

Recent Legal Issues Between the U.S. and the People's Republic of China

Hungdah Chiu

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [International Law Commons](#)

Recommended Citation

Hungdah Chiu, *Recent Legal Issues Between the U.S. and the People's Republic of China*, 12 Md. J. Int'l L. 1 (1987).
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol12/iss1/3>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

ARTICLES

RECENT LEGAL ISSUES BETWEEN THE U.S. AND THE PEOPLE'S REPUBLIC OF CHINA

HUNGDAH CHIU*

I.	INTRODUCTION	2
II.	THE AUGUST 17, 1982, U.S.-PRC TAIWAN ARMS SALES COMMUNIQUE	2
III.	HUMAN RIGHTS ISSUES	7
	A. <i>Political Asylum</i>	7
	B. <i>Family Planning and Forced Abortion</i>	8
	C. <i>Student Movements in China</i>	9
	D. <i>Human Rights in Tibet</i>	10
IV.	PROTECTING U.S. NATIONALS IN CHINA	12
	A. <i>The PRC's State Secret Law and Reporters' Activi- ties</i>	12
	B. <i>Protecting U.S. Nationals in the PRC</i>	14
V.	TRADE LAW DISPUTES	16
	A. <i>General Trade Situations Between the PRC and the U.S.</i>	16
	B. <i>Country of Origin Issue</i>	18
	C. <i>U.S. Import Restraint — Dumping Issue</i>	20
	D. <i>U.S. Restriction of High-Tech Sales to China</i>	21
	E. <i>U.S.-PRC's Textile Export Issue</i>	22
	F. <i>The PRC's Membership at the General Agreement on Tariffs and Trade ("GATT")</i>	23
	G. <i>The PRC's Criticism of the U.S. Trade Act of 1974</i>	25
VI.	THE HUGUANG RAILWAY BOND CASE	26
VII.	LIBEL SUIT AGAINST <i>People's Daily</i> BROUGHT BY WANG BINGZHANG OF <i>China Spring</i>	29
VIII.	CONCLUSIONS	32

* Professor of Law, University of Maryland School of Law. This article is a revised and updated version of a paper originally presented at the 16th Sino-American Conference on Mainland China, University of Virginia, Charlottesville, Virginia, on June 11-14, 1987.

I. INTRODUCTION

While there are many studies on the recent political relations between the United States and the People's Republic of China ("PRC"), most of these studies do not adequately address the legal aspects of such issues or the purely legal issues between the two countries. Sometimes legal issues may severely strain political relations. For instance, one needs only to recall the 1982 Hu Na political asylum case and the Huguang Railway Bonds case,¹ each of which caused considerable disruption in U.S.-PRC relations. This article analyzes certain recent major legal issues in U.S.-PRC relations. It begins with the controversy generated by U.S. relations with Taiwan.

II. THE AUGUST 17, 1982, U.S.-PRC TAIWAN ARMS SALES COMMUNIQUE

From the PRC's point of view, the status of the Republic of China ("ROC" or Taiwan) is the most important issue in the PRC's relations with the United States. Generally speaking, the PRC views the Taiwan question as an internal affair of China which brooks no outside intervention. The U.S. point of view is shaped by its association with the Chinese Nationalists dating back to the 1930s and the unwillingness of the Chinese people on Taiwan to accept PRC rule. These factors create an allegiance with Taiwan which views a withdrawal of support as permitting the fate of the 19 million Chinese people there to be left to the mercy of Communist China. Moreover, under the Taiwan Relations Act of 1979,² the U.S. is legally obligated to provide adequate defensive weapons to Taiwan. The PRC, however, considers the Act to be a violation of international law and assumes that the U.S. has recognized its sovereign claim to Taiwan,³ although the U.S. denies this recogni-

1. See *infra* notes 22-23 and 128-145 and accompanying text.

2. Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 21 (1979) reprinted in CHINA AND THE TAIWAN ISSUE 266-275 (H. Chiu ed. 1979).

3. Cf. the following comments made by two PRC international lawyers. Professor Liu Fengming wrote:

The municipal law of a state should not violate the international obligations assumed by itself. The "Taiwan Relations Act" (April 10, 1979) passed by the U.S. Congress and signed by the President of the United States provides [in Section 4(b)(1)]: "Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." This in fact attempts to view Taiwan as a "state" and the Taiwan authorities as a "government." This is inconsistent with the spirit of the "Sino-American Joint Communiqué on the Establishment of Diplomatic Relations" which was announced in advance on Dec. 16, 1978.

tion. This issue requires some explanation.

At the time of normalization, the English text of the U.S.-PRC Joint Communiqué, announced on December 15, 1978, and entered into force on January 1, 1979, stated that the U.S. "acknowledges the Chinese position that there is but one China and Taiwan is part of China."⁴ In the Chinese text, the PRC purposely mistranslated the word "acknowledges" into "Chengren" (Cheng-jen in Wade-Giles), which, if retranslated into English, means "recognizes."⁵ Based on this distorted translation, the PRC later put out several articles alleging that the U.S. had already recognized its sovereignty over Taiwan and therefore the Taiwan Relations Act was an interference in China's "internal affairs."⁶ Since "acknowledge" does not mean "recognize," there is no basis for the PRC to charge the U.S. with interfering in China's internal affairs by engaging in arms sales or other relations with Taiwan after normalization.

Moreover, at the time of the enactment of the Taiwan Relations Act in early 1979, the PRC closely watched the Taiwan bill when it was pending in the Congress, yet it only made a perfunctory protest

The Communiqué states: "The United States of America recognizes the Government of the People's Republic of China as the sole legal government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan." The "Taiwan Relations Act" of the U.S. violated the principle of establishment of diplomatic relations between the two countries and the international obligation assumed by the U.S.

LIU FENGMING, XIANDAI GUOJI FA GANYAO [ESSENTIALS OF MODERN INTERNATIONAL LAW] 8 (1982).

Professor Wei Min wrote:

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

GUOJI FA GAILUN [INTRODUCTION TO INTERNATIONAL LAW] 30 (Wei Min ed. 1986). However, it should be noted that the U.S. has never considered the communiqué as a treaty. It is not listed in the *Treaties in Force* published annually by the State Department.

4. 79 DEP'T OF STATE BULL. 25 (1979) reprinted in CHINA AND THE TAIWAN ISSUE, *supra* note 2, at 255.

5. Chinese text in Renmin Ribao (People's Daily), Dec. 16, 1978, at 1.

6. See, e.g., Zhang Hongzeng (Chang Hung-tseng in Wade-Giles), *The U.S. 'Taiwan Relations Act' Viewed from an International Law Perspective*, 1982 ZHONGGUO GUOJIFA NIANKAN [CHINESE Y.B. INT'L L.] (Chinese Soc. of Int'l L.) 195.

against the bill on March 16, 1979, shortly before the bill's adoption on March 29, 1979. At that time, Huang Hua, then PRC Foreign Minister, told U.S. Ambassador to the PRC, Leonard Woodcock, that "if the bills [sic] are passed as they are worded now, and are signed into law, great harm will be done to the new relationship that has just been established between China and the United States."⁷ However, during the period between the bill's passage on March 29 and President Carter's signing it on April 10, 1979, the PRC did not protest. It was not until April 28, 1979, that the PRC secretly protested by saying, "[T]he Chinese government's position of opposing 'Two Chinas or One China, One Taiwan' is firm and steadfast. If the United States side does not comply with the agreement reached on the Taiwan question at the time of establishing diplomatic relations and continues to harbor attempts to interfere in the internal affairs of China, this can only bring damage to Sino-American relations and will not benefit either." This protest was kept secret from the press until the Spring of 1982 when it was partially disclosed in a PRC publication entitled *Journal of International Studies*, published under the auspices of the PRC Foreign Ministry.⁸

Therefore, diplomatic relations were established and ambassadors were exchanged clearly on the condition that U.S. arms sales to Taiwan would continue after normalization. The PRC was fully aware of this at that time. According to President Carter's diary of January 30, 1979, then PRC Vice-Premier Deng Xiaoping (Teng Hsiao-p'ing in Wade-Giles) told him only "to be prudent in the sale of any weapon to Taiwan after this year [1979], and he let it be known that they were not in favor of any such sale."⁹ Later, when President Carter announced in early 1980 that the U.S. would sell \$280 million worth of arms to Taiwan, the PRC did not protest. In 1980 the Carter Administration sold a total of \$830 million in arms to Taiwan without causing a diplomatic crisis with the PRC. By the time President Ronald Reagan assumed office, the PRC may have felt that relations with the U.S. were strong enough to weather a diplomatic crisis on the issue of U.S. arms sales to Taiwan, and it decided to test the will of the U.S. commitment to Taiwan. Thus, in the August 17, 1982 U.S.-PRC Joint Communique, it reopened the case and pressured the U.S. to agree to the principle of gradually phasing out Taiwan arms sales.¹⁰ The PRC seemed to understand that any major diplomatic crisis would be disad-

7. Huang Hua Reiterates China's View, 22 BEIJING REV., March 30, 1979, at 8.

8. *Where Lies the Crux of Sino-U.S. Relations*, 1982 GUOJI WENTI YAN-JIU, No. 2, at 4-5 (1982).

9. J. CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT 209-210 (1982).

10. N. Y. Times, Aug. 18, 1982, at A12, col. 1.

vantageous to the party in power in the U.S., therefore it exploited this situation to the fullest extent by threatening to downgrade relations with the U.S.

In the August 17, 1982 Communique, the U.S. stated "that it does not seek to carry out a long-term policy of arms sales to Taiwan, that its arms sales to Taiwan will not exceed, either in qualitative or in quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China, and that it intends to reduce gradually its sales of arms to Taiwan, leading over a period of time to a final solution."¹¹ Since the issuance of the Communique, the United States and the PRC have disputed its implementation. According to the United States, arms sales to Taiwan have declined progressively since 1983 by about \$20 million a year. In 1983 the total amount was \$780 million, while, for fiscal year 1987, the amount was \$720 million.¹² The U.S. has also refused to sell high performance jet-fighters such as the F-16 or the F-20 to Taiwan. Therefore, the United States has faithfully implemented the Communique.

The PRC, however, has routinely protested U.S. arms sales to Taiwan, despite the fact that the U.S. has never promised to terminate such arms sales. Moreover, according to the U.S., its promise to gradually reduce arms sales to Taiwan is premised on a continuation of the PRC's peaceful policy toward a resolution of its differences with Taiwan.¹³ Despite this position, PRC leaders have spoken of using force against Taiwan on a number of occasions.

