REVISITING TAIWAN'S LEGAL STATUS IN THE UNITED STATES:
THE IMPACT OF TAIWAN RELATIONS ACT ON PRIVATE DISPUTES

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I. INTRODUCTION

In the past several years, a number of circuits within the U.S. Court of Appeals system encountered a growing number of disputes involving private parties from or concerns over the Republic of China (hereinafter Taiwan). Although facts in each case vary, there is at least one common aspect: that the outcome may be determined by the court's ruling on the legal status of Taiwan in the United States.

On January 1, 1979, the United States government severed its diplomatic tie with Taiwan and simultaneously switched its official recognition to the government of the People's Republic of China (hereinafter PRC).[1] Although many in Congress felt this development an inevitable eventuality, yet an even greater number of Congressmen and Senators were outraged by the way the scenario was handled by the Executive branch.[2] The

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[1] *See* Joint Communiqué on the Establishment of Diplomatic Relations, January 1, 1979, U.S.–People's Republic of China, *Public Papers of the Presidents of the United States: Jimmy E. Carter, 1978*, Washington, D.C.: Government Printing Office, 1979, pp. 2264-66 (hereinafter the Normalization of Relationship Communiqué). On the issue of Taiwan's status, the English text states, "[t]he Government of 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 Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China…." Note that the Chinese text translated the word "acknowledges" into *Chengren* (承認), which, if translated back into English, would mean "recognizes."

[2] On December 15, 1978, when Congress was in recess, then-President Jimmy Carter went on live television to announce that the United States would terminate its governmental relationship with Taiwan in two weeks. This created an instant uproar within and outside the United States. To begin with, Congress felt that it was not properly consulted beforehand. Many congressional supporters of Taiwan and members of the press believed that the United States gave in too fast and too easily to the demands of the PRC. They considered the President's action an utmost insult to a friendly ally (Taiwan) that would also hurt the U.S. worldwide credibility. They also cited the irony that President Carter, who put human rights on the very top of his foreign policy agenda, would sacrifice the interests of an ally in an exchange with what many considered one of the most repressive and dictatorial regimes of the time. This mood was further infuriated in the aftermath of the "de-recognition" when many in Congress felt the initial legislative proposal by the Carter Administration on future relations with Taiwan grossly inadequate. In a bi-partisan effort, Congress seized the initiative in enacting the TRA. For detailed illustrations and analyses, *see* Robert L. Downen, *The Taiwan Pawn in the China Game: Congress to the Rescue*, Washington, D.C.: Center for Strategic and International Studies, 1979; Harry Harding, *A Fragile Relationship: The United States and China Since*

prevalent sentiment was that recognizing the PRC should not be at the expenses of sacrificing what had been a very friendly, constructive, and long-term relationship with Taiwan.[3] As a result, Congress enacted the Taiwan Relations Act (hereinafter TRA) to "help maintain peace, security, and stability in the Western Pacific" and to continue the "commercial, cultural and other relations" between the United States and Taiwan on unofficial bases.[4] Under this law, those relations are to be conducted by a non-profit corporation called the American Institute in Taiwan (AIT) on behalf of the United States.[5] Taiwan, on the other hand, created an agency called the Coordination Council for North American Affairs (CCNAA) as AIT's counterpart and it was determined to be the "unofficial instrumentality" for Taiwan by the U.S. President.[6] In 1996, CCNAA Washington, D.C. Office was renamed and succeeded by the Taipei Economic and Cultural Representative Office in the United States (TECRO).[7]

1972, Washington, D.C.: The Brooks Institution, 1992, pp. 82-87; and Ahmed Sheikh, "The United States and Taiwan after De-recognition: Consequences and Legal Remedies," *Washington and Lee Law Review*, Vol. 37, pp. 323-341 (1980).

[3] In addition to fighting World War II together, the United States and Taiwan had been military allies since 1955, when a mutual defense treaty ratified by both sides formally came into force. *See* Mutual Defense Treaty, December 2, 1954, U.S. – Republic of China (Taiwan), *United Nations Treaty Series* (U.N.T.S.) No. 3496, pp. 214-228 (1956). Note that Article X stipulated that either side might terminate the treaty subject to a one-year prior notice, but there were no specific provisions on how that should actually be done. Therefore, several members of Congress filed a formal complaint concerning the constitutionality of President Carter's unilateral abrogation of the treaty. They argued that since it took 2/3 of the Senate's vote to ratify a treaty in the first place (or to exercise its "advice and consent" power, *see* Article II, Section 2, Paragraph 2 of the U.S. Constitution), it should take the same process to disavow that treaty as well. After adjudication by lower courts, the U.S. Supreme Court quickly granted *certiorari* and dismissed the case. *Held*: The case was not ripe for judicial review because Congress and the President had not reached a constitutional impasse, *i.e.*, a legally binding congressional vote rejecting the President's claim. The court obviously did not consider a mere congressional resolution sufficient for the "case and controversy" requirement under the U.S. Constitution. The court seems to suggest that it may review a case in the future if Congress should vote to override a presidential decision on foreign affairs (with 2/3 of the votes in *both* Houses). *See* Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979).

[4] Taiwan Relations Act, Pub. L. No. 96-8, § 2(a), 93 *United States Statutes at Large* (Stat.) 14 (1979), 22 *United States Code* (U.S.C.) § 3301(a) (1994, Supplement 3); effective as of April 10, 1979.

[5] 22 U.S.C. § 3305(a) (1994, Supp. 3). AIT was chartered in the District of Columbia on January 10, 1979 (before the enactment of the TRA) and headquartered in Arlington, Virginia. It maintains two "representative offices" in Taiwan, *i.e.*, Taipei and Kaohsiung, respectively. With the exception of "local hires," its full-time employees must all be first technically "retired or resigned" from the U.S. Department of State in order to maintain its non-official status.

[6] *See* Executive Order 12143, § 1-204, *Federal Register*, Vol. 44, No. 124, pp. 37191, 37192 (1979). CCNAA was established on February 23, 1979 and formally ratified by Taiwan's Executive Yuan (the Cabinet) on March 1. As of the end of 1999, Taiwan has 13 "representative offices" throughout the United States. Note that Taiwan did not enact any legislation in the aftermath of the "de-recognition" but to also rely on the TRA as its legal basis for the maintenance of unofficial relations with the United States.

[7] *See* Executive Order 13014, *Federal Register*, Vol. 61, No. 124, p. 42963 (1996). It formally recognizes TECRO as the successor to CCNAA-Washington, D.C. Office. Note that CCNAA-Taipei continues its original name and remains to be the headquarters. Its offices in other locations of the United States, however, are now referred to as "Taipei Economic and Cultural Office in (the name of the city)." *See also* "Exchange of Letters Concerning the Name Change and Confirmation of Status Quo of Rights,

To close the gap created out of this "de-recognition," especially on the applicability of laws and legal standings concerning parties or nationals of both sides, Section 4(a) of the TRA provides, "[t]he 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."[8] Section 4(b) further declares,

> "(b) The application of subsection (a) of this section shall include, but not limited to, the following: …
> (3)(B) For *all* purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's 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.
> (4) Whenever the application of the laws of the United States depends upon the law that is or was applicable on Taiwan or compliance therewith, the law applied by the people on Taiwan shall be considered the applicable law for that purpose….
> (7) The 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 affected in any way by the absence of diplomatic relations or recognition." [Emphasis added][9]

Congress made it clear that the language in these provisions is meant to be all-inclusive and fully applicable to the matters to which they are directed.[10] At the same time, they are not to be interpreted either as exhaustive or as excluding the applicability of general provisions to matters not specifically addressed.[11] It is quite clear, therefore, that on legal matters or disputes, Taiwan is to be treated as if it were a state and be separated from the laws of the PRC, regardless of its lack of diplomatic recognition.[12]

Section 4(c) of the TRA assures that all existing treaties and international agreements between Taiwan and the United States prior to "de-recognition" shall continue in force, unless and until terminated by law.[13] Here, Congress took note the 1946 Treaty of Friendship, Commerce and Navigation (hereinafter FCN Treaty), especially Article VI(4), which

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Responsibilities and Status (October 13, 1994 – January 3, 1995)," in Hungdah Chiu, ed., *Chinese Yearbook of International Law and Affairs (1994-95)*, Vol. 13, pp. 719-722 (hereinafter Chinese Yearbook).

[8] 22 U.S.C. § 3303(a) (1994, Supp. 3).

[9] 22 U.S.C. § 3303(b) (1994, Supp. 3).

[10] *See* House Report No. 96-71 (Committee of Conference), 96th Cong., 1st Sess., Washington, D.C.: Government Printing Office, 1979, pp. 14-15.

[11] *Id.*

[12] The constitutionality of TRA, *i.e.*, a domestic *sui generis* legislation in handling foreign relations without formal diplomatic recognition, was challenged in court and upheld. *See infra*, New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., *et al.*, 954 F.2d 847 (2d Cir. 1992), *cert. denied*, 506 U.S. 827, 113 S.Ct. 86, 121 L.Ed.2d 49 (1992), *rehearing denied*, 506 U.S. 1015, 113 S.Ct. 639, 121 L.Ed.2d 569 (1992).

