

# INTERNATIONAL LAW AND THE EXTRAORDINARY INTERACTION BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF CHINA ON TAIWAN

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## INTRODUCTION

Since 1987, the relationship between the People's Republic of China (PRC)<sup>1</sup> and the Republic of China (ROC)<sup>2</sup> has defied existing categories of cross-border interaction. This Article examines major aspects of the PRC-ROC relationship, contrasts this relationship with state-based and nongovernmental cross-border interactions, and discusses the implications of this complex and unique relationship for international legal scholarship.

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1. The problems between the PRC and ROC are often referred to as "cross-straits" problems, both because these entities are separated by the Taiwan Strait and because the term "cross-straits" avoids allusion to their sovereignty dispute. The translations of the Chinese and Taiwanese materials that appear in this project are my own. Chinese and English are two very different languages with different sentence structures, nouns, verbs, etc. Sometimes there is no corresponding translation in English. Sometimes two Chinese words have to be translated as a full English sentence. I have tried to find the best English translations for Chinese terms. As readers will discover shortly, I offer both Romanization and translation for many Chinese terms and titles, because only using English to discuss PRC and ROC law written in Chinese may cause potentially important information to be lost in translation. Romanization may also help readers and researchers find the original materials.

2. Although some of the materials about the ROC on Taiwan are of only remote relevance to this study, they provide a background for readers who are not familiar with it. *See, e.g.*, CONSTITUTIONAL REFORM AND THE FUTURE OF THE REPUBLIC OF CHINA (Harvey J. Feldman ed., 1991); THOMAS E. STOLPER, CHINA, TAIWAN, AND THE OFFSHORE ISLANDS (1985); CONTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN (Edwin A. Winckler & Susan Greenhalgh eds., 1988); ALAN M. WACHMAN, TAIWAN: NATIONAL IDENTITY AND DEMOCRATIZATION (M.E. Sharpe, Inc. 1994); THOMAS B. GOLD, STATE AND SOCIETY IN THE TAIWAN MIRACLE (Douglas Merwin ed., 1997); TAIWAN: BEYOND THE ECONOMIC MIRACLE (Denis Fred Simon & Michael Ying-mao Kau eds., 1997); Yun-han Chu, *Surviving the East Asian Financial Storm: The Political Foundation of Taiwan's Economic Resilience*, in THE POLITICS OF THE ASIAN ECONOMIC CRISIS 184 (T.J. Pempel ed., Cornell U. Press 1999). A general introduction to the ROC legal system can be found in Tay-sheng Wang, *Taiwan*, in ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA 124 (Poh-ling Tan ed., 1997), and in Tsung-fu Chen, *The Rule of Law in Taiwan: Culture, Ideology, and Social Change*, in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 374-409 (C. Stephen Hsu ed., N.Y.U. Press 2003). A general introduction to the PRC legal system can be found in ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (3d ed. 2004).

To proponents of the state-based perspective, the state is the most powerful social form of political organization in the contemporary world,<sup>3</sup> and state-based interaction is the backbone of the contemporary world order. Adherents of the traditional state-based perspective point out that the United Nations, the most influential international organization, admits only sovereign states as members. Some scholars of the PRC-ROC relationship have emphasized that the ROC should enjoy greater participation in international organizations, or even that the ROC should be considered a separate state, rather than part of the Chinese state.<sup>4</sup> Other scholars have emphasized the extent to which Chinese history and the Westphalian concept of sovereignty constrain the choices that the contemporary PRC and ROC governments may make.<sup>5</sup>

An alternative perspective posits that nongovernmental cross-border interaction is playing an increasingly important role in the world.<sup>6</sup> Scholars of the PRC-ROC relationship have studied the economic exchanges<sup>7</sup> and have

3. Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 325-47 (1996). Finnemore is a political scientist who teaches at The George Washington University.

4. See, e.g., Y. Frank Chiang, *State, Sovereignty, and Taiwan*, 23 FORDHAM INT'L L.J. 959, 960 (2000). The idea that the ROC should enjoy greater participation in international organizations enjoys wide support in the ROC. In contrast, the Democratic Progressive Party (DPP) supports the idea that the ROC should be a state separate from the PRC, but Kuomintang argues that the ROC is only one part of the Chinese state, the rest of which is currently ruled by the PRC.

5. See, e.g., Michel Oksenberg, *The Issue of Sovereignty in the Asian Historical Context*, in PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL RESPONSIBILITIES 83, 83-104 (Stephen D. Krasner ed., Columbia U. Press 2001). I acknowledge that the Westphalian concept of sovereignty may itself be an idea constructed by successive diplomats and scholars. See, e.g., STEPHANE BEAULAC, *THE POWER OF LANGUAGE IN THE MAKING OF THE INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTTEL AND THE MYTH OF WESTPHALIA* (2004); JANNE ELISABETH NUMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* (Cambridge U. Press 2004); DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS* (Princeton U. Press 2001); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 2, 251-87 (2001). I also acknowledge that the concept of sovereignty has been evolving and is not monolithic. See, e.g., JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* (Steve Smith et al. eds., Cambridge U. Press 1995); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (Princeton U. Press 1999). What I seek to convey in the text is the general agreement among scholars of Chinese history and politics that the Westphalian concept of sovereignty is influential among the political elites of the PRC and ROC, even though it was not introduced to the Chinese world until the late nineteenth century. See, e.g., IMMANUEL C. Y. HSÜ, *CHINA'S ENTRANCE INTO THE FAMILY OF NATIONS: THE DIPLOMATIC PHASE 1858-1880* (Harvard U. Press 1960).

6. See, e.g., SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (Steve Smith et al. eds., Cambridge U. Press 1996); *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875* (John Boli & George M. Thomas eds., Stanford U. Press 1999); Ann Marie Clark et al., *The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women*, 51:1 WORLD POL. 1, 1-35 (1998).

7. See, e.g., T.J. Cheng, *China-Taiwan Economic Linkage: Between Insulation and*

highlighted such social phenomena as migration and marriage<sup>8</sup> to lend support for this perspective. As an example, analysts have pointed out that since 2003, the PRC has been the largest market for exports from the ROC,<sup>9</sup> while citizens and companies from the ROC have become the fifth largest source of foreign direct investment in the PRC.<sup>10</sup>

My thesis is that the current PRC-ROC relationship cannot be categorized according to the traditional categories of cross-border interaction. The relationship is not state-based for several reasons. First, to say that the PRC-ROC relationship is unequivocally state-based is to ignore the official attitudes of the PRC and the ROC. The PRC has always vehemently contended that its relationship with the ROC is not state-based, while the ROC's attitude is more ambiguous.<sup>11</sup> Several indicators of the ROC's attitude, which changes in tandem with changes in its administration, present mixed signals. Second, several mechanisms of enormous importance in the PRC-ROC relationship have intentionally been made to appear nongovernmental.<sup>12</sup> Third, activities such as marriage, trade, investment, and crime have been undertaken with little, if any, regard for government-to-government diplomacy.

While the current PRC-ROC relationship cannot be characterized as state-based, neither can it be characterized as composed of purely nongovernmental interaction of the type that has informed the basis of much current scholarly writing regarding informal government networks.<sup>13</sup> First, PRC and ROC courts, which are governmental in nature, adjudicate and resolve a variety of conflicts that arise out of nongovernmental interaction. Second, the efforts to make several mechanisms of enormous importance in the PRC-ROC relationship appear nongovernmental underscore that they are, or at least initially were, governmental mechanisms. Third, even though activities such as marriage, trade, investment, and crime have been pursued with little or no regard for government-to-government diplomacy, they have been undertaken with the legal rules established by governments in mind. Human traffickers and smugglers, for example, know they are violating either PRC or ROC laws.

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*Superconductivity*, in DANGEROUS STRAIT: THE U.S.-TAIWAN-CHINA CRISIS 93 (Nancy Bernkopf Tucker ed., Columbia U. Press 2005).

8. See RICHARD C. BUSH, UNTYING THE KNOT: MAKING PEACE IN THE TAIWAN STRAIT 142 (Brookings Inst. Press 2005).

9. Chinabiz.org, Cross-Strait Economic Statistics Monthly, <http://www.chinabiz.org.tw/maz/Eco-Month/home.htm> (last visited March 25, 2003).

10. Mainland China Foreign Capital Inflow by Country (Area), <http://www.mac.gov.tw/big5/statistic/em/162/29.pdf> (last visited May 9, 2009). The four largest sources of foreign direct investment in the PRC are Hong Kong, Japan, the United States, and the British Virgin Islands. Just as the British Virgin Islands is a legal fiction for some sources of investment, such may be the case for the PRC and the ROC as well.

11. See *infra* Part I.

12. See *infra* Parts I, III.

13. See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton U. Press 2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA J. INT'L L. 1, 1-92 (2002).

This Article supports my thesis by examining conflict-of-law rules<sup>14</sup> and cross-border crime control<sup>15</sup> within the PRC-ROC relationship. To date, these issues have not received adequate scholarly examination. Part I describes the historical background of the PRC-ROC relationship, lays out the official positions of the PRC and ROC on the nature of their bilateral relationship, and chronicles major events in their relationship. Part I further explains the distinction between state-based and nongovernmental cross-border interaction by examining the nature of informal government networks and discussing Paragraph 125 of the 1971 Namibia advisory opinion of the International Court of Justice (ICJ).<sup>16</sup> It is within this advisory opinion that the ICJ acknowledged that the registration of births, deaths, and marriages of an unrecognized regime is a public or state-based act, and, upon this acknowledgement, ruled that the registration of such matters should not be invalid simply because a regime is not accorded diplomatic recognition.<sup>17</sup>

Parts II and III examine the interaction between the civil and criminal justice systems and related institutions of the PRC and ROC with the purposes of demonstrating these mechanisms' nongovernmental appearance and the efforts behind creating such an appearance. As stated earlier, this nongovernmental semblance and the attempts to create it are critical to the conclusion that the current PRC-ROC relationship defies existing categories of cross-border interaction. Parts II and III will additionally detail the instances in which PRC and ROC courts have met the challenges that were created by the extensive interaction between the two entities. It should be noted that throughout Parts II and III, the dates on which various events occurred will be provided whenever possible. Viewing these dates alongside the chronology of the major events in the PRC-ROC relationship supports the conclusion that activities such as marriage, trade, investment, and crime have been undertaken with little or no regard for government-to-government diplomacy.

Parts II and III present PRC and ROC court decisions as a useful lens through which observers may examine the PRC-ROC relationship. Most studies of this relationship have rarely discussed court decisions. However, this Article demonstrates that lawyers and judges have paid much heed to these materials, which reflect the efforts of the PRC and ROC to come to grips with the challenges created by their extensive interaction. Court judgments illustrate the real-world impact of the application of legal rules—one party loses while the other party wins—as well as the extent to which extralegal motivations are

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14. See *infra* Part II; see also Chi Chung, *Conflict of Law Rules Between China and Taiwan and Their Significance*, 22 ST. JOHN'S J. LEGAL COMMENT. 559 (2008).

15. See *infra* Part III.

16. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Req. for Advisory Op.) (Order of Jan. 26, 1971), available at <http://www.icj-cij.org/docket/files/53/11457.pdf?PHPSESSID=7b48b5d09529372114dbe1773ebf2303> [hereinafter Namibia Advisory Opinion].

17. *Id.*

translated into legal arguments.<sup>18</sup> This Article contends that anyone wishing to gain an understanding of the PRC-ROC relationship cannot ignore these court decisions.<sup>19</sup>

Certainly, a focus on adjudication can lead to misunderstandings. Readers must understand that court cases present only a snapshot. Some corporations and individuals may choose to settle outside of court, and estimating the number of disputes resolved in this manner is difficult.<sup>20</sup> Furthermore, while court cases and settlements arise from disputes, not all PRC-ROC interactions, such as marriages or transactions, end in disputes, nor can PRC and ROC police catch every criminal. In addition, the PRC does not yet have a centralized database that systematically reports cases in its court system.<sup>21</sup> Therefore, although court decisions present a valuable opportunity to understand the PRC-ROC relationship, they are still only part of the complicated relationship.

The Conclusion of this Article discusses the stability of PRC-ROC interaction and its implications for international legal scholarship. The unique nature of the PRC-ROC interaction may lead to questions regarding its stability, an issue which I shall do my best to address. Beyond the immediate consequences in the region, the PRC-ROC interaction has implications for international legal scholarship. The PRC-ROC interaction suggests the need

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18. In order to succeed in courts, both state policies and profit motives must be stated in legal terms, which is what I mean by “the extent to which extralegal motivations are translated into legal arguments.”

19. It should be noted that both the PRC and the ROC are civil law jurisdictions where court judgments do not have the precedential value as they do in common law jurisdictions. On the other hand, it would be inaccurate to state that the PRC and ROC judges do not read court judgments previously made by other judges at all. For more information on the effects of previous judgments on adjudication in civil law jurisdictions, see, e.g., MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (U. Chicago Press 1986). Neither Shapiro nor I suggest that the PRC and the ROC judges behave the same as the judges in other civil law jurisdictions do. It may be tempting to find commonalities between adjudication in the PRC and the ROC and adjudication in other civil law jurisdictions, as they indeed share some characteristics. However, readers must understand that the legal development of each jurisdiction is unique in important aspects; therefore, the process of adjudication in one jurisdiction should not be assumed to be the same as the process of adjudication in another jurisdiction. For more discussion on the issue of “comparability,” see, e.g., STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (Stanford U. Press 1999); William P. Alford, *On the Limits of “Grand Theory” in Comparative Law*, 61 WASH. L. 945, 954 (1986); Zhu Suli, *Political Parties in China’s Judiciary*, 17 DUKE J. COMP. & INT’L L. 533 (2007) (explaining the adjudication process in the PRC).

20. To some extent, court judgments may also shape the nature of dispute resolution outside of the courts; as Robert H. Mnookin, a Harvard Law School professor, has demonstrated, law may dictate the default rules affecting the bargaining that occurs outside of the courts. See Robert H. Mnookin et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

21. The ROC has a centralized database that systematically reports judgments rendered by its courts. See *infra* Appendix I.

for more focus on the *substance* of the international law, and the focus on the substance of international law will also have implications for the PRC-ROC interaction.

Before further discussion, a note on terminology is in order. The ROC government now controls Taiwan, Penghu, Kinmen, Matsu, and their neighboring islands, with Taiwan being the largest land mass under its control. The language of the PRC law refers to the PRC as the Mainland Area, (*dalü dìqū*; 大陸地區) or heartland (內地), and the ROC as the Taiwan Area (*Taiwan dìqū*; 台灣地區). The language of the ROC law refers to the PRC as the Mainland Area and to the ROC as the Taiwan Area. Renminbi (RMB\$), or the Chinese Yuan, is the currency issued by the PRC. On average, in June 2009, a U.S. dollar could have been exchanged for RMB\$6.8339. The New Taiwan Dollar (NT\$) is the currency issued by the ROC. On average, in June 2009, a U.S. dollar could have been exchanged for NT\$32.792. When describing the statutory and case law of the PRC and the ROC, I use the language of the government that made the laws to maintain the greatest possible accuracy. In general, I translate *jumin* as residents, *renmin* as people or person,<sup>22</sup> *dalü* as Mainland, and *dalü dìqū* as Mainland Area.

## I. THE CONTEXT

Part I aims to fulfill three goals. First, it aims to provide background information on the PRC-ROC relationship and chronicle major events in their history of interaction. Second, it aims to lay out the official positions of the PRC and ROC on the nature of their bilateral relationship. As stated earlier, examination of their official positions aids in explaining why their relationship defies existing categories of cross-border interaction. Third, it aims to explain the nature of state-based and nongovernmental cross-border interaction in greater detail.

### A. *The PRC-ROC Relationship*

#### 1. *Historical Background*

The Republic of China (ROC, *zhonghua minguo*, or 中華民國) was founded in 1911. Chiang Kai-shek rose to power when he became the Commander-in-Chief of the National Revolutionary Army in 1925. Chiang and his political party, Kuomintang (KMT), continued to rule China through the Second World War until 1949, when they lost the Chinese Civil War to the Chinese Communist Party (CCP) led by Mao Zedong. In 1949, the CCP proclaimed the establishment of the People's Republic of China (PRC,

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22. Based on the cases and statutes I have reviewed, I believe that *jumin* and *renmin*, as well as *dalü* and *dalü dìqū*, can be used interchangeably.

*zhonghua renmin gonghe guo*, or 中華人民共和國) as Chiang Kai-shek and his forces retreated to Taiwan, Penghu, Kinmen, Matsu, and other neighboring islands.

The islands to which Chiang and the KMT retreated do not share the same historical background. Kinmen and Matsu, outlying islands off the shore of China, had always been part of China. However, during Chiang's rise to power and throughout the Second World War, Taiwan and Penghu were not part of China; the Qing Dynasty of China had ceded Taiwan and Penghu to Japan in the Treaty of Shimonoseki in 1895.<sup>23</sup> When Japan surrendered at the end of the Second World War, ROC troops accepted Japan's surrender of Taiwan and Penghu on behalf of the Allied Command on October 25, 1945. Some have argued that because Japan surrendered Taiwan and Penghu to the Allied Command and that ROC troops were merely agents of the Allied Command, the ROC did not assume sovereignty over Taiwan and Penghu. The Treaty of San Francisco, which concluded the Pacific War, stated that Japan must surrender its sovereignty over Taiwan and Penghu but left unspecified to whom Japan must surrender the sovereignty.

