

1992

## GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics

Lori Fisler Damrosch  
*Columbia Law School*, [damrosch@law.columbia.edu](mailto:damrosch@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [International Law Commons](#), and the [International Trade Law Commons](#)

---

### Recommended Citation

Lori F. Damrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19 (1992).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/3719](https://scholarship.law.columbia.edu/faculty_scholarship/3719)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu), [rwitt@law.columbia.edu](mailto:rwitt@law.columbia.edu).

# GATT MEMBERSHIP IN A CHANGING WORLD ORDER: TAIWAN, CHINA, AND THE FORMER SOVIER REPUBLICS

LORI FISLER DAMROSCH\*

My introduction to questions of GATT<sup>1</sup> membership came in 1979 when, as an attorney in the U.S. Department of State, I was immersed in a series of issues concerning trade relations with the People's Republic of China ("China" or "PRC") and Taiwan ("Republic of China" or "ROC"). I kept hearing about the "Chinese seat" in the GATT as if it were some piece of furniture waiting to be taken out of storage and put back in the dining room. The image of a chair is hardly an apt way of visualizing the extraordinarily complex network of legal relationships that exists within the GATT, but the unfortunate metaphor persists. The People's Republic of China has applied to the GATT to "resume the seat" that no one has sat in for more than forty years, and a separate application from Taiwan leads some to wonder whether there can be two "Chinese chairs" in what seems to be a rather crowded banquet hall. With the same imagery, questions are also being asked about the "Soviet seat" on the U.N. Security Council and in other international bodies.

Let's have an antique dealer cart off all the chairs so that we can think sensibly and imaginatively about complex structures of legal relationships — within the GATT, with GATT Contracting Parties in their evolving trade relations with China and Taiwan, between China and Taiwan, within the disintegrated

---

\* Professor of Law, Columbia University. The author gratefully acknowledges the research assistance of Lin Kuang-Hsiang of the Columbia Law School (LL.M. 1989, J.D. expected 1992) and the National Taiwan University (LL.M. 1988, LL.B. 1984).

<sup>1</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No 1700, 55 U.N.T.S. 187 (hereinafter "GATT").

ting Soviet empire, and between the emergent ex-Soviet entities and the rest of the world.

I would like to focus on a set of problems suggested by the China-Taiwan-GATT problem, but which also cut across a number of other relationships. These are the problems of inclusion in the multilateral trading structure (GATT-based) of entities (not just "states," but a broader set of political units) that are basically market-oriented or striving to be market-oriented, but which stand in an unresolved political relationship with a giant non-market economy ("NME"). Taiwan is of course the principal example for purposes of today's conference, but we could also include Hong Kong and Macao in the shadow of China, and any number of entities in the shadow of the Soviet Union — the three Baltic republics, other former Soviet republics struggling to sort out their political and economic future, and the East European states which were formerly integrated into the COMECON trading bloc and which are now trying to figure out how to privatize their economies without suffering a complete rupture of longstanding relationships within the former bloc. This set of problems can illuminate a more basic issue that the world community will have to face increasingly in the next few years — the question of reconceptualizing participation in international organizations in a changing world. International organizations were created by "states" to serve the needs of "states," but pressures are mounting on the state system as we have known it, and new solutions to novel questions will have to be found.

In the first two parts of this paper I isolate the questions of "Taiwan and the GATT" and "non-market economies and the GATT." Then in the third part I take up the complications that arise when the place in the GATT system of a market-oriented entity, such as Taiwan, cannot be isolated from that entity's political relationship with a major non-market economy.

## I. TAIWAN AND THE GATT

Without attempting to review in detail the history and legal issues which other participants in this conference will undoubtedly examine more fully, I will identify a few key features of the Taiwan-GATT problem.

## A. The History of China and the GATT

The Republic of China was a founding member of the GATT. It participated in the original negotiations in 1947 and became party to the Protocol of Provisional Application which came into force in early 1948.<sup>2</sup> In the aftermath of the October 1949 Communist takeover of the mainland, the ROC government, from its new base on Taiwan, gave notice of withdrawal from the GATT in 1950.<sup>3</sup> This withdrawal was one of a series of actions taken by the ROC government at about the same time, with respect to membership in international organizations. For example, the ROC gave the requisite one year's notice of denunciation of the Convention on International Civil Aviation on May 31, 1950; despite a few grumblings from certain parties that the ROC lacked legal authority to denounce the Convention, the International Civil Aviation Organization (ICAO) gave effect to the denunciation, and also recognized a subsequent ROC decision to resume its ICAO membership on January 1, 1954.<sup>4</sup>

The attitude of the People's Republic at this time was that the ROC should be expelled from all international organizations.<sup>5</sup> Voluntary withdrawal on the part of the ROC may have been a preemptive move in order to obviate a debate over expulsion, or it may have been motivated by other considerations, such as a conclusion that the ROC did not wish to bear the

---

<sup>2</sup> The General Agreement itself, in its preambular paragraph, identifies "the Republic of China" as one of the original Contracting Parties. *Id.*

<sup>3</sup> GATT Doc. CP/54 (Mar. 8, 1950). The history of withdrawal is summarized in H. JACOBSON & M. OKSENBERG, *CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT* at 59-63 (1990)(hereinafter JACOBSON & OKSENBERG), and in Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 L. & POL'Y IN INT'L BUS. 371, 402-04 (1986).

