

## Legal Aspects of Trade With and Investment In The Republic of China on Taiwan: the German Experience

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**LEGAL ASPECTS OF TRADE WITH AND  
INVESTMENT IN THE REPUBLIC OF  
CHINA ON TAIWAN: THE  
GERMAN EXPERIENCE**

**ROBERT HEUSER\***

**I. INTRODUCTION†**

It is the purpose of this paper to show a pattern of economic relationship between two countries whose economies are greatly dependent on foreign trade but whose trading citizens have to deal

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† Abbreviations: ABl. = Amtsblatt der Europäischen Gemeinschaften (EEC Gazette); AHD = Aussenhandelsdienst (Düsseldorf); AWD = Aussenwirtschaftsdienst, Recht der Internationalen Wirtschaft (Heidelberg); BGBl. = Bundesgesetzblatt (Gazette of the FRG); Cosway-Ma-Shattuck = R. Cosway, H. P. Ma, W. Shattuck, Trade and Investment in Taiwan, Taipei 1973; DWD = (Die Aussenwirtschaft, Deutscher Wirtschaftsdienst, (Köln); F. A. = Freies Asien (Bonn); ILM = International Legal Materials; TIP = Taiwan Industrial Panorama.

without much governmental assistance because of the lack of diplomatic relations.

The information upon which this paper is based has mainly been obtained from Chinese and German legal sources, from relevant German journals and from interviews I had with Chinese representatives in Germany as well as with members of German institutes (including the German Ministry of Economic Affairs), finally with executives of German capital and merchandise exporting companies.

Let me make at the beginning some short remarks concerning the development of Chinese-German economic relations in general, providing you with some statistical data.

## II. GERMAN-CHINESE TRADE AND GERMAN INVESTMENT IN TAIWAN: SOME HISTORICAL AND STATISTICAL DATA

The development of economic relations between the Federal Republic of Germany (FRG) and the ROC reflects the relevant pre-war experiences: a comparatively high trade exchange on the one hand and a comparatively small investment willingness on the other, a phenomenon — by the way — which can be observed in German foreign economic activities in general. Direct investments of German companies in developing countries are only one-half of the French, one-third of the British and one-ninth of the U.S. private investments in those countries.<sup>1</sup> The reasons for this are highly complex — experiences of expropriation and confiscation after two world wars, comparatively little training in dealing in and with non-European countries because of limited experience as an imperial power, may be mentioned.

A new beginning of ROC-German commercial interest after World War II came no earlier than the end of the fifties, increasing in the sixties, and taking on considerable volume in the seventies.

Taiwan's development in to one of the leading industrialized countries in the Far East within less than one decade, becoming able to offer her industrial products to the markets of South-East Asia, the Middle East, Africa, Europe and the Americas was

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1. See, e.g., E. Eppler, *Wenig Zeit für die Dritte Welt*, Stuttgart 1971, at 88. For a broader inquiry into the problem of direct investment in developing countries see Awni-Al-Ani, *German Investment in Developing Countries*, in: *Intereconomics* (Hamburg), No. 7, 1969, 219-221.

carefully observed in German commercial circles.<sup>2</sup> It was noticed with satisfaction by potential German traders and investors that the ROC government promoted the economy of the country according to the principles of a free enterprise, supporting the extension of the private sector of the economy as well as a more active participation of private domestic and foreign capital,<sup>3</sup> that the establishment of Export Processing Zones was of such great success as to become a model for other developing countries,<sup>4</sup> and that the government was reorganizing the foreign-trade bureaucracy<sup>5</sup> and simplifying investment formalities.<sup>6</sup>

The comprehensive market studies undertaken by the Chinese Industrial Development and Investment Center (IDIC) regarding the development of industries emphasized six branches of industry as deserving preferential support: petrochemical, plastics, electronic, steel, watch-making and synthetic resin industries. It is clear that such emphasis would appeal greatly to German economic interests.

Since the end of the fifties the Federal Republic has played an active role in Taiwan's economy. Leading German producers of the chemicals industry are represented in Taiwan, and German experts of various industrial branches are advising domestic companies, many of which are producing under a German license. German industries have delivered — partly with U.S. financial assistance — a remarkable share of industrial equipment in Taiwan. German firms supply on a basis of long-term payment. Examples are the "Southeast Soda Ash Plant" in Suao, cement plants, machinery for cargo-ships, and projects in the field of traffic and communication and more recently in the field of petrochemistry.