The government formed and led by Chiang in Taiwan, Penghu, Kinmen, Matsu, and their neighboring islands has continued to exist to this day under the official name of the Republic of China (ROC or *zhonghua minguo*). The continued use of the term ROC, coupled with the consequences of international relations during the Cold War, may have impacted the diplomacy and participation of the PRC and the ROC in international organizations throughout their history. For example, the PRC did not successfully take the ROC's seat in the United Nations until 1971,<sup>24</sup> and until 1978, the ROC was the only Chinese government recognized by the United States.<sup>25</sup> In their ongoing diplomatic dispute, both the PRC, ruled by the CCP, and the ROC, ruled by the KMT, have maintained a so-called one-China policy, according to which there is only one Chinese state. Such a stance has led the PRC and the ROC to argue that each has the true authority to rule and internationally represent the combined territory of the PRC and the ROC.

Military confrontations between the PRC and ROC continued until 1958. Between 1949 and 1987, all forms of transportation, communication, and mail

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23. Treaty of Shimonoseki, Apr. 17, 1895, China-Japan, *available at* <http://www.taiwandocuments.org/shimonoseki01.htm> (last visited Mar. 9, 2009).

24. *See, e.g.*, SAMUEL S. KIM, CHINA, THE UNITED NATIONS AND WORLD ORDER 8 (Princeton U. Press 1979).

25. *See, e.g.*, ROBERT S. ROSS, NEGOTIATING COOPERATION: THE UNITED STATES AND CHINA, 1969-1989 (Stanford U. Press 1995); PATRICK TYLER, A GREAT WALL: SIX PRESIDENTS AND CHINA: AN INVESTIGATIVE HISTORY (Pub. Aff. 1999); JAMES MANN, ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON (Vintage Books 1998); CHINA'S CROSS TALK: THE AMERICAN DEBATE OVER CHINA POLICY SINCE NORMALIZATION: A READER (Scott Kennedy ed., Rowman & Littlefield 2003); ROBERT L. SUETTINGER, BEYOND TIANAMEN: THE POLITICS OF U.S.-CHINA RELATIONS 1989-2000 (Brookings Inst. Press 2003).

between the PRC and the ROC were prohibited by both entities. Although the PRC had signaled its willingness to lift its restrictions on travel before 1987, the ROC did not allow even family visits until 1987. The gradual lifting of restrictions on travel since 1987 caused a wide variety of legal issues that are examined by this Article.

In the early 1990s, much optimism prevailed that the PRC and the ROC would negotiate their unification. This optimism reached its pinnacle in 1992<sup>26</sup> when a series of negotiations resulted in the two entities signing several agreements in Singapore through their government-organized non-governmental organizations.<sup>27</sup> However, the bilateral relationship soon became increasingly fraught with tension as the ROC sought greater participation in international organizations, something the PRC opposed for fear of implying that the PRC accepted a separate state status for the ROC.<sup>28</sup> One key event that led to significant consequences was ROC's President Lee Teng-hui's visit to his alma mater, Cornell University, in June 1995.<sup>29</sup> In protest of Lee's visit, the PRC conducted war games and tested fire missiles in waters near Taiwan in 1995 and 1996.<sup>30</sup> Although the tension decreased shortly thereafter, the tension

26. The CCP and the KMT later refer to the circumstances of 1992 as the "1992 Consensus." See, e.g., *Backgrounder: "1992 Consensus" on "one-China" Principle*, People's Daily Online, [http://english.people.com.cn/200410/13/eng20041013\\_160081.html](http://english.people.com.cn/200410/13/eng20041013_160081.html) (last visited May 31, 2009); Ko Shu-Ling et al., *Presidential Office Defends Ma*, TAIPEI TIMES, September 5, 2008, <http://www.taipeitimes.com/News/taiwan/archives/2008/09/05/2003422339> (last visited May 31, 2009); Ambassador Stephen S. F. Chen, *The Foreign and Cross-Strait Policies of the New Administration In the Republic of China, A Speech Delivered at the Chatham House, London, December 8, 2008*, <http://www.kmt.org.tw/english/page.aspx?type=article&mnum=115&anum=5669> (last visited June 1, 2009) ("For the purpose of a preliminary meeting, the two proxy organizations sent delegations to Hong Kong for a first-ever meeting in October 1992. They immediately hit snags over the definition of "One China." For [the ROC], it is the Republic of China, and both Taiwan and the mainland constitute China. For [the PRC], it is the People's Republic of China, and Taiwan is part of China. Finally, both sides agreed that, having respectively stated their interpretations, they should shelve the issue and proceed to the formal business talks in the future. That in essence was the "Consensus of 1992." Indeed, the principals of the two organizations, C. F. Koo and Wang Taohan, were able to meet for talks in April 1993 in Singapore.").

27. How can organizations be both government-organized and non-governmental? This apparent paradox is exactly why it is important to understand their complex nature. Suffice it to say that the PRC and ROC governments have organized, by donations and staffing, certain non-governmental organizations specifically for the purpose of addressing certain issues within the PRC-ROC relationship. See *infra* Parts II, III; see also, Steven M. Goldstein, *Terms of Engagement: Taiwan's Mainland Policy*, in *ENGAGING CHINA: THE MANAGEMENT OF AN EMERGING POWER* 57, 70-71 (Alastair Iain Johnston & Robert S. Ross eds., Routledge 1999).

28. The PRC opposes the idea that the ROC has a separate state status because it claims the true authority to rule and internationally represent the combined territory of the PRC and the ROC. See also, Chung, *supra* note 14, at 569-70. The ROC still pursues greater participation in international organizations. See *infra* Conclusion.

29. See e.g., Robert Ross, *The 1995-96 Taiwan Strait Confrontation: Coercion, Credibility, and Use of Force*, in *THE UNITED STATES AND COERCIVE DIPLOMACY* 225 (Robert J. Art & Patrick M. Cronin eds., US Institute of Peace Press 2003).

30. *Id.*



escalated once more after Lee stated in an interview on July 9, 1999 that the PRC-ROC relationship should be regarded as a special state-to-state relationship.<sup>31</sup>

On May 20, 2000, Chen Shui-bian succeeded Lee as President of the ROC. Before winning the presidential election, Chen's Democratic Progressive Party (DPP) had not adopted the one-China policy, as both the CCP and the KMT had. Instead, the DPP developed its own policies towards the PRC-ROC problem. Article 1 of the DPP's Platform (黨綱), as revised in October 1991, stated that one of the DPP's primary goals was "to establish the Republic of Taiwan with independent sovereignty."<sup>32</sup> However, in 1999, the National Assembly of Party Members (全國黨員代表大會), the same DPP body that had developed and later revised the Platform, passed the Resolution on Taiwan's Future (臺灣前途決議文) (the "Resolution"), the preface (前言) of which asserted that the goal of establishing Taiwan's sovereignty had already been achieved: "The congressional election in 1992, direct presidential election in 1996, and constitutional amendment in 1997 made Taiwan a *de facto* democratic and independent state."<sup>33</sup> The DPP's National Assembly of Party Members made this bold assertion even though there was no Republic of Taiwan and the ROC had not formally declared its independence. The Resolution makes seven assertions (主張): First, "Taiwan is an independent sovereign state; any change of the status quo—*independence*—must be determined by a referendum of all inhabitants in Taiwan."<sup>34</sup> Second, "Taiwan does not belong to the People's Republic of China; 'one-China Principle' and 'one-country-two-systems' are China's unilateral assertions and do not fit Taiwan."<sup>35</sup> Third, "Taiwan should widely participate in international society and seek international recognition and membership in the United Nations and other international organizations."<sup>36</sup> Fourth, "Taiwan should abandon the one-China idea to avoid confusion in international society that may be an excuse for China to swallow Taiwan."<sup>37</sup> Fifth, "Taiwan should legislate a Referendum

31. Office of the President, Republic of China (Taiwan), <http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueY> (last visited May 19, 2009).

32. Democratic Progressive Party, <http://www.dpp.org.tw/> (last visited May 19, 2009). The Romanization of the quoted text is as follows: *jianli zhuquan dili zizhu de Taiwan gonghe guo*.

33. *Id.* The Romanization of the quoted text is as follows: *yi jiu jiu er nian de guohui quanmin gaixuan yi jiu jiu liu nian de zongtong zhijie minxuan yiji xiuxian feisheng deng zhengzhi gaizao gongcheng yi shi Taiwan shishi shang chengwei minzhu dili guojia*.

34. *Id.* The Romanization of the quoted text is as follows: *Taiwan shi yi zhuquan dili guojia renhe youguan dili xianzhuang de gengdong bixu jingyou Taiwan quanti zhumin yi gongmin toupiao de fangshi jue ding*.

35. *Id.* The Romanization of the quoted text is as follows: *Taiwan bingbu shuyu zhonghua renmin gonghe guo zhongguo pianmian zhuzhang de yige zhongguo yuanze yu yiguo liangzhi genben bu shiyong yu Taiwan*.

36. *Id.* The Romanization of the quoted text is as follows: *Taiwan ying guangfan canyu guoji shehui bing yi xunqiu guoji chengren jiaru lianheguo ji qita guoji zuzhi wei fendou nuli de mubiao*.

37. *Id.* The Romanization of the quoted text is as follows: *Taiwan ying yang qi yige zhongguo de zhuzhang yi bimian guoji shehui de renzhi hunyao shouyu zhongguo bingtun de*

Act as soon as possible to realize direct democracy and, when necessary, form a national consensus and express national will.”<sup>38</sup> Sixth, “in order to counter China’s bullying and ambitions, all political parties in Taiwan should form a consensus and make the most efficient use of the limited resources on foreign policy.”<sup>39</sup> Seventh, “Taiwan and China should, through comprehensive dialogue, seek deep mutual understanding and reciprocal economic cooperation, and establish a peaceful framework for long-term stability and peace for both sides.”<sup>40</sup>

These policy statements sent mixed signals to the world community. Although Taiwanese independence is listed as the first and foremost goal in the DPP platform, above even “the legal and political order with democracy and liberty” (民主自由的法政秩序), the DPP’s Resolution on Taiwan’s Future claimed that Taiwan was already a *de facto* independent state and pledged that any change in the status quo should be determined by a referendum in the ROC. Although the PRC might share the goal of maintaining the status quo, it was disturbed by both the DPP’s pursuit of Taiwanese independence and the DPP’s characterization of the status quo as independence. Therefore, the DPP’s electoral victory in 2000 greatly concerned the PRC. To reassure both the PRC and the United States, in his inaugural speech on May 20, 2000, Chen promised:

As long as the CCP regime [of the PRC] has no intention of using military force against Taiwan, we will not declare independence; will not change the official name of the state; will not seek to amend the Constitution to describe the cross-strait relationship as a state-to-state one; will not seek to hold a unification/independence referendum to change the status quo; and will not abolish the National Unification Council or the Guidelines for National Unification.<sup>41</sup>

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*jielkou.*

38. *Id.* The Romanization of the quoted text is as follows: *Taiwan ying jinsu wancheng gongmin toupiao de fazhi hua gongcheng yi luoshi zhijie minquan bing yu biyao shi jieyi ningju guomin gongshi biaoda quanmin yizhi.*

39. *Id.* The Romanization of the quoted text is as follows: *Taiwan chaoye gejie ying bufen dangpai zai duiwai zhengce shang jianli gongshi zhenghe youxian ziyuan yi miandui zhongguo de daya ji yexin.*

40. *Id.* The Romanization of the quoted text is as follows: *Taiwan yu zhongguo ying touguo quan fangwei duihua xunqiu shenqie huxiang liaojie yu jingmao huhui hezuo jianli heping jiagou yiqi dacheng shuangfang zhangqi de wending yu heping.*

41. Office of the President, Republic of China (Taiwan), [http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=89&issueMM=5&issueDD=20&title=&content=&\\_section=3&\\_pieceLen=50&\\_orderBy=issueDate%2Crid&\\_desc=1&\\_recNo=7](http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=89&issueMM=5&issueDD=20&title=&content=&_section=3&_pieceLen=50&_orderBy=issueDate%2Crid&_desc=1&_recNo=7) (last visited June 22, 2009). The Romanization of the quoted text is as follows: *zhiyao zhonggong wuyi duitai dongwu benren baozheng zai renqi zhinei buhui xuanbu duli buhui genggai guohao buhui tuidong liangguolun ruxian buhui tuidong gaibian xianzhuang de tongdu gongtou ye meiyou feichu guotong gangling yu guotonghui de wenti.* See also TAIWAN’S PRESIDENTIAL POLITICS: DEMOCRATIZATION AND CROSS-STRAIT RELATIONS IN THE TWENTY-FIRST CENTURY (Muthiah Alagappa ed., M.E. Sharpe Inc.

That notwithstanding, between 2000 and 2008, the period in which Chen served as the ROC's President, having been re-elected for a second term in 2004, the PRC-ROC relationship was fraught with tension.

On March 22, 2008, the ROC elected Ma Ying-jeou as President for the 2008-2012 term.<sup>42</sup> Ma was sworn into office on May 20, 2008.<sup>43</sup> Maintaining a different perspective on the one-China principle than that held by the Chen administration, Ma and the KMT, his political party, do not seek a complete agreement with the CCP over the nature of the PRC-ROC relationship.<sup>44</sup> Whereas the CCP maintains that there is one China and that the PRC represents it, Ma and the KMT maintain that there is one China and that the ROC represents it.<sup>45</sup> Thus, both agree that there is one China but differ on which entity represents it. Observers of Asia expect that the CCP and the KMT will continue to focus on their agreement that there is one China while keeping unresolved the question regarding which entity represents it.<sup>46</sup> Not surprisingly, Ma stated in an interview on September 3, 2008 that the cross-strait relationship is a special relationship but not a state-to-state one.<sup>47</sup> As President of the ROC, Ma has substantial influence. Ma has the power to appoint and remove the President of the Executive Yuan and thereby influence the executive branch. In addition, his party enjoyed a landslide electoral victory and now maintains a majority in the Legislative Yuan, through which its policy initiatives are likely to become law.<sup>48</sup>

## 2. Official Positions on the Nature of the Bilateral Relationship

The PRC government has always vehemently contended that its relationship with the ROC is not state-based.<sup>49</sup> It reacted furiously to Lee Teng-

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2001) (examining the 2000 election).

42. Office of the President, Republic of China (Taiwan), <http://www.president.gov.tw/en/> (follow "President" hyperlink; then follow "Biography" hyperlink) (last visited May 31, 2009).

43. *Id.*

44. *See, e.g.*, Chen, *supra* note 26.

45. Chen's administration sent mixed signals. In general, Chen's administration and the DPP, the ruling party between 2000 and 2008, oppose the idea that the ROC represents the Chinese state and, instead, want a Taiwanese state separate from the Chinese state represented by the PRC. *See infra* Part I.A.

46. *See, e.g.*, Chen, *supra* note 26 ("[Both the PRC and the ROC] agreed that, having respectively stated their interpretations [of what China is], they should shelve the issue and proceed to the formal business talks in the future.").

47. Office of the President, Republic of China (Taiwan), [http://www.president.gov.tw/php-bin/prez/shownews.php4?\\_section=3&\\_recNo=2](http://www.president.gov.tw/php-bin/prez/shownews.php4?_section=3&_recNo=2) (last visited May 19, 2009).

48. *See, e.g.*, Shelley Rigger, *Needed: A Newish U.S. Policy for a Newish Taiwan Strait*, March 2009, available at <http://www.fpri.org/enotes/200903.rigger.newishtaiwanstrait.html> (last visited May 31, 2009) ("In May 2008 Chen [Shui-bian] handed over the presidency to Ma Ying-jeou, who came into office with a strong popular mandate. He won the presidency with 58 percent of the vote, and his party (the Kuomintang, or KMT) was just shy of a three-fourths majority in Taiwan's legislature.").

49. *See, e.g.*, Embassy of the People's Republic of China in the United States of America, *The One-China Principle and the Taiwan Issue*, <http://www.china-embassy.org/eng/zt/twwt/White%20Papers/t36705.htm> (last visited May 19, 2009).

hui's special state-to-state characterization in 1999 and Chen Shui-bian's one-side-one-country characterization in 2002.<sup>50</sup> According to the one-country-two-systems formula offered by former PRC leader Deng Xiaoping, the ROC may collect and keep its own tax revenue, operate its own legal system, and even maintain its own military—the PRC may not send even a single soldier to the ROC if the ROC so requests—but the ROC must remain a part of the Chinese state, of which the PRC government in Beijing is the central government.<sup>51</sup> PRC leaders who have succeeded Deng have not altered this one-country-two-systems policy. Under this policy, the PRC will not seek to fully integrate the ROC into the PRC and will allow the ROC to enjoy a high degree of autonomy. While the PRC government opposes the notion that an international border exists between the PRC and the ROC, it acknowledges that the ROC should be allowed to develop its own policies.

