsuperscript{55} The defendant argued that the lack of de jure recognition of the East German government was determinative of whether transactions with it should be denied enforcement in U.S. courts.\textsuperscript{56} The court rejected this argument and held that "[t]he lack of jural status for [an unrecognized] government or its creature corporation is not determinative of whether transactions with it will be denied enforcement in American courts . . . ."\textsuperscript{57} When considering United States policy in foreign affairs, "[t]he legal consequences of non-recognition should be narrowly construed unless they can be properly related as inimical to the aims and purposes of our public and national policy."\textsuperscript{58} The Taiwan Relations Act, by encouraging the continuation of economic, cultural and other relations, reflects the American policy of assuring the continued prosperity of Taiwan.\textsuperscript{59} In light of this policy, private parties in Taiwan have standing to sue in American courts.\textsuperscript{60}

IV. The American Institute in Taiwan

To enable U.S.-Taiwan relations to continue unofficially, the Taiwan Relations Act also provides for the establishment of the American Institute in Taiwan (AIT). Section 6(a)(1) of the Taiwan Relations Act states:

Programs, transactions, and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through

(1) The American Institute in Taiwan, a non-profit corporation incorporated under the laws of the District of Columbia, . . . .\textsuperscript{61}

\textsuperscript{55} Id. at 41, 213 N.Y.S.2d at 419.
\textsuperscript{56} Id. at 42, 213 N.Y.S.2d at 421.
\textsuperscript{57} Id. However, the court concluded that the mere fact that a country is unrecognized de jure may be determinative if the unrecognized government is the plaintiff. Id. "[I]f the unrecognized government were allowed to sue, this would be deemed recognition of jural status (Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 [1923])." Id. at 42 n.2, 213 N.Y.S. 2d at 421 n.2.
\textsuperscript{58} TRA Issues, Feb. 1979, supra note 1, at 120.
\textsuperscript{59} Id.
\textsuperscript{60} See Daniunas v. Simutis, 481 F. Supp. 132, 135 (S.D.N.Y. 1978)(recognition is to be given to private, as opposed to political acts, of any unrecognized sovereign).
In essence, the AIT succeeds the U.S. Embassy in Taiwan, with certain limitations discussed below.\textsuperscript{62}

The establishment of the AIT presents a unique situation under traditional diplomatic practice. The AIT is a private non-profit corporation specifically created to carry out the provisions of the Taiwan Relations Act.\textsuperscript{63} The AIT consists of a three-person board of trustees with particular expertise in U.S.-Taiwan relations and with privileges and immunities normally accorded ordinary diplomatic personnel.\textsuperscript{64}

The AIT entered into a contract with the State Department to provide certain services in return for reimbursement of operating costs within prescribed limits.\textsuperscript{65} The AIT’s principal commercial goals are to provide an “increase [in] sales of American goods and services to Taiwan, to enlarge the U.S. share of the Taiwan market, to provide information and services to U.S. firms interested in trading with and investing in Taiwan, and to encourage the removal by Taiwan of restrictions which discourage imports from the United States.”\textsuperscript{66}

In addition, the AIT may present technical problems to the State Department that it is unable to address directly.\textsuperscript{67} For example, because the AIT is the agency through which the United States conducts its unofficial relations with Taiwan, it may obtain technical information from any agency of the U.S. government necessary to conduct such relations.\textsuperscript{68} Section 7 of the Taiwan Relations Act authorizes the employees of the AIT to perform the functions and services of United States consular officers.\textsuperscript{69} Thus, all transactions and communications of a governmental nature are directed through the AIT rather than through U.S. government agencies.\textsuperscript{70} This has permitted

\begin{itemize}
\item 63. Id.
\item 64. Id. \textit{See also} The Taiwan Relations Act § 10(c), 22 U.S.C. § 3309 (Supp. V 1981).
\item 65. \textit{Oversight of the Taiwan Relations Act: Hearings Before the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations,} 96th Cong., 2d Sess. 9-12 (1980)[hereinafter cited as \textit{Oversight}](statement of David Dean, Chairman of the Board and Managing Director, American Institute in Taiwan).
\item 66. Id. at 10.
\item 67. TRA Hearings, Oct. & Nov. 1979, supra note 43, at 34 (statement of Honorable Warren Christopher, Deputy Secretary of State).
\item 68. Id.
\end{itemize}
a smooth transition into the new relationship with Taiwan.