One such occasion occurred on October 11, 1984, when Chinese Communist leader Deng Xiaoping (Teng Hsiao-p'ing in Wade-Giles) stated that the PRC could institute a military blockade against Taiwan.¹⁴ Another such occasion is the General Secretary of the Chinese Communist Party, Hu Yaobang's (Hu Yao-p'ang in Wade-Giles) statement of May 10, 1985 which specifically pointed out that the PRC could use force against Taiwan in eight or ten years.¹⁵ Yet another

11. *Id.*

12. *The Military Weans Itself from Dependency on U.S.*, 132 FAR E. ECON. REV., May 8, 1986, at 26.

13. *U.S. Policy Toward China and Taiwan: Hearings Before Senate Foreign Relations Committee*, 97th Cong., 2d Sess. 13 (1982) (statement of Assistant Secretary of State for East Asian and Pacific Affairs Holdridge).

14. *Deng Warns of 'Eruption' in U.S.-China Ties Over Taiwan*, N.Y. Times, Oct. 12, 1984, at A8, col. 3.

15. *Hu Yaobang Interviewed by Pai Hsing's Lu Keng*, Foreign Broadcast Information Service, Daily Reports, China, June 3, 1985, at W1, W7 [hereinafter FBIS, China].

example is the April 3, 1987 statement made by Chinese Deputy Minister Qian Qisheng in which he said that the PRC cannot promise to rule out "non-peaceful means" to resolve the Taiwan question.¹⁶

Recently, the United States and the PRC have engaged in another dispute over the interpretation of the Communiqué. This involves U.S. private industry's assistance to Taiwan by manufacturing high-performance jet-fighters to meet the threat posed by the PRC. The numerical inferiority faced by the ROC's armed forces in every category of military strength makes it essential for the ROC to maintain the military balance in the Taiwan Strait. Because of the U.S. restriction on the quality of arms sales to Taiwan in the Communiqué, the military balance in the Taiwan Strait may gradually shift to the PRC's favor. Taiwan's weaponry will become outmoded just as the PRC gains access to U.S. and European weaponry. Control of the airspace over the Taiwan Strait is probably the most essential problem the ROC faces. In order to address this situation, the ROC has sought the assistance of U.S. private industry to develop an indigenous all-weather fighter. It is believed that a prototype should be able to fly by 1989, with the first production models available by the early 1990's.¹⁷

In an interview with Selig S. Harrison of the Carnegie Endowment for International Peace on April 23, 1986, Hu Yaobang, then General Secretary of the Chinese Communist Party, spoke strongly against the transfer of technology for arms manufacture and equated this with actual sale of arms.¹⁸ An article in the authoritative *Liaowang Zhoukan* (The Outlook Weekly) magazine alleged that private U.S. involvement in producing jet-fighters in Taiwan "seriously violated the principle of the August 17 Communiqué."¹⁹ During a visit to the U.S. in June 1986, PRC Vice-Foreign Minister Zhu Qizhen sought clarification of the U.S. position on technology transfer. It was reported that the PRC sent an inquiry to the U.S. asking whether military technology transfers violated the spirit of the August 17, 1982 Communiqué. On August 15, 1986, the U.S. reply stated that the Communiqué stands on its

16. Beimei Ribao (Peimei News), Apr. 4, 1987, at 1. On May 24, 1987, PRC Vice-Chairman of the Military Commission General Yang Shankun also stated that the PRC cannot exclude the use of force as the ultimate means to achieve unification.

17. *U.S. Industry Aiding Taiwan in Developing National Fighter to Meet Threat from the PRC*, AV. WEEK & SPACE TECH., Mar. 31, 1986, at 31.

18. Southerland, *U.S. Support of Taiwan Jet Fighter Cited by Peking as Violation of Pact*, Wash. Post, Apr. 25, 1986, at A32, col. 1; A33, col. 4.

19. Zhang Jingxu, *A Preliminary Analysis of the Theory of Military Balance in the Taiwan Strait*, LIAOWANG ZHOUKAN [THE OUTLOOK WEEKLY], July 28, 1986, at 23 (overseas ed.).

own, and that there is no need to reinterpret or renegotiate it. A U.S. official reportedly stated: "The text is very clear. It talks of arms sales and not technology."²⁰ Because of the firm position taken by the U.S., the PRC did not press this issue.

III. HUMAN RIGHTS ISSUES

A. *Political Asylum*

Because of the fundamental differences between the U.S. and the PRC in their social, economic, legal and political systems, it is only natural for some PRC nationals, especially students and visiting scholars, to seek political asylum in the U.S. It has been reported that by the end of October 1982, there were 1,030 applications pending for political asylum filed by PRC nationals; approximately ten percent of the estimated 10,000 to 11,000 PRC nationals who were on extended visits here.²¹ The PRC Embassy in Washington has reportedly made protests "at the highest level" over what it views as American receptiveness to Chinese requests for asylum.²² A case worthy of special attention is the Hu Na case. Hu Na is a famous young tennis player who has won several international tennis tournaments. Her decision to seek political asylum in the U.S. greatly embarrassed the PRC and the Chinese put tremendous pressure on the U.S. to send her back. The U.S. decision to grant her political asylum caused the PRC to cancel its cultural exchange programs with the U.S.²³

The wide publicity received by this case in the American media significantly tarnished the PRC's image in the U.S., and the PRC appeared to have learned a bitter lesson from it. Consequently it has not publicly pressured the U.S. on any asylum case since then. On the other hand, the U.S. executive branch appears to be making an effort to avoid similar confrontations with the PRC over political asylum and similar issues. U.S. authorities have subsequently handled the political asylum cases *in camera*. Moreover, in at least two cases concerning the kidnapping or death of Chinese officials seeking political asylum, U.S.

20. Nayan Chanda, *A Technical Point, U.S. Rejects China's Stance on Technology Transfers to Taiwan*, 133 FAR E. ECON. REV., Aug. 28, 1986, at 26.

21. According to figures provided by the U.S. Immigration and Naturalization Service.

22. Bernstein, *Peking is Troubled by Rise in Defections to West*, N. Y. Times, Dec. 5, 1982, at § 1, col. 3.

23. *19 Events with U.S. Cancelled by China, Sports and Cultural Program in '83 is Annulled to Protest Asylum for Tennis Star*, N. Y. Times, Apr. 8, 1983, at A1, col. 4.

authorities made only perfunctory investigations of the situations and closed the cases promptly.

The first case involved a Chinese official from the PRC Ministry of Petroleum Industry, Zhang Zhenggao, who fell from the PRC Consulate-General's Office in New York in the early morning of April 11, 1984, and was sent to the hospital for emergency treatment. He had applied for political asylum. While he was waiting for approval of his application for political asylum, he mysteriously disappeared on July 19, 1984. Later, the Chinese Consulate-General in New York announced that he had decided to return to China "voluntarily." Many believed that he was kidnapped by Chinese agents in the United States.²⁴

The second case involved Zhang Xin. Zhang was an official of the PRC Textile Ministry who met with U.S. immigration officials at New York's Kennedy Airport on December 9, 1984, shortly before he was supposed to leave with other ministry officials for Guyana. However, he did not leave the United States and on December 10, 1984, he went to the Manhattan Office of the U.S. Immigration and Naturalization Service and turned over his passport to the immigration officials. On December 12, he was found hanging from a cable on the roof of the Chinese Consulate-General in New York.²⁵ The Chinese authorities regarded this incident as a pure case of suicide, but others suspected that Chinese agents murdered Zhang.²⁶

B. *Family Planning and Forced Abortion*

Another recent human rights issue between the U.S. and the PRC is the U.S. criticism of Chinese forced abortion measures used in carrying out its one-child family planning program. According to Western press reports, abortion is not only compulsory, but some have been carried out as late as the ninth month of pregnancy. Moreover, Chinese doctors performing late-term abortions of unauthorized pregnancies have routinely killed the child as it emerged from the womb, either by crushing the skull with forceps or by injecting formaldehyde into the soft spot on the head.²⁷ On August 1, 1986, the Committee on Foreign

24. See Li Qinyan, *The Inside Story of Zhang Zhenggao's Kidnapping to China*, 16 ZHONGGUO ZHICHUN [CHINA SPRING] 55-57 (1984).

25. See Berger, *Chinese Official on Visit to U.S. Found Hanging*, N. Y. Times, Dec. 13, 1984, at B7, col. 1.

26. *Intrigue, Chinese Defector Hanged Himself in New York — or Was it Murder?*, Wash. Times, Sept. 5, 1985, at 1A, col. 1, 4A, col. 1.

27. Weisskopf, *Abortion Policy Tears at Fabric of China's Society*, Wash. Post, Jan. 7, 1985, at A1, A10. See also Stepney, *How Chinese Doctors Kill Babies*, WORLD

Affairs of the U.S. House of Representatives passed a draft resolution criticizing the Chinese family planning program and the one-child policy. In a commentary published in the authoritative *Renmin Ribao* (People's Daily) on August 4, 1986, the PRC severely criticized the draft resolution as an arbitrary interference in Chinese internal affairs.²⁸

On August 27, 1986, an official of the U.S. Agency for International Development told Reuter's News Agency that the United States would not contribute \$25 million to the United Nations Fund for Population Activities ("UNFPA") for 1986-87 because "China enforces family planning that encourages abortions."²⁹ An article in the overseas edition of the *People's Daily* criticized the U.S. decision as follows:

[S]ome people do not understand the family planning policy and persuasive education is necessary. There is nothing strange about this. Which of the U.S.'s policies is agreeable to 100 percent of the people? Would it not be ridiculous for anyone to accuse the United States of "enforcing" a certain policy simply because of this? However, since last fall, some people in the United States have made a clamor against China, taking advantage of the population issue.³⁰

On November 9, 1987, at the United Nations, the PRC again criticized the U.S. for withholding contribution to UNFPA and its attack on Chinese population control policy as interference in the PRC's internal affairs.³¹

C. Student Movements in China

In December 1986, students in several Chinese cities demonstrated

MEDICINE, July 9, 1983, at 22, where it is reported that Chinese doctors even used strangulation to destroy infants whose birth had not been authorized. See also S. MOSHER, *BROKEN EARTH. THE RURAL CHINESE* 224-261 (1983), where the abortion program in the rural area was vividly described. See also *Family Planning and Fertility in China; Political Developments and Human Rights in the People's Republic of China: Hearings before House Subcommittees on Human Rights and International Organizations and Asian and Pacific Affairs*, 99th Cong., 1st Sess. 128-170 (1985) (testimony of Judith Banister).