In contrast, the ROC's position is more complex. First, as stated earlier, the ROC's attitude changes in tandem with changes in its administration, as demonstrated by the change in attitude when Ma succeeded Chen as President. Although it may appear unusual to casual observers that successive executive leaders could maintain such fundamentally different positions, long-time observers are not surprised that Chen and Ma differ so radically regarding the nature of the PRC-ROC relationship.<sup>52</sup>

Secondly, the ROC's policy is not based on an affirmative or negative response to one question but rather its ambiguous attitude demonstrated by a combination of several factors. In my opinion, the best examples of these factors are listed in Chen's inaugural speech in 2000.<sup>53</sup> During his terms as the President of the ROC, Chen kept the first three of his five promises: (1) not to declare independence, (2) not to change the official name of the state, and (3) not to amend the Constitution to describe the PRC-ROC relationship as a state-to-state relationship. However, Chen sought to hold a highly controversial referendum in March 2004; although Chen argued that it was not a referendum on unification or independence, the United States and the PRC disagreed.<sup>54</sup>

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50. Office of the President, Republic of China (Taiwan), [http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=91&issueMM=8&issueDD=3&title=&content=&\\_section=3&\\_pieceLen=50&\\_orderBy=issueDate%2Crid&\\_desc=0&\\_recNo=0](http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=91&issueMM=8&issueDD=3&title=&content=&_section=3&_pieceLen=50&_orderBy=issueDate%2Crid&_desc=0&_recNo=0) (last visited May 19, 2009). On August 3, 2002, Chen publicly stated that "Taiwan is a sovereign state" and that "[t]he two sides of the Taiwan Strait are two states." *Id.* The Romanization of the quoted text is as follows: *Taiwan shi yige zhuquan de guojia Taiwan gen duian zhongguo yibian yiguo.*

51. The one-country-two-systems policy now applies to Hong Kong and Macau, though Hong Kong and Macau do not have their own military forces. See, e.g., THE HONG KONG READER: PASSAGE TO CHINESE SOVEREIGNTY: AN INTERDISCIPLINARY READER 5 (Ming K. Chan & Gerard A. Postiglione eds., M.E. Sharpe, Inc. 1996).

52. Successive executive leaders maintain such fundamentally different positions because their electorate does. See e.g., Tahirih V. Lee, *Democracy and Federalism in Greater China*, 48 ORBIS 275 (2004).

53. See former President Chen's inaugural speech, *supra* note 41.

54. For an early assessment of the referendum in 2004, see Jih-wen Lin, *Taiwan's*

Reneging on his promise not to “abolish” the National Unification Council or the Guidelines for National Unification, on January 29, 2006, Chen argued, “[t]he time to seriously consider their [the National Unification Council and the Guidelines for National Unification] abolition (廢除) has come.”<sup>55</sup> After stirring intense controversy, Chen backed off on February 27, 2006, by declaring that the National Unification Council “ceased (終止) to function” and the Guidelines for National Unification “ceased to apply.”<sup>56</sup> While some scholars believe that to abolish something is different than making it cease to apply, others believe Chen simply played a game of words.

During Chen’s tenure, he stopped short of declaring independence or changing the official name of the ROC, but asserted opinions and performed actions that indicated a change in the ROC’s position on the PRC-ROC relationship.

### 3. *Travel, Marriage, Trade, and Investment*

An introduction to the relationship between the PRC and ROC would be incomplete if it did not provide for a basic understanding of the travel, marriage, trade, and investment that occurs between their people.

As stated earlier, there was no contact between the people of the PRC and the people of the ROC between 1949 and 1987.<sup>57</sup> A policy shift occurred within the PRC when, during its Third Plenary Meeting on December 22, 1978, the Eleventh Central Committee of the Chinese Communist Party<sup>58</sup> replaced its goal of the “liberation” (解放) of Taiwan with the more abstract and potentially friendly goal of “unification with the ROC by urging Taiwan to come to the embrace of the motherland.”<sup>59</sup> However, the ROC responded on April 4, 1979 by announcing its refusal to negotiate with the PRC.<sup>60</sup> The ROC later indicated a change in its position when, on November 2, 1987, it lifted its ban on travel to allow its inhabitants<sup>61</sup> to visit relatives in the PRC. Travel between the PRC and the ROC increased over the following years to become the basis for their

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*Referendum Act and the Stability of the Status Quo*, ACADEMIA SENICA, available at <http://www.ipsas.sinica.edu.tw/image/speech/24/1.pdf>.

55. The Romanization of the quoted text is as follows: *muqian shi renzhen sikao feichu guotonghui ji guotong gangling de shidang shiji*.

56. Office of the President, Republic of China (Taiwan), [http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=95&issueMM=2&issueDD=27&title=&content=&\\_section=3&\\_pieceLen=50&\\_orderBy=issueDate%2Crid&\\_desc=1&\\_recNo=0](http://www.president.gov.tw/php-bin/prez/shownews.php4?issueDate=&issueYY=95&issueMM=2&issueDD=27&title=&content=&_section=3&_pieceLen=50&_orderBy=issueDate%2Crid&_desc=1&_recNo=0) (last visited June 22, 2009).

57. See *supra* Part I.A.1.

58. The Romanization of the title is as follows: *zhongguo gongchandang di shi yi jie zhongyang weiyuanhui di san ci quanti huiyi*.

59. The Romanization of the quoted text is as follows: *taiwan huidao zuguo huaibao shixian tongyi daye*.

60. Mainland Affairs Council, Republic of China (Taiwan), <http://www.mac.gov.tw/english/index1-e.htm> (follow “Dialogue and Negotiation” hyperlink; then follow “Major Events across The Taiwan Straits” hyperlink) (last visited June 22, 2009).

61. I use the word “inhabitant” instead of “citizen” because the word “citizen” has special implications in the PRC-ROC relationship. See *infra* Part II.

increasingly important bilateral relationship.

As previously stated, the PRC has been the largest market for exports from the ROC since 2003 and ROC citizens and companies are the fifth largest source of foreign direct investment in the PRC.<sup>62</sup> Not only are their economies closely connected, but the societies of both entities are as well. According to Dai Xiaofeng, head of the Cultural Exchange Bureau (交流局), Taiwan Affairs Office, State Council, PRC, as of the end of September 2007, about 270,000 marriages had occurred between Taiwan and Mainland residents. In addition, roughly 400,000 Taiwan residents were living on the Mainland for work or study and about 18,000 Taiwan residents permanently resided on the Mainland.<sup>63</sup> Furthermore, in 2006, about five million pieces of mail were sent from the ROC to the PRC and about six million pieces of mail were sent from the PRC to the ROC.<sup>64</sup> Also in 2006, about 350 million telephone calls were made from the ROC to the PRC and about 358 million telephone calls were made from the PRC to the ROC.<sup>65</sup> If it is assumed that each person in the ROC makes and receives the same number of telephone calls each year, then each person in the ROC makes 15.2 calls to the PRC and receives 15.5 calls from the PRC per year.

Travel between the PRC and ROC has remained brisk since restrictions were lifted. Between 1987 and December 2006, ROC inhabitants made 42.41 million trips to the PRC<sup>66</sup> and PRC inhabitants made 1.54 million trips to the ROC.<sup>67</sup> In 2006 alone, ROC inhabitants made 4.41 million trips to the PRC<sup>68</sup> and PRC inhabitants made 243,200 trips to the ROC.<sup>69</sup> Of the trips made by ROC inhabitants to the PRC in 2006, 26,400 were made to engage in economic activities and 98,600 to engage in sightseeing.<sup>70</sup>

The terms "Chinese people" and "Taiwanese people" are legally and politically ambiguous. According to the PRC and the ROC the term "Chinese citizens" (中國公民) encompasses residents of both the Mainland Area and the Taiwan Area.<sup>71</sup> All citizens<sup>72</sup> of the ROC are citizens of the PRC according to

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62. See *supra* Introduction.

63. Taiwan Affairs Office of the State Council, [http://www.gwytb.gov.cn/jlwl/lajl0.asp?lajl\\_m\\_id=1054](http://www.gwytb.gov.cn/jlwl/lajl0.asp?lajl_m_id=1054) (last visited May 19, 2009). The reliability of this statistic is bolstered by the fact that it came from a PRC official at the Taiwan Affairs Office of the State Council. However, there may be a slight chance of exaggeration as Dai Xiaofeng was in charge of both regulating the travel of Mainland residents to Taiwan and promoting cultural exchanges between the Mainland and Taiwan. His goal of promoting cultural exchanges might have affected the accuracy of the statistics that he provided.

64. CROSS-STRAIT ECONOMIC STATISTICS MONTHLY, No. 169, at 17, <http://www.mac.gov.tw/english/english/csexchan/rpt/index.htm> (follow "No. 169" hyperlink; then follow "Brief Summary" hyperlink) (last visited May 19, 2009) [hereinafter ECON. STAT.].

65. *Id.*

66. ECON. STAT., *supra* note 64, at 17.

67. ECON. STAT., *supra* note 64, at 17.

68. *Id.*

69. *Id.*

70. *Id.*

71. In the 1950s and 1960s, the Chinese Communist Party and the Kuomintang on Taiwan

PRC law. The rule that comes closest to providing a definition of citizenship is found in Article 2 of the PRC *Regulations of the Travel of Chinese Citizens to and from the Taiwan Area*,<sup>73</sup> promulgated by the State Council (國務院) on December 17, 1991 and effective since May 1, 1992.<sup>74</sup> It defines “Mainland residents” (大陸居民) as those PRC citizens (中國公民) residing on the Mainland (居住在大陸) and “Taiwan residents” (台灣居民) as those PRC citizens residing on Taiwan (居住在台灣), thereby categorizing both Mainland and Taiwan residents as PRC citizens.<sup>75</sup> Two vital statutes, the *Law Protecting Investments by Taiwan Compatriots*<sup>76</sup> and the *Anti-Secession Law* (反分裂國家法),<sup>77</sup> refer to ROC citizens as “Taiwan compatriots” (台灣同胞).

Whereas the former statute uses the phrase “Taiwan compatriots” without defining it, the *Anti-Secession Law* defines “Taiwan compatriots” in Article 2, providing that “[t]here is only one China in the world;”<sup>78</sup> “[b]oth the mainland and Taiwan belong to one China;”<sup>79</sup> “China’s sovereignty and territorial integrity brook no division;”<sup>80</sup> and “[s]afeguarding China’s sovereignty and territorial integrity is the common obligation of all Chinese people, the Taiwan compatriots included[.]”<sup>81</sup>

Although Article 2 of the *Anti-Secession Law* does not look like a definition per se, it unambiguously states the phrase “all Chinese people, the Taiwan compatriots included,” which embodies the PRC policy that Taiwan compatriots are Chinese people.<sup>82</sup> In addition, Article 9 of the *Anti-Secession*

fought over who should rule and represent all of China (the combined territory of the PRC and the ROC).

72. I understand that some scholars distinguish nationality from citizenship. In the text I use the word “citizen” because it is usually translated as *gongmin* in Chinese and is closest to the term used in Article 2 of the PRC *Regulations of the Travel of Chinese Citizens to and from the Taiwan Area*, as discussed in the text.

73. Taiwan Affairs Office of the State Council, *Regulations of the Travel of Chinese Citizens to and from the Taiwan Area*, [http://www.gwytb.gov.cn/flfg/flfg0.asp?flgf\\_m\\_id=4](http://www.gwytb.gov.cn/flfg/flfg0.asp?flgf_m_id=4) (last visited May 19, 2009). The Romanization of its title is as follows: *zhongguo gongmin wanglai Taiwan diqu guanli banfa*.

74. *Id.*

75. *Id.* at art. 2.

76. Taiwan Affairs Office of the State Council, *Law Protecting Investments by Taiwan Compatriots*, <http://www.gwytb.gov.cn/flfg/tbf.htm> (last visited May 29, 2009). The Romanization of its title is as follows: *zhonghua renmin gonghe guo Taiwan tongbao touzi baohu fa*. The statute has been valid since March 5, 1994.

77. *Anti-Secession Law* (promulgated by the Third Session of the Tenth National People’s Congress, Mar. 14, 2005, effective Mar. 14, 2005) 2005 available at [http://english.peopledaily.com.cn/200503/14/eng20050314\\_176746.html](http://english.peopledaily.com.cn/200503/14/eng20050314_176746.html) [hereinafter *Anti-Secession Law*]. It has been valid since March 14, 2005. *Id.*

78. *Id.* at art. 2. The Romanization of the quoted text is as follows: *shijie shang zhiyou yige zhongguo*.

79. *Id.* The Romanization of the quoted text is as follows: *dalu he Taiwan tongshu yige zhongguo*.

80. *Id.* The Romanization of the quoted text is as follows: *zhongguo de zhuquan he lingtu wanzheng burong fenge*.

81. *Id.* The Romanization of the quoted text is as follows: *weihu guojia zhuquan he lingtu wanzheng shi baogua Taiwan tongbao zainei de quan zhongguo renmin de gongtong yiwu*.

82. *Id.*

*Law* states that the PRC shall protect the “legitimate interests” (正當權益) of both the ordinary people (平民) and foreigners (外國人) in Taiwan, which implies the PRC policy that Taiwanese people are not foreigners.<sup>83</sup>

ROC law is similarly complicated. According to ROC law, citizens of the PRC are citizens of the ROC. Article 2 of the ROC’s Nationality Law (國籍法) provides that anyone whose father or mother is a national (國民)<sup>84</sup> of the ROC is an ROC national,<sup>85</sup> and that anyone “born in the territory of the ROC,”<sup>86</sup> whose father or mother is not known (不可考) or who has no nationality, is an ROC national.<sup>87</sup> As will be explained in more detail in the discussion of criminal convictions in ROC courts,<sup>88</sup> ROC law considers all the territory of the PRC to be part of the ROC, and, therefore, considers citizens of the PRC to be citizens of the ROC as well.

However, ROC law distinguishes between ROC citizens that live in the PRC and ROC citizens that live on Taiwan.<sup>89</sup> This distinction was authorized by the Preface of the Amendments to the ROC Constitution<sup>90</sup> and the Eleventh Constitutional Amendment,<sup>91</sup> which have been effective since May 1, 1991.<sup>92</sup> As stated in the Preface, one purpose of these constitutional amendments is “to meet the needs of the time before our country is unified.”<sup>93</sup> Specifically, the Eleventh Amendment states that “[t]he rights, responsibilities, and other affairs between the people of the free area and the people of the Mainland Area, can be governed by special legislations.”<sup>94</sup> Most importantly, the Eleventh Amendment authorizes the ROC Legislative Yuan to enact the *Act Governing Relations Between Peoples of the Taiwan Area and the Mainland Area* (the

83. *Id.* at art. 9.

84. I use the word “national” here because it is the word usually translated as *guomin* in Chinese and closest to the usage in Article 2 of the ROC Nationality Law, as discussed in the text.

85. Nationality Law of the People’s Republic of China (promulgated by Order No.8 of the Chairman of the Standing Committee of the National People’s Congress, Sept. 10, 1980, effective Sept. 10, 1980) 1980, available at <http://www.china.org.cn/english/LivinginChina/184710.htm> [hereinafter PRC Nationality Law].

86. *Id.* The Romanization of the quoted text is as follows: *chusheng yu zhonghua minguo lingyu nei*.

87. *Id.* For the purposes of this paragraph, the word “citizen” (*gongmin*; 公民) is interchangeable with the word “national” (*guomin*; 國民).

88. See *infra* Part III.

89. See *infra* note 90.

90. Preface of the ROC Constitutional Amendments. The Romanization of its title is as follows: *zhonghua minguo xianfa zengxiu tiaowen*.

91. Eleventh Constitutional Amendment [hereinafter Eleventh Constitutional Amendment]. The Eleventh Amendment was the Tenth Amendment before July 21, 1997.

92. Government Information Office of the ROC, <http://www.gio.gov.tw/info/news/additional.htm> (last visited June 1, 2009).

93. Preface of the ROC Constitutional Amendments, *supra* note 90. The Romanization of the quoted text is as follows: *wei yinying guojia tongyi qian zhi xuyao*.

94. Eleventh Constitutional Amendment, *supra* note 91. The term “free area” indicated the ROC’s self-perception shortly after the end of the Cold War that the ROC was part of the free world.



“Act”).<sup>95</sup> The Act, valid since July 31, 1991, is the ROC’s most important legislation on the PRC-ROC relationship. Article 2 of the Act provides the following definitions: the “Taiwan Area” is the area currently governed by the ROC government, and the “Mainland Area” is the remaining territory of the Republic of China.<sup>96</sup> The “people of the Taiwan Area” are “the people who register their residence in the Taiwan Area with the government of the Taiwan Area.”<sup>97</sup> The “people of the Mainland Area” are “the people who register their residence in the Mainland Area with the government of the Mainland Area.”<sup>98</sup>

In conclusion, the PRC distinguishes between Taiwan residents and Mainland residents while the ROC distinguishes between people of the Taiwan Area and people of the Mainland Area. Although they differ in terminology, they both make distinctions between those whom they regard as their citizens—Chinese citizens. Taiwan residents are often also people of the Taiwan Area and Mainland residents are often also people of the Mainland Area, but not always. The status of a particular person ultimately depends upon the specific issue that person faces under the particular PRC or ROC government.

It should be noted that under both PRC and ROC law, the status of a person as either a Taiwan resident or a Mainland resident, or as either a person of the Taiwan Area or a person of the Mainland Area does not signify nationality (國籍).<sup>99</sup> Both the PRC and the ROC hold that the nationality of their people is that of the Chinese state, even though the PRC and the ROC differ on whether the Chinese state is the PRC or the ROC. The concept of nationality is closely intertwined with that of sovereignty, the historical root cause of the PRC-ROC conflict.<sup>100</sup> Therefore, as long as the PRC-ROC conflict remains unsettled, I forecast that the distinction between Taiwan residents and Mainland residents and that between people of the Taiwan Area and people of the Mainland Area will remain a separate consideration from the concept of nationality.

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95. Act Governing Relations Between Peoples of the Taiwan Area and the Mainland Area, available at <http://www.mac.gov.tw/english/english/law/law1.pdf> [hereinafter Act Governing Relations]. The Romanization of its title is as follows: *Taiwan diqu yu dalu diqu renmin guanxi tiaoli*. English translations of this statute can be found at Ada Koon Hang Tse, *The Statute Governing Relations Between People of the Areas of Taiwan and Mainland China*, 6 J. CHINESE L. 179 (1992); see also ROC Mainland Affairs Council, <http://www.mac.gov.tw> (last visited May, 29, 2009); see also Chung, *supra* note 14.