[13] This, ironically, is with the exception of the Mutual Defense Treaty, *see supra* note 3.

guarantees freedom of access to the courts in each country by the nationals, corporations and associations of the other party.[14]

Despite those what appear to be unambiguous provisions, federal courts have not been consistent in their holdings on the legal status involving Taiwan officials, nationals, and/or entities. In at least two recent cases, courts were confronted with the issue of whether the PRC's accession to a certain international convention or treaty should bind Taiwan as well, if and when Taiwan is not a part of that convention or treaty in its own rite, given the PRC's sovereignty claim over Taiwan.[15] Judging from the ever frequent, often sensitive and complex rapport among the United States, PRC and Taiwan, one would expect the emergence of more diverse and complicated cases in the future that will constantly challenge the courts' rulings on TRA.[16] This article is an attempt to analyze the existing cases, to assess the international impact of their rulings and to explore possible solutions for the future.

II. RECENT CASES AND DEVELOPMENTS

A. Lee v. China Airlines, Ltd.[17]

This is a case brought by passengers against China Airlines, Ltd. for personal injuries sustained during a flight from Hong Kong via Taipei, Taiwan to San Francisco. The issue is, whether the Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly known as the Warsaw Convention, is applicable in this case.[18] Plaintiffs argued that it should not because their flight did not depart from a country

[14] Treaty of Friendship, Commerce and Navigation, November 4, 1946, U.S.–Taiwan, *Treaties and Other International Acts Series* (T.I.A.S.) No. 1871, 63 Stat. 1299 (1949). *See also supra* note 10, p. 17.

[15] *See* Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service, 177 F.3d 1142 (1999) and Atlantic Mutual Insurance Co. *et al.* v. Northwest Airlines, Inc., 796 F.Supp. 1188 (E.D. Wis. 1992).

[16] For instance, there has been debates over the issue of whether TRA takes precedent over the three communiqués that formed the foundation of United States – PRC diplomatic relationship, *i.e.*, the Shanghai Joint Communiqué of February 28, 1972, *Public Papers of the Presidents of the United States: Richard M. Nixon, 1972*, Washington, D.C.: Government Printing Office, 1974, pp. 376-79; the Normalization of Relationship Communiqué of January 1, 1979, *supra* note 1, and the Joint Communiqué of August 17, 1982, *Public Papers of the Presidents of the United States: Ronald W. Reagan, 1982*, Washington, D.C.: Government Printing Office, 1983, pp. 1052-53. Those who argue positively point to the fact that TRA *is* the law of the land and that the communiqués really amount to nothing but political statements (thus no legal binding force). They even tried to push for an amendment on TRA to expressly clarify this point but to no avail thus far. On the other hand, those who argued negatively (primarily the Administration) point out that it was the very communiqués based upon which TRA was enacted. They allude to the political reality and consequences should TRA be revised to undermine the spirit of the three communiqués. *See United States – Taiwan Relations: The 20th Anniversary of the Taiwan Relations Act, Hearing Before the Committee on Foreign Relations, U.S. Senate*, Hearing No. 106-43, March 25, 1999, 106th Cong., 1st Sess., Washington, D.C.: Government Printing Office, 1999 (hereinafter TRA Hearing).

[17] Lee v. China Airlines, Ltd., 669 F.Supp. 979 (C.D. Cal. 1987).

[18] Convention for the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention), October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 49 U.S.C. § 40105 (1994, Supp. 3). Note that the original Convention provided a limited liability of an air carrier for personal injury or death of a passenger or damage to goods in international air carriage, unless an agreement provided

that is a party to the Convention. The defendant argued, however, that the Warsaw Convention do apply yet the court lack jurisdiction in this case in accordance with Article 28 of the Convention.[19]

The district court sided with the defendant on both counts. Citing Article 1 of the Warsaw Convention, the court reasoned that it could exercise subject matter jurisdiction if, and only if, any of the two conditions are met: (1) that the contract of transportation (such as the plane ticket) designate the travel from one High Contracting Party to another; or (2) the contract provide a round trip with the point of origin and destination being within a High Contracting Party.[20] Here, although the plaintiffs were both residents of California, the starting point and final destination indicated on their round-trip plane tickets, however, was Hong Kong, which qualify as a High Contracting Party, given the fact that it was a British

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otherwise. Liability for death or personal injury was limited to US$8,300 (125,000 francs)(Article 22). Later on, the Hague Protocol (1955), a series of amendments to the Warsaw Convention, doubled the liability limit. The United States did not adhere to the Warsaw Convention until 1934 and did not ratify or adhere to the Hague Protocol because of dissatisfaction with their low limits of liability. In 1969, the air carriers, under the auspices of the International Air Transport Association (IATA), agreed to raise this limit to US$75,000 with respect to passengers traveling to or from or passing through the U.S. This so-called Montréal Agreement was then incorporated in airline tariffs, which were accepted by the U.S. Civil Aeronautics Board (CAB) on May 13, 1966 (Agreement CAB 18900). As a result, effective May 16, 1966, a special contract was provided for a limit of liability for each passenger for death, wounding, or other bodily injury of US$75,000 inclusive of legal fees, and, in case of a claim brought in a state where provision is made for separate award of legal fees and costs, a limit of US$58,000 exclusive of legal fees and costs (the Intercarrier Agreement on Passenger Liability). These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocols that includes a point in the United States as a point of origin, point of destination, or agreed stopping place. Subsequently, a new treaty, the Guatemala Protocol to the Warsaw Convention, was enacted and was signed by the U.S. in 1970. This protocol provided for *absolute liability* on the part of the airline as well as for an unbreakable limitation of damages to US$100,000. The Guatemala Protocol was later amended to provide that the limit would be 100,000 *Special Drawing Rights* (units of international monetary exchange, to be administered by the International Monetary Fund). Since 1983, the U.S. Senate has denied ratification of these new treaties, entitled the *Montréal Protocols Nos. 3* and *4*. But Montréal Protocol No. 4 was finally ratified on September 28, 1998 and effective to the United States on March 4, 1999. *See* Montreal Protocol No. 4–Treaty Document No. 95-2(B), *Congressional Record–Senate*, September 28, 1998, p. S11059; Treaty Actions, *U.S. Department of State Dispatch*, January/February 1999, pp. 22-23.

[19] Article 28 provides, *inter alia*, "1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination…." The defendant raised issues on this ground in the hope that in the worst-case scenario, it will be held liable for the limited liability under the Warsaw Convention, whereas in the best-case scenario be only accountable under the company's internal rules. There was no dispute on the fact that plaintiffs sustained injuries due to negligence from defendants' flight crew in the course of employment.

[20] "[T]he expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either in the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place in a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this Convention." *See* Warsaw Convention, Article 1, *supra* note 18.

colony then and the United Kingdom is a High Contracting Party of the Warsaw Convention. Thus, the court held that the Convention apply in this case.

The court then ruled that as far as the Convention is concerned, there could only be one "destination" in each transportation contract and that has to be determined by reference to a passenger's ticket and not by reference to the place to which an aircraft is traveling when an incident occurs, nor is it relevant how many carriers are involved.[21]

There are several notable points in this case. First, it was one of the many cases arising out of the same incident (when the airplane engaged in a rapid descent in its final approach to the San Francisco International Airport, causing personal injuries to passengers and damages to cargo shipment). Second, this was a judgment by the federal district court and the parties settled their dispute before the Ninth Circuit could have decided on the appeal. Third, neither party ever cited the TRA and the district court did not make any reference to it, either. Ironically, it was the defendant, China Airlines, by then the semi-governmental "national airline" of Taiwan, who ardently argued for the application of the Warsaw Convention despite the fact that Taiwan was *not* a signatory or "High Contracting Party" to that international instrument. In this regard, the reasoning of the district court is questionable.

B. **New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., *et al*.**[22]

Between 1991 and 1992, the legal status and constitutionality of the TRA and the FCN Treaty received frontal challenge in court.[23] What appears to be a straightforward copyright infringement case turns into a major test for the U.S. *sui generis* approach in handling its foreign relationship with Taiwan in light of formal diplomatic recognition with the PRC.

The defendants were accused of engaging in pirating videotapes of the plaintiff, the authorized licensee and distributor of programs originating (and therefore copyrighted) in Taiwan. Having lost the first round in the federal district court, the defendants appealed. They conceded that they copied the plaintiff's works without authorization, but challenged that the plaintiff does not have valid copyright in the United States in the first place. They argued that ever since the U.S. de-recognition of Taiwan, there is no longer any valid bilateral treaties or agreements on copyright between the two.[24] They further argued that it

[21] *See supra* note 17, pp. 980-81.

[22] *See supra* note 12.

[23] *See supra* notes 14 and 16.

[24] In addition to the FCN Treaty, a treaty in 1903 also dealt with the issue of copyright protection (and the earliest treaty on this issue between the United States and China). *See* Articles IX–XXI, Commercial Treaty, Oct. 8, 1903, U.S.–China (Ch'ing or Manchu Dynasty), reprinted in *Treaties, Conventions, Etc. between China and Foreign States (2d ed.)*, Vol. 1, p. 745, at 752-54 (1917). Between 1979 and 1999, the United States and Taiwan entered four other agreements on the protection of intellectual property rights. Note that one of them was already in force when this case was argued (November 21, 1991). They are: Agreement Concerning the Protection and Enforcement of Rights in Audiovisual Works, effective June 27, 1989; Understanding Concerning the Protection of Intellectual Property Rights, effective June 5, 1992; Agreement for the Protection of Trademarks, effective April 15, 1993; Agreement for the Protection of Copyrights, effective July 16, 1993; and, Memorandum of Understanding between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Taiwan [on Patent

has to be another treaty to reinstate a previous treaty being invalidated due to de-recognition, and the TRA was both flawed and insufficient to meet that requirement. Alternatively, even if the United States should continue to honor the FCN Treaty, such a course of action nevertheless violates the Constitution because Taiwan is no longer a "nation" and the United States cannot possibly remain bound by any treaties with Taiwan.[25]

The U.S. Court of Appeals for the Second Circuit disagreed. Citing a presidential memorandum/executive order entitled *Relations with the People of Taiwan*, the court points out that it has been the mandate and basis from the Executive Branch upon which the FCN Treaty should continuously be honored.[26] The court also cited provisions of the TRA to demonstrate that the congressional intent being analogous to that of the Executive Branch. The court then took notice that both the Executive and Legislative Branch agree that the FCN Treaty is to continue in force.[27] The court further declared the rule that a subsequent name change of or reference to a party in the FCN Treaty (*i.e.*, from Republic of China to Taiwan by the TRA) is not an amendment to that treaty as long as no obligations imposed by the treaty or substantive requirement is changed.[28] It follows that the TRA is not an unconstitutional amendment to the FCN Treaty, as argued by the defendants, nor is it necessary for Congress to follow the Treaty Clause under the Constitution in order to achieve such a superficial change.