<sup>4</sup> For history and analysis of the ICAO developments, see T. BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* 35-38 (1969).

<sup>5</sup> See J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 309-10 (1974); BUERGENTHAL, *supra* note 4, at 37. In August of 1950, in a cable to the International Monetary Fund, Zhou Enlai demanded expulsion of Taiwan's appointees from the annual meeting of the Fund's board of governors; the same year (and in several subsequent years) Czechoslovakia, Yugoslavia, and India sponsored unsuccessful resolutions that would have expelled Taiwan's designees at the Fund. JACOBSON & OKSENBERG, *supra* note 3, at 59-60.

financial and other obligations of participation in these organizations.<sup>6</sup> Whatever the motivation, there is no indication that the PRC contested the legality of the withdrawals at the relevant time — that is, in the early 1950's, contemporaneously with the events. Nor did the PRC attempt to assume the "Chinese seats" in these organizations or to observe the legal obligations of the international agreements associated with the organizations.<sup>7</sup> Only decades later, when the PRC began to see potential benefits in occupying a "seat" that had long since been removed from the table, did the notion surface that the 1950 withdrawals might have been somehow unauthorized or without legal effect.<sup>8</sup> Surely there is no merit to this claim. The time to raise any question of the legality of termination of Chinese membership was in the early 1950's; the claim is now foreclosed not only by virtue of the PRC's failure to assert it at the relevant time, but also by the PRC's failure to undertake and observe the obligations of membership in the 1950's or indeed at any subsequent time.

The legal situation concerning the relationship of both the ROC and the PRC to the GATT is thus clear: there has been no Chinese "seat" since 1950.<sup>9</sup> The eligibility of China or Tai-

---

<sup>6</sup> With respect to ICAO, Buergenthal's account supports the latter theory: the ROC negotiated with the organization in 1953-54 concerning its financial arrearages and upon resolution of those difficulties was permitted to rejoin ICAO by becoming once again a party to the Convention. BUERGENTHAL, *supra* note 4, at 37.

<sup>7</sup> COHEN & CHIU, *supra* note 5, at 299, 310; BUERGENTHAL *supra* note 4, at 37. Buergenthal speculates that the PRC "might have been unwilling, for military reasons, to assume the obligations incumbent upon Contracting States under the [Civil Aviation] Convention, or it may well have believed that its attempts to join the Organization would be unsuccessful." *Id.*

<sup>8</sup> See generally Herzstein, *supra*, note 3 at 402-406; Li Chung-chou, *Resumption of China's GATT Membership*, 21 J. WORLD TRADE L. 25 (1987); Feng Yu-shu, *China's Membership of GATT: A Practical Proposal*, 22 J. WORLD TRADE L. 53 (1988).

<sup>9</sup> The Taiwan government had an observer position from 1965 to 1971. See JACOBSON & OKSENBURG, *supra* note 3 at 63; J. JACKSON, *THE WORLD TRADING SYSTEM* 288 (1989) (hereinafter *THE WORLD TRADING SYSTEM*).

In April of 1980 China "resumed" its seat on the U.N.'s Interim Commission for the International Trade Organization, a vestigial body whose sole current function is to appoint the GATT secretariat. In this capacity China has participated in the selection of GATT personnel, including the incumbent director-general, Arthur Dunkel. See JACOBSON & OKSENBURG, *supra* note 3 at 83-84.

wan for GATT membership, or the authority of any government purporting to represent either one in a quest for GATT membership, must therefore be examined *de novo*. As long as everyone understands that what is involved is a fresh start, the choice of terminology in the documents eventually establishing a new legal relationship can be made in accordance with political preferences. No harm will be done if the GATT contracting parties defer to Beijing's insistence on the term "resumption" instead of "accession."

The legal situation with respect to GATT is independent of the question of Chinese membership in the United Nations. As is well known, the ROC government continued to represent China at the United Nations until 1971; in October 1971 the General Assembly voted to allow the PRC to assume the Chinese "seat" in the United Nations, including the permanent seat on the Security Council.<sup>10</sup> Following the lead of the U.N.'s principal political organs, the specialized agencies of the United Nations and other U.N. organs<sup>11</sup> have "seated" the PRC — provided, of course, that the PRC has been ready and willing to assume the responsibilities of membership. But this political-

---

China has become party to GATT's Multifibre Arrangement, and by virtue of a decision of GATT's contracting parties has been permitted to participate in the Uruguay Round negotiations. *Id.* at 84, 94.

<sup>10</sup> G.A. Res. 2758, 26 U.N. GAOR Supp. (No. 29) at 2, U.N. Doc. A/8429 (1972). The current turmoil in the Soviet Union has precipitated interest in all arguably relevant precedents for allocating Security Council "seats" in the event of dramatic change in the political situation of one of the permanent members. Of interest is the fact that the U.N. Charter specifies in article 23 that the Security Council's permanent members shall include the "Republic of China." This choice of term did not preclude the United Nations from de-accrediting the representatives of the government using that name and accepting the credentials of the representatives of the government of the People's Republic.