96. Act Governing Relations, *supra* note 95 at art. 2.

97. Koon Hang Tse, *supra* note 95, at 179. The Romanization of the quoted text is as follows: *zai Taiwan diqu sheyou huji zhi renmin*.

98. *Id.* The Romanization of the quoted text is as follows: *zai dalu diqu sheyou huji zhi renmin*.

99. Shelley Rigger, a political scientist teaching at Davidson College, analyzes the issue of ROC citizenship from the perspective of nationalism. See Shelley Rigger, *Nationalism Versus Citizenship in the Republic of China on Taiwan*, in CHANGING MEANINGS OF CITIZENSHIP IN MODERN CHINA 353 (Merle Goldman & Elizabeth J. Perry eds., Harvard Univ. Press 2002).

100. See, e.g., Chung, *supra* note 14.

#### 4. Conclusion

There is frequent interaction between PRC and ROC, as the existence of travel, marriage, trade, and investment shows. However, it remains difficult to identify and describe the precise nature of this relationship. As discussed in this section, the PRC has always vehemently contended that its relationship with the ROC is not state-based, while the ROC's attitude is more complicated. As I stated in the Introduction, my thesis is that the current PRC-ROC relationship defies existing categories of cross-border interaction, a term upon which I elaborate in the following section.

#### B. Existing Categories of Cross-border Interaction

Cross-border interaction is conventionally divided into two categories: state-based interaction and nongovernmental interaction. State-based cross-border interaction refers to cross-border interaction whose format and content is determined by states (國家); it is an example of the oldest form of diplomacy. During such interactions, the representatives of heads of state convey messages, exchange information, and negotiate with one another. Underscoring the contemporary prominence of this type of diplomacy, the United Nations, the most influential international organization, admits only sovereign states as members.<sup>101</sup>

Nongovernmental cross-border interaction refers to cross-border interaction, the format and content of which are determined by non-state actors. As pointed out by Susan Strange, an international political economy scholar, organized crime, the insurance industry, and multinational accounting firms are examples of nongovernmental entities which hold tremendous power across international lines in the contemporary world.<sup>102</sup> Aside from these specific sectors, multinational enterprises in general exert strong influence and engage in important forms of nongovernmental cross-border interaction.<sup>103</sup> Nonprofit

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101. It should be noted that the World Trade Organization (WTO) may be no less influential than the United Nations. The WTO admits not only sovereign states but also separate customs territories. The ROC is a member of the WTO under the title of "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu." See, e.g., Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19, 23 (1992). Given the prominence of the WTO, the fact that the ROC is a member of the WTO is not a trivial matter. On the other hand, the ROC continues to be denied membership in such organizations as the World Health Organization as they are considered organizations affiliated with the United Nations. See, e.g., World Health Organization, *Summary Records of Meetings of Committees*, available at [http://apps.who.int/gb/ebwha/pdf\\_files/WHA60-REC3/A60\\_REC3-en2.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA60-REC3/A60_REC3-en2.pdf) (last visited June 22, 2009).

102. See STRANGE, *supra* note 6.

103. See, e.g., The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, ¶¶ 20, 21, A/HRC/4/35 (Feb. 19, 2007); *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights* ¶ 3, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 2003 (2003).

organizations also form advocacy networks that are nongovernmental, cross-border in scope, and play an important role in some international organizations.<sup>104</sup>

The distinction between state-based and nongovernmental cross-border interactions may seem simple, but it is not. In addressing this complexity, this section discusses government networks and the inhabitant-welfare exception to nonrecognition.

### 1. Government Networks

The direct foreign contact made among government officials who work outside of foreign ministries will be discussed first.<sup>105</sup> Some legal scholars describe such direct foreign contact as “government networks,”<sup>106</sup> while other scholars specializing in diplomacy use the word “paradiplomacy.”<sup>107</sup> Regardless of the nomenclature, this form of interaction is neither track-two nor multi-track diplomacy, which denotes the informal interaction between members of adversarial entities that is intended to be a complement to traditional diplomacy.<sup>108</sup> The “informal” nature of track-two and multi-track diplomacy leads it to differ from the formal interaction which serves as the hallmark of traditional diplomacy. Indeed, track-two or multi-track diplomacy is specifically “designed” by states to be informal in order to complement traditional diplomacy.<sup>109</sup> Informal interaction may serve as a litmus test before engaging in formal diplomacy, which decreases the likelihood of embarrassment should negotiations fail. The primary contexts in which scholars and politicians use track-two or multi-track diplomacy have been those of protracted conflict.<sup>110</sup> Given that the informal quality of these types of diplomacy is designed or authorized by traditional diplomats, this diplomacy

104. See, e.g., Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 348-72 (2006); see MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 6 (Cornell Univ. Press 1998); see Clark et al., *supra* note 6.

105. Paul W. Meerts, *The Changing Nature of Diplomatic Negotiation*, in *INNOVATION IN DIPLOMATIC PRACTICE* 79 (Jan Melissen ed., St Martin’s Press Inc., 1999).

106. See, e.g., SLAUGHTER, *supra* note 13; Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1-92 (2002).

107. See e.g., Meerts, *supra* note 105; Jan Melissen, *Introduction*, in *INNOVATION IN DIPLOMATIC PRACTICE* at xiv (Jan Melissen ed., St Martin’s Press Inc., 1999).

108. See John W. McDonald, *Further Exploration of Track Two Diplomacy*, in *TIMING THE DE-ESCALATION OF INTERNATIONAL CONFLICTS* 201 (Louis Kriesberg & Stuart J. Thorson eds., Syracuse Univ. Press 1991); Joseph V. Montville, *Transnationalism and the Role of Track Two Diplomacy*, in *APPROACHES TO PEACE: AN INTELLECTUAL MAP* 255, 255 (W. Scott Thompson & Kenneth M. Jensen eds., U.S. Institute of Peace Press 1991); Nadim N. Rouhana, *Unofficial Intervention: Potential Contributions to Resolving Ethno-national Conflicts*, in *INNOVATION IN DIPLOMATIC PRACTICE* 111, 113-14 (Jan Melissen ed., St Martin’s Press Inc., 1999).

109. *Id.*

110. *Id.*

should not be confused with forms of purely nongovernmental cross-border interaction.

While track-two or multi-track diplomacy is designed by states in protracted conflicts to decrease the likelihood of embarrassment, government networks exist primarily in liberal states that already have an extensive relationship. Government networks “grow out of various ‘reinventing government’ projects”<sup>111</sup> that “focus on the many ways in which private actors now can and do perform government functions, from providing expertise to monitoring compliance with regulations to negotiating the substance of those regulations, both domestically and internationally.”<sup>112</sup>

The role of private actors at the center of a definition of government networks presents a paradox that makes it difficult to categorize government networks as either state-based or nongovernmental. In response, the following pages discuss government networks in more detail and examine their characteristics.

Government officials who are not employed in foreign ministries make direct foreign contact in various forms of communication. Although this contact may occur through avenues as formal as an international organization, the contact more often occurs during informal visits<sup>113</sup> and conversations during breaks in formal meetings.<sup>114</sup> These officials constitute a large group of functionaries with widely different roles. According to Anne-Marie Slaughter, a pioneer in the analysis of government networks and Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, regulators, judges, and even legislators network or engage in direct foreign contact with their foreign counterparts.<sup>115</sup>

After analyzing dozens of examples of such government networks, in her book *A New World Order*, Slaughter concludes that direct foreign contact by these government officials serves three functions: (1) exchanging information and ideas, (2) enhancing cooperation among themselves to enforce existing national laws and rules, and (3) adopting international standards that are a compromise between the regulatory standards of two or more countries.<sup>116</sup>

First, government officials may exchange information regarding their various regulatory procedures and their competence, integrity, and professionalism.<sup>117</sup> Through such exchanges of information, government officials can enhance their country’s reputation and learn about other countries’ policy successes and failures.

111. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 13, at 9.

112. *Id.*

113. *Id.* at 36.

114. *Id.* at 52 (“As an hour in any big convention hotel will attest, participants go to panels on new developments and techniques in their profession, hold roundtable discussions sharing experiences, and network furiously in the lobbies.”).

115. *Id.*

116. *Id.* at 52-61.

117. *Id.* at 52-55.

Second, government officials—law enforcement officials in particular—can share their intelligence regarding specific cases through organizations and initiatives such as the International Police Organization (Interpol).<sup>118</sup> In addition to sharing intelligence regarding specific cases, law enforcement officials from various countries can exchange and learn from each other's experiences in a process called "capacity building."<sup>119</sup>

Third, government officials may work together either to adjust regulatory standards, such as product-safety standards, or to promote "mutual recognition by two countries of each other's regulatory standards and decisions on specific cases."<sup>120</sup> Slaughter points out the International Network for Environmental Compliance and Enforcement<sup>121</sup> and the International Competition Network<sup>122</sup> as organizations that promote this type of contact.

Slaughter stresses the informal quality of these networking activities among these government officials. She explains, "[w]e need more government on a global and a regional scale, but we don't want the centralization of decision-making power and coercive authority so far from the people actually to be governed."<sup>123</sup> On the one hand, these networks among government officials of different states may help them resolve cross-border problems more efficiently and effectively. On the other hand, they may ease the need of establishing more formal international treaties and organizations that some analysts criticize for infringing on state sovereignty.<sup>124</sup>

The significant and growing scholarship on government networks may be summarized as follows: If government officials do not wield enormous power in their respective states, then their meetings and conversations are simply meetings and conversations among citizens of their respective states. However, while the fact that they are government officials itself does not prevent them from meeting and engaging in conversation, their meetings and conversations carry more importance than those among ordinary citizens. Examining the importance of these meetings and conversations is a major contribution of the scholarship regarding government networks.

These government networks are not the predominant driving force affecting people's lives within the PRC-ROC relationship. PRC and ROC government officials do meet and engage in conversation with each other, and these face-to-face interactions may play a role in the PRC-ROC relationship. However, as this Article will demonstrate, the government mechanisms

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118. *Id.* at 55.

119. *Id.* at 52, 58.

120. *Id.* at 59.

121. International Network for Environmental Compliance and Enforcement Home Page, <http://www.inece.org/> (last visited May 10, 2009).

122. *Id.*

123. SLAUGHTER, A NEW WORLD ORDER, *supra* note 13, at 8.

124. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (Oxford Univ. Press, 2005); JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (Princeton Univ. Press, 2007).

between the PRC and the ROC are made to appear nongovernmental to avoid the adverse consequences of the entities' mutual non-recognition, and therefore they differ from the government networks that are driven by the networking activities of government officials.

## 2. *Inhabitant Welfare as an Exception to Nonrecognition*

The inhabitant-welfare exception presents another situation where the distinction between state-based and nongovernmental interaction is complicated. The inhabitant-welfare exception was created by the ICJ's 1971 Namibia Advisory Opinion.<sup>125</sup> It stipulated that the registrations of births, deaths, and marriages of an unrecognized regime, even though they were public acts, should still be deemed valid by other states because doing otherwise would adversely affect the welfare of the inhabitants living under that unrecognized regime.<sup>126</sup> Although giving effect to the public acts of an unrecognized regime is a government act, it is not a form of diplomacy. As interaction based upon the inhabitant-welfare exception is the type of cross-border interaction the examination of which helps one best understand the nature of the PRC-ROC relationship, it is described and analyzed in detail in this Article.

The inhabitant-welfare exception should be put into its context: using non-recognition as a punishment. Speaking at the 1933 American Society of International Law symposium, Frederick A. Middlebush, professor of political science and public law at the University of Missouri, explained: "State practice of withholding and delaying recognition of revolutionary or illegitimate governments, of new states and territorial acquisitions, and treaties affecting third parties, as a measure of coercion is not at all new in the history of international relations."<sup>127</sup> Middlebush cited the Serbian regicide government of 1903 and the Huerta régime in Mexico as examples in which international recognition of new governments was withheld or delayed in order to express international disapproval of the commission of atrocious crimes and the use of unconstitutional processes.<sup>128</sup> According to Middlebush, nonrecognition of revolutionary governments has "been frequently objected to as unsound in principle and of evil effect in practice. Judge John Bassett Moore is 'of the opinion that this practice has tended to give an undue emphasis to the question of formal recognition.'"<sup>129</sup>

The use of nonrecognition as a sanction is also known as the Hoover-Stimson doctrine<sup>130</sup> or the Stimson Doctrine,<sup>131</sup> named for its chief proponent,

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125. Namibia Advisory Opinion, *supra* note 16.

126. *Id.*

127. Frederick A. Middlebush, *Non-recognition as a Sanction of International Law*, 27 AM. SOC'Y INT'L L. PROC. 40, 40 (1933).

128. *Id.*

129. *Id.* at 44.

130. *Id.*

Henry L. Stimson. Stimson was serving as U.S. Secretary of State when the Empire of Japan installed Manchukuo, Japan's puppet regime, in the Northeast region of China.<sup>132</sup> On January 7, 1932, Stimson sent the following message to both China and Japan:

In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.<sup>133</sup>

On March 11, 1932, two months after Stimson had delivered his message, the Assembly of the League of Nations, with the abstention of China and Japan, resolved "not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."<sup>134</sup> A thoughtful analysis of the Stimson Doctrine was provided in 1933 by Arnold D. McNair.<sup>135</sup> Two parts of McNair's analysis are particularly relevant to the current relationship between the PRC and ROC, even though phrases such as "the newly annexed territory" and "the annexing state" are no longer applicable.<sup>136</sup>

First, addressing the issue of commercial treaties, McNair asserted:

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131. Arnold D. McNair, *The Stimson Doctrine of Nonrecognition: A Note on Its Legal Aspects*, 14 BRIT. Y.B. INT'L L. 65 (1933); John Trone, Note, *The Stimson Doctrine of Nonrecognition of Territorial Conquest*, 19 U. QUEENSLAND L.J. 160 (1996); David Turns, *The Stimson Doctrine of Nonrecognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 CHINESE J. INT'L L. 105 (2003).

132. See PRASENJIT DUARA, *SOVEREIGNTY AND AUTHENTICITY: MANCHUKUO AND THE EAST ASIAN MODERN* (Lanham: Rowman and Littlefield, 2003) for more information on Manchukuo.

133. McNair, *supra* note 131, at 65.

134. *Id.*

135. McNair was Reader in Public International Law at the University of Cambridge, and later a judge of the ICJ from 1946 to 1955, and President of the European Court of Human Rights from 1959 to 1965.

136. McNair, *supra* note 131, at 65.

Suppose that a non-recognizing state declines to regard commercial treaties with the annexing state as applicable to the newly annexed territory. The inhabitants of that territory will be denied the benefits of those treaties and their commerce will to that extent be restricted. *Per contra*, the commerce of the non-recognizing state will be similarly restricted. Theoretically it is perhaps conceivable that commerce might continue on the basis of any former commercial treaties applicable to the annexed territory, but that is unlikely when the territory is no longer under the control of the government which made the treaties.<sup>137</sup>

McNair's reasoning is that because nonrecognition between two entities makes previous treaties inapplicable and new treaties impossible, it severely restricts commerce. While McNair was insightful in pointing out the link between nonrecognition and commerce, if he were alive today, he would be surprised by the extent of the commerce between the PRC and the ROC, two entities that do not recognize each other. In other words, McNair's reasoning and the PRC-ROC relationship are incompatible and lead one to ask: how could extensive commerce have developed between two entities that do not recognize each other? The answer I offer at the conclusion of this Article is that even though the PRC and the ROC do not recognize each other, they have developed a relationship that, because it is neither state-based nor purely nongovernmental, enables their citizens to engage in commerce.

Regarding the effect of nonrecognition on extradition treaties, McNair elaborated:

[A] refusal by a non-recognizing state to regard extradition treaties with the annexing state as applicable to the newly annexed territory merely means that the non-recognizing state will not extradite to the annexing state fugitive criminals alleged to have committed crimes on the newly annexed territory, and will not demand from the annexing state alleged criminals who have found refuge on that territory. *The only persons likely to benefit are the alleged criminals.*<sup>138</sup>

McNair's assertion that "[t]he only persons likely to benefit are the alleged criminals"<sup>139</sup> is the most powerful statement on the effect of nonrecognition I have yet encountered. Perhaps precisely because the "only persons likely to benefit are the alleged criminals,"<sup>140</sup> the PRC and the ROC

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137. *Id.*

138. *Id.* (emphasis added).

139. *Id.*

140. *Id.*



have developed an extradition-like mechanism.<sup>141</sup> Overall, McNair was skeptical of the efficacy of the policy of nonrecognition without the application of other sanctions because he believed “[i]t is difficult to see how such a policy can do more harm to the wrongdoing state than to the non-recognizing states.”<sup>142</sup>

Despite the efforts of the League of Nations, eight states—Japan, El Salvador, Italy, Spain, Germany, Poland, Hungary, and Finland—recognized Manchukuo as a state<sup>143</sup> until the conclusion of the Second World War, when Manchukuo ceased to exist. Since the establishment of the United Nations, nonrecognition has been used several times as a sanction against a wrongdoer.<sup>144</sup>

The Stimson Doctrine may even have become customary international law. According to the Restatement (Third) of Foreign Relations Law of the United States, “[a] state has an obligation not to recognize or treat as a state an entity that has attained the qualification for statehood as a result of a threat or use of armed force in violation of the United Nations Charter”<sup>145</sup> as well as “an obligation not to recognize or treat a regime as the government of another state if the control has been effected by the threat or use of armed force in violation of the United Nations Charter.”<sup>146</sup>

In most situations, nonrecognition was simply declared, as it was in the Manchukuo situation. However, in Paragraph 125 of the Namibia Advisory Opinion, the ICJ states that inhabitant interests should be protected even if recognition is denied.<sup>147</sup> South West Africa, a former German colony, had been

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141. See *infra* Part III.