Looking at some figures we realize the continuous growth of foreign trade between the ROC and the FRG. In 1954 Germany's

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2. See, e.g., AHD vol. 19 (1965), at 600: *Taiwans Werdegang zum autarken Staat*; DWD 1963, No. 23: *Der industrielle Aufschwung in Taiwan*; *id.* 1966, at 1142: *Günstiges Investitionsklima fördert den industriellen Aufbau in Taiwan*; *id.* 1967, at 791: *Ausländische Privatinvestitionen forcieren wirtschaftliche Prosperität Taiwans*. For a scholarly assessment see J. Riedel, *Wirtschaftspolitik und Exportentwicklung in Taiwan*, in: *Die Weltwirtschaft*, 1975, No. 1, 100-113.

3. In AHD vol. 22 (1968) at 190 "the excellent opportunities for foreign investment in Taiwan" ("a model case of economic development within the developing countries") are stressed.

4. AHD vol. 26 (1972), at 952.

5. AHD vol. 23 (1969), at 40.

6. AHD vol. 22 (1968), at 536.

share of Taiwan's total imports was 2.46%, 4.74% in 1961, 5.1% in 1969 and 5% in 1976. Germany's share of Taiwan's total exports was 1.82% in 1954, 3.83% in 1961, 4% in 1969 and 4.7% in 1976.

Expressed in absolute figures, the value of Taiwan's imports from Germany was US\$4.3 million in 1954, 9.1 million in 1961, about 80.0 million in 1969 and 416 million in 1976.<sup>7</sup> For more than a decade there has been a trade surplus for the ROC, with the single exception of 1974. (This is also the case regarding the U.S. but not Japan.)

A comparison with other major trading partners of the ROC shows that Germany ranks at third place after the U.S. and Japan, although there is still a broad gap between Germany and those two countries concerning trade exchange with the ROC. It would seem, however, that the ROC Government is attempting to intensify the trade with European countries in order to avoid dependence on any single country.<sup>8</sup> The trade deficits with Japan are a particular object of concern, although Chinese specialists see clearly enough that the time of economic independence from Japan is "a long way off,"<sup>9</sup> and that the competitiveness of

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7. Sources: AHD vol. 16 (1962), at 376; TIP vol. 5, No. 2 (Feb. 1, 1977).

Shipments and financing of the FRG through Hong Kong are not contained in these figures, which only reflect the direct foreign trade relations of both countries. In terms of merchandise, the imports from Taiwan consist at the present time of 35% textiles and 20% canned goods, the remainder being products of light industries as plastics and electrical. See, e.g., *Lien-he pao* (Taipei), Dec. 19, 1974.

8. In "Foreign Trade Development in the Republic of China," issued by the Board of Foreign Trade, Ministry of Economic Affairs (1976) it says that "our private enterprises have been urged to procure more sophisticated, high quality machinery and equipment from European countries . . ." (p. 11). And the Secretary General of the Council for International Economic Cooperation and Development of the ROC appealed in 1968 to European business men "not (to) give up Taiwan as a captive market for Japanese and American suppliers" (see S. Y. Dao, *How to Strengthen Economic Relations between the Republic of China and Western Europe*, in: *Chronique de Politique Etrangère*, vol. 21 (1968), at 709, 719). From May 25 to June 15, 1969, a "European Industrial Machinery Exhibition" took place in Taipei. It was sponsored by the Council for International Economic Cooperation and Development and the Free China Europe Industrial Institute. The share of German industry was more than 50% of the total participants (eight West European countries). In the summer of 1973 a Chinese trade delegation consisting of 13 representatives of Chinese companies visited the main commercial and industrial centers in Western Europe. With the support of the Government, Chinese commercial and industrial circles in Taiwan established in Nov. 1975 a "Society for the Promotion of Chinese-European Trade."

9. Quoted in AHD, vol. 26 (1972), at 914: *Europa-Orientierung Taiwans*.

European products remains adversely affected by Europe's high labor costs and the distance separating Europe and Taiwan.

In contrast to foreign trade, the export of private German capital to Taiwan is rather limited in volume. Up to the present time little more than a dozen German firms have established themselves as government-approved direct investors in Taiwan. All but one are fully owned subsidiaries<sup>10</sup> and are producing mainly in the fields of chemistry, electronics, optics and clothes. Most of them are situated in the Export Processing Zones, and only the few looking for a local market are outside the zones.