The court in this case declared yet another rule on the interrelationship between statehood and recognition. Citing Comments for § 202 of the *Restatement (Third) of the Foreign Relations Law of the United States* (hereinafter Restatement of Foreign Relations), and taking note that the United States still honors several other treaties with nations it has no official relations, the court went straight ahead and held that an entity's status as a nation does not depend on whether it receives diplomatic recognition from other nations.[29] Therefore, the U.S. de-recognition of Taiwan did not change the latter's status as a nation.

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and Trademark Filing Priority], effective April 10, 1996. *See* American Institute in Taiwan, "List of Agreements Concluded between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States," 60 *Federal Register* 42,159-02 (1995).

[25] *Id.*, p. 852-853.

[26] Memorandum for All Departments and Agencies: Relations with the People of Taiwan, December 30, 1978, *Federal Register*, Vol. 44, p. 1075. This memorandum was superseded in 1979 by Executive Order No. 12143, which, in turn, was superseded in 1996 by Executive Order No. 13014. *See supra* notes 6 and 7.

[27] *See supra* note 24, p. 852.

[28] *Id.*, pp. 853-854.

[29] "An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states. As a practical matter, however, an entity will fully enjoy the status and benefits of statehood only if a significant number of other states consider it to be a state and treat it as such, in bilateral relations or by admitting it to major international organizations." *See Restatement of the Law [of] the Foreign Relations of the United States, 3rd ed.*, § 202, Comment b, St. Paul, Minnesota: 1987. § 201 provides the definition of a "State:" "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."

The U.S. Supreme Court affirmed these rulings and rejected the defendants' respective petitions to seek a writ of *certiorari* and rehearing.[30] What is intriguing about the Second Circuit's rulings is that the court seems to be more willing to exercise judicial review and actively taking judicial notice over issues concerning foreign affairs. Judging from the court's rationale, one could not help but ask whether the court would have reached the same conclusion if there had not been the existence of presidential memoranda and/or a domestic legislation such as the TRA but an out-right presidential decision to severe the U.S. diplomatic recognition (for whatever political reasons)? In that instance, even with the best possible intention (such as to encourage bilateral protection of copyright, as in this case),[31] would the court have either intentionally or inadvertently stepped into the "political questions" zone traditionally off-limits to judicial review?[32] These questions, of course, will and can only be addressed in future cases. But for the time being, it is certain that as far as the TRA and FCN Treaty are concerned, they will continue to serve as the foundation of all commercial and cultural relations between the United States and Taiwan.

C. **Atlantic Mutual Insurance Co., *et al.* v. Northwest Airlines, Inc.**[33]

Similar to *Lee v. China Airlines, Ltd.*, this case concerns whether a federal court in the United States has subject matter jurisdiction over a dispute involving Taiwan as the shipment destination. On March 27, 1992, the Atlantic Mutual Insurance Company and Tacoma Boatbuilding Company jointly brought suit before the circuit court for Milwaukee County. The plaintiffs alleged that certain of their machinery components were damaged as a result of the defendant's negligence during the air transport of the components from Milwaukee, Wisconsin to Taipei, Taiwan. On May 1, 1992, the defendant successfully removed the case to the federal District Court on the ground that the dispute involved issues concerning the Warsaw Convention, hence a federal case.

Here, as in *Lee*, the defendant Northwest Airlines successfully persuaded the district court that the Warsaw Convention is applicable and the federal court should exercise jurisdiction as a result. Unlike *Lee*, however, the court did address whether Taiwan should be considered a High Contracting Party of the Convention even though it is not a signatory, and

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[30] *See supra* note 12.

[31] In upholding the continuous validity of the FCN Treaty and as the conclusion of its opinion, the Second Circuit reasoned that "our holding encourages the United States to provide copyright protection to works authored by Taiwanese citizens, and insures that Americans will receive copyright protection of their works in Taiwan." *See supra* note 24, p. 854.

[32] The U.S. Supreme Court has held that a controversy is nonjusticiable if and when it involves a political question, *i.e.*, where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it...." Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). But the court must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. *See also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972); and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

[33] Atlantic Mutual Insurance Co., *et al.* v. Northwest Airlines, Inc., 796 F.Supp. 1188 (E.D. Wis. 1992).

more noticeably, not even a party to this case.[34] The court answered in the affirmative. It reasoned that insofar as the U.S. Executive Branch has formally recognized the PRC as the legitimate government of China (so did over 100 other countries), the PRC's claim when ratifying the Warsaw Convention in 1958 that the Convention "shall of course apply to the entire Chinese territory, including Taiwan" is sufficient evidence to support that conclusion.[35]

The court's reasoning is contradictory and troublesome. First, it made no distinction between a *de jure* and a *de facto* sovereign entity, thus mistakenly denied the latter any rights and/or obligations for the lack of diplomatic recognition.[36] Rules on international law aside, the court never cited the TRA, the 1979 and 1996 executive orders that form the U.S. domestic legal basis for its treatment of Taiwan, *i.e.*, Taiwan is to be considered as a nation as far as justiciability is concerned. Relying on the basic findings of *New York Chinese TV Programs* and the 1978 presidential memorandum on relations with Taiwan, the court oddly backtracked in its final reasoning and totally ignored the TRA and other presidential orders as authorities for the case. Instead, the court turned around and cited *Lee v. China Airlines*, a federal district court decision in and of itself questionable, as its principal authority.[37] This inconsistency is particularly lucid when the court on the one hand recognized the FCN Treaty between the United States and Taiwan to be valid (hence separate from the PRC jurisdiction), yet on the other hand imposed the PRC jurisdiction over Taiwan (while acknowledging that Taiwan is not a signatory of the Warsaw Convention).

On June 8, 1993, ten months after this decision was rendered, the parties settled their dispute, yet a twist developed.[38] Only two days after the settlement and dismissal of the case (June 10), CCNAA sought to intervene in the hope that the district court would reconsider its decision on Taiwan's status.[39] The district court denied that motion and CCNAA appealed.

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[34] Taiwan did try to intervene but was all too late when it did so. *See infra* for detailed illustrations.

[35] Christopher N. Shawcross, K. M. Beaumont and Patrick R. E. Browne, *Air Law*, 4th ed., London, United Kingdom: Butterworths, 1992, Appendix, pp. 16-21, n. 8. *See also supra* note 33, p. 1191.

[36] A long established principle of international law is, while an entity that meets the qualifications of statehood may be denied recognition by one or more states in the international community, it cannot, because of the lack of such recognition, be denied its rights or escape its obligations. *See* Louis Henkin, Richard C. Pugh, Oscar Schachter and Hans Smit, *Cases and Materials on International Law*, 2nd ed., St. Paul, Minnesota: West Publishing Co., 1987, pp. 232.

[37] *See supra* note 33, p. 1191.

[38] The total damages involved were less than US$50,000, a figure far less comparable to the attorneys' fees that would be needed to finish the case on the merits. In addition, both parties were in the middle of their respective bankruptcy/reorganization proceedings, which certainly provide a strong incentive to settle out-of-court.

[39] By CCNAA's own admission, it first acquired knowledge of the lower court's decision from a newspaper report on March 7, 1993, way after that opinion was issued (August 5, 1992). When this "news" broke in Taiwan's media, the Legislative Yuan (Taiwan's parliament) and many in the public reacted strongly. Without fully appreciate the American political system, especially the role of the judiciary, they viewed this development a back-door usurping of the TRA and a sell-off of Taiwan's interests. The Ministry of Foreign Affairs was under strong criticisms for being a do-nothing governmental agency. Bowing to this domestic pressure, its spokesman publicly pledged that Taiwan would intervene to sway the court's opinion.