142. McNair, *supra* note 131, at 73.

143. Trone, *supra* note 131, at 163.

144. On November 12, 1965, the Security Council decided to “condemn the unilateral declaration of independence made by the racist minority in Southern Rhodesia and to call upon all states not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime.” S.C. Res. 216 U.N. Doc. S/RES/216 (Nov. 12, 1965). See also Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT’L L. 1-19 (1968). Between 1976 and 1982, the South African Parliament created four entities administered by black South Africans and subsequently encouraged black South Africans to live in these entities, leaving South Africa to white South Africans. The General Assembly declared this action illegal and called upon all States to deny any form of recognition to these four entities and refrain from having any dealings with them. G.A. Res. 1514 (1966). On November 18, 1983, the Security Council resolved that the declaration of independence by the Turkish Republic of Northern Cyprus (TRNC) was invalid and called upon “all States not to recognize any Cypriot State other than the Republic of Cyprus.” S.C. Res. 541 U.N. Doc. S/RES/541 (Nov. 18, 1983). On August 6, 1990, the Security Council responded to the Iraqi invasion of Kuwait by calling upon all States “not to recognize any régime set up by the occupying Power.” S.C. Res. 661 U.N. Doc. S/RES/0661 (Aug. 6, 1990).

145. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202.2 (1986).

146. *Id.* at § 203. The Restatement also offers additional examples in which nonrecognition was used as a sanction.

147. Namibia Advisory Opinion, *supra* note 16.

under South African administration as a Mandate before the United Nations replaced the League of Nations.<sup>148</sup> When the Trusteeship system of the United Nations replaced the Mandate system of the League of Nations, South Africa refused to comply with the Trusteeship system.<sup>149</sup> In 1966, the General Assembly of the United Nations responded by resolving to terminate the South African Mandate in South West Africa.<sup>150</sup>

In 1970, the Security Council declared South Africa's continued presence in South West Africa illegal and called upon all States "to refrain from any dealings with the Government of South Africa."<sup>151</sup> Further, the Security Council asked the ICJ for an advisory opinion on "the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)."<sup>152</sup> By a thirteen-to-two vote, the ICJ was of the opinion "(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory."<sup>153</sup> By an eleven-to-four vote, the ICJ was of the opinion:

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration [and] (3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.<sup>154</sup>

After clarifying the consequences of the nonrecognition of the South African administration, the ICJ asserted in Paragraph 125:

In general, the nonrecognition of South Africa's administration of the Territory *should not result in depriving the people of Namibia of any advantages derived from international co-operation*. In particular, while *official acts* performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are

148. *Id.*

149. *Id.*

150. G.A. Res. 2145 (Oct. 27, 1966).

151. S.C. Res. 276 (Jan. 30, 1970).

152. Namibia Advisory Opinion, *supra* note 16, at 58.

153. *Id.*

154. *Id.*

*illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.*<sup>155</sup>

Although the ICJ did not issue any further statements more specific than those cited above, it is laudable that the ICJ created an inhabitant-welfare exception to the use of nonrecognition as punishment. In so doing, the ICJ recognized that the negative consequences for the unrecognized government of an unrecognized entity should not result in negative consequences for its inhabitants, thus stressing the continued importance of protecting inhabitant welfare even during nonrecognition. Implicit in Paragraph 125 is the understanding that nonrecognition has punitive consequences for inhabitants; otherwise, the ICJ would not have needed to create the inhabitant-welfare exception.

As demonstrated by the events discussed above, the ICJ's creation of an inhabitant-welfare exception demonstrated its acknowledgement that nonrecognition leads to punitive consequences for the wrongdoing regime as well as the inhabitants under its control. Nonrecognition could have, as the ICJ noted, deprived the people of Namibia of advantages derived from international cooperation. In creating the exception, the ICJ sought to mitigate the unintended effects of earlier instances of nonrecognition.

However, the contexts of the Namibia Advisory Opinion and the PRC-ROC relationship are quite different; the mutual nonrecognition that exists between the PRC and the ROC is not intended as a form of punishment for either entity. Unlike situations in which nonrecognition was used as a sanction against wrongdoing, the mutual nonrecognition between the PRC and ROC has its origin in war, specifically the Chinese Civil War and the Cold War.<sup>156</sup> The PRC was established in 1949 but, as a result of the outbreak of the Korean War and the subsequent Cold War, the United States did not recognize it until 1979.<sup>157</sup> Neither the nonrecognition of the PRC by the United Nations before 1971, nor the nonrecognition of the ROC by the United States after 1979, was intended as a sanction against wrongdoing.<sup>158</sup> The enactment of the Taiwan Relations Act<sup>159</sup> by the United States, which gave Taiwan the right to sue in

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155. *Id.* at 56 (emphasis added).

156. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY (Harvard University Press, 1994).

157. *See, e.g.*, NORMALIZATION OF U.S.-CHINA RELATIONS: AN INTERNATIONAL HISTORY (William C. Kirby et al. eds., Harvard University Asia Center, 2005).

158. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. f (1986) (“A state derecognizes a regime when it recognizes another regime as the government. Thus, the United States, in recognizing the People’s Republic of China as the government of China in 1979, derecognized the regime on Taiwan, ‘the Republic of China,’ previously recognized as the government of China.”).

159. Taiwan Relations Act 22 U.S.C. §§ 3301-16.

U.S. courts, own property in the United States, and hold a position in the U.S. legal system as if Taiwan were a state, clearly indicated that the United States did not intend nonrecognition as a sanction.<sup>160</sup>

Nonetheless, the inhabitant-welfare exception created by the Namibia Advisory Opinion is relevant in the context of the PRC-ROC relationship because some politicians and scholars have called for similar exceptions to nonrecognition, but based upon a different reasoning. As stated earlier, the ICJ created the inhabitant-welfare exception for public acts that were comparable to the registration of births, deaths, and marriages. The underlying assumption of the inhabitant-welfare exception is that the registration of births, deaths, and marriages are public acts. Had the ICJ not created the inhabitant-welfare exception, the public acts of an unrecognized regime would have to be deemed invalid under international law.

However, as will be demonstrated in this Article, whether an act is, or appears, public or state-based determines whether the PRC and the ROC may put aside their mutual nonrecognition. Within the context of the PRC-ROC relationship, the registration of births, deaths, and marriages must have been considered, or have been made to appear, nongovernmental by the PRC and the ROC to be considered an exception to their mutual nonrecognition.<sup>161</sup> The ICJ, in contrast, does not deny that the registration of births, deaths, and marriages is public or state-based. Under the ICJ's approach—the inhabitant-welfare exception to nonrecognition—there is no need to make state-based interaction appear nongovernmental. Instead, the key consideration under the ICJ's approach is determining whether inhabitant welfare would be adversely affected by nonrecognition.

Gaining understanding of the inhabitant-welfare exception, therefore, helps one appreciate the motives underlying the PRC's and the ROC's efforts to make state-based interaction appear nongovernmental. As nonrecognition adversely affects trade and other forms of exchange between the PRC and the ROC, both entities may have, perhaps reluctantly, chosen to make their state-based interaction appear nongovernmental, instead of adopting the ICJ's approach that is based upon inhabitant welfare. This partly explains why the PRC-ROC relationship has defied the existing categories of cross-border interaction; by endeavoring to make their state-based interaction appear nongovernmental, the PRC and the ROC have invented their own cross-border interaction with little or no regard for the existing categories.<sup>162</sup> With this thesis

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160. *See, e.g.*, CHINA CROSS TALK: THE AMERICAN DEBATE OVER CHINA POLICY SINCE NORMALIZATION: A READER (Scott Kennedy ed., Rowman & Littlefield, 2002).

161. This is because nongovernmental appearance is currently the most important factor in determining whether any exceptions should be made to the mutual nonrecognition in the PRC-ROC relationship.

162. Some situations elsewhere may seem similar to the PRC-ROC interaction. First, some people may find the PRC-ROC interaction pertinent to the literature on conflict management, an example of which is a book written by Gabriella Blum of Harvard Law School in 2007, discussing the various agreements that were reached in the conflicts between India and Pakistan,

in mind, Part II and Part III further examine the PRC-ROC relationship to determine the extent to which it differs from the existing categories of cross-border interaction.

## II. CIVIL JUSTICE: CONFLICT OF LAWS

Part II aims to achieve two goals: (1) to demonstrate an important mechanism that has been made to appear nongovernmental but still reflects strong state preference and involvement; and (2) to describe activities that have been undertaken with little regard for government-to-government diplomacy but with attention to legal rules established by governments.<sup>163</sup> By fulfilling these two goals, Part II aids in supporting the thesis that the PRC-ROC relationship defies the existing categories of cross-border interaction.

### A. Choice of Law Issues

#### 1. Cases in PRC Courts

Several rules and cases in the PRC address choice of law issues in the

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Greece and Turkey (and Cyprus), and Israel and Lebanon (and Syria). GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES (Harvard Univ. Press 2007). Discussing the range of agreements reached between India and Pakistan, Blum even made a statement that in my opinion is equally applicable in the PRC-ROC context: "Many of the provisions of these islands of agreement were unique in the sense that they were not provided for in existing international agreements or treaties but were tailor-made, designed by the parties themselves to meet the specific needs and conditions of their situation. Indeed, anything else would have been impossible given the degree of interdependence existing between the populations." *Id.* at 79; see also G.R. BERRIDGE, TALKING TO THE ENEMY: HOW STATES WITHOUT 'DIPLOMATIC RELATIONS' COMMUNICATE (Palgrave Macmillan 1994). However, in none of the contexts discussed by Blum and Berridge has the distinction between governmental and nongovernmental been used or manipulated for a period of time as long as it has been in the PRC-ROC interaction. Neither did nongovernmental organizations established by governments figure prominently in Blum's and Berridge's books. Secondly, there are situations where nongovernmental organizations perform government functions. Nongovernmental organizations, for example, play an important role in the food crisis in the Democratic People's Republic of Korea (DPRK or North Korea). See e.g., Hazel Smith, *Overcoming Humanitarian Dilemmas in the DPRK (North Korea)*, UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO. 90 (July 2002), available at <http://www.usip.org/pubs/specialreports/sr90.html>. Some private for-profit companies even perform military functions for governments. See e.g., PETER W. SINGER, CORPORATE WARRIORS: THE RISE OF PRIVATIZED MILITARY INDUSTRY (Cornell Univ. Press, updated ed., 2007). However, it is still correct to state that, by endeavoring to make their state-based interaction appear nongovernmental, the PRC and the ROC have invented their own cross-border interaction with little or no regard for the existing categories. The PRC and the ROC have not made efforts to justify their SEF-ARATS mechanism and repatriation process by systematically studying foreign examples. See *infra* Parts II, III.

163. Several scholars have previously examined the conflict of law rules between the PRC and the ROC. For a brief summary and discussion of the scholarship on the conflict of law rules between the PRC and the ROC, see Chung, *supra* note 14. Part II contributes to the scholarship by examining the conflict of law cases as a way to test their generalizations. See *infra* Part II.

context of the commercial world within the PRC-ROC relationship. PRC law permits private parties to designate their choice of law at the time of contracting or when a dispute arises.<sup>164</sup> If private parties fail to agree on the choice of applicable law, PRC courts should apply the law of the place with the closest connection to the contract.<sup>165</sup> When PRC courts conduct the choice of law analysis applying the law of the place with the closest connection, courts have determined, without exception, that the PRC had the closest connection and that the PRC law should be the applicable law.<sup>166</sup> The following material demonstrates the manner in which PRC courts adjudicate cases that are “Taiwan-related.”

*Zheng Lianyu v. Zhao Wenzheng* is a typical commercial dispute.<sup>167</sup> Zheng Lianyu lived in the Mazhang District of Zhanjiang City, Guangdong Province, the PRC, while Zhao Wenzheng was a Taiwanese man whose “common place of residence in the Mainland” (內地經常居住地) was also in the Mazhang District.<sup>168</sup> Zheng sued Zhao for payment of RMB\$17,850 while Zhao countersued (反訴) Zheng for payment of RMB\$7,850.<sup>169</sup> Zheng and Zhao had signed a contract on January 28, 2003, in which Zhao offered seeds and skills in exchange for Zheng’s land and labor.<sup>170</sup> Zheng argued that he had fulfilled his obligations as prescribed in the contract, but Zhao argued that the products Zheng had produced failed to meet the required specifications.<sup>171</sup> The People’s Court of the Mazhang District rendered a judgment,<sup>172</sup> but it was later rescinded (撤銷) by the Intermediate People’s Court of Zhanjiang City. The Intermediate People’s Court reversed because the People’s Court of the Mazhang District lacked jurisdiction over “Taiwan-related civil and commercial cases” (涉臺民商事案件).<sup>173</sup> The Intermediate People’s Court of Zhanjiang City subsequently transferred the entire case to the Intermediate People’s Court of Guangzhou City, Guangdong Province.<sup>174</sup> The court stated that it had jurisdiction over this case because the case involved “a dispute arising out of a contract related to Taiwan” (涉臺合同糾紛) and because Zhao was “a resident of the Taiwan Area of ‘our country’” (我國臺灣地區居民). The court stated

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164. General Provisions of the PRC Civil Code, art. 145, <http://www.people.com.cn/GB/shehui/8217/39932/2944727.html> (last visited June 30, 2009).

165. *Id.*

166. *Id.* I derive my observation from the cases that I find.

167. Zhan Ma Fa Min Chu Zi No. 201 [Zheng Lianyu v. Zhao Wenzheng] (People’s Ct., Mazhang Dist., Zhanjiang City, Guangdong Province, 2004), found at Sui Zhong Fa Min San Chu Zi No. 17 (Intermediate People’s Court of Guangzhou City, Guangdong Province, June 7, 2005) (P.R.C.) LAWYEE, <http://www.lawyer.net> (last visited June 27, 2009).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Zhan Zhong Fa Min Er Zhong No. 65 (Intermediate People’s Ct., Zhanjiang City, 2004), found at Sui Zhong Fa Min San Chu Zi No. 17.

174. Sui Zhong Fa Min San Chu Zi No. 17.

that this Taiwan-related dispute “could be adjudicated in the way a foreign-related case would be adjudicated” (可參照涉外案件審理).<sup>175</sup>

Both the place of performing contractual obligations (履行地) and Zhao’s common place of residence were in Zhanjiang City.<sup>176</sup> With reference to Article 24 of the PRC *Civil Procedure Law*<sup>177</sup> and *Regulations on Several Problems of the Jurisdiction to Adjudicate Foreign-Related Civil and Commercial Cases*,<sup>178</sup> promulgated by the Supreme People’s Court, the court concluded that it had jurisdiction to adjudicate this case.<sup>179</sup>

The court then addressed the choice of law issue, noting that the parties had not chosen the law governing the disputes arising from their contract.<sup>180</sup> Article 126, Section 1 of the PRC *Contract Law* (中華人民共和國合同法)<sup>181</sup> provides that “[w]here parties to the foreign related contract failed to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto.”<sup>182</sup> The court concluded that “the law of the PRC Mainland”<sup>183</sup> should govern this dispute because both the place where the contract was signed and the place of performing contractual obligations (履行地) were in the PRC Mainland (我國內地).<sup>184</sup> Applying the PRC *Contract Law*, the court concluded that Zhao had neither inspected the products that Zheng produced nor notified Zheng of any defects within a reasonable period of time.<sup>185</sup> Based upon this conclusion, the court ruled that Zhao should

175. *Id.*

176. *Id.*

177. Civil Procedure Law of the People’s Republic of China (promulgated by the Order No 44 of the President of the People’s Republic of China, Apr. 9, 1991, effective Apr. 9, 1991) available at <http://www.unhcr.org/refworld/type,LEGISLATION,CHN,3ddbca094,0.html> [hereinafter PRC Civil Procedure Law]. The Romanization of the title is as follows: *zhonghua renmin gonghe guo minshi susong fa*.

178. Regulations on Several Problems of the Jurisdiction to Adjudicate Foreign-Related Civil and Commercial Cases. The Romanization of the title is as follows: *guanyu shewai min shang shi anjian susong guanxia ruogan wenti de guiding*.

179. Sui Zhong Fa Min San Chu Zi No. 17.

180. *Id.*

181. Contract Law of the People’s Republic of China (promulgated by the Second Session of the Ninth National People’s Congress, Mar. 15, 1999, effective Mar. 15, 1999) art. 126, §1, available at [http://www.novexc.com/contract\\_law\\_99.html](http://www.novexc.com/contract_law_99.html) [hereinafter PRC Contract Law].

182. *Id.* at art. 126, §1. The Romanization of the quoted text is as follows: *shewai hetong de dangshiren meiyou xuanze de shiyong yu hetong you zui miqie lianshi de guojia de falu*. Article 126, Section 1 is similar to Restatement (Second) of Conflict of Laws § 188.1 (1971), which states that, in absence of effective choice by the parties, “[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188.1 (1971). I choose the phrase “the closest connection” over the phrase “the most significant relationship” because “the closest connection” is closer to the Chinese words used in Article 126, Section 1.