The development of German direct investment in Taiwan is expressed by the following figures:<sup>11</sup> Starting from 1972, the total investment was US\$3.7 million in that year, 4.1 in 1973, 5.3 in 1974, 6.6 in 1975, and up to June 30, 1976 already 6.9.<sup>12</sup>

It is obvious that the gap between Germany on the one hand and Japan and the U.S. on the other is even wider concerning direct investment than it is in the case of trade. It is not surprising that the ROC government tries to reduce the domination of single countries in favor of a more balanced foreign investment situation. A special need for such a balance seems to be felt concerning investments in the fields of electronics and automobile parts. In March 1972 the Vice-Chairman of the Council for International Economic Cooperation and Development of the

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10. One is a joint venture with local firms; another a joint venture with a Japanese firm. From the German experience it would seem that the ROC government does not follow the general trend in the developing countries towards emphasizing joint ventures. For an assessment of the contribution of joint ventures to the development of the South Korean economy see Chang Young Kim, *Der Beitrag von partnerschafts. Unternehmen (Joint Ventures) zum Entwicklungsprozess. Dargestellt am Beispiel der Republik Korea*, Ph.D. thesis, Köln 1971.

11. Source: Information from the Federal Ministry of Economic Affairs. See also *Jahresbericht of the Ostasiatischen Vereins e.V. 1975/1976*, p. 32. This is little less than investments in the Republic of Korea, only a third of those in Hong Kong, a fifth of Indonesia, a seventh of Singapore and less than a fifteenth of German investment in Japan. According to paragraphs 55 and 56 of the *Foreign Economy Regulations (Aussenwirtschaftsverordnung)* promulgated by the Federal Government in 1966, German capital exports are to be notified to the German Federal Bank and are published in the *Federal Bulletin*. All information concerning the investor is protected by a secrecy clause. The above-mentioned figures, of course, do not contain the quite considerable capital sums which are raised by German companies on the well functioning Asia-Dollar market.

12. Within the last 25 years the total investment of European countries was US\$194,437,000 (i.e., 17.73% of all foreign investments), as compared to US\$491,810,000 (i.e., 44.83%) of the US and US\$246,632,000 (i.e., 22.48%) of Japan. Source: F.A. no. 3/1977 (Feb. 10, 1977), at 4.

ROC explained at the International Conference on Foreign Investment in Asian Developing Countries held in Hamburg the "Reasons and Motives for German Investment in Taiwan,"<sup>13</sup> clearly with the intention of appealing to potential German investors. An increase of German capital export to Taiwan is very probable. Negotiations concerning a big German investment project in the field of electronics have just been successfully concluded.

Let me now turn to the consideration of some specific legal problems which emerge in the economic relations between the two countries.

### III. LEGAL ASPECTS OF TRADE AND INVESTMENT

#### A. The Institutional Framework

After July 3, 1941, when the Chinese Republic — then in Chungking — cut off diplomatic relations with Germany (the German government had two days before recognized the Wang Ching-wei government of Nanjing), and after the end of the Wang Ching-wei regime in 1945, Germany has never established diplomatic relations with the ROC. There are no agreements in force between the two countries. Consequently, the existing economic relations are of a purely private nature, little aided by governmental encouragement and international legal assistance.<sup>14</sup>

In view of this situation the institutional framework for economic cooperation is merely of a private and — as far as Chinese representation in Germany is concerned — of a semi-official (if at all) character.<sup>15</sup> The representation of ROC economic interests in the Federal Republic is institutionalized in the Far East Trade Service Center, which deals with trade relations

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13. For W.H. Fei's speech *see*: *Industry of Free China* (Tzi-yu Chung-Kuo chikung-ye), vol. XXXVII, No. 3 (March 1972), at 2.

14. On a governmental level there was only "technical help" for a short time at the end of the sixties, limited in volume (2.3 mill. DM) and dropping to none when diplomatic relations were established with the PRC. (Information from the Federal Ministry of Economic Cooperation to the author.)

15. But even less official than Japan-ROC relations, which are characterized by simply changing the label. Former diplomatic personnel now work in the "Japan-Taiwan Interchange Association" (offices in Taipei and Kaohsiung) and the "East Asia Relations Association" (offices in Tokyo, Osaka and Fukuoka). Both organizations concluded an agreement on Dec. 26, 1972 concerning "Commerce, economy and culture" (*see* *China aktuell*, Hamburg, Dec. 1972, at 14.)

between Taiwan and Germany, and the Asia Trade Center, which consists of three bodies: one responsible for purchase from all Europe, one dealing with investment services concerning all European investors, and one dealing with German-ROC tourism. Both Centers have their seat in Frankfurt/Main and have close contact with the ROC Ministry of Economic Affairs. Cultural and political information is offered by the Far East Information Service, with branches in Bonn, Hamburg and West Berlin.