28. Zhong Bao (Centre Daily News), Aug. 5, 1986, at 1.

29. Zhong Bao (Centre Daily News), Aug. 29, 1986, at 1; *Columnist on U.S. Non-contribution to UNFPA*, FBIS, China, Sept. 5, 1986, at B3.

30. See translation in *Columnist on U.S. Non-Contribution to UNFPA*, FBIS, China, Sept. 5, 1986, at B3.

31. *U.S. Distorts China's Population Policy*, FBIS, China, Nov. 10, 1987, at 2.

against the PRC government demanding more democracy and press freedom.³² This prompted the Communist Party of China to launch a campaign against so-called "bourgeois liberalism," along with a crackdown on the student movement and the removal of several key government or party officials who were allegedly sympathetic to the students' demands.³³ In January 1987, a PRC student, Yang Wei, who returned from the U.S., was arrested for unspecified charges.³⁴ Despite such violations of human rights, the U.S. took no public action to denounce the PRC's behavior, although some private groups, PRC students and visiting scholars did express their dissatisfaction with the PRC's action.³⁵

On December 21, 1987, a PRC court sentenced Yang Wei to two years imprisonment for inciting unrest and spreading propaganda for the New York-based Chinese Alliance for Democracy during student demonstrations and protest.³⁶ Before the sentence, the U.S. Department of State commented on this case and said that the PRC's decision to close the trial to foreign observers was "counter to international principles of justice." After the trial, the U.S. stated, "[W]e regret the imposition of such a sentence and hope that after further reviews the Chinese authorities will show leniency." The PRC's foreign ministry responded to the U.S. criticism by saying that the case "is purely China's internal affairs."³⁷

D. *Human Rights in Tibet*

On October 6, 1987, the U.S. Senate voted 98-0 to adopt an amendment claiming that China had violated human rights in Tibet.³⁸

32. See, e.g., Gargan, *Thousands Stage Rally in Shanghai Demanding Rights*, N.Y. Times, Dec. 21, 1986, at A1, col. 6; *China Denounces Student Protests as 'Illegal Acts'*, N.Y. Times, Dec. 22, 1986, at A1, col. 6; *Beijing Imposes Rules Banning Protests in City*, N.Y. Times, Dec. 27, 1986, at 1, col. 5; *Chinese Officials Criticize Protests*, N.Y. Times, Dec. 30, 1986, at A5, col. 1; *Chinese Students End Their Marches*, N.Y. Times, Dec. 31, 1986, at A8, col. 1.

33. See Gargan, *Clues Clarifying Shifts in Beijing Remain Elusive*, N.Y. Times, Jan. 18, 1987, at 1, col. 5.; Butterfield, *Hu's Ouster: Deng's Role?*, N.Y. Times, Jan. 17, 1987, at 1, col. 6; Gargan, *Leader of Party in China is Ousted for His Mistakes*, N.Y. Times, Jan. 17, 1987, at 1, col. 5.

34. See Zhou Chunqing, *New Development in the Case of Yang Wei*, 47 ZHONGGUO ZHICHUN [CHINA SPRING], May 1987, at 39-40.

35. Butterfield, *160 U.S. Scholars in Appeal to China*, N.Y. Times, Feb. 24, 1987, at A7, col. 1.

36. *Student Found Guilty*, 30 BEIJING REV., Dec. 28, 1987, at 12-13.

37. *U.S. Criticism of Yang Wei Trial Rejected*, FBIS, China, Dec. 24, 1987, at 3.

38. *Beijing is Backed by Administration on Unrest in Tibet*, N.Y. Times, Oct. 7, 1987, at A1, col. 3.

This followed a visit in September to the U.S. by the Dalai Lama, Tibet's spiritual and political leader.³⁹ The Senate vote has incurred vehement condemnation by the Chinese government which is especially sensitive to the Tibet issue because of the recent violent protests there by Buddhist monks.⁴⁰

The Chinese claim to Tibet dates back for centuries. Communist China has had troops in Tibet since 1950 and in 1959 the military suppressed a bloody rebellion. The Dalai Lama fled to India where he still resides. During the Cultural Revolution under Mao, thousands of Buddhist monasteries were destroyed. The most recent demonstrations have resulted in several deaths and were apparently sparked by the execution of at least two Tibetans who were Dalai Lama followers.⁴¹ Chinese government officials in Lhasa, the capital of Tibet, deny that the executions were political, stating that the two were convicted criminals.⁴²

During the Dalai Lama's September visit, he presented to members of the Congress a five-point plan calling for a withdrawal of Chinese troops.⁴³ This prompted a letter to Prime Minister Zhao Ziyang by congressional members protesting human rights violations and endorsing the plan.⁴⁴ However, the Reagan Administration and State Department have supported Chinese sovereignty over Tibet. The official U.S. stand recognizes Tibet as part of China.⁴⁵ Recently, however, some Administration officials have admitted they did not react as strongly as they should have when China acted to suppress unrest.⁴⁶ The most recent conflict arose out of a prospective congressional fact-finding mission. The PRC has threatened to deny such a visit.⁴⁷

On December 15 and 16, 1987, the U.S. Congress adopted an amendment on "human rights violations in Tibet by the People's Republic of China." On December 26, 1987, the Nationalities Committee and the Foreign Affairs Committee of the PRC's rubber-stamp Na-

39. *Amendment 'Interfering'*, FBIS, China, Oct. 8, 1987, at 6. Earlier in the year on June 18, 1987, the House of Representatives approved a similar Amendment.

40. *See supra* note 38.

41. *See, e.g., U.S. 'Splitting' Attempt*, FBIS, China, Oct. 8, 1987, at 3.

42. *Chinese Report Protest by Lamas to Free Tibet*, N. Y. Times, Nov. 1, 1987, at A8, col. 3.

43. *Tibet Monks Protest Rule by Chinese*, Wash. Post, Sept. 30, 1987, at A28, col. 1.

44. *Id.*

45. *See supra* note 38.

46. *U.S. is Reassessing Response to Beijing in Tibet Crackdown*, N.Y. Times, Oct. 18, 1987, at 1, col. 1.

47. *Id.* at 17, col. 2.

tional People's Congress issued a statement strongly protesting the U.S. Congressional amendment as "grossly meddl[ing] in China's internal affairs."⁴⁸

IV. PROTECTING U.S. NATIONALS IN CHINA

A. *The PRC's State Secret Law and Reporters' Activities*

Post-Mao China has adopted an open-door policy and an increasing number of Americans have come to China for pleasure, business or study. However, the PRC is still essentially a totalitarian communist state, and its legal system is vastly different from that of the West. Like many other communist states, the PRC has declared a wide-range of classified information to be state secrets and many areas are not open for foreigners to visit. Article 2 of the 1951 Provisional Act on Guarding State Secrets applies to almost all information not officially made public. There is also a catch-all provision which reads: "all other state affairs which should be kept secret." Even for official published information there is a category of "internal circulation" which foreigners are not supposed to read or acquire. In June 1982, an American teacher, Lisa Wichser, was expelled from China because of her attempt to acquire information on rural economy classified as "internal circulation" for her doctoral dissertation.⁴⁹

Another case concerning the PRC's secret law is the Peking Public Security Bureau's detention of John F. Burns, the Peking bureau chief of the New York Times. Between June 29 and July 7, 1986, Mr. Burns, along with an American lawyer, Edward McNally, and a Chinese friend, Zhang Daxing, travelled by motorcycle in an area 250 miles southwest of Peking. He was detained on July 17, 1986, for investigation "on suspicion of entering an area forbidden to foreigners, gathering intelligence information and espionage."⁵⁰ Despite the fact that Burns is a British national, U.S. officials have publicly expressed Washington's "strong concern" about Mr. Burns' detention, and have stated that they have the fullest confidence in his journalistic integrity. On

48. "Text" of Committees' Protest Against U.S., FBIS, China, Dec. 28, 1987, at 3. After the Amendment was adopted at the House-Senate Conference of the U.S. Congress, PRC Vice Foreign Minister Zhu Qizhen made an appointment in Beijing with the U.S. Ambassador Winston Lord and lodged a strong protest. *U.S. Amendment Protested*, 30 BEIJING REV., Dec. 21, 1987, at 9.

49. See Weisskopf, *China Holds American as Suspect in Spy Case*, Wash. Post, June 2, 1982, at A1; *American Expelled for 'Stealing' China's Secrets*, FBIS, China, June 3, 1982, at B1.

50. *Times Reporter Being Held in Peking*, N. Y. Times, Jul. 18, 1986, at A3.

July 23, 1986, the PRC expelled him.⁵¹ Another American, working for Agence France-Presse, Lawrence MacDonald, had his visa revoked while he was out of the country. Although U.S. Secretary of State George P. Shultz told reporters that he would raise the treatment of these two reporters with the Chinese authorities during his visit to China from February 28 to March 6, 1987,⁵² no concrete result was reported after the conclusion of his visit. Instead, on May 8, 1987, China announced the expulsion of Japanese reporter Shuitsu Henmi of Kyodo News Service for alleged "illegal activities" in China. That reporter left China on May 11.⁵³ Many believe that this is a warning to other Western reporters in China.⁵⁴

The most recent incident occurred on October 8, 1987, when 14 journalists from the United States, Britain, Italy, West Germany, Canada and Australia were expelled from Tibet. The expulsion was due to the reporters' non-compliance with a little-known rule which requires an application for permission to cover news in Tibet ten days in advance. Human rights violations by the Chinese occupying Tibet has currently become a volatile issue. During the two weeks prior to the expulsion, violent demonstrations led by Buddhist monks, followers of the Dalai Lama, had resulted in at least 14 deaths.⁵⁵ The U.S. State Department expressed regret over the Tibet Foreign Affairs Office's request that the reporters covering the events leave. The Tibetan officials maintain that free press coverage is allowed but "it is only natural . . . to take administrative measures with regard to these correspondents."⁵⁶

Therefore, it is unlikely that U.S. reporters in China will gain any

51. See *N.Y. Times Chief Meets with Official on Reporter*, FBIS, China, Jul. 23, 1986, at B1; *Correspondent Expelled*, FBIS, China, Jul. 23, 1986, at B2.