In representing the interests of the United States, the AIT oversees the performance of existing treaties and agreements and negotiates agreements with Taiwan’s counterpart, the Coordination Council for North American Affairs (CCNAA). Since the AIT and CCNAA represent the interests of their respective governments, both the United States and Taiwan accept the legal consequences and benefits of their agreements. The United States and Taiwan may modify these agreements on a case-by-case basis.

Because of the unofficial status of U.S.-Taiwan relations, the AIT does not enjoy the privilege, previously held by the U.S. Embassy, of maintaining close contact with Taiwanese economic officials. However, it must be noted that "no private corporation has ever received such a broad range of powers and authority to represent the United States government as this act has given AIT." For example, the Taiwan Relations Act provides that the President may grant certain diplomatic privileges and immunities to the CCNAA when Taiwan grants comparable privileges and immunities to members of the AIT. Moreover, any conflict in law or regulation of any political subdivision of the United States, in which the AIT is

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71. Id. at 250-53. The Articles of Incorporation of the American Institute in Taiwan are as follows:
The institute is organized to engage exclusively in charitable, educational, and scientific activities, in furtherance of such activities (and without limitation):
(a) to enable the American people and the people on Taiwan to maintain commercial, cultural, and other relations without official government representation or diplomatic relations;
(b) to represent the interests of the United States and its people in conducting and carrying out programs, transactions, and other relations with the people on Taiwan;
(c) to enable international agreements and arrangements to be performed and enforced in a manner consistent with subparagraphs (a) and (b) above; and
(d) to perform functions, on behalf of the American people, that would otherwise be performed by government.

72. Randolph, supra note 70, at 260 n.40. Mr. Randolph notes that, "[u]nder the Vienna Convention on the Law of Treaties, legally recognized 'international agreements' may exist between states and 'other subjects of international law that are not states['], or between such 'other subjects of international law' themselves.'" Id.

73. TRA Hearings, Oct. & Nov. 1979, supra note 43, at 37, 42 (statement of Honorable Warren Christopher, Deputy Secretary of State).

74. Oversight, supra note 65, at 32 (statement of William N. Morell, President of the USA-ROC Economic Council); see also Comment, United States-Taiwan Relations: Taiwan Relations Act, 20 HARV. INT'L L.J. 731, 736 (1979) (the status of AIT is virtually the same as that of an official U.S. consulate).

75. Comment, supra note 74, at 737-38 (footnote omitted).

incorporated or doing business, which impedes the performance of the AIT will be superceded by the Taiwan Relations Act. Finally, the Act requires Congress to periodically report agreements concluded through the AIT, review the AIT's performance and budget, and review the legal and technical aspects of the U.S.-Taiwan relationship.

V. ECONOMIC CONDITIONS IN THE AFTERMATH OF DERECOGNITION

Since the enactment of the Taiwan Relations Act, the AIT has enabled the United States and Taiwan to maintain political status quo ante without jeopardizing Taiwan's legitimate security interests. It is necessary, however, to consider the status of economic relations between the two countries in light of the change in Taiwan's diplomatic status.

In the aftermath of the derecognition of Taiwan as the de jure government of China, economic relations between the United States and Taiwan have not deteriorated, but have improved. Thus, Taiwan has been able to absorb the impact of U.S.-PRC normalization of relations and confidently proceed through a smooth transition toward unofficial relations with the United States.

It is argued that the Taiwanese are now able to proceed with their economic plans because the uncertainty of Taiwan's future has been removed by President Carter's shift in diplomatic recognition. The president of Ford Lio Ho Motor Company, a joint venture firm that is 70 percent owned by Ford Motor Company, stated that "[n]ormalization has removed the one dark cloud—whether Taiwan could make it without the U.S.'" In fact, two-way trade between the United States and Taiwan reached approximately $7.5 billion in 1978. Surprisingly, after derecognition in 1979, the trade volume increased over 30 percent to approximately $10 billion. Another factor to this remarkable increase in trade is the historical stability of Taiwan's economic system. From 1952 through 1977, Taiwan has enjoyed an annual growth rate of 8.4 percent, increasing its gross national product 700 percent. In 1977, Taiwan gained real growth of 11.8 percent, increasing its overall GNP to $15 billion and per capita income to $900.