As far as German organizations are concerned, only the East Asia Association (Ostasiatischer Verein e.V.) of Hamburg and Bremen can be mentioned. This private association of German businessmen interested in the Far East was founded in 1900 and is engaged in the cultivation of trade relations with this region, including the ROC. The German economy is so far not represented in the ROC. The German Cultural Centers in Taipei and Kaohsiung are not prepared to be of any assistance in economic matters; there are no German banking and commercial institutions. Information concerning investment projects in Taiwan can be received, however, from the German Consulate General in Hong Kong.<sup>16</sup>

## **B. Does This Lack of Diplomatic Relations Have a Disturbing Impact on the Execution of Foreign Trade and Investment Programs?**

### **1. Protection of Investments**

Foreign direct investments can be protected by different legal means. The domestic legal order of the capital receiving country, the contract between the government of this country and the foreign investor, finally a bilateral or multilateral international legal order all may be concerned with such protection.

The lack of diplomatic relations between the Federal Republic and the ROC frustrates the development of a bilateral international legal order in favor of the protection of German investments. Since 1959 the Federal Republic has concluded with 37

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16. In contrast to the German absence of economic representation in Taiwan, the Confederation of British Industries plans the establishment of an office in Taipei with a "residential manager," and British and Canadian banks will open branches in Taiwan. In 1974 an office of the "Australia-Free China Society," which represents Australian economic interests in Taiwan, was opened (*see* China aktuell Hamburg, May 1974, at 227).



developing countries so-called "investment-protection agreements."<sup>17</sup> They are intended to assist in creating more favorable conditions for private investments through a guarantee of legal protection, especially against expropriation based on an international legal commitment. Whereas the government of the USA relies for this purpose<sup>18</sup> on its traditional form of Treaties of Friendship, Commerce and Navigation, the German government chose with its "investment-protection agreements" a new way. It is characterized by being shaped for the special needs of developing countries and is confined to the protection of capital; it does not contain any provisions concerning commerce and freedom of settlement.<sup>19</sup>

Such an agreement was of course not concluded with the ROC. Although German investors have confidence in the ROC legal order — German lawyers feel at home in a legal system which is shaped according to the civil law system and especially according to German law — there lacks the confirmation and attestation of the relevant contents of this domestic legal order by an international legal commitment. While the value of an investment-protection agreement might be contested,<sup>20</sup> the non-consideration of the ROC within the agreement system of the German government leads to problems concerning the investment-risk guarantee which may be obtained by German citizens or companies under the German investment guarantee

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17. See Justus Alenfeld, *Die Investitionsförderungsverträge der Bundesrepublik Deutschland*, Frankfurt a. M., 1971 and Helmut Frick, *Bilateraler Investitionsschutz in Entwicklungsländern. Ein Vergleich der Vertragssysteme der Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland*, Berlin 1975.

18. The justification for such U.S. treaties was expressed as follows: ". . . to reduce the special hazards to which overseas investment may be exposed by reason of unfavourable laws or judicial conditions. Rigid exchange controls, inequitable tax statutes, or drastic expropriation laws are not conducive to the free flow of capital, and it is against obstacles of this kind that these treaties are directed," in: UN Doc. E/3021, at 40.

19. The standard contents of these agreements is mainly as follows: clause of non-discrimination (art. 2); provision against expropriation and for sufficient compensation (art. 3); guarantee of free transfer of capital and profits (art. 4); provisions concerning the transfers (art. 6, 7) and the jurisdiction in case of dispute settlement (art. 11).

20. See, e.g., Ingrid Delupis, *Finance and Protection of Investments in Developing Countries*, Epping, Essex 1973, at 34 f. She argues that investment guarantee agreements add "little or nothing to what would anyway apply under international law."

program<sup>21</sup> (covering the risks of war, inconvertibility, and expropriation or confiscation). The main condition for receiving such a guarantee is the existence of an investment-protection agreement. The chief significance of such an agreement is therefore its link to the national guarantee scheme.<sup>22</sup>

The problem resulting from this legal mechanism for the potential investor in Taiwan is as obvious as it is surmountable. According to information from the Federal Ministry of Economic Affairs, an *ad hoc* declaration of the Chinese government (Ministry of Economic Affairs) presented to the German investor concerning legal protection is required and is sufficient for participating in the national guarantee scheme. This declaration must contain an agreement on the exclusive jurisdiction of the arbitration tribunal according to the 1966 World Bank Convention on the Settlement of Investment Disputes Between States and Nationals of other States (International Center for the Settlement of Investment Disputes, New York).<sup>23</sup> Up to the present there exists only one investment case which produced such a declaration.<sup>24</sup> Other German investors just don't take advantage of the Federal investment guarantee. They are aware that they are participating in Taiwan's export boom and that their investments will have amortized within about three years. The Federal guarantee thus does not appear to be of major importance.