52. Shipler, *Shultz to Arrive in China Tomorrow for Talks on Trade and Human Rights*, N. Y. Times, Feb. 28, 1987, at 3.

53. See *Kyodo Journalist Expelled for Stealing Secrets*, FBIS, China, May 8, 1987, at D1; *PRC Expels Kyodo Beijing Correspondent*, FBIS, China, May 11, 1987, at D1; *Expelled Kyodo Reporter Violated Chinese Law*, FBIS, China, May 13, 1987, at D1. The Foreign Correspondents Club ("FCC") of Beijing sent a letter of protest to the PRC Foreign Ministry on May 14, 1987, saying that the expulsion could "jeopardize the positions" of foreign reporters in China and that "it is most unfortunate that Mr. Henmi was not given an opportunity to defend himself against serious accusations." See *Foreign Correspondents Club Protests Expulsion*, FBIS, China, May 14, 1987, at D1.

54. See *PRC Foreign Ministry Holds Weekly News Briefing*, FBIS, China, May 20, 1987, at A1; *Zhong Bao (Centre Daily News)*, May 14, 1987, at 1.

55. *China Expels Western Reporters in Tibet*, N. Y. Times, Oct. 9, 1987, at A3, col. 4.

56. *Response to State Department on Tibet*, FBIS, China, Oct. 9, 1987, at 1.

better access to Chinese society and there may be high risks in attempting to do so.

B. *Protecting U.S. Nationals in the PRC*

Because of the differences between criminal procedure in the U.S. and the PRC, an American charged for violating Chinese law may be convicted even though the activity is not a criminal one in the United States. Except for diplomats, Americans who go to China have to live with the PRC's law and criminal process. The case concerning Richard S. Ondrik, an American businessman, is an example. He was detained, interrogated, arrested, tried, and sentenced to eighteen months in a Chinese prison on charges of causing a fire in a Harbin hotel that resulted in the death of ten persons on April 18, 1985.⁵⁷

Ondrik was confined to the City of Harbin for approximately two months for investigation. During this period he had no access to a Chinese lawyer because Chinese law allows a suspect to have a lawyer only when the procuratorate decides to indict that person. Public Security officials interrogated him over a period of approximately ten days. He neither admitted nor denied that he had fallen asleep while smoking a cigarette as the police charged. He claimed repeatedly that he did not remember whether he had been smoking when he laid down on his bed, and that it was not his habit to smoke in bed. Ondrik was repeatedly asked the same questions, many of which presumed his guilt. One interrogation lasted until approximately 4:00 a.m. At the end of each interrogation session, a suspect is shown a transcript of the interrogation to read and sign. In the Ondrik case, the transcript was written in Chinese and was read to him. He understood Chinese, so no translator was provided to verify the record.⁵⁸

In July 1985, the Chinese procuratorate decided to indict Ondrik and he was allowed to hire a Chinese lawyer to defend his case. Under the PRC system, guilt or innocence is determined during the pre-trial proceedings. Once indicted, a suspect's conviction is almost certain. The trial is simply a final check on the propriety of the investigations conducted by the public security officials and the procuracy.⁵⁹ Thus, the role of the Chinese lawyer is quite different from that of defense lawyers in Western countries. A Chinese lawyer must "act on the basis

57. See *American is Arrested in China*, N. Y. Times, June 28, 1985, at A2, col. 3; *Judge Explains Sentencing of Ondrik for Hotel Fire*, FBIS, China, Aug. 14, 1985, at B1.

58. See Lubman and Wajnowski, *Criminal Justice and the Foreigner*, 12 CHINA BUS. REV., Nov.-Dec. 1985, 27, 28.

59. *Id.* at 29.

of facts, take the law as the criterion, and be loyal to the interest of the socialist cause and people.”⁶⁰ The defense lawyer is expected to help the court render a just verdict. Where a defendant is guilty beyond any doubt, the lawyer must encourage his client to repent and seek the leniency of the court.⁶¹

At the trial, Ondrik’s lawyer asked the court to allow an international fire expert to evaluate the evidence and testify as to his findings.⁶² The court, however, rejected this request on the ground that it was unnecessary since the Chinese investigators were quite competent in determining the cause of the blaze.⁶³ Through cross-examination, Ondrik’s lawyer showed that the hotel and its staff shared some responsibility for causing the devastation of the fire.⁶⁴ The lawyer did not challenge the evidence or testimony which formed the foundation of the prosecution’s case; however, she did ask the court for lenience toward her client.⁶⁵ Ondrik also showed his cooperative attitude toward the trial by saying:

It is difficult for me to accept that I am a criminal. This is partly because the law in my country and in China toward accidents is different. However, I am a friend of China and a guest in your country, and if this court decides that vengeance and punishment are necessary according to your laws, then I will accept that.⁶⁶

The Court appeared to appreciate Ondrik’s attitude and rendered a sentence of only 18 months out of a possible seven years.⁶⁷ This case

60. SHAO-CHUAN LENG AND H. CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA, ANALYSIS AND DOCUMENTS* 93 (1985).

61. *Id.*

62. Lubman and Wajnowski, *supra* note 58, at 30.

63. *Judge Explains Sentencing of Ondrik for Hotel Fire*, FBIS, China, Aug. 14, 1985, at B1.

64. The hotel had no fire or smoke detectors in the rooms, no fire alarms on the floors, highly flammable plastic wall paper that gave off toxic fumes, and fire exits that were usually locked. A floor attendant on a twenty-four hour shift left his post, and a “panic-stricken” supervisor had failed to organize any measures to extinguish the blaze. Moreover, numerous calls to the fire department over thirty minutes failed to produce any reply. The firefighters arrived thirty-seven minutes after the fire started. See Burns, *Final Pleas Are Heard in Trial of American Businessman in China*, N. Y. Times, Jul. 24, 1985, at A11, col. 1.

65. Lubman and Wajnowski, *supra* note 58, at 30.

66. Burns, *American on Trial Puts Chinese Justice to the Test*, N. Y. Times, Aug. 7, 1985, at A2, col. 3.

67. See *Hotel Guest Jailed for Death Blaze*, China Daily, Aug. 14, 1985, at 3. Article 135 of the Chinese Criminal Law provides: “Whoever unintentionally causes

appears to have been handled in accordance with Chinese legal procedure. However, Ondrik was found guilty under circumstances for which prosecution in the United States would have been highly unlikely.⁶⁸

For an American involved in an alleged spy case, the trial procedure was not as open as in the Ondrik case. On August 23, 1986, the PRC announced the sentencing of a Chinese-American, Roland Shensu Loo, to twelve years imprisonment in China on charges of spying for Taiwan. The sentence was rendered on July 25, and confirmed on August 20, 1986. No details of the trial proceedings were released.⁶⁹ Because the Chinese-American community in the U.S. did not indicate any concern over this case, no U.S. diplomatic intervention in this case was reported, despite the secrecy of the trial which is apparently in violation of the minimum international standards.⁷⁰

V. TRADE LAW DISPUTES

A. *General Trade Situations Between the PRC and the U.S.*

Since the establishment of diplomatic relations between the U.S. and the PRC, trade has been steadily increased, with a substantial favorable balance for the U.S. until 1983. The U.S. balance reached \$1.124 billion in 1979, increased to \$2.675 billion in 1980, followed by a decline to \$1.694 billion in 1981, and \$0.628 billion in 1982.⁷¹ According to U.S. statistics, the U.S. began to carry a trade deficit with the PRC in 1982, but the PRC denies this and asserts that it has always maintained a deficit in its trade with the U.S. Thus, the PRC reported \$7.3 billion in PRC-U.S. trade in 1985, suffering a deficit of \$2.6 billion. On the other hand, the U.S. reported a total of \$8.1 billion in U.S.-PRC trade, suffering a deficit of 0.5 billion.⁷² The difference in

severe injury to another person shall be sentenced to fixed-term imprisonment of 2 years or less or detention. In particularly grave cases, the offender shall be sentenced to fixed-term imprisonment of 2 to 7 years." Chinese Criminal Law, art. 135 *translated in THE CRIMINAL LAW AND THE CRIMINAL PROCEDURE LAW OF CHINA* 48 (1984).

68. Lubman and Wajnowski, *supra* note 58, at 30.

69. *Peking Sentences American As Spy*, N. Y. Times, Aug. 24, 1986, at A11, col. 1.

70. Universal Declaration of Human Rights, art. 11, G.A. Res. 217, 3 GAOR, U.N. Doc. 1/777 (1948); International Covenant on Civil and Political Rights, Art. 14, 999 U.N.T.S. 171, 6 I.L.M. 388 (1967).

71. INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, *DOING BUSINESS WITH CHINA* 47 (1983).

72. See Chen Yawen, *Reviewing and Peering Into the Future of Sino-American Economic Relations*, 1986 SHIJI JINGJI [WORLD ECONOMY], No. 12, at 27-33, *translated in Shijie Jingji on Sino-American Economic Relations*, FBIS, China, Feb. 18,

statistics is due to different methods of calculation. For instance, the U.S. uses the free-on-board ("FOB") method for valuing commodities, thus excluding the cost of insurance and freight from calculation. The PRC uses the cost, insurance, and freight ("CIF") method for valuing commodities, which includes insurance and freight in the calculation. A major dispute between the U.S. and the PRC is the U.S. "country of origin" rule which includes many PRC commodities shipped or processed through third countries as exported from the PRC.⁷³

According to PRC statistics, Sino-U.S. trade in 1986 declined significantly. In 1986, the trade volume was \$5.812 billion, a decline of 17% over that of 1985. PRC exports fell to \$2.474 billion and imports to \$3.337 billion, down by 16.7% and 23.7% respectively over the previous year.⁷⁴ The PRC carried a deficit of \$0.863 billion. In the same year, the trade volume between the PRC and the European Community and the Soviet bloc countries increased significantly.⁷⁵ By the end of the third quarter of 1987, the PRC's exports to the U.S. were \$2.188 billion, an increase of 18.94%, while its imports from the U.S. were \$0.84 billion, a decrease of 19.32%.⁷⁶ Originally, the chief U.S. exports to the PRC were agricultural but now include high-tech products. The chief PRC exports to the U.S. are textiles. Because of increased textile exports to the U.S., which severely affect the American textile industry, the U.S. in 1983 invoked the escape clause provisions of its 1974 Trade Act.⁷⁷ This imposed a quota on PRC textile exports in order to force the PRC to accept a textile agreement limiting its export growth rate to three percent annually.⁷⁸ From the PRC's point of view, this low growth rate allocated by the U.S. for the PRC's textile quota seemed clearly unjustified because of the large overall favorable balance in

1987, at B1.