<sup>11</sup> A unique international institution is the International Court of Justice, which is the "principal judicial organ of the United Nations" (U.N. CHARTER, art. 92). It had no member of Chinese nationality from 1967 (end of term of Judge Wellington Koo of the ROC) until 1985 (beginning of term of Judge Ni Zhengyu of the PRC). Purists will note that judges of the Court do not represent governments (therefore, there is no "Chinese seat"), but since the Security Council participates in the election of judges it is not merely a coincidence that the nationalities of judges generally reflect the geographic distribution of the Security Council.

legal fact within the U.N. system is simply irrelevant to the GATT, because the GATT is not a U.N. agency.<sup>12</sup>

## B. Current Problems of Law and Policy

In January of 1990 Taiwan applied for GATT membership. In a clever move aimed at avoiding the issue of Taiwan's political status, its application purports to be on behalf of the "Customs Territory of Taiwan, Penghu, Kinmen and Matsu."<sup>13</sup> This formulation appears to be consistent with Article XXXIII of the GATT, which allows applications for membership to be filed by "governments" in the traditional sense, and also by "a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement."<sup>14</sup> Functionally, Taiwan does possess such autonomy, and the authorities in Taiwan do function as the government acting on its behalf.

One may of course quibble over the meaning of the term "government" in Article XXXIII, or over any number of other arcane issues of the drafting of the provisions of the General Agreement and related instruments covering membership and similar issues,<sup>15</sup> but in my view the functional realities should prevail and there should be no legal obstacle to Taiwan's admission as a "separate customs territory."

Before leaving these legal technicalities I would note the applicability of a different article, Article XXVI(5), to Hong Kong's situation. Article XXVI(5)(a) provides in part that a government accepting the Agreement does so "in respect of its metropolitan territory and of the other territories for which it has interna-

---

<sup>12</sup> For detailed discussion of the evolution of the PRC's relationship with the International Monetary Fund and the World Bank, see JACOBSON & OKSENBURG, *supra* note 3. Concerning Taiwan and international financial institutions; see Damrosch, *The Taiwan Relations Act After Ten Years*, 3 J. CHINESE LAW 157, 179-80 (1989).

<sup>13</sup> See WuDunn, *Taiwan's Chances Rising for World Trade Status*, N.Y. Times, Sept. 29, 1991, at A21.

<sup>14</sup> GATT, *supra* note 1, Article XXXIII.

<sup>15</sup> *E.g.*, the relationship of Article XXXIII to Article XXVI, discussed in the next paragraph of the text, and the relationship of the General Agreement's final clauses to the Protocol of Provisional Application, *infra* note 18, and other GATT instruments.

tional responsibility,"<sup>16</sup> and Article XXVI(5)(c) provides a mechanism under which territories possessing or acquiring full autonomy in external commercial relationships "shall, upon sponsorship through a declaration by the responsible Contracting Party establishing the above-mentioned fact, be deemed to be a Contracting Party."<sup>17</sup> Without attempting to parse all the intricacies of these and related provisions in their application to the triangular United Kingdom-Hong Kong-PRC relationship,<sup>18</sup> I would simply note that the articles invoked by Taiwan and Hong Kong respectively are different and not legally interchangeable. The functional significance of the legal difference is that for the reasons previously given in Part I.A, Taiwan's application is *de novo* and requires negotiation of a new protocol of accession to be approved by a two-thirds majority of the GATT Contracting Parties. Hong Kong, in contrast, has enjoyed continuity of membership by virtue of its legal relationship with its current metropolitan power, the United Kingdom, which sponsored Hong Kong for membership in its own right; no new protocol was required to consummate this change in status. Interestingly, the PRC supplied the GATT with confirmation that Hong Kong will continue to possess full autonomy in its external commercial relations after the change in its political status takes effect in 1997;<sup>19</sup> Beijing was content with this formula for continuation of Hong Kong's GATT participation because of the acknowledgment of the PRC's sovereignty over Hong Kong (an element which the pending application on behalf of Taiwan clearly does not satisfy). Accordingly, "Hong Kong China" became the 91st member of the GATT in April of 1986. (Prospects for the Hong Kong-PRC-GATT relationship, and comparisons to potential future Taiwan-PRC-GATT relationships, are dealt with in Part III below.)

Macao, like Hong Kong, has been and remains an overseas territory of a European power (Portugal), and will revert to

---

<sup>16</sup> GATT, *supra* note 1, Article XXVI (5)(a).

<sup>17</sup> GATT, *supra* note 1, Article XXVI (5)(c).

<sup>18</sup> *E.g.*, Paragraph 2 of the Protocol of Provisional Application of the GATT, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 308 (concerning provisional application in respect of territories other than metropolitan territories).

<sup>19</sup> See *Hong Kong Joins GATT; Separate Membership to Continue Even Under Chinese Sovereignty*, 3 INT'L TRADE REP., No. 18, at 581 (Apr. 30, 1986); Li Chung-chou, *supra* note 8, at 43-44.