Immediately after U.S. derecognition of the Taiwan government, wages in Taiwan rose 20 to 25 percent thereby countering inflation and the rise in consumer prices. Foreign investment approvals were at their highest level during the first 11 months of 1979. During 1980, unemployment was less than 2 percent. These conditions, combined with the smooth transition to unofficial relations, created much confidence that Taiwan could prosper as a
A reason for Taiwan's strong economic performance has been the establishment of joint venture agreements which involve high technology transfers and the promotion of foreign investment. This has been due to Taiwan's expansion to capital-intensive and technology-intensive industries. This economic plan has had positive effects on United States corporations since Taiwan has been able to offer numerous tax incentives and investment opportunities to them. Taiwan has expanded its gross national product (GNP) at an annual average rate of over 10 percent since 1979.

The Taiwanese experienced successful economic growth in 1979 by "redoubling their impressive drive to industrialize and to conquer new world markets . . . compensating for the political shock of losing their close political ties and military alliance with the U.S." During the first year of derecognition, several large joint venture agreements involving high technology transfers and foreign investments were signed with American firms such as General Electric and General Motors. One major factor for this economic prosperity was Taiwan's revision of statutes which gave foreign investors considerably

separate political entity while absorbing the impact of normalization of relations between the United States and the People's Republic of China. Finally, foreign private investment in Taiwan during 1979 increased 64 percent over the previous year, amounting to approximately $311 million. TRA Hearings, Oct. & Nov. 1979, supra note 43, at 2; see also Taiwan: One Year After United States-China Normalization: Workshop Sponsored by the Senate Comm. on Foreign Relations, 96th Cong., 2d Sess. 7-8, 71, 80 (1980) (statements of Ralph Clough, George Washington University, and Jan Prybyla, Professor of Economics, Pennsylvania State University) [hereinafter cited as One Year After]. See also PRICE-WATERHOUSE, DOING BUSINESS IN TAIWAN 8 (1979).

82. One Year After, supra note 81, at 80.
83. PRICE-WATERHOUSE, supra note 81, at 12. Some of the alternatives to promote economic growth through a shift to capital-intensive and technology-intensive industries include:
1. Allowing royalty payments for the technology to be exempt from taxes in Taiwan to encourage local companies to purchase foreign technology;
2. Offering a number of additional incentives and tax benefits that are not currently available to encourage well-known foreign companies to invest in Taiwan;
3. Permitting the purchase of locally listed stocks by foreign corporations and individuals and allowing them the right to repatriate their investment and profits when the shares are sold to promote the local securities market; and
4. Relaxing the controls and restrictions over the importation of goods and raw materials so as to improve trade relations with other countries and simplify the customs release procedures for imports and exports.
84. Id. at 8.
85. The U.S. rebuff fails to dampen the boom, supra note 26, at 47.
86. Id. at 51. In the first eight months of 1979, U.S. companies invested $69 million which nearly equalled the 1978 total of $70 million.
more profit and tax incentives.

The Statute for Encouragement of Investment by foreign nationals provides liberal tax and other incentives to attract foreign capital. The government of Taiwan has also indicated that it welcomes foreign investment if it falls into one of the following “encouraged” industry categories:

1. those productive and manufacturing endeavors needed in Taiwan;
2. those enterprises with export markets;
3. those which improve and develop Taiwan’s industry, mining, and communications; and
4. those that promote economic and social development.

Finally, Taiwan offers foreign investors unlimited remittance of profits and interest, repatriation of original capital and any subsequent approved additions at a rate of 20 percent annually commencing two years after the completion of the approved investment plan.

These tax incentives have encouraged major U.S. firms to enter into joint venture agreements in the field of technology, research and development. Firms like Chrysler, General Electric, Ford, General Instruments, General Motors, Bechtel, Texas Instruments and RCA have invested millions of dollars in Taiwan’s market. In fact, an-

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88. These incentives include:
* Business income tax exemption for 5 years or accelerated depreciation of fixed assets for newly established encouraged productive enterprises;
* Business income tax exemption for 4 years or accelerated depreciation of fixed assets for encouraged productive enterprises at the time of increasing capital and expanding machinery and equipment;
* Business income tax limited to 22 to 25 percent of total annual income;
* Export sales exempted from business tax;
* Special encouraged industries are exempted from import duty on imported machinery and equipment;
* Productive enterprises may apply for installment payment of import duty on imported machinery and equipment;
* Import duties paid or payable on imported raw materials used in export products may be refunded or bonded.

Id.

89. Id. at 18. The investment policy in the past has drawn labor-intensive industries but has now been modified in an effort to shift to more capital-intensive and high-technology industries, including petrochemicals, steel, and shipbuilding. Id.