73. See generally *infra* notes 80-92 and accompanying text (Country of Origin issue). In late 1987, a U.S. diplomat estimated Sino-U.S. trade would be \$9 billion for that year, an 8% increase larger than 1986's \$8.3 billion. PRC Ambassador Han Xu revealed, however, that the volume of such trade would be \$8 billion, exceeding last year's \$7.3 billion. The difference of one billion is partly due to the fact that transit goods exported to the U.S. via Hong Kong are not covered by the Chinese figure. *Four Problems in Sino-U.S. Relations Reviewed*, FBIS, China, Dec. 21, 1987, at 2.

74. *Ministry Spokesman Announces 1986 Trade Figures*, FBIS, China, Jan. 29, 1987, at A4.

75. *Id.*

76. *Development of 1987 Sino-U.S. Trade Viewed*, FBIS, China, Dec. 23, 1987, at 5.

77. Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C., §§ 2401-2487 (1982 & Supp. IV 1986)).

78. *China and the U.S. Said to Near End of Trade Dispute*, N. Y. Times, Jul. 31, 1983, at 1, col. 6.

U.S.-PRC trade. However, it is the agricultural sector of the U.S. economy which benefits from the large favorable balance. This, of course, provides no consolation to the U.S. textile industry which is seriously threatened by the low-priced Chinese textiles. Under the U.S. political and economic system, there is no way for the U.S. government to transfer some of the benefits reaped from U.S. agricultural exports to the troubled textile industry. The only remedy was to take unilateral action to compel the PRC to control the quantity of its textile exports to the U.S.⁷⁹

B. *Country of Origin Issue*

In 1984 a dispute developed between the U.S. and the PRC over new U.S. "country of origin" regulations under the 1973 multi-fiber arrangement regarding international trade in textiles ("MFA").⁸⁰ The MFA attempts to reconcile the developing countries' needs to increase exports in order to sustain economic growth and the desire of the developed countries to limit imports of textiles from those countries with low labor costs.⁸¹ It was renewed in 1977, 1981 and 1986.⁸²

Under the MFA, each textile or apparel importing country will accept at least a 6% increase in imports each year from each exporting country, providing protection for threatened industries and opportunities for new exporters. There has evolved a practice, formalized in the 1977 renewal, that countries could sign bilateral agreements, providing for deviation from this 6% norm. These bilateral arrangements are usually much more restrictive and often provide specific ceilings for particular categories. They may further include detailed provisions, which set ceilings that can be modified by consultation, and governing whether unfilled quotas can be transferred from one year to another.⁸³

The implementation of the import restrictions depends on the country of origin. The definition of the country of origin becomes an

79. See generally *supra* note 77.

80. The official title of the MFA is Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840, 930 U.N.T.S. 166 (*entered into force* Jan. 1, 1974, except for art. 2, paras. 2-4, which *entered into force* Apr. 1, 1974) [hereinafter MFA]. China recently joined the MFA. See *JL. OF COMMERCE*, Jan. 7, 1984, at 5, *cited in* J. JACKSON AND W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 322 (2d ed. 1986 & Doc. Supp.).

81. See MFA, *supra* note 80, art. 1, para. 2.

82. See J. JACKSON AND W. DAVEY, *INTERNATIONAL ECONOMIC RELATIONS*, *supra* note 80, at 642.

83. See J. BARTON AND B. FISHER, *INTERNATIONAL TRADE AND INVESTMENT, REGULATING INTERNATIONAL BUSINESS* 258 (1986).

issue when either goods or services are added to the product in more than one country. In 1980, the U.S. Customs Administration issued a ruling which provided that when pieces of cloth produced in one country are assembled into a garment in a second country, the good has undergone a substantial transformation in the second country and is therefore a product of that country for quota purposes.⁸⁴ On August 13, 1984, the U.S. Customs Service published interim regulations for the determination of country of origin for imported textile products,⁸⁵ revising its earlier rules. On March 5, 1985, the final regulations were promulgated and became effective on April 4, 1985.⁸⁶ Under the new regulations, the country of export will be deemed the country of origin for customs purposes only if, in the country of export, the article has "been substantially transformed by means of a substantial manufacturing or processing operation into a new and different article of commerce with a name, character, or use distinct from the article or material from which it was so transformed."⁸⁷ These regulations are quite technical in their attempt to define specifically what is "substantially transformed." For instance, the dyeing of fabric and printing when accompanied by two or more finishing operations such as bleaching, shrinking, fulling, napping, decatizing, permanent stiffening, weighting, permanent embossing, or moireing meets the regulation standard. The article is now no longer included in the country of origin's quota.⁸⁸

The regulations provide a list of the different types of processes which meet the substantially transformed criterion. However, section 12.130(d) of the regulations provides that the criteria for determining the country of origin enumerated in the regulations are not exhaustive; one or any combination of criteria may be determinative and additional factors may be considered.⁸⁹

The PRC has been seriously affected by the new regulations because it has exported many semi-processed products to Hong Kong to be transformed into final products for export to the U.S. Under the new regulations, these Hong Kong products will be charged to the PRC's quota, rather than that of Hong Kong. In 1984, the PRC cancelled orders for 675,000 tons of U.S. grain to be delivered in that year, and cancelled another 150,000 tons which were to be shipped in 1985, in violation of the Sino-U.S. Agreement on Grain Purchases of October

84. C.S.D. 80-10, 14 CUST. BULL. 741 (1980).

85. 49 Fed. Reg. 31248 (1984).

86. 50 Fed. Reg. 8711 (1984).

87. *Id.*

88. *Id.*

89. *Id.*

22, 1980.⁹⁰ It was reported that China justified its violation on the ground of retaliation against the promulgation of the new country of origin regulations.⁹¹ On August 15, 1985, PRC Ambassador Zhang Wenjin sent a letter to U.S. Trade Representative William E. Brock, stating that:

[T]he proposed new Customs regulations changing rules of origin for imports of textiles and textile products to the United States . . . would, if made effective, completely change the rules and the basis for quotas in existence and relied upon by the People's Republic of China at the time it entered into its bilateral agreement in textile products with the United States. As such, adoption of these proposals would constitute a clear violation of the bilateral agreement.⁹²

C. U.S. Import Restraint — Dumping Issue

The PRC recently expressed its concern regarding the application of certain sanctions under U.S. trade laws to the PRC exports to the U.S. On September 8, 1986, the PRC ambassador to the U.S., Han Xu, sent a letter to U.S. Trade Representative Clayton Yeutter, Commerce Secretary Malcolm Baldrige, Secretary of State George Shultz, and Treasury Secretary James Baker, among other members of the Cabinet and Congress, expressing "great concern" about the restrictiveness of U.S. trade laws and policies applied to the PRC. Han was particularly concerned about the proposed amendment to Section 406 [Market Disruption] of the 1974 Trade Act,⁹³ allowing petitioners to single out countries classified as non-market economies and subjecting them to import relief actions [e.g., quotas], under standards that are not applied to other countries. Han asserted that the fact that China is a late-comer to the U.S. market is often neglected when the U.S. imposes restraints of various kinds on China's exports. He also pointed out that "in handling anti-dumping cases against China, the U.S. currently treats China dogmatically as a non-market economy" and "China's low but fairly priced exports are under the constant threat of anti-dumping petitions" under U.S. trade laws.⁹⁴ As a result, "China is

90. FBIS, China, Oct. 22, 1980, reported in H. CHIU, AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA, A CALENDAR OF EVENTS: 1966-1980, 207 (1981).

91. Wren, *China Lags on Buying U.S. Grain*, N. Y. Times, Sept. 29, 1984, at 29, col. 3.

92. Letter from Zhang Wenjin to William Brock (Aug. 15, 1985).

93. Trade Act of 1974, *supra* note 77, § 406, 19 U.S.C. § 2436 (1982).

94. Dumping is generally defined as sale in the U.S. market at a price lower than

forced to artificially inflate its prices and its access to the U.S. market is, therefore, unfairly restricted."⁹⁵ He further noted that China "is particularly opposed to using the U.S. average import price as a benchmark because its effect would be to severely cut China's competitive advantages such as low cost labor and raw materials."⁹⁶

D. *U.S. Restriction of High-Tech Sales to China*

With the abolition of the "People's Commune" by Deng Xiaoping, Chinese grain production has increased significantly, thereby decreasing China's U.S. grain imports. The PRC would like to increase U.S. exports of high-tech products. However, according to China, the U.S. has on occasion approved the sale of technology to China only after learning that other countries were selling the same items. The U.S. has also delayed approval until the product China finally received had become relatively outdated.⁹⁷ The United States pointed out that it has included 30 product categories, an increase of seven, in the quick approval list for export to China.⁹⁸ The PRC, however, would like the U.S. to lift all U.S. embargoes to China under the North Atlantic Treaty Organization's Coordinating Committee for Export Control ("COCOM").⁹⁹ Recently, the PRC pointed out that in 1986 only 60% of the applications to transfer technology to it were approved by the U.S., despite the fact that the latter has listed China as a country on which fewer restrictions are to be imposed on the sale of "sensitive

in the home market. But it is difficult to apply this test to a non-market economy where the price is not set in accordance with a free market situation, so the Commerce Department officials will calculate a constructed value based on the third country price of a market economy at a comparable stage of economic development. The application of this third-country test can lead to the imposition of very high levels of additional anti-dumping duties equal to the margin of dumping, which is defined as the difference between the "fair value" and the U.S. price. See J. BARTON AND B. FISHER, *supra* note 83, at 254. For application of this rule to PRC export, see, e.g., *Four "H" Corporation v. U.S.*, 611 F. Supp. 981 (Ct. Int'l Trade 1985), where the PRC's price quote for canned mushrooms was artificially raised under U.S. anti-dumping legislation.

95. *U.S. Laws 'Adversely Affect' Trade Ties*, FBIS, China, Sept. 9, 1986, at B1. See also Yang Zhifeng, *Sino-U.S. Trade Must Be Expanded Without Delay*, FBIS, China, Sept. 16, 1986, at B4.