The Seventh Circuit affirmed the district court decision.[40] In a rather strong-worded opinion, the court criticized CCNAA for its tardiness to bring about intervention in the lower court's proceeding. Furthermore, the court pointed out a deeper problem with CCNAA's action or standing. Federal Rules of Civil Procedure § 24(a) provides that only a person who claims *an interest relating to the property or transaction* that is the subject of the lawsuit may intervene. The property at stake was cargo damaged in transit. CCNAA, however, disclaimed any interest in that cargo – all it cared about was the *content* of the judge's opinion. A litigant unhappy with the analysis of a court opinion, but not aggrieved by the judgment, may not intervene. People who care about the legal principles surrounding a suit may appear as *amici curiae*, but are not entitled to intervene, the court noted. The court also made it clear that it was in no way passing judgment on Taiwan's status. "Out of an excess of caution we add: Readers of this opinion should not seek to divine our views about the status of Taiwan ... for we have none."[41]

Unabated, CCNAA explored another forum in an attempt to get its position heard and vindicated. So it filed another suit before the U.S. District Court for the District of Columbia against Northwest Airlines.[42] Here, CCNAA petitioned two forms of relief: (1) a court order requiring Northwest Airlines to inform CCNAA whenever the airline tries in the future to apply the Warsaw Convention to claims for damages from its Taiwan services, and (2) a declaratory judgment prohibiting Northwest Airlines from applying the Warsaw Convention to future claims from Taiwan flights. In other words, as the court noted, CCNAA was not to prosecute any claim it might have as a shipper of goods on Northwest Airlines, but to protect both its interests as a sovereign and the interests of its citizens as *parens patriae*.[43] In fact, what CCNAA really tried to accomplish was to first have the court issue a declaratory judgment that Taiwan is not a province of the PRC and hence is not a signatory nor bound by the PRC's accession to the Warsaw Convention. It then hoped the court would require Northwest Airlines to abide by this declaration in all future suits.

Understandably, CCNAA (or Taiwan, rather) was quite concerned in light of the holdings of two federal district courts in *Lee* and *Atlantic Mutual*. Taiwan evidently fears that other courts will follow the same reasoning which could have serious implications to its standing and interests in the United States. The district court here clearly realizes this. But it nevertheless dismissed CCNAA's complaint on three grounds. First, even on the bare surface, the requirement of "case and controversy" was not satisfied. The court noted that there is merely a disagreement without injury. Any injury caused by Northwest Airlines is moot and disposed of in *Atlantic Mutual*. Any future claims that might arise are not ripe for review. Second, even if there is any present injury, the court in the District of Columbia is certainly

[40] Atlantic Mutual Insurance Co., *et al.* v. Northwest Airlines, Inc., *et al.*, 24 F.3d 958 (7th Cir. 1994).

[41] *Id.*, p. 962.

[42] Coordination Council for North American Affairs v. Northwest Airlines, Inc., 891 F.Supp. 4 (1995).

[43] *Id.*, p. 5. "*Parens patriæ*" literally means "parent of the country," refers traditionally to role of state as sovereign and guardian of persons under legal disability. It is the principle that the state must take care of those who cannot care for themselves. It is also a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people. *See Black's Law Dictionary*, 6th ed., St. Paul, Minnesota, 1990, p. 1114.

not the appropriate forum. Hence it does not have the jurisdiction over the case. Any decision rendered by the court in the District of Columbia would be judicial overreach and setting a bad precedent. Third, and fundamentally, the court ruled that CCNAA lacked the standing to sue.[44] Consequently, this case was dismissed.

It is not entirely clear why CCNAA chose to take the path that it knew would more than likely add more injuries to the self-inflicted insult and cause more embarrassments. But there was indeed a growing anxiety, frustration and desperation among the ranks and files of the Ministry of Foreign Affairs, compounded by public pressure for a "quick fix."[45] Keenly sensitive to its relations with the United States, Taiwan seems to be willing to try any and all avenues to reach a satisfactory conclusion *at the present*, instead of waiting any longer for the occurrence of another case or controversy *in the future*. Ironically, several cases did occur shortly thereafter and the rationale of *Lee* and *Atlantic Mutual* was immediately put to test.

D. **Schwinn Bicycle, *et al.* v. AFS Cycle & Co., Ltd., *et al.***[46]

In this case, one of the issues presented before the Bankruptcy Court of Illinois was whether the Hague Service Convention of 1965 is applicable to the service process on the two defendant corporations located in Taiwan.[47] Recognizing that Taiwan is not a signatory country to that Convention (but the PRC is), the court rejected *Atlantic Mutual*'s rationale.[48] The court pointed out that the recognition of the PRC and de-recognition of Taiwan has not had the effect in any legal or practical sense of accepting the PRC's territorial claim to Taiwan.[49] Thus, the court here found the reasoning in *Atlantic Mutual* flawed precisely

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[44] To acquire standing, the U.S. Supreme Court has laid down the following test: (1) A plaintiff must have suffered an "injury in fact," (2) there must be a causal connection between the injury and the conduct complained of, and (3) it must be likely that the injury will be redressed by a decision in plaintiff's favor. The burden of establishing these three elements falls upon the party invoking federal jurisdiction. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The district court held that even assume CCNAA has met the first two prongs of this test, it cannot meet the third. It is because the plaintiff is in fact asking the court to issue a "gag order" preventing Northwest Airlines from asserting the applicability of the Warsaw Convention in future cases. The court ruled that this is highly inappropriate and other courts are entirely free to disregard this court's declaration that Taiwan is or is not a province of the PRC. Thus, the court did not believe that it could redress plaintiff's alleged injury, *i.e.*, "harm to the people who lived on Taiwan … that the laws that should apply to them are laws chosen by a government in which they have no representation that is a Communist dictatorship." *See supra* note 42, p. 8.

[45] *See* Chiang Ching-ling, "Ministry of Foreign Affairs: Treaties Signed by Communist China Carry No Effect Over Taiwan," *China Times*, September 19, 1995, p. 4 (text in Chinese).

[46] Schwinn Bicycle, *et al.* v. AFS Cycle & Co., Ltd., *et al.*, 190 B.R. 599 (N.D. Ill.1995).

[47] Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention of 1965), November 15, 1965, *United States Treaties and Other International Agreements* (U.S.T.), Vol. 20, p. 361 (1969); T.I.A.S. No. 6638; 658 U.N.T.S. 163 (1969).

[48] *See supra* note 46, p. 607.

[49] *See* Wong v. Ilchert, 998 F.2d 661 (9th Cir. 1993)(*Held*: China and the United States' "mutual commitment to respect one another's territorial integrity ... does not necessarily entail acceptance of one another's territorial claims," p. 663).

because the court there jumped to the conclusion that the U.S. diplomatic recognition of the PRC naturally and necessarily accepts the PRC's territorial claim to Taiwan.[50]

The court then moved on to discuss the TRA and noted that it is implicit in the Act's provision that Taiwan is separated from the PRC and that all treaties and international agreements entered into between the United States and Taiwan before December 31, 1978 were to continue in force.[51] Thus, the United States maintained its treaty obligations to Taiwan that were in existence prior to the Taiwan Relations Act, but did not apply to Taiwan those treaties between the PRC and the United States that had been or would be entered into with the PRC. One of those treaties not made applicable to Taiwan was the Hague Service Convention.[52]

E. Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service, *et al.*[53]

Although there are disagreements on the scope of U.S. diplomatic recognition over the PRC, until this case surfaced, they only exited at the district court level. Here, for the first time on appeal, the Ninth Circuit put *Atlantic Mutual* directly to test and dealt a major (perhaps even fatal) blow to its rationale.

In this case, the plaintiff, Mingtai Fire & Marine Insurance Co. (hereinafter Mingtai), headquartered in Taipei, Taiwan, acquired subrogation to sue for indemnity concerning the loss of computer chips of its insured worth more than US$83,000 during their shipment by the defendants, the United Parcel Service and United Parcel International, Inc. (hereinafter UPS collectively). Mingtai argued that the Warsaw Convention should apply. UPS, as expected, opposed the view and argued instead that the most it might be liable is US$100, as provided in its "air waybill." The U.S. District Court for the District of Northern California found for the defendant, Mingtai appealed.[54]

The Ninth Circuit framed the issue as: Whether the PRC's status as a High Contracting Party to the Warsaw Convention is sufficient to bind Taiwan to the terms of that Convention? The court approached this issue by first pointing out two distinctive areas of foreign relations, *i.e.*, the effects of foreign sovereign recognition and the status of treaties. Recognizing that "the U.S. Supreme Court has repeatedly held that the Constitution commits to the Executive Branch alone the authority to recognize, and to withdraw recognition from, foreign regimes," courts must "answer questions regarding the status of treaties following a change in the sovereign status of one of the relevant entities by deferring to the political branches'

[50] *See supra* note 46, p. 611.

[51] *See* 22 U.S.C. § 3303(c)(1994, Supp. 3).

[52] *See supra* note 46, p. 611.

[53] Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service, *et al.*, 177 F.3d 1142 (9th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 374 (1999).

[54] *Id.*, p. 1144.

understanding of the resulting obligation."[55] In other words, courts must look for and refer to actions and statements of the Executive Branch to address the above issue.

Having carefully examined the relevant provisions of the TRA, the presidential memoranda/Executive Orders, the headings and listing of U.S. Department of State's annual publication, *Treaties in Force*,[56] and moreover, the Clinton Administration's *amicus curiae* brief which clearly laid out the government's official position on the point,[57] the court found it abundantly clear that Taiwan ought not to be bound by the Warsaw Convention of which it is not a signatory. The court cautioned, however, that what it did was to merely defer to the position of the Executive Branch that Taiwan is not to be bound by China's adherence to the Warsaw Convention; the opinion should not be interpreted, under any circumstances, as an independent determination on the status of Taiwan.[58]

In August 1999, Mingtai petitioned to the U.S. Supreme Court for a writ of *certiorari*, but the High Court denied the motion in October.[59] Therefore, it is safe to say, at least for now, that the U.S. Supreme Court has completely discarded the reasoning in *Atlantic Mutual* and the TRA is *the* authority in determining any issues concerning the status of Taiwan.

F. TECRO v. U.S. District Court[60] and Sun v. Taiwan, *et al.*[61]

While Taiwan (through CCNAA or TECRO) has more or less been a silent party (or being pushed to the sideline) when its interests were at stake by disputes among private parties in the United States, it has at least on two occasions successfully got what it hope for

[55] *Id.*, pp. 1144-45.