In this context it may be interesting to take into consideration the results of a study of the Hamburg Institute for International Economics (Hamburgs Weltwirtschafts-Archiv) concerning German investments in developing countries. Better support to be

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21. See, e.g., paragraph 20 I, No. 3 of the Bundeshaushaltsgesetz of 1969, April 18, 1969, BGBl. 1969 II, 793 ff. Corresponding provisions are in the subsequent Federal Budget Laws.

22. This function of the treaties is also emphasized by E. J. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries*, Manchester, 1965, at 70: "These are important and expensive protective measures which provide a firm basis for the insurance of investments."

23. ROC and FRG have both ratified the Convention. See Joy Cherian, *Investment Contracts and Arbitration. The World Bank Convention on the Settlement of Investment Disputes*, Leyden, 1975. List of signatories at 121. See also AHD vol. 23 (1969), at 532. The ROC deposited its ratification on Dec. 10, 1968, see ILM (1969), at 446.

24. The legal nature of this *ad hoc* declaration might be questioned. For this complex problem, see, e.g., A.A. Fatouros, *Government Guarantees to Foreign Investors*, New York and London 1962, at 120 ff., 190ff., and K.-H. Böckstiegel, *Der Staat als Vertragspartner ausländischer Privatunternehmen*, Frankfurt 1971; see also chapter 2 of Delupis (*supra* note 20).

extended by West German diplomatic missions abroad and the conclusion of investment pacts and of agreements on avoiding double taxation were among the proposals which German companies who had answered the Institute's questionnaires recommended for making it easier and more profitable to invest in developing countries.<sup>25</sup>

## ***2. Trademark and Patent Protection***

The mutual protection of trademarks was not possible for a long time. The Chinese Trademark Law provides that "an application for registration of a trademark may be refused acceptance if it is filed by a national of a foreign country which has not concluded with the ROC a treaty of agreement for reciprocal protection of trademarks *or which, by its national law does not admit of trademark application by nationals of the ROC*" (paragraph 1, art. 3, Trademark Law of July 4, 1972). According to the German trademark law of January 2, 1968, a foreigner who has no fixed establishment in Germany is protected by the law only when the Federal Bulletin announces that the applicant's home country protects German trademarks to the same extent as those of its own nationals (paragraph 35, art. 1). Thus neither trademark law states as a precondition for mutual protection the mere existence of treaty relations.<sup>26</sup> Because the ROC is not a member of the Paris Convention for the Protection of Industrial Property (1891, repeatedly revised) or any other convention by which mutual trademark protection would be guaranteed without the above-mentioned announcement in the Federal Bulletin, this protection can only be achieved by undertaking the two one-sided measures provided for in the trademark laws of both countries. However, it was only in July, 1967 that the Federal Bulletin announced that German trademarks are admitted in the ROC for legal protection to the same extent as Chinese trademarks,<sup>27</sup> thus expanding the protection of German trademark law to Chinese trademarks.

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25. See Awni-Al-Ani, *supra* note 1, at 221.

26. But this was the case before the revision of the ROC trademark law in 1958.

27. BGBl. I, at 549 and 574 (July 21, 1967): Notification of the Federal Ministry of Justice. Not mentioned in the standard work of German trademark law: Baumbach-Hefermehl, Wettbewerbs- and Warenzeichenrecht, 10th edition, Munich 1969, under art. 35.