183. Sui Zhong Fa Min San Chu Zi No. 17. The Romanization of the quoted text is as follows: *zhonghua renmin gonghe guo neidi falu*.

184. *Id.*

185. *Id.*

pay Zheng RMB\$17,850 and dismissed Zhao's countersuit against Zheng.<sup>186</sup>

Scholars of international law versed in the PRC-ROC relationship may have noted that the PRC court concluded that "the law of the *PRC Mainland*"<sup>187</sup> should be applied when a PRC court was directed by PRC law to "apply the law of the *country* that had the closest connection to the contract."<sup>188</sup>

Clearly, the "PRC Mainland" is not a country, nor does the PRC government ever assert as much. However, given the PRC's official position that the ROC may have its own legal system but must remain part of the Chinese state represented by the PRC government, the "PRC Mainland" is an inventive method of expression utilized by the court.

Following the same basic analysis, the Intermediate People's Court of Foshan City of Guangdong Province asserted jurisdiction and applied the "law of the Mainland" (內地法律)<sup>189</sup> to adjudicate a dispute between Deng Huasheng, a sole proprietor (個體工商戶) from the PRC, and Tailong Textile Company, a business located in the PRC but wholly owned by a Taiwanese man.<sup>190</sup> Tailong Textile Company was ordered by the court to pay Deng RMB\$60,900 plus interest accrued from "the date on which the suit commenced" (原告起訴之日) at the "Rate for Defaulted Loans" (逾期貸款利率) set by the People's Bank of China.<sup>191</sup>

Ideally, a judgment should be structured so that a jurisdictional analysis is followed by a choice of law analysis,<sup>192</sup> as the judgments discussed above and a number of others were.<sup>193</sup> However, in some cases, PRC courts did not analyze jurisdiction or choice of law at all. One such case was a 2005 case between a Taiwanese man and a PRC woman regarding living expenses for their illegitimate daughter.<sup>194</sup> Xu Weizhe, a Taiwanese man, had been married when, in 1994, he began living with Wei Jia, a woman of the PRC.<sup>195</sup> Their

186. *Id.*

187. *Id.* (emphasis added). The Romanization of the quoted text is as follows: *zhonghua renmin gonghe guo neidi falu*.

188. PRC Contract Law, *supra* note 181 (emphasis added). The Romanization of the quoted text is as follows: *shiyong yu hetong you zui miqie lianshi de guojia de falu*.

189. Scholars of international law who pay attention to the use of names in the PRC-ROC relationship may be surprised to see another method of expression, "the law of the Mainland." As stated earlier, there is no such a country as the "Mainland."

190. Fo Zhong Fa Min Si Chu Zi No. 179 (Intermediate People's Ct., Guangdong Province, Foshan City, November 21, 2005) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009) (P.R.C.).

191. *Id.*

192. SYMEON C. SYMEONIDES ET AL., *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* (2d ed. 2003).

193. *See, e.g.*, Sui Zhong Fa Min San Chu Zi No. 293 (Intermediate People's Court, Guangzhou City, Guangdong Province, October 9, 2007) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009) (P.R.C.).

194. Fo Zhong Fa Min Yi Zhong Chu Zi No. 137 (Intermediate People's Court of Foshan City, Guangdong Province, April 1, 2005) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009) (P.R.C.).

195. *Id.*



illegitimate daughter was born on April 23, 1997.<sup>196</sup> On July 1, 2004, Xu's daughter sued him<sup>197</sup> for living expenses in the People's Court of the Nanhai District, Foshan City, Guangdong Province. The court charged the Forensic Medicine Center of the Sun Yat-sen University<sup>198</sup> with determining whether the plaintiff was truly the defendant's daughter.<sup>199</sup> The Forensic Medicine Center found that the plaintiff indeed was the defendant's daughter.<sup>200</sup> The People's Court of the Nanhai District ordered Xu to pay his daughter RMB\$219,294.79 within ten days of the judgment's effective date, an amount that would provide for her living expenses until her eighteenth birthday.<sup>201</sup> Both the plaintiff and the defendant appealed to the Intermediate People's Court of Foshan City.<sup>202</sup> The Intermediate People's Court instead ordered Xu to pay his daughter RMB\$193,500 within ten days of the judgment's effective date, an amount calculated to cover her living expenses until her eighteenth birthday.<sup>203</sup>

## 2. Cases in ROC Courts

The ROC choice-of-law rules for cases between the PRC and the ROC can be found between Article 41 and Article 73 of the Act. As these rules are mainly facsimiles of rules in the ROC Act on the Application of Law in Foreign-Related Civil Disputes ("Foreign-Related Civil Disputes Act")<sup>204</sup>, I will not discuss them one by one. Rather, I will focus upon adoption rules and cases.

People should have the right to adopt children, but society as a whole has an interest in preventing fraud and abuse. As with similar issues, a balance must be struck between the competing policy objectives that are involved in adoption. I choose to focus upon adoption to highlight the societal interests involved in regulating adoption and their irrelevance to the government-to-government diplomacy between the PRC and the ROC.

Three articles of the Foreign-Related Civil Disputes Act pertain to adoption. First, Article 55 states that the law of the place where the father and child register their residence determines the requirements for adopting illegitimate children (認領), and that the law of the place where the father

196. *Id.*

197. Even though Xu's illegitimate daughter was only seven years old, it was her right to demand living expenses from her father. Her custodian may help her participate in legal proceedings.

198. The Romanization of its name is as follows: *zhongshan daxue fayi jianding zhongxin*.

199. Fo Zhong Fa Min Yi Zhong Chu Zi No. 137.

200. *Id.*

201. Nan Min Yi Chu Zi No. 1577 (People's Ct. of Nanhai Dist., Foshan City, Guangdong Province, 2004) (P.R.C.). *Id.*

202. *Id.* The plaintiff appealed because she was not satisfied with the amount of money the court ordered the defendant to pay her.

203. *Id.*

204. Act on the Application of Law in Foreign-Related Civil Disputes [hereinafter Foreign-Related Civil Disputes Act].

registers his residence determines the legal effects of such adoption.<sup>205</sup> Second, Article 56 provides that the law of the place where the adoptive parents and adopted child register their residence governs the formation and termination of an adoptive relationship (收養), and that the law of the place where the adoptive parents register their residence determines the legal effects of adoption.<sup>206</sup> Third, Article 65 prohibits the people of the Taiwan Area from adopting children of the Mainland Area under three circumstances: (1) they have had children or have adopted other children; (2) they have adopted two children of the Mainland Area simultaneously; or (3) the Taiwan government or private organizations authorized by the Taiwan government have not certified the specific circumstances.<sup>207</sup>

Article 1079, section 4 of the ROC Civil Code “requires adoptive relationships to be recognized by ROC courts.”<sup>208</sup> For example, on October 31, 2007, the Taipei District Court<sup>209</sup> recognized an adoptive relationship between adoptive parents and an adopted daughter as having been valid since June 18, 2007.<sup>210</sup> The court described the adopted daughter, born on September 25, 2005, as “a person of the Mainland Area” (大陸地區人士).<sup>211</sup> The adoptive parents and adopted child were required to pay a procedure fee of NT\$1,000.<sup>212</sup>

A 2001 case in Taiwan High Court illustrates the application of the three articles of the Foreign-Related Civil Disputes Act that pertain to adoption.<sup>213</sup> An ROC man<sup>214</sup> wanted to adopt Lee Weiyang, born on November 17, 1990, as his child.<sup>215</sup> Lee Weiyang’s mother, Li Aiping, had married the ROC man in 1996.<sup>216</sup> In 1998, Li Aiping gave birth to a daughter, Chen Wanyu.<sup>217</sup> In 2001, the ROC man applied to the Banqiao District Court, seeking recognition of the adoptive relationship between him and Lee Weiyang, his wife’s son.<sup>218</sup> However, the Banqiao District Court ruled against him because he had a daughter and was therefore prohibited by Article 65 of the Foreign-Related

205. *Id.* at art. 55.

206. *Id.* at art. 56.

207. *Id.* at art. 65.

208. ROC Civil Code, at art. 1079, §4 [hereinafter ROC Civil Code]. The Romanization of the quoted text is as follows: *shouyang zinu ying shengqing fayuan renke*.

209. A District Court (*difang fayuan*; 地方法院) in the ROC is a trial court at the lowest level of the court system.

210. Yang Sheng Zi Caiding, Judgment No. 197, The Judicial Yuan of the Republic of China Law and Regulations Retrieving System, <http://jirs.judicial.gov.tw/Index.htm> [hereinafter The Judicial Yuan Database] (District Ct., Taipei District, October 31, 2007). See *infra* Appendix 1.

211. *Id.*

212. *Id.*

213. Jia Kang Zi Caiding, Judgment No. 364, The Judicial Yuan Database (Taiwan High Ct., November 29, 2001).

214. Reports in the database did not disclose the names of the parties due to privacy concerns. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

Civil Disputes Act from adopting his wife's son.<sup>219</sup>

An adoption case in 2005 highlighted the willingness of the ROC judiciary to apply PRC law after it had determined that PRC law should be the applicable law.<sup>220</sup> Daniel,<sup>221</sup> a person of the Taiwan Area, and Patrick, a person of the Mainland Area, applied to the Taoyuan District Court to recognize the adoptive relationship (聲請認可收養) between them, but the Taoyuan District Court dismissed (駁回) the application.<sup>222</sup> Both applicants appealed (抗告) to the Taiwan High Court, but their application was again dismissed.<sup>223</sup>

The analysis of the Taiwan High Court was as follows: (1) Article 56, Section 1 of the Foreign-Related Civil Disputes Act states that "the law of the place where the adoptive parents and adopted child register their residence"<sup>224</sup> governs "the formation and termination of an adoptive relationship."<sup>225</sup> (2) Considering the law of the Mainland Area,<sup>226</sup> the court noted that Article 2 of the *Adoption Law* (收養法) states that only minors can be adopted.<sup>227</sup> (3) The court then noted that Article 14 of the *Adoption Law* states that when a single parent marries another person, that person may adopt the spouse's children with the permission from the biological parents of the children regardless of the restrictions that a person may adopt only one person, and that an adoptee must be at least fourteen years old.<sup>228</sup> (4) The court then noted that even though Article 14 of the *Adoption Law* lifts some restrictions, it does not supersede Article 2, and therefore that the spouse of a single parent may not adopt the parent's adult child.<sup>229</sup> As Patrick had been born on May 3, 1974 and was more than twenty-nine years old when Daniel had attempt to adopt him on November 7, 2003, Article 2 was applicable.<sup>230</sup> (5) The Taiwan High Court therefore affirmed the Taoyuan District Court's decision and, applying the *Adoption Law* of the Mainland Area, dismissed the application.<sup>231</sup>

Both applicants appealed to the Supreme Court, which repealed the Taiwan High Court's decision and remanded the case to the Taiwan High Court.<sup>232</sup> The Supreme Court stated that the following two issues should have

219. *Id.*; Foreign-Related Civil Disputes Act, *supra* note 204, at art. 65.

220. Tai Kang Zi Judgment No. 81, The Judicial Yuan Database (Sup. Ct. of the ROC, January 25, 2005).

221. The database did not disclose the names of the applicants. *Id.*

222. *Id.*

223. *Id.*

224. Foreign-Related Civil Disputes Act, *supra* note 204, at art. 56, § 1. The Romanization of the quoted text is as follows: *gegai shouyangzhe bei shouyang zhe sheji diqu zhi guiding*.

225. *Id.* The Romanization of the quoted text is as follows: *shouyang zhi chengli ji zhongzhi*.

226. The court used the Chinese translation of the phrase "Mainland Area," rather than the Chinese translation of "the PRC."

227. *Adoption Law* at art. 2.

228. *Id.* at art. 14.

229. Jia Kang Geng Yi Zi Caiding, Judgment No. 3.

230. *Id.*

231. *Id.*

232. *Id.*

been investigated: (1) when Article 14 is applied in the Mainland Area, does it prohibit an adult from being adopted; and (2) if so, why did the Bureau of Civil Affairs of the Chongqing City register the adoptive relationship between Daniel and Patrick?<sup>233</sup> The Supreme Court stated that the Taiwan High Court should apply the *Adoption Law* according to the court precedents (判例) and customs (習慣) of the Mainland Area instead of the Taiwan High Court's interpretation of the *Adoption Law* of the Mainland Area.<sup>234</sup> Although it would be highly interesting to observe how the Taiwan High Court complied with the Supreme Court's directive, the report was not available.

In addition to the choice of substantive law, procedural issues such as jurisdiction and recognition of foreign judgments are also important aspects of the corpus of conflict of law, and they will therefore be discussed in the following section.

### B. Procedural Issues

Procedural issues can be divided into the two categories: (1) jurisdiction, and (2) recognition and enforcement of foreign<sup>235</sup> judgments and arbitral awards. Central to both categories are the interface mechanisms between the PRC and the ROC. Acting as the interface between the PRC and ROC governments for procedural issues are the Association for Relations across Taiwan Strait ("ARATS")<sup>236</sup> in the PRC and the Strait Exchange Foundation ("SEF")<sup>237</sup> in the ROC, both of which were established as private organizations with government funding.<sup>238</sup> These organizations are intentionally made to appear nongovernmental in nature.<sup>239</sup>

The ARATS/SEF mechanism is important to the PRC-ROC relationship. When an ROC court needs to serve process on a defendant in the PRC, the ROC court sends the SEF a letter requesting assistance and a request that process be served.<sup>240</sup> The SEF then sends the process to be served as well as

233. *Id.*

234. *Id.*

235. The word "foreign" here means "non-native" (非本地的).

236. Taiwan Affairs Office of the State Council Home Page, [www.gwytb.gov.cn](http://www.gwytb.gov.cn) (last visited May 23, 2009) (containing the most authoritative information on ARATS).

237. Strait Exchange Foundation Home Page, [www.sef.org.tw](http://www.sef.org.tw) (last visited May 23, 2009).

238. *See supra* notes 236 and 237.

239. *Id.*

240. I find no formal rules governing this procedure until the signing of *Haixia liangan gongtong daji fanzui ji sifa huzhu xieyi* [Agreement on Fighting Crimes and Judicial Assistance across the Taiwan Straits] (海峽兩岸共同打擊犯罪及司法互助協議) on April 26, 2009, available at <http://www.mac.gov.tw/big5/cc3/ag3-1.pdf> (last visited June 29, 2009). These rules formalized the pre-existing practice, according to the ROC government. *See, e.g.*, Press Release of the ROC Ministry of Justice, *Haixia liangan gongtong daji fanzui ji sifa huzhu xieyi bushu zhiding ji xiuzheng falu* [The Agreement on Fighting Crimes and Judicial Assistance across the Taiwan Straits Does not Necessitate Enactment or Revision of Any Law], available at <http://www.mac.gov.tw/big5/gov/980505d.htm> (last visited June 29, 2009).

another letter written by the SEF to the ARATS, which then sends its own letter and the process to be served to the appropriate PRC court.<sup>241</sup> The PRC court then serves process on the defendant in the PRC, and the defendant is thereby notified of the commencement of the suit.<sup>242</sup> PRC courts serve processes on defendants in the ROC in the same manner, but in the reverse direction.<sup>243</sup>

This process, called document authentication (文書驗證), is used not only for the distribution of court processes, but also for a wide variety of government documents, including court judgments, as stipulated by the *Agreement on the Use and Verification of Certificates of Authentication across the Taiwan Straits* (兩岸公證書使用查證協議) signed by the SEF and the ARATS on April 29, 1993.<sup>244</sup> This process is resilient and stable, having weathered turbulence in the political relationship between the PRC and the ROC. After the former ROC President Lee Teng-hui announced the special state-to-state theory in 1999, the talks between the ARATS and the SEF did not resume until 2008 when Ma became President of the ROC.<sup>245</sup> However, the SEF-ARATS channel continues to operate. Between June 1991 and November 2005, a total of 34,705 document authentications occurred through the SEF-ARATS channel between the PRC and the ROC.<sup>246</sup>

In addition, the institution of notary most resembles the technical character of “registration” that the 1971 Namibia Advisory Opinion referred to in identifying the “registration” of births, deaths, and marriages as exemplary of the detrimental effects of nonrecognition upon inhabitants. The institution of notary makes it possible for Mainland residents to use the certificates issued by the PRC government in the ROC and vice versa. The process is as follows: When a person in the ROC wants to use in the PRC a certificate issued by the ROC government, he or she must first go to the SEF. The SEF photocopies the certificates to be authenticated and then issues a formal letter to the applicant. Meanwhile, the SEF sends a letter directly to the ARATS. The applicant then travels to the PRC with both the formal letter issued by the SEF and the government certificate, and submits them to the appropriate PRC government

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241. *Id.*

242. *Id.*

243. *Id.*

244. Agreement on the Use and Verification of Certificates of Authentication across the Taiwan Straits, <http://www.sef.org.tw/ct.asp?xItem=48904&ctNode=4384&mp=300> (last visited June 29, 2009).

245. This was because the PRC conditioned the resumption of the negotiations between the ARATS and the SEF on the acceptance of its one-China principle by the ROC. In fact, the PRC argued that the simultaneous acceptance of the one-China principle by both the PRC and the ROC was what actually made all the SEF-ARATS negotiations possible. In the negotiations regarding the charter flights during the Lunar New Year in 2003, 2005, and 2006, the PRC made public that it would not negotiate with the staff of the SEF unless the SEF, namely the ROC government, accepted the one-China principle. As the SEF did not submit to the demands of the PRC, the standoff continued until Ma Ying-jeou became the ROC's President on May 20, 2008. See *supra* Parts I, IV.