[56] Treaty Affairs Staff, Office of the Legal Adviser, U.S. Department of State, compiled, *Treaties in Force: A List of Treaties And Other International Agreements of the United States in Force*, Washington, D.C.: U.S. Government Printing Office, 1997, p. iii–iv. The court specifically pointed out that while "China" was listed as a signatory to the Warsaw Convention, "China (Taiwan)" was not.

[57] The *amicus* brief was prepared and filed by the U.S. Department of Justice. In a recent interview, a senior TECRO official stated to the author that Taiwan neither involved directly nor requested the U.S. government to file a brief on its behalf in this case.

[58] *See supra* note 53, p. 1147. However, news reports and initial reactions from a local attorney in Taiwan did just that, thinking this is a "conspiracy" between the court and the Clinton Administration to play both hands with the PRC and Taiwan. Some local scholars even feared for a political fall-out, which further isolates Taiwan's role in the international community. *See* TVBS-N Hourly News, "U.S. Federal Court Issued Judgment Recognizing Taiwan An Independent Entity," May 27, 1999, transcript available at *http://www.tvbs.com.tw/code/tvbsnews/daily/19990527/22/88052722018.asp* (in Chinese). TVBS News is one of the most watching news programs in Taiwan.

[59] Mingtai sticks to all of its arguments since the trial level and in fact asks the U.S. Supreme Court to review the U.S. policy on China, specifically, to honor President Clinton's "One China" policy. *See* "Insurer Seeks High Court Review on China-Taiwan Question: Mingtai Fire & Marine Ins. Co. v. UPS," *Andrew Aviation Litigation Report*, Vol. 17, No. 9, October 12, 1999, p. 11.

[60] TECRO v. U.S. District Court for the Northern District of California, 128 F.3d 712 (1997).

[61] Sun v. Taiwan, *et al.*, 1998 WESTLAW 738002 (N.D.Cal. October 15, 1998).

in the American judicial system. The first dispute in fact results in two cases, *TECRO v. U.S. District Court for the Northern District of California* and *Sun v. Taiwan, et al.*

In 1993, a Chinese-American student (Peter Sun) participated in a summer study tour to visit Taiwan and was drowned while engaging in a swimming excursion there. His family members then brought a wrongful death suit in the State of California, first solely against Taiwan's reprehensive office there, first CCNAA and later TECRO after its name change. TECRO moved to dismiss the suit for lack of subject matter jurisdiction and the district court granted the motion on the ground that TECRO is immune from the jurisdiction of U.S. courts because of the Foreign Sovereign Immunities Act (FSIA), but allowed the plaintiffs to amend their complaint.[62] The plaintiffs then did so and this time named two other Taiwan agencies in addition to TECRO as co-defendants, the Overseas Chinese Affairs Commission (OCAC) and the Chinese Youth Corps (CYC).[63] The defendants once again moved to dismiss on the same ground. This time, however, the defendants provided a declaration by a Kenneth Tsai, then-deputy director of the Service Division in TECRO's San Francisco office, explaining TECRO's role in representing Taiwan's interests in the United States and its activities in connection with the study tour. Subsequently, the district court granted plaintiff's motion to proceed with discovery and to depose Mr. Tsai. Defendants objected on the ground that Mr. Tsai is entitled to "diplomatic" immunity. Yet the district court granted the motion.[64]

TECRO then petitioned the Ninth Circuit to issue a writ of *mandamus* to enjoin the district court order that compel Mr. Tsai to be deposed and answer questions in seven

[62] 28 U.S.C. § 1604 (1994, Supp. 3).

[63] OCAC's original name in Chinese is 中華民國行政院僑務委員會 and CYC is 救國團. It should be pointed out that in the district court's facts finding, the court identified both of them as the organizers of the study tour and governmental agencies of Taiwan. This is not quite true, however. The chief organizer of the study tour is CYC, whose full name is literally "The Chinese Anti-Communist and Nation-saving Youth Corps (中國青年反共救國團)." Its original formation, ironically, mirrored the Chinese Communist Youth Corps (中國共產青年團), an effective tool in the Chinese Communist Party's victory over the civil war with the Nationalist Party, or the *Kuomingtang* (KMT, 中國國民黨), and the eventual taking control of the entire Mainland China in 1949. Thus, on October 31, 1952, at the call of Chiang Kai-shek (蔣中正), then-President of Taiwan and Chairman of the KMT, CYC was formally organized. Not coincidentally, this is also the birthday of Chiang Kai-shek. Chiang Ching-kuo (蔣經國), Chiang Kai-shek's eldest son, was appointed as its first director. Therefore, CYC was designed to be an arm of and funded primarily by the KMT with the specific goal of outreaching to the youth constituency from the outset. This can be demonstrated by the list of Chiang's successors, who have all been senior party officials of the KMT. CYC did, however, go through two organizational changes later. First, it was formally registered as a civic organization in 1969. Twenty years later, it petitioned to and received approval from the Ministry of the Interiors and the Taipei District Court respectively to be a non-profit "social service organization" under Taiwan's law. As a result, the key issue here is whether the U.S. district court must defer to the status recognition by Taiwan's internal authority or make its independent finding on the status of either KMT or CYC (or both), particularly, should they be treated as a civic and private organization under the U.S./California law regardless of their origin in Taiwan? This can and will certainly raise a number of very interesting and challenging questions and the district court subsequently did touch on this issue somewhat in *Sun v. Taiwan*. *See infra* for detailed illustration; for CYC's organization, history and activities, *see* CYC's website at *http://www.cyc.org.tw*.

[64] *See supra* note 60, pp. 715-716.

designated topics.[65] First acknowledging the extraordinary nature of *mandamus*, the Ninth Circuit gingerly applied the so-called "*Bauman* factors" in the hope to strike a balance between the lower court authority and the interests of the petitioners/defendants.[66] The circuit court broadly construed Article 5 of the 1980 Agreement on Privileges, Exemptions and Immunities between AIT and CCNAA/TECRO on testimonial immunities.[67] While the district court's interpretation of that provision may be in line with Article 5(e), *i.e.*, arguably each and every designated topic falls outside of the protectable scope of immunity, the circuit court pointed out that such an interpretation would in effect nullify Article 5(c) and render the whole purpose of that article meaningless.[68] Instead, the Ninth Circuit used the International Organizations Immunities Act as guidelines in the interpretation of Article 5 and held that a U.S. court *cannot* compel a TECRO employee to testify about information he or she possesses *solely* by virtue of his or her official position.[69] Consequently, on the ground of excessively narrow construction of an international agreement, the Ninth Circuit held the district court's order clearly erroneous as a matter of law.[70]

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[65] *Mandamus* is a writ issued by a court of superior jurisdiction and directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived. *See Black's Law Dictionary*, *supra* note 43, p. 961.

[66] They are: (1) whether the party seeking the writ has no other adequate means … to attain the relief he desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctible on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression. *See* Bauman v. U.S. District Court, 557 F.2d 650 (9th Cir. 1977); Calderon v. U.S. District Court, 98 F.3d 1102 (9th Cir. 1996), *cert. denied*, 520 U.S. 1233, 117 S.Ct. 1830, 137 L.Ed.2d 1036 (1997).

[67] Article 5 provides, "… (c) The property and assets of the sending counterpart organization, and any successor organization thereto, wherever located and by whomsoever held, shall be immune from forced entry, search, attachment, execution, requisition, expropriation or any other form of seizure or confiscation, unless such immunity be expressly waived. The archives and documents of the sending counterpart organization shall be inviolable at all times and wherever they may be…. (e) Designated employees of each sending counterpart organization shall be immune from suit and legal processes relating to acts performed by them within the scope of their authorized functions, unless such immunity be specifically waived by the sending counterpart organization." *See* Agreement on Privileges, Exemptions and Immunities, October 2, 1980, U.S.–Taiwan, reprinted in *Chinese Yearbook*, *supra* note 7, Vol. 1, pp. 235-240, full text is also available on the AIT's official website at *http://www.ait.org.tw/ait/agree3.htm*.

[68] *See supra* note 60, p. 718.

[69] Act of December 29, 1945, ch. 652, title I, 59 Stat. 669, 22 U.S.C. §§ 288–288i (1994, Supp. 3). This is the statute that defines the immunities enjoyed by public international organizations and their employees within the United States. The Ninth Circuit pointed out that Article 6(b) of the 1980 Agreement incorporated the same language as this act: "(b) In order that it may effectively perform its functions, each sending counterpart organization shall enjoy in the territory in which the receiving counterpart organization is located, immunity from suit and legal processes equivalent to those enjoyed by public international organizations in the United States."

[70] *See supra* note 60, p. 719.