90. Id. at 20. A higher percentage rate would require special approval. Dividends may be repatriated at any time, so long as the dividends declared do not exceed the profit or accumulated profit per the tax return. Companies formed under the Statute are exempt from the residence requirement normally applicable to shareholders and officers. Id. at 19.

91. One Year After, supra note 81, at 94, 96.
alysts confidently predict that Taiwan will be the key manufacturer of telecommunications by the mid-1980's. For example, International Telephone and Telegraph entered into a joint venture agreement with Taiwan's International Standard Electronics agreeing to produce and market hardware and software equipment globally under American management but developed by the Taiwanese. Most economic analysts agree that Taiwan is a very attractive and profitable market. It has withstood political setbacks and successfully challenged the recent sluggishness in the world economy.

Nevertheless, U.S. investors should note that Taiwan's rate of growth declined in 1982. Taiwan's GNP increased by 5 percent in 1981 but only rose to 3.6 percent in the first three quarters of 1982, the lowest growth rate since 1973. This is far below the normal average rate of growth of 9 percent per year. Economists believe that Taiwan's economy will make a moderate recovery of 4 to 6 percent growth rate in 1983. A main factor for the decline in rate of growth can be attributed to the recession in and budget deficits of the United States.

Taiwanese economic policymakers are striving to become less dependent on the United States so that the economy will be less vulnerable to fluctuations in the American economy. Despite these efforts, however, exports to the United States increased by 19.6 percent in 1980, 20.8 percent in 1981 and 8.5 percent in 1982. Taiwan's exports to other trading partners decreased by 7.2 percent in 1982. In 1982, U.S. exports to Taiwan totalled $4.4 billion and imports totalled $8.9 billion, leaving a deficit of $4.5 billion.

There are several areas of trade which will enable U.S. companies to reduce the current trade imbalance with Taiwan. These areas

92. Id. at 94. Despite the surge in high technology agreements between the U.S. and Taiwanese firms, Taiwan's rate of economic growth during 1981 and the beginning of 1982 decreased. This was mainly due to the high interest rates, world-wide recession, increased oil prices and the sluggish growth of its major trading partners. Nevertheless, Taiwan's economy is still considered to be viable and impressive under international standards. See, Even in the Midst of Slump Economy Posts Enviable Record; Exporters of High Technology Items Find Ready Markets, BUS. AM., Mar. 8, 1982, at 26.

93. One Year After, supra note 81, at 91.


95. Id.

96. Id.

97. Id. at 30.

98. Id.
include: analytical and scientific instruments, computers, electronic industry production and test equipment, electronic components and medical equipment.\textsuperscript{99} Imports of analytical and scientific instruments are estimated to grow at approximately thirty percent through 1984. This is a result of increased sophistication of Taiwan’s local industries and their need for more advanced instrumentation. In addition, Taiwanese authorities are stressing research and development in the private sector.\textsuperscript{100}

Another growing market is the computer industry. The United States currently dominates the Taiwan market mainly because their software and service are highly reputable. There is extensive development in Chinese-language word processing.\textsuperscript{101} Equipment for the electronic industry should increase Taiwan’s imports by 25 percent through 1984 due to Taiwan’s emphasis in high technology development. Similarly, imports for electronic components are projected to increase up to 35 percent as the United States maintains its standing behind Japan in this area.\textsuperscript{102} Finally, the United States will benefit from a 30 percent growth in Taiwan’s market of medical equipment as several major hospitals plan significant expansion.\textsuperscript{103}

Despite these attractive markets for U.S. companies, several factors will present obstacles to trade with Taiwan. First, the Taiwan government will undergo protectionist measures beyond the already existing high tariffs in response to the recession and pressure from economic interest groups.\textsuperscript{104} The majority of tariffs have been concentrated in the agricultural sector. The American Institute in Taiwan has attempted to liberalize this area of trade by entering into an agreement with Taiwan’s Coordination Council for North American Affairs. The agreement, which took effect on July 12, 1982, lowered duties on thirty-one U.S. agricultural and industrial products.\textsuperscript{105}

The second, and probably most significant, obstacle to U.S.-Taiwan trade has been Taiwan’s patent, trademark and copyright infringements.\textsuperscript{106} Examples of such infringements include a counterfeit of Union Carbide’s Everready Battery. These copies have

\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Fighting the Fakes From Taiwan, FORTUNE, May 30, 1983, at 114.
penetrated markets in Asia, Africa and the Middle East under the names of "Everlight" and "Evershine." Union Carbide's attorneys have acknowledged that people in Taiwan consider trademarks "a Western system designed to stifle competition from local entrepreneurs." This is evidenced by Taiwanese law enforcement officials' relatively lax treatment of counterfeiters. Although such pirated products only accounted for less than 1 percent of Taiwan's exports, the damage to American companies was very high. Taiwan had to assure protection for foreign investors.