246. <http://www.sef.org.tw/xls/statist/st14.xls> (last visited May 23, 2009).

office. The PRC government office verifies with the ARATS whether the SEF truly verified the authenticity of the certificate provided to the PRC government office. As can be observed, while the PRC and ROC do not have embassies in the other's area<sup>247</sup> that can verify the authenticity of documents, they do have functional equivalents that facilitate transactions between the PRC and the ROC.

The inventive nature of this process of document authentication is a major reason why the PRC-ROC relationship defies the existing categories of cross-border interaction. There is no question that the ARATS and the SEF are private associations or foundations. The PRC and ROC governments deliberately made the ARATS and the SEF nongovernmental in nature, and their efforts underscore these organizations' nature, or at least their nature had there been no such efforts, as governmental mechanisms. The ARATS/SEF mechanism solves the problem of nonrecognition by manipulating the distinction between state-based and nongovernmental interaction, and has become the foundation for the economic and social interaction between the PRC and the ROC, alleviating some of the inconveniences of nonrecognition discussed in Part I.<sup>248</sup> Nonetheless, it must be remembered why the ARATS/SEF mechanism was needed and therefore created. The ARATS and the SEF are not simply nongovernmental organizations; as two organizations entrusted with the task of document authentication, the ARATS and the SEF carry out an important government function and have a monopoly in performing the task of document authentication between the PRC and the ROC.

The remainder of this section discusses the legal rules pursuant to which the PRC and ROC courts have addressed the procedural issues relating to civil litigation that have arisen from the ongoing interaction between the PRC and the ROC.

### *1. Jurisdiction*

Jurisdiction, the power of a court to adjudicate a case, is determined prior to the deliberation of substantive issues in litigation. Therefore, if a court is found to have no jurisdiction, it cannot proceed to determine choice of law for a case. The issue of jurisdiction arises within the context of the PRC-ROC relationship in a number of different forms.

#### *a. Jurisdiction and Residence*

The residence of the parties to litigation may determine whether a court has jurisdiction over their case. A good example of this is a 2007 case in which an ROC court ruled that it lacked jurisdiction because the plaintiff should have

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247. I avoid the word "territory" because the PRC and the ROC reserve the word "territory" for the territory of the Chinese state. *See supra* Part I.

248. *See supra* Part I.

brought the suit in a PRC court.<sup>249</sup> The plaintiff was a father who brought suit against his child, arguing that he was not the biological father of the child.<sup>250</sup> The court cited Article 249, Section 1, Paragraph 2 of the *Civil Procedure Law*, which states that a suit to deny the parent-child relationship (否認子女之訴) “should be adjudicated in the court at the place where the child resides or, if the child has died, where the child resided at death, and nowhere else.”<sup>251</sup> The court also cited Article 589 of the *Civil Procedure Law*, which states that a court should dismiss (駁回) the suit by a decision (裁定) “if the suit should not be adjudicated in the court and the court cannot transfer the suit to a court with jurisdiction.”<sup>252</sup> The court noted that the place where the plaintiff’s child resided (子女住所地) was in the Guangxi Province of the Mainland Area, and therefore that this suit violated Article 249, Section 1, Paragraph 2 of the *Civil Procedure Law*.<sup>253</sup> At the same time, the court noted that it was impossible to transfer the suit to a court in the Guangxi Province of the Mainland Area, and therefore, pursuant to Article 589 of the *Civil Procedure Law*, the court dismissed the suit.<sup>254</sup>

PRC courts address the jurisdiction issue pursuant to Article V of the *Regulation on the Problems of Jurisdiction of Foreign-Related Civil and Commercial Litigation* (“Regulation”), promulgated by the PRC Supreme People’s Court and valid since March 1, 2002.<sup>255</sup> Article V states that the remainder of the Regulation governs jurisdiction in civil and commercial litigation involving private parties who are from Hong Kong, Macau Special Administrative Regions, and the Taiwan Area.<sup>256</sup>

The case between Lin Chong and Zhang Jianzhen demonstrates an application of the PRC jurisdictional rule based on residence.<sup>257</sup> Even though both Lin and Zhang were Taiwan residents, a PRC court asserted its jurisdiction over their case.<sup>258</sup> Zhang had borrowed NT\$6,200,000 from Lin in Taiwan in

249. Qin Zi Judgment No. 102, The Judicial Yuan Database (Dist. Ct., Taipei Dist., October 17, 2007).

250. *Id.*

251. *Id.*; ROC Civil Procedure Law, available at The Laws and Regulations Database of The Republic of China, <http://law.moj.gov.tw/Scripts/Query4B.asp?FullDoc=&Lcode=B0010001> (last visited June 30, 2009). The Romanization of the quoted text is as follows: *zhuanshu zinu zhushuo di huo qi siwang shi zhushuo di zhi fayuan guanxia*.

252. *Id.* The Romanization of the quoted text is as follows: *susong shijian bu shu shousu fayuan guanxia er buneng yi caiding yisong yu qi guanxia fayuan*.

253. *Id.*

254. *Id.*

255. *Zuigao renmin fayuan guanyu shewai minshangshi anjian susong guanxia ruogan wenti de guiding* [Regulation on the Problems of Jurisdiction of Foreign-Related Civil and Commercial Litigation] (最高人民法院關於涉外民商事案件訴訟管轄若干問題的規定), available at [http://www.law-lib.com/law/law\\_view.asp?id=17055](http://www.law-lib.com/law/law_view.asp?id=17055) (last visited June 30, 2009).

256. *Id.*

257. Lin Chong (林冲) v. Zhang Jianzhen (張劍珍), see LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009) (P.R.C.). The detailed citation of this case is not available from the database.

258. *Id.*

1995 but later defaulted.<sup>259</sup> The two negotiated another contract (借據) in Xiamen City, Fujian Province, the PRC, on August 26, 1998.<sup>260</sup> This contract stated that after Zhang had transferred to Lin his ownership of two apartments, the total amount owed by Zhang to Lin would become RMB\$1,124,000.<sup>261</sup> As Zhang had paid Lin nothing since August 26, 1998, Lin sued Zhang in the People's Court of Huli District, Xiamen City, Fujian Province, the PRC, on September 1, 2000.<sup>262</sup>

Zhang objected to the jurisdiction (提出管轄權異議) of the People's Court of the Huli District on October 9, 2000, though he should have done so within fifteen days of September 1, as required by the PRC law.<sup>263</sup> Zhang argued the following: (1) that both plaintiff and defendant were Taiwan residents; (2) that the domiciles (*juzhu di*; 居住地) of both parties were in Taiwan; (3) that "both parties had identity cards issued by Taiwan;"<sup>264</sup> (4) that the transaction had been carried out in Taiwan in the denomination of the New Taiwan dollar; (5) that the contract made on August 26, 1998, did not require adjudication in Mainland China (*zhongguo dalu*; 中國大陸); and (6) that the parties had not designated in writing Mainland courts (大陸法院) as the forum to resolve any future disputes.<sup>265</sup> The People's Court of the Huli District ruled against Zhang.<sup>266</sup> The court stated that when a defendant's domicile (*zhusuo di*; 住所地) and his common place of residence (*jingchang juzhu di*; 經常居住地) were different, the People's Court of the defendant's common place of residence had jurisdiction.<sup>267</sup> The court found the common place of residence of Zhang, the defendant, to be in the Huli District.<sup>268</sup> In addition, the court noted that Zhang did not object to the court's jurisdiction within fifteen days after receiving a copy of the complaint submitted by the plaintiff to the court.<sup>269</sup>

Zhang appealed to the Intermediate People's Court of Xiamen City, but his appeal was dismissed on December 9, 2000.<sup>270</sup> The court ruled that Zhang had not lost the right to raise jurisdictional objection because the People's Court of the Huli District did not notify Zhang that any jurisdictional objection had to be raised within fifteen days.<sup>271</sup> However, the court ruled that even though Zhang could still raise his jurisdictional objection, his objection should

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* The Romanization of the quoted text is as follows: *shuangfang de shenfen zheng douwei Taiwan.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*



be dismissed.<sup>272</sup> The court stated that even though Zhang was a “resident (*jumin*; 居民) of the Taiwan Province,” Zhang had lived in the Huli District since 1995 and therefore Zhang’s common place of residence was the Huli District, which gave the People’s Court of the Huli District the jurisdiction to adjudicate this case.

*b. Forum-Selection Clauses*

The parties to a contract may select the court in which disputes between them will be adjudicated by inserting a so-called “forum selection clause” into the contract, which may also affect the determination of jurisdiction. An example of the application of such clauses is seen in a 1996 case decided by the ROC Supreme Court.<sup>273</sup> In 1993, Shilin Construction Company (“Shilin”) sold Qiaomao Electronics Company (“Qiaomao”) a tract of land numbered B-17 and the industrial buildings on it in the Huizhou Industrial Park in the PRC.<sup>274</sup> Shilin later asked Qiaomao to accept the tract of land numbered C-9 instead of B-17 because the PRC government did not allow buildings on the tract of land numbered B-17.<sup>275</sup> Qiaomao refused to accept this change and notified Shilin of its intent to rescind the contract (解除契約).<sup>276</sup> Shilin’s most important defense was that the “ROC courts” (中華民國法院) had no jurisdiction because the contract between Shilin and Qiaomao specified the “Huizhou People’s Court,”<sup>277</sup> a PRC court, as the only court that could adjudicate disputes arising out of that contract.<sup>278</sup> On October 26, 1995, the Taiwan High Court ruled against Shilin’s jurisdictional objection, because “our country” (我國) and the Mainland Area are still divided and governed separately (分裂分治), and because the parties could not limit the jurisdiction of “our country” by choosing a forum outside “the area that the civil procedure law of ‘our country’ actually governed.”<sup>279</sup>

However, on August 29, 1996, the ROC Supreme Court overturned the Taiwan High Court’s judgment and stated that if the courts of the Taiwan Area did not have exclusive jurisdiction over this case under ROC law and the courts of the Mainland Area allowed people of the Taiwan Area to choose a forum in the Mainland Area by contractual agreement, the contractual agreement in question was effective.<sup>280</sup>

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272. *Id.*

273. Tai Shang Zi Judgment No. 1880, The Judicial Yuan Database (Supreme Ct., August 29, 1996).

274. *Id.*

275. *Id.*

276. *Id.*

277. The Romanization of the quoted text is as follows: *huizhou renmin difang fayuan*.

278. Tai Shang Zi Judgment No. 1880.

279. Shang Zi Judgment No. 873, The Judicial Yuan Database (Taiwan High Ct., October 26, 1995). The Romanization of the quoted text is as follows: *woguo minshi susong fa shishi shang suode guifan zhi diqu*.

280. Tai Shang Zi Judgment No. 1880.

The ROC Supreme Court additionally held that, if the contractual agreement was effective and exclusive (排他性) and one of the parties used it as a defense, then the courts of the Taiwan Area had no jurisdiction.<sup>281</sup> The ROC Supreme Court remanded the case to the Taiwan High Court<sup>282</sup> to investigate whether the courts of the Taiwan Area had exclusive jurisdiction over this case under ROC law, whether the courts of the Mainland Area could allow the parties (兩造) to choose a forum in the Mainland Area by contractual agreement, and whether the contractual agreement in question was exclusive in nature.<sup>283</sup>

### *c. The Effect of Arbitration Clauses in PRC Courts*

Parties to a contract may elect to arbitrate, rather than litigate, their disputes through a so-called “arbitration clause” inserted into the contract. These clauses may also affect the determination of jurisdiction. In addition to conforming to other requirements for valid contractual clauses, an arbitration clause must be sufficiently specific regarding the place of arbitration and the method of forming an arbitration panel. If an arbitration clause is found to be valid, the court should dismiss the suit. If an arbitration clause is found to be invalid, the court may entertain the suit. The following section discusses one case that exemplifies each category.

In a 2005 case concerning the effect of an arbitration clause on the jurisdiction of a PRC Court, the court found the arbitration clause in question to be invalid.<sup>284</sup> The Zhenhua Trading Company,<sup>285</sup> a Hong Kong<sup>286</sup> company, and the Underground Space Development Company (the “USDC”),<sup>287</sup> incorporated in Harbin City, Heilongjiang Province, the PRC, signed a contract entitled “On the Joint Venture of the Zhenhua Trading Company in Harbin” on July 18, 1993, with the purpose of developing an underground business center at the Harbin City train station.<sup>288</sup> Article 42 of the contract stated the law of the PRC governed “the formation, efficient interpretation, performance of the

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281. *Id.*

282. The ROC Supreme Court does not itself investigate facts. It only reviews issues of law and remands a case to lower courts if there are issues of fact requiring investigation.

283. Tai Shang Zi, Judgment No. 1880. In dictum, the ROC Supreme Court stated that if the Huizhou Court of the Mainland Area had jurisdiction, then the Taipei District Court should have dismissed Qiaomao’s suit at the district level because, in this circumstance, the Taipei District Court had no jurisdiction and could not transfer the case to the Huizhou Court of the Mainland Area “where our legal power did not reach” (我法權所不及). *Id.*

284. Min Si Zhong Zi No. 13 (Sup. People’s Ct., April 25, 2005) LAWYEE, <http://www.lawyer.net> (last visited June 27, 2009) (P.R.C.).

285. The Romanization of its title is as follows: *zhenhua maoyi youxian gongsi*.

286. This case itself did not involve any party from Taiwan, but the legal rules that the PRC Supreme People’s Court used to reach its conclusion have implications for Taiwan-related cases. More details are provided in later sections.

287. The Romanization of its title is as follows: *dixia kongjian kaifa jianshe gongsi*.

288. Min Si Zhong Zi No. 13.

contract, and the resolution of any disputes.”<sup>289</sup> Article 43 stated that “all disputes arising out of the performance of, or related to, this contract”<sup>290</sup> “should be resolved by friendly negotiation”<sup>291</sup> but “if negotiation fails, should be submitted to arbitration institutions”<sup>292</sup> whose “arbitral awards would be final and binding on both parties.”<sup>293</sup> On August 20, 1993, the Planning Committee (計劃委員會) of Harbin City permitted the joint venture, named the Zhenhua Infrastructure Company,<sup>294</sup> to do business for thirty years.<sup>295</sup> On May 22, 1995, the Bureau Managing Foreign Capital (外資管理局) of Harbin City allowed the Zhenhua Infrastructure Company to change its name to Yonghua Infrastructure Inc. (“YII”).<sup>296</sup> On September 16, 1998, the Bureau Managing Foreign Capital of Harbin City permitted Underground Construction Inc. (“UCI”),<sup>297</sup> incorporated in Harbin City, Heilongjiang Province, the PRC, to replace the USDC as an investor in YII.<sup>298</sup> On April 20, 1999, the Zhenhua Trading Company transferred its investment in YII to the Yonghua Investment Company (“YIC”),<sup>299</sup> incorporated in the Hong Kong Special Administrative Region.<sup>300</sup>

On January 17, 2004, the YIC sued the USDC and YII in the High People’s Court (高級人民法院) of Heilongjiang Province.<sup>301</sup> The YIC complained that the USDC had not invested the full amount of money it should have invested in YII.<sup>302</sup> The YIC sought to have the court liquidate (進行清算) the assets of YII, confirm the YIC’s right to make important decisions for YII, convene YII’s shareholder meetings, access YII information, and order the defendants to compensate the YIC for the loss of RMB\$30 million.<sup>303</sup> On March 8, 2004, YII objected to the jurisdiction of the High People’s Court of

289. *Id.* The Romanization of the quoted text is as follows: *ben hetong de dingli xiaolu jieshi luxing he zhengyi de jie jue.*

290. *Id.* Romanization of the quoted text is as follows: *fan yin zhixing ben hetong suo fasheng de huo yu ben hetong youguan de yiqie.*

291. *Id.* The Romanization of the quoted text is as follows: *shuangfang ying tongguo youhao xieshang jie jue.*

292. *Id.* The Romanization of the quoted text is as follows: *ruguo xieshang buneng jie jue ying tijiao zhongcai jigou de zhongcai chengxu jinxing.*

293. *Id.* The Romanization of the quoted text is as follows: *zhongcai caijue shi zhongju de dui shuangfang dou you jushu li.*

294. *Id.* The Romanization of its title is as follows: *zhenhua gonggong sheshi youxian gongsi.*

295. *Id.*

296. *Id.* The Romanization of its title is as follows: *yonghua gonggong sheshi youxian gongsi.*

297. *Id.* The Romanization of its title is as follows: *dixia jianzhu gongcheng gongsi.*

298. *Id.*

299. *Id.* The Romanization of its title is as follows: *yonghua touzi youxian gongsi.*

300. *Id.* Hong Kong has been a Special Administrative Region of the People’s Republic of China since after 1997.

301. Hei Gao Shang Chu Zi Caiding No. 4-2, (High People’s Ct. of Heilongjiang Province, 2004), found at Min Si Zhong Zi No. 13.