On the other hand, because Tsai voluntarily submitted the declaration, the Ninth Circuit held that he must make himself available for deposition to be questioned about the matters referred to in the declaration. But then, the court also held that Tsai could nevertheless exercise his immunity and "refuse to answer any question that would reveal information he possesses solely by virtue of his official position." If and when that happens, "the matters referred to in the declaration should cause the district court to strike the pertinent parts of his declarations or his declaration in its entirety."[71]

The Ninth Circuit then went on to examine whether the defendants' petition met the other *Bauman* factors and concluded that three out of other four factors are met.[72] Therefore, the court issued a writ of *mandamus* and the case was remanded to the district court.[73]

As a result of this judgment, in the subsequent case of *Sun v. Taiwan*, Mr. Tsai did avail himself for deposition but, not surprisingly, refused to answer questions. The defendants once again raised the lack of subject matter jurisdiction as their main defense.[74] In their amended complaint, the plaintiffs argued that the "commercial activity" exception to FSIA should apply in this case.[75] The district court, however, sided with the defendants on all grounds. The court found that all of defendants' actions on which plaintiffs' cause of action is based took place in Taiwan. There was not any commercial activity in the United States that forms the basis of plaintiffs' cause of action against the defendants. Furthermore, the district court could not find the death of Peter Sun, an American citizen, while traveling in Taiwan, caused any direct effect in the United States. Thus, the court held that "commercial activity" exception does not apply in this case at all to defendants TECRO and OCAC.[76]

Separately, the court tried to examine whether it has jurisdiction over defendant CYC. Here plaintiffs asserted two contradictory arguments. On the one hand, they claimed that

[71] *Id*. Thus, the net effect of this ruling is to allow TECRO and all other co-defendants backtrack from whatever statement that was made in the original declaration given by Kenneth Tsai.

[72] The district court order did not meet the fourth factor that it is an oft-repeated error or manifests persistent disregard for the federal rules. But this alone certainly will not necessarily preclude the circuit court from issuing a writ of *mandamus* to the lower court. *See supra* note 66.

[73] On remand, the Ninth Circuit noted, however, that on the issue of whether the Taiwan defendants are immune from the court's jurisdiction under the Foreign Sovereign Immunities Act of 1976 (Pub.L. No. 94-583, 90 Stat. 2892; 28 U.S.C. §§ 1602-1611 (1994, Supp. 3)), the district court is entitled to strike Tsai's affidavit concerning factual allegations that he refuses to testify.

[74] *See supra* note 61.

[75] 28 U.S.C. § 1605(a)(2) provides the so-called "commercial activity" exception to immunity on following grounds: (1) where the action is *based upon* a commercial activity carried on in the United States by the foreign state; or (2) upon an act performed in the United States *in connection with* a commercial activity of the foreign state elsewhere; or (3) upon an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a *direct effect* in the United States. Note that the court specifically pointed out that Taiwan is a foreign state within the meaning of the FSIA; both TECRO and OCAC are instrumentalities of Taiwan; and therefore immune from the jurisdiction of U.S. courts, absent an applicable exception under the FSIA. *Id.*, p. 4.

[76] *See supra* note 61, p. 9.

CYC is a government instrumentality, which would naturally take CYC out of the court's jurisdiction. On the other hand, if CYC is a private foundation as claimed by the plaintiffs in their amended complaint, the court nevertheless held that it has neither general nor specific jurisdiction over CYC because of CYC's lack of contact with the forum state, California.[77]

G. **Export-Import Bank of the Republic of China v. Republique du Niger**[78]

Another recent development concerning Taiwan's international status and interests took place in New York. This time it involves a government agency of Taiwan, the Import-Export Bank of the Republic of China, that actively pursues against a foreign government in a U.S. court. This represents yet another twist on how Taiwan tries to conduct its foreign relations by borrowing the hands of a U.S. court to effectively achieve a certain impact.

In the constant diplomatic tug of war between the PRC and Taiwan, the Republique de Niger (hereinafter Niger) became a major battlefield in the 1990s. On July 22, 1963, Taiwan and Niger first established formal diplomatic relations but they were terminated on July 29, 1974, right after Niger switched its recognition to the PRC.[79] On June 19, 1992, Taiwan and Niger re-established their diplomatic ties but the relations were again terminated four years later, after Niger switched its recognition back to the PRC.[80] Because of this political fall-out, one of the primary sponsors of Taiwan's economic aid package to the Niger government, the Export-Import Bank of the Republic of China (hereinafter Ex-Im) filed sue in the United States (before a federal district court in New York) in 1997, claiming that Niger has breached two loan agreements with Ex-Im and has failed to repay the loan and its interests thereafter. On October 22, 1998, the district court granted the plaintiff's motion for summary judgment.

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[77] *Id.*, pp. 9-12. "A court may exercise either specific or general jurisdiction over a non-resident defendant…. Specific jurisdiction may be applied where the suit arises out of or relates to the defendant's contacts with the forum…. General jurisdiction may apply in circumstances where the suit does not arise out of or is not related to the defendant's contacts with the forum, but the defendant's activities in the forum are substantial." The court apparently could find none of those conditions are met based on the evidence provided by the plaintiffs. *See also supra* note 63.

[78] Export-Import Bank of the Republic of China v. Republique du Niger, No. NY 97CV03090, available at *http://www.nysd.uscourts.gov/courtweb* (S.D.N.Y. order issued November 9, 1998).

[79] *See* Ministry of Foreign Affairs, *Foreign Relations Yearbook 1996* (1996 外交年鑑), Taipei, Taiwan: Ministry of Foreign Affairs, 1996, pp. 185-86 (text in Chinese).

[80] In November 1991, after a series of political power struggle, Amadou Cheiffou became the Prime Minister of Niger. Recognizing Niger's desperate need for economic aid, Taiwan seized the opportunity and agreed to provide financial assistance (estimated to be US$50 millions, mostly in loans) to Niger in exchange for the latter's diplomatic recognition. As a consequence, Niger and the PRC severed their diplomatic ties with each other, a move that causes lingering dispute within Niger. In 1996, General Ibrahim Mainassara Bare, then the army chief of staff, launched a successful military coup to become the President of Niger. Bare eventually decided to restore relations with the PRC at the latter's offer for more financial assistance. Thus, on August 19, 1996, the PRC and Niger re-established their official relations. On the same day, Taiwan and Niger formally terminated their relations. For a detailed analysis of the diplomatic warfare between Taiwan and the PRC over Niger, *see* George T. Yu and David J. Longenecker, "The Beijing-Taipei Struggle for International Recognition: From the Niger Affair to the U.N.," *Asian Survey*, Vol. 34, No. 5, 1994, p. 475; *see also* Foreign Broadcast Information Service, *Daily Report–East Asia*, various reports, June–August 1992 and May–August 1996.

The defendant then moved to reconsider. On November 9, 1998, the district court issued an order denying the defendant's motion. Thus, Ex-Im won its first major victory.[81]

It is interesting to note that the district court did not find TECRO (or the government of the Republic of China) to be a necessary and indispensable party to this case, even though Ex-Im is indeed a government agency of Taiwan.[82] The court especially emphasized that regardless of the purpose of the loan (political or otherwise), what matters is the nature of the transaction itself. Therefore, the court found the transaction here to be commercial activity within the exception of FSIA. Hence, it had jurisdiction over the dispute.[83]

It should be pointed out that the court's reasoning is contained in the form of an order and is not formally considered a "published opinion," although it is in fact being "published" on the Internet. Thus, it remains to be seen whether the same court and/or other courts will uphold its rationale in the future. Nevertheless, regardless of the Ministry of Foreign Affairs' disclaimer, as far as Taiwan is concerned, this ruling sends a clear message that Taiwan will not hesitate to use the judicial system of other countries (most likely the United States) to pursue its interests, political or otherwise, and there will be consequences for those who do not honor their part of the bargain.[84]

III. CHALLENGES AND SOLUTIONS

It does not come as a surprise that parties involved in a dispute always try to find whatever argument best to its advantages. Ironically, in *Lee*, *Schwinn*, and then *Mingtai*, it was the party *in* Taiwan who argued for the application of an international convention that

[81] *See supra* note 78. The court awarded more than US$72 millions in total. After the summary judgment, Roy Wu (烏元彥), spokesman of the Ministry of Foreign Affairs, denied that Taiwan provided loan to the Nigerian government in exchange for diplomatic recognition and insisted that the case was purely a private dispute over loan payments, not a political retaliation. *See* "Taiwan Denies Exchanging Loans to Niger for Diplomatic Ties," *Agence France-Presse*, October 29, 1998, 1998 *Westlaw* 16628558. Thus far, there is no public record on the cases' appeal status.

[82] *See* Federal Rules of Civil Procedure, Rule 19, *Joinder of Persons Needed for Just Adjudication*: "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action."

[83] *See supra* note 78, p. 2.

[84] Since the defendant here is a foreign sovereignty, its assets in the United States are immune from the U.S. jurisdiction as well. Therefore, it is not entirely clear how this judgment may actually be carried out, assuming it becomes final. Yet it does bring forth a symbolic victory for Taiwan at least.

Taiwan is not a part of. This is as if a citizen of Taiwan filing suit (or be sued) in the United States claiming that he or she is to be treated as a national of the PRC instead and not to be bound by any law of Taiwan. Clearly this may not be for political reasons, but if upheld, its legal and political impact, without a doubt, can be quite significant.[85]

The immediate impact of these cases clearly is that shippers will have a harder time collecting damages for their air- or ship-cargo losses.[86] That means all shipment contracts involving Taiwan either as the point of origin or destination will need to be re-negotiated or shippers may be facing a rather significant increase of insurance premium and legal costs in the future. This will cut both ways on Taiwan's imports and exports, particularly decreasing Taiwan's competition edge at least on the U.S. market.