Chinese control on a known future date (1999). Macao became the 101st member of the GATT in January of 1991, on the same basis as Hong Kong.<sup>20</sup>

On the merits — that is, viewing the trade policy questions independently of political or legal considerations — there is no question that the world trading system would benefit from bringing Taiwan into the GATT. Taiwan's application stresses that it is a major economic power, arguably the 13th largest trading power in the world.<sup>21</sup> Its export volume has typically exceeded that of the PRC, and on the basis of most economic indicators it is world-class.<sup>22</sup> Even more important than Taiwan's economic strength is the value to GATT parties, and indeed to Taiwan itself, of bringing Taiwan under GATT discipline. For so long as Taiwan remains outside GATT's framework of legal obligation and multilateral scrutiny, the only constraint on Taiwan's trading practices is the potential for retaliation on the part of trading partners that might unilaterally deem themselves aggrieved. Subsidies, dumping, market disruption, protectionist practices with respect to imports and foreign investment, misappropriation of intellectual property — all these, and more, have been problems in Taiwan's trade relations.<sup>23</sup> Unilateral retaliation or threats of retaliation, as under the U.S. "Super-301" procedures, are no substitute for multilateral supervision of Taiwan's trading practices and responsive action within the multilateral structure.

## II. NON-MARKET ECONOMIES AND THE GATT

In this section I will take up some considerations concerning the GATT relationship with economies that are not structured on market principles — China being the most pertinent example. It is worth underscoring that Taiwan, despite a strong state sector and considerable state influence over private eco-

---

<sup>20</sup> See *Taiwan Revising Membership Bid in Light of Recent, Less Favorable Trade Statistics*, 8 INT'L TRADE REP. at 175 (Jan. 30, 1991).

<sup>21</sup> *Id.* Whether it is the 13th or the 16th or even the 25th is not material; the point is that it is not on the fringes of world trade but instead vigorously involved in it.

<sup>22</sup> For a table showing ten years of key economic indicators, see Damrosch, *supra* note 12 at 162.

<sup>23</sup> *Id.* at 164-67.

conomic activity, is basically market-oriented, both internally and externally.<sup>24</sup> The objections to Taiwan's bid for membership in the GATT are almost exclusively political and have nothing to do with the substantive economic concerns about the potential GATT membership of countries that are ideologically committed to central control of economic activity. It is to those concerns that we now turn.

For the reasons that have been developed in Part I, the matter of Chinese membership in GATT has had to be taken up from scratch, starting from the mid-1980's when China first began to express serious interest. Of paramount importance is China's situation as a gigantic non-market economy (NME): despite some experiments with limited private enterprise, the economy has been basically directed from the center and not organized on market principles. China may complain, but the GATT Contracting Parties must reckon with this fact of life in deciding whether to admit China to membership and if so, on what terms.

By the late 1980's, with China pressing for GATT membership and the Soviet Union beginning to express interest, considerable attention was being given to the difficult policy questions for the GATT attendant upon the possible incorporation into the GATT system of these two vast NME's. It may be convenient to consider these questions in two phases, with late 1989 as the dividing point in light of the collapse of Communist ideology in Europe at about that time, and to differentiate between the problems of "big NME's" (China and the USSR),<sup>25</sup> and "little NME's" (most of the East European countries, and potentially some of the smaller Soviet republics).

#### A. NME's and the GATT Through 1989

GATT Contracting Parties have justifiable concerns about NME's with respect to both import and export trade.<sup>26</sup> As re-

---

<sup>24</sup> *Id.* at 164 n. 29.

<sup>25</sup> To the extent that the legacy of non-market structure can be expected to persist for some time, similar problems would be posed if Russia, or a new grouping of former Soviet republics including Russia, should apply for GATT membership.

<sup>26</sup> For a succinct overview, see *THE WORLD TRADING SYSTEM*, *supra* note 9, at 283-98.

gards imports into NME's, tariff concessions from an NME could be rendered meaningless by virtue of arbitrary or manipulative pricing decisions made by state authorities; and prohibitions on quotas could be evaded by central decisions to limit orders of imported goods. Concerning the exports of NME's, the absence of market pricing makes judgments concerning sales at less than fair value especially elusive, and the concept of subsidies seems virtually meaningless when applied to a centrally planned economy.<sup>27</sup> Moreover, NME's are perceived as being able to target their exports in ways that threaten disruption of existing markets. For all these and other reasons, GATT Contracting Parties have been wary about treating NME entry as a simple matter of claiming a "seat"; elaborate negotiations have been required to set terms and conditions of participation in the system.

Some half-dozen NME's have so far joined the GATT, as follows:<sup>28</sup>

<i>Country</i>	<i>Year of GATT Entry</i>	<i>Mode of Entry</i>
Cuba	1948	Original Entrant
Czechoslovakia	1948	Original entrant
Yugoslavia	1966	Normal accession
Poland	1967	Protocol requiring annual import increase of 7%.
Romania	1971	Protocol requiring increase in imports from GATT CP's at rate proportional to total import growth.
Hungary	1973	Protocol with normal schedule of concessions and some special terms.