As a result, Taiwan has only recently enacted tougher legislation to address the counterfeit problem. The new trademark law imposes penalties of up to five years imprisonment. A ruling in March, 1983, also allowed Apple Computer to press criminal charges against two companies that allegedly infringed on its design. This has made Taiwan courts more accessible because until the ruling, foreign companies without registered local branches could not participate in criminal actions.

Taiwan's cure for the counterfeit problem will be gradual. Intellectual property rights present relatively new and vague issues in Taiwan where most judges do not have such specialized knowledge. American companies should register their trademarks and patents in Taiwan and have U.S. Customs block any imports of counterfeiters. Apple Computer successfully convinced U.S. Customs to stop counterfeit models named "Pineapple" and "Orange" from entering the States. While progress in adequate protection against counterfeits has been gradual, investors may be assured that Taiwan will not jeopardize its need to attract high-technology investments.

107. Id.
108. Id.
109. Id.
110. Id. Other actions taken by the Taiwan government include: strengthening the existing Anti-Counterfeiting Committee by adding staff increasing the and budget and bringing in law enforcement agencies; encouraging the judiciary to impose stiffer sentences; disseminating information on convicted counterfeiters; studying the possibility of establishing a special court; compiling information on well-known trademarks not registered in Taiwan; and undertaking an educational campaign to discourage counterfeiting. Opportunities Are Open to U.S. Firms in Certain Fields Despite Slumping Economies and Various Trade Barriers, supra note 94, at 31.
111. Fighting the Fakes From Taiwan, supra note 106, at 116.
112. Id.
113. Id.
114. Id.
Derecognition has not had negative effects on U.S.-Taiwan relations for several reasons. First, the Taiwan Relations Act was enacted immediately after derecognition and provided continuity of all relations while discouraging the PRC from imposing any blockade. Second, the AIT has effectively conducted unofficial relations with Taiwan and maintained close contact with American businesspersons in Taiwan. Third, with few exceptions, the American business community "gave no signs of allowing itself to be overly influenced by the hypothetical . . . prospect of fabulously lucrative business with the PRC, or to be intimidated by mainland threats of boycotting American firms which conduct business with Taiwan . . . ." Fourth, Taiwan assured American businesspersons that derecognition would not adversely affect its attitude toward existing U.S.-Taiwan commercial relations. Finally, derecognition occurred at a "propitious time in the history of Taiwan's economy." Based on the four years following derecognition, U.S.-Taiwan relations have been positive and American businesspersons may be optimistic about the Taiwan market.

VI. CONCLUSION

In light of the Taiwan Relations Act and principles of international law, American business concerns and anxieties following derecognition were not jeopardized. President Carter and Congress sought to alleviate these anxieties with quick legislation which assured that commercial relations with Taiwan would remain unaffected by U.S.-PRC normalization of relations.

The overall economic picture for U.S.-Taiwan commercial relations remains optimistic. Taiwan’s economy, however, is extremely vulnerable to extrinsic factors because it is heavily dependent upon the American and Japanese economies. A deterioration in these economies would have dramatic effects in Taiwan. Despite this dependence, however, Taiwan has had an impressive economic record

115. One Year After, supra note 81, at 79.
116. Id.
117. Id.
118. Id.
119. Id.
120. Id. at 18, 80. Exports constitute 50 to 60 percent of Taiwan’s GNP. Taiwan imports almost all of its raw materials.
measured by international standards.\textsuperscript{121}

The future of Taiwan's economic stability will also depend on
the country's military and political stability. The PRC has applied
increased pressure on the Reagan Administration to completely
terminate arms sales to Taiwan.\textsuperscript{122} Taiwan is quite concerned that this
may present another political setback initiated in response to PRC
pressure.\textsuperscript{123} However, the Taiwan Relations Act permits the con-
tinued sales of defensive arms to Taiwan with the rationale that the
United States has strong security interests in Taiwan.\textsuperscript{124}

If arms sales to Taiwan were to significantly decrease this would
present a matter of grave concern to the Taiwanese government. The
possibility of PRC intervention in Taiwan's political or economic
affairs could possibly lead to serious domestic political up-
heaval.\textsuperscript{125} To date, many congressional leaders have expressed con-
cern that the U.S. should provide assurance of Taiwan's security, and
that it pay sufficient attention to the military balance in East Asia
while considering the legitimate needs of Taiwan's defense.\textsuperscript{126}