96. *Id.*

97. *China Says U.S. Delays Export of High-tech Goods*, Balto. Sun, Apr. 21, 1987, at 9D.

98. *Beimei Ribao* (Peimei News), Apr. 23, 1987, at 1.

99. See Chen Tean, *Economic Jottings: When Will COCOM's "Embargo" Come to an End*, *Renmin Ribao* (People's Daily), Feb. 20, 1987, at 7, reported in *Renmin Ribao Urges Lifting COCOM Embargoes*, FBIS, China, Mar. 3, 1987, at A3.

technological products."¹⁰⁰

Events in the Persian Gulf have affected high-technology trade with China. China had been selling Silkworm missiles to Iran, which were used in Iranian attacks on a U.S. flagged Kuwaiti oil tanker. In protest, the U.S. decided to maintain these curbs on its export of computers, semi-conductors and other high technology trade. Chinese officials protested this decision to postpone any easing of trade restrictions, and denied any direct arms trade with Iran.¹⁰¹ However, apparently in response to the U.S. embargo, China has stopped Silkworm missile sales and the U.S. is currently considering lifting the embargo.¹⁰²

E. U.S. - PRC's Textile Export Issues

On May 7, 1987, the spokesman of the PRC Ministry of Foreign Economic Relations and Trade said that some Hong Kong businessmen had counterfeited Chinese textile export visas and thus seriously affected the economic interests of China. He also said that the Chinese Government had requested the United States to strictly inspect the textiles exported to the U.S. for counterfeited visas.¹⁰³ The PRC took the position that the counterfeited visas should not be deducted from its quota allotment. However, U.S. officials consider these textile goods to have been made in the PRC and therefore should be charged against the Chinese quotas.¹⁰⁴ In an agreement reached on August 14, 1987, China promised to crack down on fraudulent visas which are blamed as a major cause of overshipment.¹⁰⁵

This dispute is aggravated by the fact that the PRC accelerated its textile exports to the U.S. in 1987. As a result, by May of 1987, about 70%-80% of all quotas for Chinese textile exports to the U.S. were filled. This meant that the PRC would not have been able to make any U.S. shipments in the second half of this year, causing serious harm to

100. *Editorial [of Hong Kong WEN WEI PO] Views Sino-U.S. Trade Obstacles*, FBIS, China, Apr. 27, 1987, at B1.

101. *U.S. Curbs High-Tech Sales to China over its Iran Aid*, Balto. Sun, Oct. 23, 1987, at A1, col. 1. *U.S. Official Warns China on Missile Sales to Iran*, Wash. Post, Nov. 4, 1987, at A36, col. 3.

102. *Sipler, U.S. Informs China High-Tech Exports Could be Widened*, N.Y. Times, Mar. 10, 1988, at A1, col. 1.

103. *Zhongguo Fazhi Bao (Chinese Legal System Paper)*, May 8, 1987, at 1.

104. *Fung, Exceeding Quotas, Chinese Textile Exports to U.S. Facing Embargo*, Asian Wall St. J. Weekly, May 11, 1987, at 11.

105. *U.S. China End Dispute Over Coat Embargo*, Asian Wall St. J. Weekly, Aug. 17, 1987, at 19, col. 2.

the Chinese textile industry.¹⁰⁶

In previous years, when the PRC exhausted its annual quota, it borrowed from the next year's quota. The U.S. and the PRC did not reach a new textile agreement covering 1988 until December 20, 1987.¹⁰⁷ As a result, no quotas existed from which the PRC could borrow. Under such circumstances, some U.S. buyers in the U.S. cancelled many textile and apparel orders because of the quota problem.

Part of this problem was exacerbated by a U.S. Customs error in calculating the number of cotton coats imported from China. The Customs computer failed to log in 3.3 million coats. When the error was discovered and the 3.3 million was added to coats already imported, the amount exceeded the quota causing an embargo.¹⁰⁸ A resolution to the problem has been reached. The entry of one million coats will be applied against next year's quota and China has agreed to limit growth in the category next year.¹⁰⁹

In an agreement reached on December 19, 1987, after six rounds of negotiations which began in February of that year, China has agreed to limit the growth of its textile sales to the U.S. to 3 percent a year for the next four years.¹¹⁰

F. *The PRC's Membership at the General Agreement on Tariffs and Trade ("GATT")*

On May 21, 1948, the Republic of China became an original signatory to the Protocol of Provisional Application for GATT, but on March 6, 1950, *i.e.*, after the establishment of the PRC on October 1, 1949, it withdrew its provisional application.¹¹¹ In 1965, the ROC was granted observer status at the GATT, which was terminated in 1972 after the loss of its United Nations representation on October 26, 1971.¹¹²

106. Fung, *supra* note 104.

107. *Agreement Limits Textile Exports to U.S.*, FBIS, China, Dec. 21, 1987, at 3.

108. *U.S. Customs Error Squeezes Importers Into Middle of Quota Clash With China*, Asian Wall St. J. Weekly, Jul. 27, 1987, at 2, col. 1.

109. *U.S. China End Dispute Over Coat Embargo*, Asian Wall St. J. Weekly, Aug. 17, 1987, at 19, col. 1.

110. *China Agrees To Slow Growth of Textile Shipments*, Wash. Post, Dec. 20, 1987, at A16, col. 1.

111. MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS, LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, ETC. AS OF 31 DECEMBER 1979, New York: The United Nations, 1980, at 269, U.N. Doc. No. ST/LEG/SER. D/13 (1980).

112. *Representation of China Within the United Nations System*, 11 I.L.M., 569-

The PRC began to send official observers to the GATT meeting in 1982 and joint GATT arrangements regarding international textile trade in late 1983.¹¹³ The PRC now wants to "restore" its membership status at the GATT, rather than join the GATT as a new member. The rationale of this approach to GATT membership requires explanation.

In order to join GATT, states must go through the procedure for membership provided in Article XXXIII. Original signatories to the Protocol of Provisional Application for GATT, like the ROC, and newly independent states are excepted from this procedure. Article XXXIII requires a decision of a two-thirds majority of the existing contracting parties, and accession to GATT on terms "to be agreed between such government and the CONTRACTING PARTIES."¹¹⁴ The reason for this arrangement is that if a new country were to enter the GATT without agreeing to comparable tariff commitments, it would gain a free benefit by receiving the previously negotiated concessions of the existing members. Consequently, the existing members require a negotiation with the applicant country. This must result in the applicant agreeing to a series of tariff concessions which the existing members feel are reciprocally balanced to those commitments which they have already made in GATT.¹¹⁵ By insisting that it is the successor to the signature of the Republic of China made in 1948,¹¹⁶ the PRC hopes to avoid the above procedure and, to a certain extent, some concessions.¹¹⁷

In July of 1986, after several years of effort, the PRC formally submitted an application to GATT to restore its position as an original signatory.¹¹⁸ Whether the PRC can restore its membership status to GATT as an original signatory will have a significant impact on its growing trade economy. If the PRC can rejoin GATT without going through new membership procedures, and the concessions that entail,

570 (1972).

113. FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 6 (M. Moser ed. 1984).

114. General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, Art. XXXIII, 61 Stat. (5)(6), T.I.A.S. No. 1700, 55 U.N.T.S. 194, *reprinted with amendments in* Document Supplement to J. JACKSON AND W. DAVEY, *supra* note 80, at 1.

115. *See* J. JACKSON AND W. DAVEY, *supra* note 80, at 320-321.

116. *See supra* note 111 and accompanying text.

117. Lei Jie, *Participate in the World Market to Meet the Needs of China's Opening Up to the Outside World*, SHIJIE ZHISHI [WORLD KNOWLEDGE], Oct. 16, 1986, at 13, *translated in Journal Examines Reason for Rejoining GATT*, FBIS, China, Nov. 14, 1986, at A1-A3.

118. *Id.*

its economic development will be greatly facilitated. The real issue then is whether the PRC is the legitimate heir to the ROC 1948 signature. The PRC, of course, maintains that it is.¹¹⁹

The U.S., however, does not support the Chinese position and is, therefore, criticized by a Chinese writer as follows:

China is one of the founders of and one of the signatory states to the GATT, so it is that China will be restored to its status as a signatory state to the GATT, and not that China will "join" or "rejoin" the GATT. The U.S. side still uses the "mutually unapplicable" method provided by the 35th item of the GATT to deal with China and has reservations on the item in the protocol on restoring China's status as a signatory state to the GATT, which says that China should be unconditionally accorded most-favored-nation treatment. China's interests as a founder of and a signatory state to the GATT will be seriously harmed, which will bring about serious consequences to multilateral Sino-U.S. trade. This will hardly be acceptable to China, and will also be contradictory to the wishes of both the Chinese people and the American people.¹²⁰

Moreover, another obstacle the PRC hopes to avoid as original signatories is the fact that its trade relies on dual exchange rates and export subsidies which are not allowed in GATT.¹²¹

G. *The PRC's Criticism of the U.S. Trade Act of 1974*

Title V of the U.S. Trade Act of 1974 contains the Generalized System of Preferences ("GSP") for most developing countries, but does not include the PRC.¹²² Therefore, Chinese products exported to the U.S. cannot enjoy duty free or low tariff status under the GSP. The

119. *Id.*

120. Wang Yi, *The Discriminative Clause of the U.S. Trade Act of 1974 Is Not Conducive to Sino-U.S. Trade*, GUOJI SHANGBAO [INTERNATIONAL COMMERCIAL PAPER], Dec. 1, 1986, at 3, translated in *U.S. 1974 Trade Act Discriminates Against PRC*, FBIS, China, Dec. 23, 1986, at B3. Professors Jackson and Davey observed that: "Some argue that the withdrawal of China from GATT was attempted by a government which was not in control, and therefore was not effective. However, China's absence from GATT for many decades would be a counter argument." J. JACKSON AND W. DAVEY, *supra* note 80, at 322.

121. *Trade Subsidies, Dual Exchange Rates Stall Bid to Join GATT*, Asian Wall St. J. Weekly, Sept. 28, 1987, at 22, col. 4.