<sup>27</sup> See Horlick & Shuman, *Non-Market Economy Trade and U.S. Anti-dumping/Countervailing Duty Law*, 18 INT'L LAW. 807 (1984).

<sup>28</sup> The following chart is adapted from THE WORLD TRADING SYSTEM, *supra* note 9, at 287. In addition, Bulgaria and China have observer status and their applications for full membership are pending. The USSR has had observer status since 1990.

Basically, the GATT system has been able to accommodate these small NME's with some glitches but without any insuperable difficulties.<sup>29</sup> There is a modest literature on the experience of these NME's in the GATT,<sup>30</sup> and the lessons learned from the GATT's efforts to iron out the problems of their participation would be relevant to planning for the potential future participation of other NME's.<sup>31</sup>

The issues raised by the bids of China and the USSR for GATT membership are of a substantially different order, however. Even if the GATT has been able to manage the smaller NME's satisfactorily, the prognosis is not necessarily the same for the big NME's. Would these countries really be willing and able to integrate into the world trading system in a way that will promote global welfare and efficiency? Or do they want to join the system in order to exploit it — or worse, to destroy it? It is not irrational to be skeptical about the motivations of these two behemoths, and to demand enforceable assurances that they would conduct their international trade in a manner consistent with the letter and spirit of GATT.<sup>32</sup>

---

<sup>29</sup> *But cf.* JACOBSON & OKSENBERG, *supra* note 3, at 39 ("Hardly any knowledgeable official or observer claimed that the arrangements that had been made for the participation of Eastern European countries with communist governments in GATT had proved satisfactory . . ."). This passage could mean either that there is room for improvement in relations of the smaller NME's with the GATT, or that the arrangements would be an unsuitable model for China's case. Both of these positions could be valid, and neither is necessarily inconsistent with the claim made in the text.

<sup>30</sup> *See, e.g.*, Patterson, *Improving GATT Rules for Nonmarket Economies*, 20 J. WORLD TRADE L. 185 (1986); Lansing & Rose, *The Granting and Suspension of Most-Favored-Nation Status for Nonmarket Economy States: Policy and Consequences*, 25 HARV. INT'L L. J. 329 (1984); Grzybowski, *Socialist Countries in GATT*, 28 AM. J. COMP. L. 539 (1980).

<sup>31</sup> An important criticism (made by Herzstein, *supra* note 3, and Patterson, *supra* note 30, among others) is that certain features of the protocols of accession of the small NME's, such as import commitments fixed with reference to the NME's five-year plan, had the undesirable effect of reinforcing state control and discouraging decentralization.

<sup>32</sup> Jacobson and Oksenberg are optimistic based on their assessment of China's experiences with the International Monetary Fund and the World Bank, but they acknowledge that there have been rough aspects to the relationships; moreover, the events of June 1989 in China caution against assuming that past trends are necessarily good predictors for the future. JACOBSON & OKSENBERG, *supra* note 3, at 129-39, 152-64.

Of course, even if the complex questions of the entry of China and the USSR into the GATT could be satisfactorily resolved on economic grounds, delicate political questions have complicated the situation further. GATT Contracting Parties have had to take account of China's sensitivities with respect to Taiwan, thus precluding either application from being addressed purely on the merits. China's demand for the special trade preferences accorded to developing countries raises political and legal complications, especially for the United States.<sup>33</sup> Furthermore, there are jealousies between China and the USSR, as well as fallout from dramatic political events within each country, especially the Tiananmen Square massacre of June 4, 1989 and the changing fortunes of Soviet President Gorbachev.

As of the end of the 1980's, eventual resolution of the economic and political obstacles to full GATT membership on the part of both China and the USSR seemed to be a matter of time rather than of principle. China had been accorded observer status in the GATT in 1986 and negotiations toward full membership had covered considerable ground. In December of 1989, at a summit meeting between Presidents Bush and Gorbachev, the United States agreed to support GATT observer status for the Soviet Union,<sup>34</sup> a step which was widely perceived as intended to lead in due course to full GATT membership.

Before turning to the 1990's, it is appropriate to take note of an important contribution to the literature on NME's and the GATT by the leading U.S. scholar of GATT law, John H. Jackson, writing at the turn of the decade. After summarizing the competing positions on whether NME's can be successfully accommodated within the GATT system, Jackson articulated his own position:

I feel that the GATT, or some structure related to it, should be designed to be "universal" in orientation, and thus to accommodate all types of economies. One of the reasons for this goes back to the fundamental notion of the Bretton Woods system, i.e., the

---

<sup>33</sup> Concerning U.S. law on preferences for developing countries with reference to both Taiwan and the PRC, see Damrosch, *supra* note 12, at 163.