Because not all the nations who do not diplomatically recognize Taiwan have similar arrangement as the United States does in maintaining their relations with Taiwan, whether or not a judgment by a U.S. court (either procedural or substantive) may be recognized and enforced in other countries is questionable.[87] To make matters more complicated, the growing establishment of the same or affiliated entities across the Taiwan Strait, busier transshipment activities among the PRC, Hong Kong Specialized Administrative Region Taiwan, and/or the United States as well as the emergence of electronic commerce will only provide more challenges to the TRA and the courts. For example, in the service of process area, could it eventually be done by electronic means (with modern cryptographic technology) and therefore rendering even the Hague Service Convention itself entirely obsolete? In that regard, if a new international convention should be developed and implemented in the future, given Taiwan's unlikely chance to participate in that convention, the TRA may, ironically, turn out to hinder somewhat on Taiwan's economic development and growth.[88]

There are at least two other issues in light of the growing activities across the Taiwan Strait: (1) since more corporations are now legal entities under the laws of both the PRC and Taiwan, should a multilateral convention (to which the PRC is a party) be nevertheless applicable for those bi-national entities? What about individuals who have double or even

[85] The diverse opinions of various circuits certain will not help the situation either. Chances are the U.S. Supreme Court is hardly likely to tackle this issue unless some major constitutional question is involved.

[86] *See* Jack Lucentini, "U.S. Court Says Taiwan Not in Warsaw Treaty," *Journal of Commerce Abstracts*, June 7, 1999, p. 18.

[87] Under normal circumstances, a foreign court should and will defer to a U.S. judicial decision on substantive matters, provided, that the U.S. law is determined to be the applicable rule and such application does not contradict the "public policy" of the nation or state where that forum belongs. For a detailed illustration of cross-border enforcement, *see*, for example, John R. Thomas, "Litigation Beyond the Technological Frontier: Comparative Approaches to Multinational Patent Enforcement," *Law & Policy in International Business*, Vol. 27, 1996, pp. 277-352.

[88] TRA most certainly is not the cause of this problem, yet it can contribute to it. As can be seen already from *Lee*, *Schwinn* and *Mingtai*, American enterprises, especially small or median-size ones, will probably be somewhat less motivated to do business in or with Taiwan, now that they have to bear more costs, although other factors may set off this negative concern. For the over-all evaluation of the United States–Taiwan trade relationship, *see* American Chamber of Commerce in Taipei, "1998-99 Taiwan White Paper," *Topics*, September 1998, pp. 11-19.

multiple nationalities? (2) Although Taiwan and the United States have agreements in their mutual assistance in the prosecution of criminal activities, there is clearly a lack of a complete set of rules for judicial assistance, including service of process.[89]

The fundamental problem presented in these cases is Taiwan's lack of participation in the various international (especially multilateral) conventions to guarantee certain standards and/or minimum protection on the flow of commerce.[90] Taiwan's imminent and eventual accession to the World Trade Organization (WTO) will certainly help, but not completely resolve this problem.[91] Therefore, bilateral agreement remains to be an essential tool between Taiwan and other nations to address many issues not covered by the rules of WTO, either directly or indirectly.[92]

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[89] *See, e.g.*, Memorandum of Understanding on Cooperation in the Field of Criminal Investigations and Prosecutions, AIT–CCNAA, October 5, 1992, reprinted in *Chinese Yearbook, 1991-92*, *supra* note 7, Vol. 11, pp. 570-71. As of the end of 1999, neither Taiwan nor the PRC is a party to the Hague Service Convention. Note that currently a court in Taiwan may provide judicial assistance in response to letters rogatory from foreign courts in accordance with the Law Governing Extension of Assistance to Foreign Courts. Note also that Section 402 of Taiwan's Civil Procedure Law, on the other hand, provides grounds (primarily for public policy reasons) upon which a court may refuse to enforce a foreign judgment.

[90] For example, because Taiwan is not recognized as an independent state by the United Nations, its national carrier has not become a member of the IATA and has not signed IATA's Intercarrier Agreement on Passenger Liability, under which airlines voluntarily waived passenger liability limits set under the Warsaw Convention for international flights. The Warsaw Convention sets strict limits of liability up to 100,000 Special Drawing Rights (US$134,670). Thus, for all the airlines in Taiwan, it depends upon whether they have contracts in place enabling the basic limits of the Warsaw Convention–about $10,000 per fatality–to apply. *See* Sarah Goddard, "Significant Claims Foreseen From Air Crash In Taiwan," *Business Insurance*, February 23, 1998, p. 3; *see also supra* note 18.

[91] The United States and Taiwan concluded a comprehensive Market Access Agreement on February 20, 1998. *See* United States Trade Representative (hereinafter USTR), "The United States And Taiwan Conclude Comprehensive Market Access Agreement," *Press Release No. 98-__*, February 20, 1998, also available at *http://www.ustr.gov/releases/1998/02/98-x1.pdf*. This agreement, together with several other agreements entered before and after (on such issues as agriculture subsidy, intellectual property, pesticide standard, and telecommunication) wrapped up Taiwan's bilateral negotiations with the United States concerning its accession to the WTO. *See also* USTR, *1999 Trade Policy Agenda and 1998 Annual Report of the President of the United States on the Trade Agreements Program*, Washington, D.C.: Government Printing Office, 1999, pp. 188, 189. As of the end of 1999, Taiwan is fully qualified and ready to be admitted to the WTO in the name of "The Separate Customs Territory of Taiwan, Penghu (Pescadores), Kinmen and Matsu" (also to be known as "Chinese Taipei"). But its formal accession will not come until right after the PRC's accession. As of November 15, 1999, the United States and the PRC reached the final accord, clearing a major obstacle for the PRC's accession to the WTO. *See* USTR, "U.S., China Signed Historic Trade Agreement," *Press Release No. 99-95*, November 15, 1999, text also available at *http://www.ustr.gov/releases/1999/11/99-95.pdf*.

[92] Many WTO rules direct the application of another convention on a given issue, thus substantially extend the actual scope of their coverage. For instance, the Agreement on Trade-Related Aspect of Intellectual Property Rights (Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994) expressly direct the application of many rules from the Paris Convention for the Protection of Industrial Property (1967), the Berne Convention for the Protection of Literary and Artistic Works (1971), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)(the Rome Convention), and the Treaty on Intellectual Property in Respect of Integrated Circuits (1989)(the Washington Treaty). Thus, many WTO Member States which may not otherwise be subscribed to those conventions are now all bound by the designated provisions therein.

Between January 1, 1979 and the end of 1997, Taiwan and the United States has entered 86 bilateral, executive agreements.[93] These agreements, together with all the treaties still in force before de-recognition, form a solid basis upon which the socio-economic and cultural relations between the two people have grown at a remarkable pace. Regrettably, neither *minimum* shipment damage award nor judicial cooperation is on the list of the achievements. To redress the former issue, one possible solution would be to have both sides indicate in a simple exchange of letter that both sides acknowledge and abide by the rules of the Warsaw Convention (or its subsequent Hague or Montréal Protocol) in the event of passenger injuries or cargo damages during transport or shipment. Similar arrangement shall also be made on the issue of judicial assistance, including service of process. Given the vast differences between the two legal systems, particular efforts and caution be given to reconcile the standards of judicial discretion under the civil law system and the American discovery process as well as the rules of evidence.

Yet it should also be noted that, despite extensive cultural exchanges and business activities over the years, there are still significant barriers remain on language, culture, education and psychology between people of Taiwan and the United States. From the U.S. perspective, quite often there is a certain degree of negative sentiment or even outright distrust on Taiwan's judicial system.[94] On the other hand, Taiwan has also demonstrated its skepticism toward the U.S. judiciary from time to time.[95]

There are also uncertainties about the status of the TRA itself. For example, the 105th U.S. Congress (1997-98) alone took up 55 legislative proposals (bills and resolutions)

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[93] For agreements in force as of the end of 1997, *see* "Status of TECRO," December 28, 1998, *Federal Register*, Vol. 63, pp. 71507-602. As of October 1999, three more trade agreements were concluded.

[94] *See, e.g.,* "Watchdog Body Formed to Monitor Judicial Reforms: Members Concerned That Direction of Modifications Will Not Solve Problems," *China News*, June 15, 1999, p. 1; "Taiwan Will Work to Ease Trade Frictions," *Central News Agency (Taiwan)*, February 4, 1999, 1999 *Westlaw* 15710115. Moreover, the administrative encumbrance in Taiwan's judicial process has been identified in the U.S. complaint (especially in the trade area) against Taiwan. *See* USTR, *1999 National Trade Estimate Report on Foreign Trade Barriers*, Washington, D.C.: Government Printing Office, 1999, p. 392 (accusing a weak judicial system in Taiwan to effectively enforce trade-related laws and agreements).

[95] A recent example is a 1995 request from Taiwan (the National Palace Museum, NPM) asking for a special guarantee by the U.S. government to effectively fend off any possible legal actions brought by any party (most likely the PRC) in the United States against 450 art pieces to be displayed in a national exhibition tour entitled "Splendors of Imperial China" in the United States. All of NPM's art collections were originally within Beijing's Forbidden City (after 1949 becomes PRC's National Palace Museum). Most of the art collections there were moved out of Beijing in 1937, at the verge of the Sino-Japanese War. When the war ended, they were shipped back briefly before being transported out again, this time to Taipei in the wake of the civil war between KMT and the Chinese Communists Party. Since then, there has been a dispute over the "proper ownership" of all the artifacts in Taiwan's NPM. The art exhibitions were eventually and successfully held in Chicago, New York, Washington, D.C. and San Francisco in 1997. The PRC never took any legal action. Instead, a senior cultural affairs official of the PRC Embassy simply put, "Taiwan is a part of China. Someday it [the art collection] will come back to us." *See* Associate Press, "U.S. Grants Protection to Taiwan Art Exhibit," printed in *Chicago Tribune*, January 19, 1997, p. 16. *See also* 22 U.S.C. § 2459 (1994, Supp. 3); United States Information Agency, "Notices–Culturally Significant Objects Imported for Exhibition Determination," September 18, 1995, *Federal Register*, Vol. 60, pp. 48201-02.

concerning Taiwan and four of them purported to amend the TRA. Eventually no amendment was made to the TRA due in part to the Clinton Administration's opposition. By the end of the first session of the 106th Congress (November 1999), 50 legislative measures have already been proposed concerning various aspects of Taiwan, including two very controversial bills (with similar contents) to enhance Taiwan's defense capability.[96] The fear is not so much on any deliberate attempt to sabotage the Sino-American relationship rather than an inadvertent mischief by amending the statute, albeit with the best possible intention, that causes irreparable damages to the intricate equilibriums among Washington, Beijing and Taipei.