The situation concerning the protection of inventions is less complicated insofar as the German patent law does not discriminate between German and foreign applicants. Applicants who live abroad merely have the obligation to appoint a domestic representative (art. 16, patent law of January 2, 1968). The relevant provision of the valid Chinese patent law (art. 14) is identical with that of the cited trademark law, thus leaving patent protection for foreigners beyond the need of treaty relations.<sup>28</sup>

### 3. Copyright Protection of Designs

Another example for the execution of economic relations under the given circumstances is an arrangement concerning the protection of copyright in design, which was reached in summer 1976 on a private basis between the German and the Taiwan Textile Federation (TTF). For western merchants in East Asian countries imitation of designs is a matter of some concern. There is quite considerable imitation in Taiwan, but the legal measures of the domestic legal order are insufficient: there is neither a separate law concerning protection of copyright in design nor a special legislation concerning the repression of unfair competition.<sup>29</sup>

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28. There are some German trademarks registered in the ROC. For figures concerning the patents issued to Germans see Cosway-Ma-Shattuck at 474, table 39.

For some comparative figures concerning applications of patents and trademarks of Asian countries in Germany see the following table:

Statistical Data Concerning Applications of East-Asian Countries in the German Patent Office

Country	Patent applications				Trademark applications			
	1973	1974	1975	1976	1973	1974	1975	1976
ROC	4	12	9	19	0	0	1	2
Singapore	0	2	1	1	2	1	2	3
S. Korea	3	4	2	7	0	0	4	3
Japan	4962	5122	4322	4643	323	301	213	322

Source: Information from the President of the German Patent Office (Munich) to the author.

29. See Teruo Doi, in: Cosway-Ma-Shattuck, at 462.

The above-mentioned arrangement between the textile federations took as its model a governmental agreement which was concluded shortly before (in June 1976) between the Federal Republic and Hong Kong. The principles of this agreement may be summarized as follows:<sup>30</sup> The Federal government is entitled to present to the government of Hong Kong concrete cases showing imitations of German designs in the field of textiles and clothes. The Hong Kong government will examine — according to the law of Hong Kong — whether a German design was wrongfully reproduced. If this is the case, it will employ certain measures in order to avoid further infringement. If consultations between the Hong Kong government and the company involved show that the designs were given by a German ordering firm to the producer in Hong Kong without the title to use them, then the government of Hong Kong is prepared to communicate the name of the ordering firm at the request of the German government.

The arrangement between the Chinese and German textile organizations is based on similar principles. Measures to prevent an infringement of copyright in design, including communication of the name of the German ordering firm, are based on the private legal relationship between TTF and the respective producer. This, however, already shows the limits of the arrangement. It concerns only textiles; moreover, TTF can only communicate information it has received from its members. Therefore it is not surprising that, despite the many infringements in Taiwan, the practical relevance of the arrangement is virtually nil. Up to the present only two cases were communicated to the German Textile Federation.

#### *4. Claims of a German Ordering Firm*

Insurmountable problems can arise if claims of a German ordering firm against the Chinese producer — *e.g.*, because of deficiency in the quality of the supplies — are made. The lack of diplomatic relations and thus of an official commercial representation in Taiwan impedes the contact with Chinese companies and an examination of their soundness, thus increasing the ordering firm's risk. Moreover, more than two-thirds of the goods destined for export have to be checked according to the "Commodity Inspection Law."<sup>31</sup> Article 8 provides that such commodities

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30. According to Bundesministerium Wirtschaft, Tagesnachricht No. 7245 of June 30, 1976.

31. Promulgated on December 14, 1932, amended on May 25, 1965 and September 3, 1970.

are to be inspected according to the CNS (China National Standard). A possible divergence from the European standard may result in claims by the European ordering firm. It is suggested that Chinese lawyers do not always handle such claims with sufficient emphasis, and that it is sometimes difficult to reach court decisions.

### **5. FRG Risk Guarantees**

Finally, the Federal Guarantees regarding risks of manufacture (risk before shipping) and export (risk after shipping) which can be granted to German exporters may be mentioned.<sup>32</sup> They are not affected by considerations concerning the nature of the state-to-state relationship.

### **C. Consequences of EEC Common Commercial Policy for FRG-ROC Trade**

As far as trade is concerned, the membership of the Federal Republic in the EEC takes on significance. What are the consequences of the EEC foreign trade policy for Chinese-German trade?

#### **1. The Commercial Policy of the EEC and Protective Measures as an Exception to the Principle of Unrestricted Importation**

Articles 110 to 116 of the EEC Treaty deal with the common commercial policy of the community. The necessity for such a policy derives from the fact that the EEC is founded on a full customs union and therefore presents a common face to exporters from non-EEC countries.<sup>33</sup> After the expiry of the transitional period for the implementation of the EEC Treaty, "the common commercial policy shall be based on uniform principles" (art. 113) with regard to both import and export policy.<sup>34</sup> Under EEC Regulation 1025/70 a common system to be applied to imports

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32. The treatment of all relevant guarantees are delegated to the "Hermes Kreditversicherungs-Aktiengesellschaft" (Hamburg) and the "Deutsche Revisions- und Treuhand-Aktiengesellschaft."