<sup>34</sup> The GATT Council granted observer status to the USSR in May of 1990, and in 1991 the USSR was admitted to the Import Licensing and Antidumping Committees. See *Soviet Union Access to Antidumping Committee Another Step Toward Full Membership in GATT*, 8 INT'L TRADE REP. at 696 (May 8, 1991).

prevention of war, which in the economic context means embracing and establishing an institutional structure by which at least major powers of the world can try to iron out their differences.<sup>35</sup>

He rejected the view that GATT countries should use leverage over the admission decision to pressure NME's to become more market-oriented:

It is not the purpose or role of the GATT to apply pressures on sovereign nations to accept market-oriented economic principles. The internal structure of a country's market should be left to that country's own judgment, as long as its practices do not harm other countries.<sup>36</sup>

Jackson went on to suggest elaboration of a system of specific new provisions on a "two-track basis," under which NME's would follow all the basic rules of GATT but market economies would be able to invoke special procedures if they believed that they were being injured by virtue of state-trading practices of an NME: "The advantage of a two-track approach is that it is relatively self-adjusting to the extent of market-economy principles followed in the new NME. It is not based on a policy of GATT pressure to marketize the economy."<sup>37</sup> Instead of using GATT to change the NME's, "it can be argued strongly that the GATT has a responsibility to change and to figure out an appropriate way to accommodate the different economic systems."<sup>38</sup>

Jackson's thesis was controversial when written and has become even more so in light of intervening developments, which will be taken up in the next section. In opposition to his view were the contentions that the large NME's would wreck the GATT, or at least divert its attention from the urgent tasks of reducing trade barriers and bringing greater discipline to trade between the major markets in the Americas, Europe, Japan, and the newly industrialized Asian countries; and that if NME's were to be admitted at all, maximum concessions toward

---

<sup>35</sup> J.JACKSON, *RESTRUCTURING THE GATT SYSTEM*, at 82-83 (1991) (hereinafter *RESTRUCTURING*); see also *WORLD TRADING SYSTEM*, *supra* note 9, at 290.

<sup>36</sup> *RESTRUCTURING*, *supra* note 35, at 85.

<sup>37</sup> *RESTRUCTURING*, *supra* note 35, at 86-87; *WORLD TRADING SYSTEM*, *supra* note 9, at 290-92.

<sup>38</sup> *WORLD TRADING SYSTEM*, *supra* note 9, at 290.

marketization should be exerted as conditions of admission. Jackson had no reason at the end of the 1980's to question the assumption that for the foreseeable future, the world would remain divided between basically capitalist and basically Marxist-Leninist economies, which would have to coexist somehow. On this assumption, his approach, under which the GATT would become a forum for "interface" between economies constructed on radically different principles, was entirely reasonable.

#### B. NME's and the GATT in the 1990's

How has the end of the Cold War changed the situation for NME's and the GATT? Arguably, China's situation has changed but little, or not at all. But for Eastern Europe and the Soviet Union, everything has changed. With the headlong rush to privatize the economies of Eastern Europe, the concept of "non-market economy" should soon become an anachronism in that region. In addition to the small, now-transitional NME's indicated on the preceding chart, the former German Democratic Republic is now within the GATT system by virtue of its integration into the Federal Republic of Germany (and thereupon into the European Communities).<sup>39</sup> The turmoil in the former Soviet Union has derailed consideration of its application for full GATT membership, but one may confidently predict that once the political situation has settled down, either the Union if it survives, or many of its republics if it does not, will soon be pressing for speedy negotiations for full accession.

Jackson's contention that the GATT admission process should *not* be used to press market reforms upon NME's has been overtaken by events in Europe. The question is no longer one of "interface" between systems that are expected to remain different forever, but of transforming Europe's NME's into market economies as rapidly and successfully as possible. The transitional NME's urgently require and request technical assistance from Western experts and international economic organizations

---

<sup>39</sup> Giegerich, *The European Dimension of German Reunification: East Germany's Integration into the European Communities*, 51 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 384 (1991).

in the marketization of their economies. It would be unthinkable for GATT to pass up this opportunity.

By analogy to the process under which the small NME's enjoyed something of a tutorial in the principles of world trade pursuant to their protocols of accession to the GATT, new terms of accession can be negotiated for the several long-standing East European members of the GATT. New relationships can likewise be established with those transitional NME's that have not yet become GATT members — notably Bulgaria,<sup>40</sup> and presumably in due course the three Baltic states and possibly other Soviet republics as well.

China is the sole surviving major country ideologically committed to a Communist model of economic organization (leaving aside Cuba, North Korea, and a few other countries whose role in world trade is insignificant). It is a fair question, however, whether that ideological commitment will continue after the ruling generation passes from the scene — indeed, whether that commitment could be sustained in any event, in view of internal and external pressures toward marketization and decentralization. The next Part will explore the possibility that a growing web of GATT relations incorporating small parts of greater China — Taiwan, Hong Kong, and Macao — could build momentum for market-oriented changes even if the larger part of China remains outside the GATT for the time being.

### III. CHANGING POLITICAL RELATIONS BETWEEN MARKET AND NON-MARKET ECONOMY COUNTRIES: GATT AS A FACTOR

The unresolved political relationship between Taiwan and the PRC poses challenging problems for the GATT and GATT Contracting Parties. Not the least of the problems is the intrusion of extraneous factors into a process that ought to be governed more by economic than by political considerations. The notion is bandied about that China has "vetoed" Taiwan's application or "blocked" it from even being considered.<sup>41</sup> Any lawyer would

---

<sup>40</sup> Bulgaria's application for GATT membership has been pending since 1988.