One probable solution to bridge this gap lies in the serious efforts of international legal harmonization. Recognizing not all the procedural and substantive aspects of a given issue can possibly be "unified" into a single set of rules or paradigm around the world, or even be uniformly interpreted across the board, harmonization is most certainly *not* a step toward the super imposition of one state's laws over the others. Harmonization can only take place by natural evolution through conscious and balanced efforts of all the participating states. Fundamentally it carries the spirit of mutual respect of each other's legal system, giving full faith and credit to the judgment rendered by the court of another country, without constantly challenging the credibility of that system.[97] This is major step forward and beyond the traditional standards of national treatment, moat-favored-nation (now called normal trade relationship, or NTR, in the United States) and transparency. Certainly this will not be an easy path, yet it does offer a great opportunity to break loose the entanglements a legal system now has to suffer due to political uncertainties. With the successful experience and model of the TRA, it can be argued that through harmonization, regardless of political recognition, an entity's legal system in the future will always and automatically be respected, as long as it meets certain minimum standards provided by the applicable international norms or conventions. This indeed will lead us to a true new world order in which the traditional distinction between *de jure* and *de facto* entities may not be necessary any longer.

IV. CONCLUSION

Starting from a brand new, never tested concept in the aftermath of a delicate foreign relations changeover, the TRA has withstood the test of time after two decades of constant

[96] *See* S. 693 and H.R. 1838, 106th Cong., 1st Sess., 1999, respectively. Proposed by Senator Jesse Helms (R-North Carolina), Chairman of the Senate Committee of Foreign Relations; and Representative Tom Delay (R-Texas), Majority Whip of the House of Representatives, respectively. The Clinton Administration again strongly objected to both bills and neither got to see the light of the day. Finally, in a compromise, Congress did enact a provision in the defense budget bill, requesting the Executive Branch to closely monitor the military conditions of the PRC and the status of the Taiwan Strait as well as to file an annual report to this effect. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, §1202, 113 Stat. 512, 781; 10 U.S.C. § 113 note (1994 supp. 3). Note, however, that these legislative proposals or actions are overwhelmingly related to political and/or national security concerns. Section 4 of the TRA has thus far received virtually no oppositions or controversies within the United States. Unquestionably, Taiwan, Israel and Russia are the three most focused and contentious areas on the U.S. foreign relations debate today.

[97] There must be certain minimum standards (or ground rules) on a number of given issues. The rule-making process and dispute settlement mechanism within the WTO offer a possible and basic model for this process to take place on an even larger scale in the future.

trials.[98] It not only forms an integral part of the U.S. strategy in Asia but also serves as a critical stabilizing element behind a highly charged, sensitive and volatile trilateral relationship among Washington, Beijing and Taipei.[99] The past ten years also witnessed a growing variety of cases further testing the flexibility of this law and the capability of the U.S. courts to strike a balance between the exercise of foreign affairs and the interpretation of the law of the land. If there were any indication, one would only expect that more complex and difficult cases will be brought forth in the future, again testing the very foundation upon which the TRA was built.[100]

Despite the ever-growing and extensive inter-relations between the United States and Taiwan, several indemnity cases on shipment losses in the past 15 years nevertheless demonstrate the shortcomings of the existing bilateral arrangements as well as the need for Taiwan to be enrolled in certain key international conventions, perhaps on the premises that statehood is not a pre-requisite for membership.[101] These cases also expose the still divergent opinions among the various federal courts toward the application of TRA. It appears the Ninth Circuit has emerged to become the most experienced bench of all the circuits in handling issues related to Taiwan. Judging from the case flow and caseload, there may

[98] *See* Senate Concurrent Resolution 17, Concerning the 20th Anniversary of the Taiwan Relations Act, 106th Cong., 1st Sess., April 12, 1999 (affirming the role of the statute and expressing Congress' unequivocal support for Taiwan; *cf*. House Concurrent Resolution 56). Note that although a concurrent resolution bears no legal binding effect on the Executive Branch, it does carry too strong a political weight for the administration to ignore. This is particularly clear in light of the overwhelming support this resolution receives from both political parties on the Capital Hill (429-1 in the House of Representatives and unanimous consent in the Senate).

[99] An excellent example is the 1996 missile crisis across the Taiwan Strait. For detailed illustrations of the interactions of this trilateral relationship and the role of the TRA, *see* Barton Gellman, "U.S. and China Nearly Came To Blows in '96; Tension Over Taiwan Prompted Repair of Ties," *Washington Post*, June 21, 1998, p. A1.

[100] This foundation may still be weak, though. A drastic change of political climate or shift of ideological spectrum may seriously affect, if not jeopardize, what the TRA intends to accomplish, let along the TRA itself. One of the most recent developments and a good example is a declaration by President Lee Teng-hui of Taiwan on July 9, 1999, during an interview with the German radio station *Deutsche Welle*, proclaiming that Taiwan and the PRC are currently in a "special state-to-state" relationship. This, at least as far as the PRC is concerned, amounts to a unilateral declaration of independence by Taiwan, and is absolutely unacceptable. *See also* Lee Teng-hui, "Understanding Taiwan–Bridging the Perception Gap," *Foreign Affairs*, Vol. 78, No. 6, November/December 1999, pp. 9 *et seq*.

[101] In his 1998 state visit to the PRC, President William J. Clinton of the United States took the opportunity in a radio interview in Shanghai to address the official U.S. policy on Taiwan. Having emphasized the U.S. adherence to the "One China" policy, he further declared the so-called "Three Noes" policy, *i.e.*, "we don't support independence for Taiwan, or two Chinas, or one Taiwan-one China. And we don't believe that Taiwan should be a member in any organization for which statehood is a requirement." *See* "Remarks in a Roundtable Discussion on Shaping China for the 21st Century in Shanghai, China," June 30, 1998, *Weekly Compilation of Presidential Documents*, Vol. 34, No. 27, pp. 1267, 1272. Critics, however, view this policy pronouncement a "pattern of appeasement," and "a far cry from March 1996, when the U.S. upheld the terms of the Taiwan Relations Act and sent carriers into the Taiwan Strait to counter China's military maneuvers and landing of missiles off the coast of Taiwan's two most important ports…." *See* Stephen J. Yates, "Promoting Freedom and Security in U.S.–Taiwan Policy," *Heritage Foundation Backgrounder*, No. 1226, October 13, 1998.

already be a strategy of forum shopping in place, with parties in a dispute picking California or New York as the forum that involves Taiwan citizens, entities, or the government itself.

Be that as it may, cases in the United States clearly show that there is hardly any doubt about Taiwan's immunity and the status of its employees working in the United States. Yet all in all, Taiwan has presented a very unique and difficult scenario for all three branches of the United States to handle. The TRA does strike a careful balance between the U.S. constitutional system of check-and-balance and a delicate political environment in the Western Pacific region. But in the long run, it is certain that more complex and difficult issues will develop. One probable and a win-win solution for all is to extend Taiwan's participation in the international community, particularly in the technical areas that do not involve political recognition or dialogues.[102] Another solution is to boost the process of international harmonization in the long run, with the combination of various bilateral initiatives and the WTO multilateral trade negotiations as a successful model.

But the real ultimate solution ought to be left for the ones who tied the knot to untie it, namely, Taiwan and the PRC themselves.[103] A statement by a U.S. Senator on the eve of TRA's 20th anniversary sums up the congressional mood and attitude toward the United States/PRC/Taiwan issue, "Taiwan has engaged China for one basic reason. They recognize that in the end Taiwan and China alone, only the two of them, can really answer the question of how they are going to be related to each other in the 21st century. Now, obviously, the United States has played a vital role, and I think it is a role we can and should be proud of. Our explicit commitment to Taiwan's security and prosperity reflected in the Taiwan Relations Act has strengthened Taiwan's hand in dealing with a much larger, more powerful, and sometimes provocative neighbor. It is essential that we maintain that commitment, but in so doing we need to be careful ourselves not to take actions which would discourage the recent trend of improving cross-strait relations, or allow either party to use the United States as a pawn in their political dialog."[104]

November 24, 1999

[102] A list of the likely candidates includes, but not limited to, the International Civil Aviation Organization, the International Telecommunications Union, the World Postal Union. There is even one body which is open to non-self-governing territories, and that is the World Meteorological Organization.

[103] By the end of 1999, all the efforts to rekindle the cross-Strait dialogues between Taiwan and the PRC failed because of President Lee's "special state-to-state relationship" pronouncement. *See* "SEF's Re-appointed Koo repeats Call for Wang's Visit," *China Post*, November 3, 1999, 1999 *Westlaw* 5574846. In light of Taiwan's presidential election in March 1000, the PRC has apparently adopted a wait-and-see attitude while hoping for any policy changes towards Mainland by Lee's successor.

[104] *See TRA Hearing*, *supra* note 16, p. 5 (Statement of Senator John F. Kerry, D–Massachusetts).