33. See A. Parry, *EEC Law*, London and New York, 1977, No. 37-13.

34. For the progress made towards a common foreign trade law see Parry, *supra* note 33, No. 37-27 ff., and Ehle-Meier, *EWG-Warenverkehr. Außenhandel-Zölle-Subventionen*, Köln 1971, at 419 ff.

from non-EEC countries was established.<sup>35</sup> Its basic principle is that of unrestricted importation. It means — together with its counterpart in regard to EEC exports — that foreign trade with third countries cannot be subjected to quantitative restrictions. In a case of emergency, however, this unrestricted foreign trade can be suspended for a specific period<sup>36</sup> through an introduction of quantitative restrictions. Because of its exceptional character, these restrictions have to take place within narrow limits, particularly shaped by the principles of statutory reserve and of proportion. The institutions of the Community and the member states have only the right to issue specific protective measures when the statutory preconditions exist, *i.e.*, when by the import situation the producers of same or similar goods within the Community will suffer a substantial damage. The Community regulations take the principle of proportion into account by factual, temporal and local limits. The type of “appropriate measures” (art. 11, Reg. No. 1025/70) can be: introduction of a license, fixing an import quota, issuing an instruction to stop all imports. A newer measure consists of so-called “agreements of self-limitation,”<sup>37</sup> which result practically in an import quota system.

## ***2. Protection Measures Regarding Imports from the ROC***

The ROC was never officially linked with the EEC.<sup>38</sup> Nevertheless, in 1971 an agreement was concluded concerning the trade in cotton.<sup>39</sup> This agreement was based on the 1962 Long Term Arrangement Regarding International Trade in Cotton Textiles — Taiwan was a member of this arrangement — and introduced quantitative restrictions by fixing certain quotas for the importation of various cotton textiles. This ROC-EEC

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35. Text: ABl. 1970, L 124 of June 8, 1970, p. 6; *see also* Regulation 1439/74, ABl. L 159, June 15, 1974.

36. There is the same mechanism in the GATT legal system.

37. Their compatibility with the GATT is doubtful; *see, e.g.*, R. Zimmer, *Zur Problematik von Exportselbstbeschränkungen*, in AWD vol. 15 (1969), 297-300.

38. In 1963 the ROC government applied to the EEC Commission in order to accredit its ambassador in Brussels to the Community. It seems that the institutions of the EEC were about to express consent *see* AHD vol. 18, 1964, at 116) when at the beginning of 1964 the breaking off of diplomatic relations between the ROC and France took place, and the establishment of official relations with the EEC was never realized.

39. ABl. February 2, 1971, No. L 43/22.

arrangement had a term of three years, but was respected from the end of 1973 until June 1975 through a unilateral decision of the EEC. From July 1975 the governmental agreement was replaced by a unilateral EEC commercial policy toward Taiwan, by introducing quotas in the field of textiles.<sup>40</sup> This regulation followed lines similar to the 1971 agreement but was extended in its contents from cottons alone to all textiles. This extension caused a considerable change in the European-ROC trade relationship. Textiles presently make up more than one-third of the total exports from Taiwan to the Common Market. In the 1971 agreement only the comparatively small share of cottons was subjected to EEC import quotas, whereas the quotas concerning all other textiles remained to be fixed by the several member states. With the 1975 regulation the most sensitive part of the textile sector was put under EEC import restriction. During the last two years — in order to mention a *pars pro toto* — the EEC has introduced by regulations issued by both the Commission and the Council protective measures (usually import license requirements) concerning imports of textiles, canned mushrooms and pipe joints made from malleable cast iron for several EEC countries. There were also antidumping measures, *e.g.*, concerning imports of bicycle chains from Taiwan.<sup>41</sup>

I may add that the ROC does not enjoy — probably because of political considerations — the benefits of the Generalized System of Preferences for developing countries sponsored by UNCTAD, which the EEC adopted in July 1971.<sup>42</sup>

### 3. EEC Impact on FRG-ROC Trade

As far as the significance of EEC commercial policy for ROC-German trade is concerned, at present only imports of *textiles*

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40. Regulation No. 1783/75 of July 10, 1975, ABl. No. L 182. The Taiwanese textile production was several times the subject of discussion in the European Parliament.