However, Secretary of State George Shultz's recent trip to main-
land China signified the PRC's continued political pressure on the
United States to halt arms sales to Taiwan. The official Chinese news
agency, Xinhua, reported that two obstacles to improved Sino-U.S.
relations are the future of Taiwan and, more importantly, arms sales
to Taiwan.\textsuperscript{127} Xinhua quoted Chinese leaders as saying that, "unless
this problem is resolved, mutual trust between China and the U.S. is
out of the question . . . ."\textsuperscript{128} PRC leaders have even urged that the
United States repeal the Taiwan Relations Act which mandates the
sale of defensive weapons to Taiwan.\textsuperscript{129}

Although repeal of the Taiwan Relations Act is unlikely, Secretary

\textsuperscript{121} Id. at 82, 88-89. Economic analysts currently project that Taiwan's GNP will
reach $100 billion and per capita GNP will reach $6,000 with foreign trade almost equating
$100 billion in the near future.

\textsuperscript{122} Trying to Snuff Out the Two-China Firecracker, Bus. Wk., Apr. 26, 1982, at
56.

\textsuperscript{123} Id.


\textsuperscript{125} One Year After, supra note 81, at 23.

\textsuperscript{126} Id. at 135.


\textsuperscript{128} Id.

\textsuperscript{129} Id.
of State Shultz affirmed U.S. intentions to abide by the provisions of the U.S.-PRC joint communiqué of August 17, 1982, in which the United States promised to gradually phase out arms sales to Taiwan.\textsuperscript{130} Thus, "Taiwan's fear now is that its position will be eroded step by step as Peking maintains its pressure on Washington."\textsuperscript{131} The United States must ensure that Taiwan maintains its self-confidence through a strong defense and economy.

American investors must also consider the future of Taiwan's political system. Although Taiwan's military security appears relatively secure for the next five to seven years,\textsuperscript{132} President Chiang Ching-Kuo, who is now 73,\textsuperscript{133} is faced with increasing demands by the native Taiwanese for more positions in government.\textsuperscript{134} Professor Parris H. Chang observes that the mainlanders who fled mainland China to Taiwan are facing increased difficulties in maintaining their dominance in political power as the Taiwanese press harder for greater political participation.\textsuperscript{135} The one-party system in Taiwan must democratize to an extent that it allows for more participation by the native Taiwanese.

Should the political equilibrium in Taiwan experience severe crisis, serious repercussions in the East Asian system and in U.S.-PRC relations would develop. Assuming a worst-case scenario, the lack of an appointed successor and a leadership crisis, once President Chiang Ching-Kuo leaves office, would create mainland-Taiwanese tensions that may result in an effort by the native Taiwanese to assume power and declare an independent republic of Taiwan. Such factional infighting would bring an end to the minority government of the mainlanders and probably provoke the PRC to attempt reunification by military means.\textsuperscript{136} Military intervention by the PRC would significantly alter the balance of power in East Asia and leave the United States with the difficult choice of defending Taiwan at the expense of newly-developed relations with the PRC. Thus, serious internal political turmoil in Taiwan would have a significant destabilizing effect.

\textsuperscript{130} L.A. Times, Feb. 8, 1983, § 1, at 6, col. 1.
\textsuperscript{131} Id., Oct. 8, 1982, § I-B, at 1, col. 5.
\textsuperscript{132} One Year After, supra note 81, at 11-12, 149.
\textsuperscript{133} Id. at 9.
\textsuperscript{134} Id. at 12, 148-49.
\textsuperscript{135} Id. at 15 (prepared statement of Parris H. Chang, Professor of Political Science, Pennsylvania State University).
\textsuperscript{136} Id. at 23.
Though this scenario is unlikely, the American investor’s efforts to prevent destabilization should also continue to facilitate Taiwan’s access to American markets, credit, materials, technology and energy resources. American businesspersons should press the Reagan Administration to guarantee the security of Taiwan, thereby protecting U.S. security interests in East Asia. This requires a firm, consistent policy toward the PRC and Taiwan which disallows any PRC coercion to halt arms sales to Taiwan. Finally, Taiwan’s own strength hinges on its economic viability. The continuance of smooth U.S.-Taiwan trade and commercial relations will assure such viability.*

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137. Id.

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