<sup>41</sup> See, e.g., *China Takes Early Action to Block Taiwan's GATT Membership Application*, 7 INT'L TRADE REP. at 131 (Jan. 24, 1990).

find this use of language imprecise, for the GATT (unlike the United Nations) has no big-power veto, and *a fortiori* no non-party veto. Moreover, there is something quite odd (to this lawyer, anyway) about an exercise in legal interpretation under which an agreement's provision concerning an entity "possessing full autonomy in the conduct of its external commercial relations" could be deprived of a logical, practical construction in obeisance to the political dogma of a non-party to the agreement. It is for the GATT Contracting Parties, not for the PRC, to judge whether Taiwan enjoys "full autonomy" within the meaning of this provision of their constitutive document. One would be hard-pressed to find a single respect in which the PRC can control Taiwan's conduct in the matters covered by the GATT, and it therefore runs contrary to sound legal interpretation to give the PRC control over the entire Taiwan-GATT relationship.

Some believe that once the PRC obtains favorable resolution of its own bid for membership, it would be willing to see Taiwan admitted on the same basis as Hong Kong and Macao. If everything were on track for a speedy disposition of the PRC's own situation, this approach might have some pragmatic appeal.<sup>42</sup> But if there is reason for concern that either economic or political reasons might delay consideration of the PRC's claim for a prolonged period, then it would be economically irrational and legally unwarranted to put Taiwan's application on hold indefinitely. The absurdity of this sequencing can be illustrated with a reminder that in the cases of Hong Kong and Macao, the PRC declared in parallel to the sponsoring colonial powers that these entities would remain autonomous. Does it make sense for the Contracting Parties to refuse to reach their own conclusion that Taiwan is autonomous — in deference to the PRC's insistence that "Taiwan is a part of China" — while awaiting the PRC's own incantation of the magic words that Taiwan enjoys "full autonomy?" If Taiwan is factually and le-

---

<sup>42</sup> The Working Party set up by the GATT to review China's application resumed its work from February 13 to February 14, 1992 in Geneva. This is the first time that the Working Party has met since its work was suspended in 1990 in the aftermath of the Tiananmen bloodshed. See *GATT to Review China*, USA Today, Feb. 8, 1992, at 10A; Shi, *GATT Working Party on China Holds Tenth Meeting*, People's Daily, Feb. 14, 1992, at 7.

gally autonomous, then the Contracting Parties need not wait for the PRC to acknowledge that state of affairs.

This is not to say that the PRC's affirmation of continued autonomy would be meaningless, only that it is not a legal prerequisite in Taiwan's case. In the cases of Hong Kong and Macao, the declaration was an important commitment in view of the interests of the GATT Contracting Parties in ensuring that the two territories not be submerged into China's non-market system. I would characterize the declarations as going beyond a political pledge to constitute an undertaking of legal obligation;<sup>43</sup> any interference with the autonomy of these two units after their change in status would presumably be actionable within the framework of the GATT.<sup>44</sup> In the absence of some dramatic change in the Taiwan-PRC relationship — at either of the two extremes of hostile takeover or negotiated rapprochement — it is not clear that the PRC would have sufficient influence over Taiwan to constitute the kind of threat to autonomy that was a real concern in the cases of Hong Kong and Macao.

As 1997 and 1999 draw near, it becomes increasingly within the realm of possibility that the PRC will still be outside the GATT system while Hong Kong and Macao (and perhaps Taiwan) are inside it.<sup>45</sup> There is no precise precedent for this situation; the reverse situation, under which a GATT Contracting Party can notify the GATT that it *excepts* certain of its autonomous territories from the system, is more consistent with GATT expectations, as evidenced by Article XXVI(5)(a). Yet despite the absence of precedent, there is no legal or logical objection to having autonomous bits of a big country within GATT. An argument can be made that that state of affairs could serve the

---

<sup>43</sup> Cf. *Nuclear Tests (Australia v. France)*, 1974 I.C.J. 253, 267; (*New Zealand v. France*), 1974 I.C.J. 457, 472 (unilateral declaration by one state treated as creating a binding obligation even without a *quid pro quo*).

<sup>44</sup> Remedies would be comparable to those applied in the case of any breach of undertakings under the GATT and GATT-related agreements, with the unusual twist that in the event that China remains in non-member status at the time of the dispute, the issue would arise as to whether retaliatory measures would apply to Hong Kong (or Macao) only, or whether sanctions could be directed against China as a whole.

<sup>45</sup> JACOBSON & OKSENBERG, *supra* note 3, speculate about this possibility, noting that "the senior part would be outside the system." *Id.* at 101-02.

long-range objective of influencing China itself in the direction of market reforms.