41. ABl. C 138, August 7, 1976. For the introduction of a temporary anti-dumping duty in this case see the regulation of the Commission of November 12, 1976, ABl. No. L 312/41, November 11, 1976.

42. The Community offers, unilaterally, tariff-free quotas of semi-finished and finished industrial goods to the seventy-seven (now more than hundred) developing countries. See, *e.g.*, H. Krämer, *Zwei Jahre Zollpräferenzen der Europäischen Gemeinschaften zugunsten von Entwicklungsländern. Methoden und erste Ergebnisse*, in: *Die Weltwirtschaft* 1973, 1. Heft, pp. 196ff.



from Taiwan are restricted, in that a German import authorization is required.<sup>43</sup>

#### IV. CONCLUSION

Let me summarize: The German economy is an important trade partner but is somewhat reluctant to employ productive capital; this, however, is gradually changing. The existing institutional framework is regarded as sufficient for the execution of trade and investment projects. The lack of diplomatic relations is not felt as a heavy burden. Existing difficulties, as in the case of claims, could be minimized by a more effective — of course, unofficial — German representation (banking and commercial institutions) in Taiwan, or, as in the case of the protection of designs, by additional private arrangements and by new Chinese legislation. The protection of direct investments in Taiwan seems to be on a firm basis, even without the investor's interests being secured under international law. The significance of protective measures based on EEC law for an assessment of the West-European markets and consequently for ROC industries remains an important matter of concern.

You will have realized that I have only mentioned those legally relevant aspects which develop on the surface of economic relations with the ROC, aspects which are more or less familiar to every lawyer dealing with foreign trade problems, and are not necessarily linked to a specific cultural background. Implications of cultural phenomena and their significance for international business transactions are not easy to analyze.<sup>44</sup> Nevertheless, we all know that they should not be neglected if reliable legal counselling is to be achieved. Negotiations concerning a dispute settlement clause, for instance, take on a quite different significance when they concern a contract with, say, a French partner than in commerce with Chinese merchants who are well known for their ability to compromise, although we must be sensitive enough to realize where the cliché begins.

Only an insight into the socio-cultural environment of the trading partner renders a responsible commercial contact possi-

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43. Based on EEC regulation 1439/74 of July 4, 1974 (*see note 35 supra*). *See, e.g.*, Reg. No. 1782/75, ABl. No. L 182/1, of July 12, 1975; No. 3045/75, ABl. No. L 3045/75, ABl. No. L 303/26 of November 22, 1975.

44. *See, e.g.*, A. T. von Mehren, *The Significance of Cultural and Legal Diversity for International Transactions*, in: *Ius Privatum Gentium, Festschrift für Max Rheinstein*, vol. 1, Tübingen 1969, pp. 247-57.

ble. This includes a deeper concern with the legal systems involved. Chinese representatives in Germany have confirmed that a closer cooperation between Chinese and German lawyers could contribute in smoothing the way to a solution of trade and investment problems and in participating in arbitration and conciliation.

Dr. Sigur thanked Dr. Heuser and also expressed his appreciation to the three panelists for adhering to the time limit. He then invited the three discussants to speak. The first discussant was Mr. Ralph Clough of the Brookings Institution. Mr. Clough, Dr. Sigur pointed out, had served in the American foreign service and was acting ambassador (*charge d'affaire*) at the American Embassy in Taipei several years ago. Mr. Clough has written extensively on Asia and American policy.

Mr. Clough stated that Dr. Heuser presented clearly the obstacles to trade between West Germany and Taiwan, but showed how many had been overcome, permitting trade with the ROC to increase substantially. Mr. Clough presented some questions for Mr. Heuser: Do merchants have travel problems? Are trade fairs permitted? How does lack of diplomatic relations with Germany affect Taiwan's trade as compared to its trade with France and Canada, or compared to German trade with South Korea? Mr. Clough stated that Dr. Wu and Dr. Yeh make a strong case that United States economic interests in Taiwan would be best served by the adoption of a two-China policy, but do not take account of overall U.S. interests. For one thing, the paper may have underestimated the People's Republic of China's potential as a trade partner with the United States. Mr. Clough pointed out that in some years Japanese trade with the People's Republic of China exceeded its trade with Taiwan. He added that both the paper done by Dr. Wu and Dr. Yeh and the Chamber of Commerce paper discussed the adverse effects of normalization, but did not discuss possibilities for mitigating these adverse effects, as, for example, by legislation providing for continuing access to Eximbank loans.

[The following is the summary of Mr. Clough's statement.]

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