122. Trade Act of 1974, *supra* note 77, § 502 (codified as amended at 19 U.S.C. § 2464 (1982 & Supp. IV 1986)).

PRC considers this to be a discriminatory measure.¹²³

Section 402 of the U.S. Trade Act of 1974¹²⁴ contains the so-called "Jackson-Vanik Amendment," which requires an annual examination of the immigration situation and immigration measures of those countries which implement a planned economy, thus including the PRC, before deciding whether to continue to accord the specified countries most-favored-nation treatment. This provision, according to a PRC writer Wang Yi, is seen as "causing unstable factors and unnecessary obstacles to Sino-American trade" and is also in violation of the Sino-U.S. Trade Relations Agreement of July 7, 1979,¹²⁵ which reciprocally granted most-favored-nation status.¹²⁶ Moreover, Wang Yi pointed out that Section 402 is also "a potential obstacle to China's enjoying the multilateral most-favored-nation treatment after China is restored to its status as a signatory state to the GATT . . . because the U.S. side has privately expressed that China is not a country which implements the market economy, and according to the U.S. 1974 Trade Act, the United States cannot unconditionally accord China 'most-favored-nation treatment' provided in Article 1 of the GATT."¹²⁷

VI. THE HUGUANG RAILWAY BOND CASE

In 1911, the Imperial Chinese Government sold, in the United States and elsewhere, certain bearer bonds in pounds sterling. The proceeds from the sale of these bonds were used to build the final link in the north-south railway system, known as Huguang Railways, connecting the city of Canton to the city of Peking. It is still in operation as an integral part of China's railway system. After the abdication of the Imperial Government on February 12, 1912, the Republic of China government continued to pay interest and principal in installments until 1939 when it was preoccupied with resisting Japanese aggression. By the time the bonds were supposed to be completely paid off in 1951, neither the ROC government, by then in Taiwan, nor the PRC govern-

123. See *Short Commentary: Make Efforts to Continuously Develop Sino-U.S. Economic and Trade Relations*, GUOJI SHANGBAO [INTERNATIONAL COMMERCIAL PAPER], Feb. 28, 1987, at 1, translated in *Commentary Views Sino-U.S. Economic Relations*, FBIS, China, Mar. 13, 1987, at B1.

124. Trade Act of 1974, *supra* note 77, § 402 (codified as amended at 19 U.S.C. § 2432 (1982)). The Amendment was directed against the Soviet Union, but the use of the general term "non-market economy" makes it applicable to the PRC.

125. Trade Relations Agreement, July 7, 1979, U.S.-PRC, 31 U.S.T. 4651, T.I.A.S. 9630.

126. Wang Yi, *supra* note 120, at B2.

127. *Id.* at B3.

ment made any further payment.

At the time of normalization, there were 384 U.S. nationals, or U.S. corporations with claims against the PRC. These claims were worth approximately \$196.8 million and have since been validated by the Foreign Claims Settlement Commission ("FCSC").¹²⁸ There were also about \$80 million in PRC nationals' assets in the U.S. which were frozen during the Korean War.¹²⁹ At the time the FCSC evaluated the claims against the PRC, several claims based on public bonds issued by the pre-1949 Chinese governments were filed. However, these bonds were in default long before the Chinese Communist regime came into power on October 1, 1949. According to the FCSC, "a bondholder's right is 'taken' by the debtor government on the day when it refuses to pay the obligation for the first time; in other words, when the foreign government first defaults upon its obligation."¹³⁰ Since the PRC government took no specific action affecting the bondholders' right, the FCSC rejected all those claims on bonds.¹³¹ At that time, it seemed no one paid attention to the PRC's obligation to those bonds under the international law principle with respect to successor governments. In view of this, the Agreement on Settlement of Claims between the U.S. and the PRC, concluded on May 11, 1979, only covers, so far as the U.S. is concerned, "the claims of the USA and its nationals (including natural and juridical persons) against the PRC arising from any nationalization, expropriation, intervention, and other taking of, or special measures directed against, property of nationals of the USA on or after October 1, 1949, and prior to the date of this Agreement . . ."¹³² The U.S. nationals' claims based on bonds issued by the pre-1949 Chinese governments were not included.

In late 1979, several American bondholders of Huguang Railway Bonds considered the PRC to be the successor government and there-

128. The number of claims and amount of each are from Redick, *The Jurisdiction of the Foreign Claims Settlement Commission: Chinese Claims*, 67 AM. J. INT'L L. 728 (1973).

129. For the U.S. freezing order, see *Control of Economic Relations with Communist China*, 23 DEP'T OF STATE BULL. 599 (1950).

130. See Redick, *supra* note 128, at 732-733 (quoting claim of Alfred Stephen Rossi, Claim No. CN-0114 (Apr. 24, 1970)).

131. *Id.* at 733. It was reported that in 1971, the FCSC denied a claim on the Huguang Railway Bonds due to the default having occurred prior to the establishment of the PRC on October 1, 1949. See Herbst, *Railway-Bond Case Threatens U.S.-China Trade*, Asian Wall St. J. Weekly, June 22, 1983, at 6, col. 1.

132. Agreement on Settlement of Claims, May 11, 1979, U.S.-PRC, 30 U.S.T. 1957; T.I.A.S. No. 9306. The agreement was amended on September 28, 1979, but the amendment is not relevant to the issue discussed here.

fore responsible for paying off the debt. The jurisdictional basis for the PRC's responsibility was the 1976 Foreign Sovereign Immunities Act,¹³³ which excludes states' commercial activities from sovereign immunity. The U.S. District Court for the Northern District of Alabama, Eastern Division, agreed with the plaintiffs' position and found it had jurisdiction.¹³⁴ Service of process was made upon the PRC Embassy in Washington through the Office of Special Consular Service on May 16, 1980.¹³⁵ A month later the PRC Embassy returned all of the documents to the Director of the Office of Special Consular Service.¹³⁶ The court, however, rendered a default judgment against the PRC on September 1, 1982, requiring the latter to pay \$41,313,038 to bondholders as the successor government of China.¹³⁷ While the case was pending in the U.S. court, the PRC chose to ignore it and instead exerted pressure on the executive branch of the U.S. government to dismiss the action.¹³⁸ The PRC apparently could not conceptually understand the separation of powers which exists under the U.S. Constitution, and that under the 1976 Foreign Sovereign Immunities Act, the executive branch is unable to act to prevent the court's ruling on the issue. This misunderstanding further aggravated relations with the PRC.¹³⁹

At that time, if the PRC continued to ignore the deadline to challenge the default judgment, bondholders could use the judgment to attach PRC properties in this country. This would most likely provoke the PRC to retaliate by seizing U.S. properties in China. As a result, U.S.-PRC trade relations would be severely undermined. Fortunately, this seizure did not occur. The U.S. government decided to send a delegation to the PRC to explain the U.S. legal system to Chinese officials and to urge the PRC to hire lawyers to challenge the default judgment.

133. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. § 1330, 1332, 1441, 1602-1611 (1982)). See also 15 I.L.M. 1388 (1976).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See *Chinese Government Statement of Feb. 2, 1983*, FBIS, China, Feb. 9, 1983, at B1, reprinted in 22 I.L.M. 81 (1983). Several PRC scholars have written articles attacking this decision. See, e.g., Fu Zhu, *U.S. Court Trial Violates International Law*, 26 BEIJING REV., March 14, 1983, at 24; Chen Tiqiang, *The Huguang Railway Bonds and the Question of National Sovereign Immunity*, XHJIE ZHISHI [WORLD KNOWLEDGE] Mar. 16, 1983, at 2-4, translated in FBIS, China, May 3, 1983, at 4-9. The main line of argument is similar to that of the PRC official statement issued on Feb. 2, 1983.

139. See Wren, *Separation of Powers? You Must be Kidding, Says China*, N. Y. Times, Mar. 20, 1983, at E3. For the text of the Chinese protest, see FBIS, China, Feb. 8, 1983, at B1.

The PRC finally decided to resort to U.S. legal procedure.¹⁴⁰ On February 27, 1984, the district court determined that the default judgment should be vacated in light of the PRC's defenses regarding subject matter and *in personam* jurisdiction, as well as the United States foreign policy interest in having the judgment reopened.¹⁴¹ On October 24, 1984, the district court dismissed the action for lack of subject matter jurisdiction, finding that the FSIA could not be applied retroactively to the activities that were the subject of the suit.¹⁴² On July 25, 1986, the Court of Appeals for the Eleventh Circuit affirmed both decisions.¹⁴³ On March 10, 1987, the U.S. Supreme Court denied *certiorari* to hear the case, and the judgment was affirmed.¹⁴⁴ On October 11, 1987, the PRC Foreign Ministry spokesman issued a statement "welcom[ing] the ruling of the Supreme Court of the United States."¹⁴⁵

VII. LIBEL SUIT AGAINST *People's Daily* BROUGHT BY WANG BINGZHANG OF *China Spring*

In 1982, Wang Bingzhang, a former Peking surgeon who earned a Ph.D. in Canada while on a PRC government scholarship, decided to defect to publish a magazine reflecting what he calls "the ideals of the Chinese democratic movement."¹⁴⁶ The magazine is called *Zhongguo Zhichun* (China Spring).¹⁴⁷ He and other Chinese students or visiting scholars also organized a political dissident group called *Zhongguo*

140. See Thornton, *U.S. Backs China's Move to Reopen 1911 Railroad Bond Case*, Wash. Post, Aug. 19, 1983, at A2, col. 1; Lewin, *Business and the Law, Legal Claims Against China*, N. Y. Times, Nov. 29, 1985, at D2.

141. *Jackson v. People's Republic of China*, No. 79-C-1727-E (N.D. Ala. Feb. 27, 1984), summarized in 78 AM. J. INT'L L. 675 (1984). The PRC did not appear at the district court. The Departments of State and Justice filed two statements of interest in support of the PRC's motions and representatives of the U.S. Government were present at the district court, but did not participate. 81 AM. J. INT'L L. 215, n.4 (1987).

142. *Jackson v. People's Republic of China*, 596 F. Supp. 386 (N.D. Ala. 1984), summarized in 79 AM. J. INT'L L. 456 (1985).

143. *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *reh'g denied* 801 F.2d 404 (11th Cir. 1986) (en banc), summarized in 81 AM. J. INT'L L. 214 (1987). On appeal, the PRC filed a brief but did not present oral argument. The United States filed a statement of interest and argued before the appellate court. *Id.*, at 215 n.7. Plaintiffs' motion for a rehearing was denied. *Id.*

144. 107 S.Ct. 1371, 55 U.S.L.W. 3607 (1987).