In making that argument, I must distance myself from John Jackson's position that it is inappropriate for GATT to be used to induce a country to change its economic system.<sup>46</sup> Whatever the merits of that argument from the vantage point of the 1980's (indeed, I might have endorsed it myself then), it seems clearly out of line with the trends of the 1990's. And in any event, even if one were to continue in the belief that "GATT" as an organization should not press countries toward dramatic changes in their governing ideology or political economy, the considerations for *U.S. policy* are not similarly constrained. For decades *U.S. policy* has sought to encourage China in pluralization, liberalization, and privatization,<sup>47</sup> and the justifications for continuing that encouragement are even stronger in the post-Cold War era than before. Thus the question is not whether to abandon longstanding strategic objectives, but whether GATT relationships should be used as one tactic for the United States to pursue in furtherance of those objectives. I believe that the answer must be in the affirmative.

An element in the current debate over *U.S. policy* toward China is the usage of most-favored-nation (MFN) treatment as a technique of influence over China. In a recent article, Secretary of State James A. Baker III responded to those who would revoke or place conditions on MFN in reaction to China's human rights practices:

MFN has been a critical catalyst in the growth of our bilateral ties . . . MFN has also facilitated development of a large market-oriented sector — in Guangdong province it now exceeds the state sector. This engagement has led to the integration of China's coastal provinces with Hong Kong, Taiwan and the global economy.<sup>48</sup>

Although the present paper is not the place to attempt to marshal empirical data in support of these provocative factual

---

<sup>46</sup> Text at notes 35-38, *supra*.

<sup>47</sup> During the Cold War we had "isms;" the favorite post-Cold War coinage seems to be "izations," as in "decentralization" and "marketization."

<sup>48</sup> Baker, *America in Asia*, 70 FOREIGN AFFAIRS 1, at 16 (Winter 1991/92).

premises, they are consistent with reports from other sources.<sup>49</sup>

If Secretary Baker's conclusions about the effect of MFN on China's evolution toward markets are correct, then it would seem to follow that multilateralizing MFN through the GATT should strengthen the effect. Application of leverage in favor of market reforms at the point of the decision on China's GATT entry could further increase the trend. Thus I favor the eventual incorporation of China into the GATT system, provided that the GATT Contracting Parties can obtain satisfactory assurances of China's willingness to conduct its foreign trade in accordance with GATT principles.

Pending receipt of those assurances, it would be appropriate to move forward with Taiwan's application forthwith, not only for the benefits to Taiwan and the world trading system, but also for the ancillary effect on greater China. It is my belief that adding Taiwan to Hong Kong and Macao as GATT members would hasten China's moves toward market orientation, because it would tighten the integration among Pacific trading partners. China's coastal provinces, and indeed China as a whole, could not remain unaffected by these trends. While I do not go so far as the suggestion that some in the United States may have a hidden agenda favoring dismemberment of China,<sup>50</sup> I do believe that the prospects for liberalization in China can be strengthened by building the momentum for economic integration in the Pacific region.

For similar reasons I would bring the fragments of the former Soviet empire into the GATT just as quickly as protocols can be negotiated embodying assurances of their commitment to

---

<sup>49</sup> See, e.g., Kristof, *Hard Line in Beijing Fails to Kill Boom*, N.Y. Times, Dec. 17, 1991, at A10 ("Most of [China's] growth now is coming from private and collective enterprises, not from the state-owned behemoths. . . . The state sector accounts for only about one-third of China's gross national product . . . .").

<sup>50</sup> See Gelb, *Breaking China Apart*, N.Y. Times, Nov. 13, 1991, at A25 (reading the passage from Baker's Foreign Affairs article quoted above to suggest that "instead of China eventually absorbing Taiwan and Hong Kong, as now prescribed in various solemn agreements, the exact opposite could happen — Taiwan and Hong Kong could absorb the southern tier of China. . . . [T]he southern provinces and Hong Kong . . . could become so attached to the outside world that they will refuse to be treated as a part of China. And along with Taiwan . . . they could all demand self-determination.").

the principles of free trade. It would be natural to complete the integration of all of Eastern Europe into the GATT and quickly add the three Baltic republics, which were admitted to membership in the United Nations and the Conference on Security and Cooperation in Europe in September of 1991. As for the other 12 republics, it remains to be seen how they will resolve the current confusion over internal and external economic policy, but once these basic decisions are taken, GATT accession should follow promptly with respect to any entity committed to free trade. If a viable commonwealth emerges with sufficient authority to create a "common economic space," GATT may be able to draw on its experiences with the European Community to fashion pragmatic solutions to the complex problems that arise when multiple levels of government have responsibility for substantive issues.<sup>51</sup>

#### IV. CONCLUSION

GATT's framers were prescient in devising formulas for participation going beyond "states" or "governments" in the classic sense. What motivated them in 1947 was the concern to provide for a workable approach to decolonization, but their pragmatic solution, focusing on functional autonomy rather than formalistic legal constructs, fits well with the realities of Taiwan's situation today. Other international agreements and organizations, based on more rigid formulations, can be expected to come under pressure for change as the state system itself changes. The GATT model is not the only one, but it has much to recommend it.

---

<sup>51</sup> See, e.g., Petersmann, *The EEC as a GATT Member*, in *THE EUROPEAN COMMUNITY AND THE GATT* at 23 (1986).