145. *Foreign Ministry Spokesman Gives Weekly Briefing, Welcomes U.S. Court Ruling*, FBIS, China, Mar. 11, 1987, at A1.

146. See Bernstein, *Student from China Defects to Establish New Rights Journal*, N. Y. Times, Nov. 18, 1982, at A13, col. 1; *Peking is Troubled by Rise in Defections to West*, N.Y. Times, Dec. 5, 1982, at 22, col. 3.

147. *Id.*

Minlian (Chinese Alliance for Democracy).¹⁴⁸ On December 13, 1984, an article was published in *Renmin Ribao* (People's Daily), the official newspaper of the Communist Party of China ("CCP"), criticizing Wang and others in the *China Spring* as "political prostitutes" and making other libelous statements.¹⁴⁹ As a result, on November 25, 1985, Wang Bingzhang and some members of the Chinese Alliance for Democracy brought a libel suit in the Superior Court of the District of Columbia, naming the *People's Daily*, its Director, Editor-in-Chief, its distribution agent in the United States, China Books and Periodicals, Inc., and Mr. Deng Ligun, Secretary in charge of propaganda of the General Secretariat of the Central Committee of the CCP, as defendants.¹⁵⁰

On May 6, 1986, the PRC sent a diplomatic note to the United States, expressing "its regret" that Wang Bingzheng and others' anti-Chinese Government activities "have not been stopped," as requested by the PRC Foreign Ministry on December 14, 1985. It also asserted that the U.S. Government "has completely violated the accepted basic norms governing international relations" by "permitting Chinese citizens to openly engage in anti-Chinese Government activities on U.S. territory." With respect to the libel case, the note states:

the Chinese side wishes to call the attention of the U.S. Government to the fact that the political system of China has its own characteristics as distinct from those of other countries. The Communist Party of China is the ruling Party and the core of leadership for all China. The People's Daily, being an organ of the Chinese Communist Party, exercises the function of publicity and education for the Chinese Communist Party and the state of the People's Republic of China. It announces the foreign and domestic policies of the Chinese Government and publishes its important documents. The property of the People's Daily is state-owned, and it is funded by the Ministry of Finance of the People's Republic of China. According to accepted principles of international law, the People's Daily should enjoy sovereign immunity in U.S. courts. In the view of the Chinese side, the U.S. court in question has no right to accept and hear the case.¹⁵¹

148. *Id.*

149. Cui Chen, *My Impressions About Mr. Jiang Nan*, *Renmin Ribao* (People's Daily), Dec. 13, 1984, at 8.

150. *Wang Bingzhang v. Renmin Ribao* (People's Daily), No. CA-8645-85 (Sup. Ct. D.C. filed Nov. 25, 1985).

151. Text of Chinese note (86) Bu Tiao Zi No. 173 *reprinted in* 42 *ZHONGGUO*

It was reported that the U.S. State Department responded by informing the Chinese that the issue is for the U.S. court to decide.¹⁵²

The defense filed by China Books and Periodicals, Inc. argued primarily that the *People's Daily* is an organ of the Central Committee of the Communist Party of China and, as such, is immune from suit for libel in accordance with § 1605(a)(5)(B) of the Foreign Sovereign Immunities Act,¹⁵³ which provides for the immunity of foreign states from "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."¹⁵⁴ (Emphasis added). The crucial issue is whether *People's Daily* is considered a state organ. In a letter dated December 30, 1986, to Mr. Robert A. Ackerman, attorney for Wang Bingzhang, from Mr. Edward A. Betancourt, Chief of the East Asian and Pacific Division of the Office of Citizens Consular Services of the U.S. State Department, it is stated that none of the defendants in this action constitute a "foreign state" within the meaning of section 1603(a) and 1608 of the Foreign Sovereign Immunities Act.¹⁵⁵ However, in the Memorandum Order of November 10, 1987, the Court found that the *People's Daily* is an agency or instrumentality of the Chinese state within the Foreign Sovereign Immunities Act. It also found that an envelope containing copies of the summons and complaint addressed to *People's Daily* and mailed by the clerk's office on June 14, 1986, had been received by *People's Daily*, and that service of process had been effected on the *People's Daily*.¹⁵⁶ The court ordered the plaintiffs to submit a brief on the question of subject matter jurisdiction to *People's Daily*.

The question at this point is whether the alleged libelous acts giving rise to the suit are "governmental" rather than "commercial." If the acts are not "governmental," then *People's Daily* cannot claim immunity under the Foreign Sovereign Immunities Act. If the court takes this position, then *People's Daily* may not claim sovereign immunity to

ZHICHUN [CHINA SPRING], Dec. 1986, at 12 (English translation provided by the PRC Embassy made available to this author by Mr. Robert A. Ackerman).

152. Sun, *Chinese Newspaper is Sued for Libel by Defector in America*, Wash. Post, Sept. 28, 1986, at A23, col. 3.

153. See *supra* note 133.

154. Reply of Defendant China Books and Periodicals, Inc. to Plaintiff's Opposition to Motion to Dismiss the Complaint, *Wang Bingzhang*, No. CA-8645-85 (all court papers available from author).

155. Text of letter provided by Mr. Robert A. Ackerman. Section 1603 provides for the definition of "foreign state" and its "agency or instrumentality." Section 1608 deals with the issue of service of process.

156. Plaintiff's Renewed Motion for Default Judgment as to Renmin Ribao, *Wang Bingzhang*, No. CA-8645-85.

dismiss the case. Under these circumstances, the case may turn into an "annoying problem" in U.S.-China relations, as noted by a State Department official.¹⁵⁷

VIII. CONCLUSIONS

The increased contact and exchange between the U.S. and the PRC brings about a better understanding of the other's political, economic and legal systems. Thus, certain legal issues, such as the Hu Na political asylum and Huguang Railway Bonds cases may set precedents for similar cases which may occur in the future, and act to prevent escalation of these cases into serious conflicts affecting relations between the two countries. However, the unknown variable which controls the degree of possible disruption in the relations depends on the PRC's domestic political development and its overall political and economic relations with a particular country. This, of course applies to any nation's relations with the PRC. An illustration of this can be seen in Sino-Japanese relations in the Kokario (Guanghua) Dormitory Case decided by a Japanese High Court. This student dormitory was originally purchased by the ROC government long before Japan's recognition of the PRC in 1972, but was illegally occupied by some leftist Chinese students. The ROC brought action in a Japanese court in 1967 to evict those students. The PRC contends that upon Japan's recognition of the PRC, the property should have been transferred back to the PRC. However, a Japanese High Court rejected this view on the ground that the dormitory is not a diplomatic property and therefore should not be transferred to the PRC upon the derecognition of the ROC, which is still a *de facto* government exercising control over Taiwan.¹⁵⁸ The case is now on appeal to the Supreme Court of Japan. On May 6, 1987, a PRC Foreign Ministry spokesman said "if the judicial organs in Japan cling to their present course and make an erroneous ruling, with the tacit connivance of the Japanese Government, the Chinese side will make a strong reaction."¹⁵⁹

157. See *supra* note 145. It should be noted that a federal district court recently dismissed a libel suit against *Izvestia*, a Soviet newspaper, on the ground that it is a state organ and ought to be immune under §1605(a)(5)(B) of the Foreign Sovereign Immunities Act. See *Gregorian v. Izvestia*, 658 F. Supp. 1224 (C.D. Cal. 1987); *Exporter Denied '85 Libel Award against Soviets*, Balto. Sun, Apr. 8, 1987, at 14A.

158. See *Zhongyang Ribao* (Centre Daily News), Feb. 27, 1987, at 1 (Int'l ed.).

159. *Japan Warned at 6 May Foreign Ministry Briefing*, FBIS, China, May 7, 1987, at A1. See also *Commentary: Kakario Decision Promotes Two Chinas*, FBIS, China, May 18, 1987, at D1; *PRC Journal Says Japan Violates Treaty with PRC*, FBIS, China, June 2, 1987, at D2; *Liaowang Examines Kokario Dormitory Dispute*,

Currently, the major legal issue between the U.S. and the PRC is protectionist trade legislation before the U.S. Congress and the application of certain existing U.S. trade laws to PRC exports to the U.S., including the anti-dumping provisions of the Tariff Act of 1930. As a country with a shortage of foreign exchange, the PRC's ability to import from the U.S. depends on its ability to export to the U.S., and any U.S. trade restrictions or barriers to the U.S. market will most likely result in a decrease in the PRC's imports from that market.¹⁶⁰ Conversely, it seems unavoidable that the U.S. will impose a quota or other restrictions on textiles — a major item of PRC exports to the U.S. In 1986 alone, exports of textiles increased 65%,¹⁶¹ and the domestic U.S. textile industry was able to pressure the U.S. government into imposing a limit of 3% annual growth rate.

The Taiwan issue will continue to be a problem in Sino-American relations. This seems to be unavoidable unless the U.S. is prepared to abrogate the Taiwan Relations Act and to terminate completely its arms sales and technology transfers to Taiwan. However, the U.S. is reluctant to, in its view, leave the fate of the 19 million free Chinese in Taiwan to the mercy of the PRC, a regime whose human rights record is among the worst in the world. The U.S. should expect the PRC to occasionally raise this issue to test American commitment to the Chinese people in Taiwan. The U.S. should, however, be fully aware of the nationalistic feeling of the PRC and any move, either by Congress or the Administration showing support for the Taiwan Independence Movement, would increase tension in PRC-U.S. relations. Currently, the PRC appears to be taking a low-profile on this issue, but it can reopen the issue and make it a major diplomatic crisis in the future.

FBIS, China, June 9, 1987, at D2; and [*People's Daily*] *Commentator's Article on 'Essence' of Kokario Case*, FBIS, China, June 10, 1987, at D1 on PRC's legal position on this case.

160. On March 10, 1987, PRC Vice Premier Yao Yiling said that if the U.S. opens its market wider to Chinese goods so that China can earn more foreign exchange, then China will be able to buy more from U.S. goods. *Yao Yiling Says Increased Trade Depends on U.S.*, FBIS, China, Mar. 16, 1987, at B1.

161. See Guoji Ribao (International Daily News), Apr. 25, 1987, at 1. In 1986, the PRC was the #1 textile supplier to the U.S., up from #4 in 1985. Fung, *supra* note 104.