302. *Id.*

303. *Id.*

Heilongjiang Province, arguing that the contract signed on July 18, 1993 required that parties submit their disputes to arbitration institutions.<sup>304</sup> The High People's Court dismissed the jurisdictional objection,<sup>305</sup> and the Supreme People's Court dismissed the resulting appeal on September 8, 2004.<sup>306</sup>

On December 16, 2004, the YIC requested the court to change the defendant from the USDC to UCI because, on September 16, 1998, the Bureau Managing Foreign Capital of Harbin City permitted UCI to take the place of the USDC as an investor in YII.<sup>307</sup> After the High People's Court of Heilongjiang Province served process (送達訴狀) on UCI, UCI objected to the jurisdiction of the court, arguing that the contract signed on July 18, 1993, required that the parties submit their disputes to arbitration institutions.<sup>308</sup> The High People's Court of Heilongjiang Province dismissed the objection, stating that "Chinese law should be applied" (應當適用中國法律) in such a "Hong Kong related case arising out of the performance of a contract of a Chinese-foreign joint venture";<sup>309</sup> that Article 43 of the contract signed on July 18, 1993, specified neither the place of arbitration (仲裁地點) nor the arbitration panel (仲裁委員會);<sup>310</sup> that the parties had reached no additional agreements regarding the place of arbitration or the formation of an arbitration panel,<sup>311</sup> and that therefore Article 43 was invalid under Article 16 and Article 18 of the *Arbitration Law* of "our country" (*wo guo*; 我國).<sup>312</sup>

In another case, the court found the arbitration clause in question to be valid, and therefore that the dispute should be resolved through arbitration

304. *Id.*

305. *Id.*

306. Min Si Zhong Zi Caiding No. 7, (Sup. People's Ct., September 8, 2004), found at Min Si Zhong Zi No. 13.

307. Min Si Zhong Zi No. 13.

308. Hei Gao Shang Chu Zi Caiding No. 4-4 (High People's Ct. of Heilongjiang Province, 2004) (P.R.C), found at Min Si Zhong Zi No. 13.

309. Min Si Zhong Zi No. 13. The Romanization of the quoted text is as follows: *yin luxing zhongwai hezuo jingying qiye hetong fasheng de she gang jiu fen anjian*.

310. *Id.*

311. *Id.*

312. *Id.*; PRC Arbitration Law, LAWINFOCHINA (last visited June 30, 2009). Later, UCI appealed to the Supreme People's Court, arguing that the High People's Court of Heilongjiang Province should have reported its decision to adjudicate the case to the Supreme People's Court before it had served process on UCI. UCI cited Article 1 of the *Notice on Problems of Foreign-Related Arbitration* (處理與涉外仲裁事項有關問題的通知) issued by the Supreme People's Court, Fa Fa No. 18 (1995). Article 1 requires People's Courts to report their decisions to adjudicate cases to the Supreme People's Court when People's Courts find the arbitration clause or agreement between the parties to be invalid or unable to be enforced due to lack of specificity before People's Courts begin to adjudicate the cases. The Supreme People's Court ruled against UCI, stating that Article 1 of the *Notice on Problems of Foreign-Related Arbitration* only applied when all the parties in a suit agreed to the arbitration clause or agreement; that YII, the joint venture, did not consent to the arbitration clause in the contract signed on July 18, 1993; and, therefore, the High People's Court of Heilongjiang Province had rightfully served the process on UCI.

rather than adjudication.<sup>313</sup> The Fuyuan Company (“Fuyuan”),<sup>314</sup> incorporated in Taiwan, sued the Weige Wood Product Company (“Weige”),<sup>315</sup> incorporated in Xiamen City, Fujian Province, the PRC, in the People’s Court of Kaiyuan District (區), Xiamen City.<sup>316</sup> Fuyuan signed a contract with Weige on April 25, 1995, agreeing to buy 600 cubic meters of *Fokiena hodginsii* (福建柏木), a kind of wood used for buildings, furniture, and sculptures, at the price of US\$96,000.<sup>317</sup> The contract between Fuyuan and Weige specified the quality of *Fokiena hodginsii* required and the method of testing for quality (驗貨方式).<sup>318</sup> Article 7 of the contract provided that disputes should be resolved “by friendly negotiations or arbitration by the International Chamber of Commerce.”<sup>319</sup> Fuyuan issued a letter of credit in the amount of US\$96,000; claimed that Weige had failed to meet its contractual obligations;<sup>320</sup> and sought to have the court order that Weige return US\$31,180, compensate for the loss of US\$27,520, and pay the testing fees (驗貨費用) of HK\$98,000 and notary fees (公證費) of HK\$3,000.<sup>321</sup> Weige argued that Article 7 of the contract in question required arbitration and requested the court dismiss the suit for lack of jurisdiction.<sup>322</sup>

On October 27, 1995, the People’s Court of Kaiyuan District (區) dismissed Weige’s jurisdictional objection, finding that Article 7 failed to specify a concrete arbitration panel or institution.<sup>323</sup> However, when Weige appealed to the Intermediate People’s Court of Xiamen City, Fujian Province, the Intermediate People’s Court ruled against Fuyuan, stating that the specification of the International Chamber of Commerce as the arbitrator in Article 7 was sufficiently specific and that Article 7 was therefore valid.<sup>324</sup>

#### *d. Jurisdiction and Location of Debtor’s Assets*

Whether a court has jurisdiction over an action that seeks to enforce a judgment against a debtor may be determined by whether the court has jurisdiction over any of the debtor’s assets. If a debtor has assets in the area

313. Kai Jing Chu Zi Caiding No. 364 (People’s Ct. of Kaiyuan Dist. (*qu*), Xiamen City, Fujian Province, October 27, 1995) (P.R.C.), *aff’d*, Xia Jing Kao Zi Caiding No. 18 (Interm. People’s Ct. of Xiamen City, Fujian Province, July 2, 1996) (P.R.C.).

314. The Romanization of its title is as follows: *fuyuan qiye youxian gongsi*.

315. The Romanization of its title is as follows: *weige mu zhipin youxian gongsi*.

316. Kai Jing Chu Zi Caiding No. 364.

317. *Id.*

318. *Id.*

319. *Id.* The Romanization of the quoted text is as follows: *shuangfang jinxing youhao xieshang jie jue huo yi guoji shanghui zhongcai wei*.

320. Reports in the database did not specify the reason why Fuyuan claimed that Weige had failed to meet its contractual obligations. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Xia Jing Kao Zi Caiding No. 18.

over which the court has jurisdiction, then his or her creditor may bring an action in that court to enforce a judgment against the debtor. If a debtor has no assets in the area, then his or her creditor must rely on other jurisdictional bases, such as the debtor's residence; otherwise, the creditor may not bring an action to enforce a judgment against the debtor in that court.

For example, in a 2004 case, a PRC court analyzed the issue of jurisdiction before determining whether to recognize and enforce an "order to pay" (支付命令) rendered by an ROC court.<sup>325</sup> The Huangqi Information Corporation ("Huangqi")<sup>326</sup> owed Hamburgische Landesbank-Girozentrale US\$7,411,305.59.<sup>327</sup> Huangqi and its chairman, Huang Rongchuan, were ordered by the Banqiao District Court to pay that amount plus interest at an annual rate of five percent and a court fee of NT\$147 within twenty days of receiving the "order to pay."<sup>328</sup> As neither Huangqi nor Huang objected to the "order to pay" within twenty days of receipt, the court order to pay, per ROC law, became enforceable.<sup>329</sup> On July 4, 2003, the Banqiao District Court issued a certificate (證明書) for the enforceability of the "order to pay."<sup>330</sup> On June 2, 2003, Hamburgische Landesbank-Girozentrale merged with Landesbank Schleswig-Holstein Girozentrale to become HSH Nordbank AD ("Nordbank").<sup>331</sup> Nordbank applied to the Intermediate People's Court of Dongguan City, Guangdong Province, the PRC, on June 17, 2004, for recognition and enforcement of the "order to pay" that had been issued by the "Banqiao District Court of the Taiwan Area"<sup>332</sup> against Huangqi.<sup>333</sup>

The court dismissed the case for lack of jurisdiction.<sup>334</sup> According to a document (批復) issued by the Supreme People's Court, People's Courts should consider the "orders to pay" and the certificates of their enforceability in accordance with the *Regulation on the People's Courts' Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area*, promulgated by the Supreme People's Court and valid since May 26, 1998.<sup>335</sup> Specifically,

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325. Dong Zhong Fa Min Si Chu Ren Zi Caiding No. 1 (Interm. People's Ct., Dongguan City, Guangdong Province, December 4, 2006) (P.R.C.), available at <http://www.dgcourt.gov.cn/sitemag/shownews.asp?id=760> (last visited June 30, 2009).

326. The Romanization of its title is as follows: *huang qi zixun gufen youxian gongsi*.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* The Romanization of the quoted text is: *Taiwan diqu Banqiao difang fayuan*. I use the quotation to present the phrase as used by the Intermediate People's Court of Dongguan City.

333. *Id.*

334. *Id.*

335. *Id.*; *Zuigao renmin fayuan guanyu renmin fayuan renke Taiwan diqu youguan fayuan minshi panjue de guiding* [Regulation on People's Courts' Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area] (Sup. People's Ct., May 22, 1998, effective May 26, 1998) (P.R.C.) [hereinafter Regulation on Recognition of Civil Judgments], available at Taiwan Affairs Office of the State Council (P.R.C.), <http://www.gwytb.gov.cn/flfg/>

as Huangqi's domicile (住所地) and common place of residence (經常居住地) were not in the Mainland Area (中國大陸), the key question was whether Huangqi owned "properties Nordbank might enforce against" (可供執行的財產) in the area over which the court had jurisdiction.<sup>336</sup> If there were such properties in the area over which the court had jurisdiction, the court would have jurisdiction to recognize the "order to pay" issued by the Banqiao District Court.<sup>337</sup>

Huangqi was the sole shareholder of the Yongye Technology Corporation ("Yongye"), incorporated in the British Virgin Islands, which wholly owned the Huangjia Electronic Technology Corporation ("Huangjia"), incorporated in Dongguan City, Guangdong Province, the PRC.<sup>338</sup> The court stated that each of these three corporations was "a legal person independent from one another" (相互獨立的法人企業) and that Nordbank had rights enforceable against Huangqi's properties, including Huangqi's ownership of all the shares of Yongye, but not against Yongye's properties, including Yongye's ownership of all the shares of the Huangjia.<sup>339</sup> As a result, the court concluded that Huangqi owned no properties Nordbank might enforce against in Dongguan City, and dismissed the case for lack of jurisdiction.<sup>340</sup>

## 2. Recognition of Foreign Judgments and Arbitral Awards

The recognition (認可) and enforcement of judgments is another procedural issue treated differently by the PRC and the ROC. The PRC rule recognizing and enforcing civil judgments rendered by ROC courts is the *Regulation on People's Courts' Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area* ("Regulation") promulgated by the PRC Supreme People's Court and valid since May 26, 1998.<sup>341</sup> Article 2 of the Regulation states that parties to the civil judgments rendered by relevant courts in the Taiwan Area may apply for recognition and enforcement in People's Courts, provided that the parties' domicile or place of usual residence is in the PRC, or that the place where the debtor's property is located is in the PRC.<sup>342</sup>

In the ROC, Article 74 of the Act governs recognition and enforcement of judgments and arbitral awards.<sup>343</sup> Section 1 provides that "to the extent that a final civil ruling, judgment, or arbitral award rendered in the Mainland Area is not contrary to the public order and good morals of the Taiwan Area, an

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flfg0.asp?flgf\_m\_id=59 (last visited June 30, 2009).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. Regulation on Recognition of Civil Judgments, *supra* note 335. The Romanization of its title is as follows: *zuigao renmin fayuan guanyu renmin fayuan renke Taiwan diqu youguan fayuan minshi panjue de guiding*.

342. Regulation on Recognition of Civil Judgments, *supra* note 335, at art. 2.

343. Act Governing Relations, *supra* note 95, at art. 74; Ada Koon Hang Tse, *supra* note 95.

application may be filed with an [ROC] court for a ruling to recognize it.”<sup>344</sup> Section 2 provides that any ruling, judgment, or award that requires parties’ performance, after being recognized by an [ROC] court’s ruling pursuant to Section 1, may serve as a “basis for government enforcement” (執行名義) in the ROC.<sup>345</sup> Section 3 provides that “Section 1 and Section 2 shall not apply until the time when final civil rulings, judgments, or arbitral awards rendered in the Taiwan Area may be recognized and enforced by courts of the Mainland Area.”<sup>346</sup> On July 28, 1998, the Taiwan High Court announced that the reciprocity requirement was satisfied by the aforementioned *Regulation on People’s Courts’ Recognition of the Civil Judgments Made by the Relevant Courts in the Taiwan Area*. These rules are explained in greater detail by reference to actual cases in the following pages.

In one case, the Taiwan High Court refused to recognize a PRC judgment due to the PRC court’s failure to notify the defendant of the litigation.<sup>347</sup> In that case, one spouse (the plaintiff-spouse) sued the other spouse (the defendant-spouse) for divorce in the People’s Court of Fuqing City, Fujian Province, the PRC, and claimed that there was no way to notify the defendant-spouse of the suit.<sup>348</sup> The People’s Court was convinced, put a notice of the suit in the newspaper (公示送達), and later granted divorce to the plaintiff-spouse.<sup>349</sup> When the plaintiff-spouse sought to have the Taipei District Court recognize the divorce judgment, the Taipei District Court ruled against the plaintiff-spouse,<sup>350</sup> and, on appeal, the Taiwan High Court affirmed the decision of the Taipei District Court.<sup>351</sup> According to the Taiwan High Court, the phrase “the public order or good morals of the Taiwan Area” in Article 74 of the Act was meant to protect an ROC person (中華民國人民) who, because of improper service of process, could not defend himself or herself in litigation in the Mainland Area.<sup>352</sup> The plaintiff-spouse knew that the domicile of the defendant-spouse was in Taipei, but had lied to the People’s Court of Fuqing City that he did not know.<sup>353</sup> In addition, the Taiwan High Court stated that there was no possibility the defendant-spouse could have learned of the suit from public notice in the Mainland Area.<sup>354</sup> Therefore, pursuant to Article 74 of the Act, the divorce judgment was not recognized.<sup>355</sup>

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344. Act Governing Relations, *supra* note 95, at art. 74, § 1.

345. *Id.* at art. 74, § 2.

346. *Id.* at art. 74, § 3.

347. Jia Sheng Zi Judgment No. 195, The Judicial Yuan Database (Taipei Dist. Ct., September 27, 2002), *aff’d*, Jia Kang Zi Judgment No. 366, The Judicial Yuan Database (Taiwan High Ct., November 13, 2002).

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*; Act Governing Relations, *supra* note 95, at art. 74.

353. Jia Kang Zi Judgment No. 366.

354. *Id.*

355. *Id.*; Act Governing Relations, *supra* note 95, at art. 74.



Once a judicial proceeding in the PRC satisfies procedural requirements, the ROC judiciary is ready to recognize and enforce PRC judgments. The ROC judiciary's unwillingness to adjudicate a case that has been adequately litigated in PRC courts is exemplified by the case between the Liquidation Committee (清算委員會) of Taiqun Technology Company ("CTTC")<sup>356</sup> and United Integrated Services Company ("UIS").<sup>357</sup> CTTC won a judgment against UIS in the Second Intermediate People's Court of Beijing City, the PRC,<sup>358</sup> and another judgment against UIS in the High People's Court of Beijing, the PRC.<sup>359</sup> CTTC then applied to the Taipei District Court to recognize and enforce both judgments in the ROC.<sup>360</sup> When the Taipei District Court recognized both judgments,<sup>361</sup> UIS appealed (抗告).<sup>362</sup> When its appeal was dismissed,<sup>363</sup> UIS brought another legal action seeking reconsideration (再審) of the decision, but the action was still dismissed.<sup>364</sup>

The Taipei District Court described the facts of the case as follows: Taiqun Technology Company ("TTC"), incorporated in Taiwan, signed a contract (投資協議書) with a Taiwanese investor<sup>365</sup> on August 5, 2001 to establish a joint venture, the Beijing Taiqun Technology Company ("Beijing Taiqun").<sup>366</sup> The articles of incorporation (公司章程) of Beijing Taiqun, enacted on July 23, 2001, stipulated that each investor should be responsible for half of the total registered capital (註冊資本) of US\$1,500,000 (US\$750,000 per investor).<sup>367</sup> The articles of incorporation also required each investor to submit to Beijing Taiqun fifteen percent of his share of the registered capital within three months of the date when the business license (營業執照) would be issued, and the balance of its share of the registered capital within two years of the date when the business license would be issued.<sup>368</sup> After Beijing Taiqun has been issued its business license on September 18, 2001, TTC failed to meet

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356. Sheng Zi Caiding No. 2507, The Judicial Yuan Database (Taipei Dist. Ct., August 30, 2005). The Romanization of its title is as follows: *taiqun keji gufen youxian gongsi qingsuan weiyuanhui*.

357. The Romanization of its title is as follows: *hantang jicheng gufen youxian gongsi*. *Id.*

358. Er Zhong Min Chu Zi Judgment No. 8635 (Second Intern. People's Ct. of Beijing City, December 20, 2004) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009) (P.R.C.).

359. Gao Min Zhong Zi Judgment No. 580 (High People's Ct. of Beijing, 2005) (P.R.C.), found at Sheng Zi Caiding No. 2507.

360. Sheng Zi Caiding No. 2507.

361. *Id.*

362. Kang Zi Caiding No. 98, The Judicial Yuan Database (Taipei Dist. Ct., December 16, 2005).

363. *Id.*

364. Sheng Zai Zi Caiding No. 15, The Judicial Yuan Database (Taipei Dist. Ct., September 5, 2006).

365. Reports in the database did not disclose the name of the investor due to privacy concerns.

366. Sheng Zi Caiding No. 2507.

367. *Id.*

368. *Id.*

its obligations.<sup>369</sup> As of September 16, 2003, the capital actually received (實收資本) by Beijing Taiqun was US\$952,484, of which US\$750,000 was paid by the Taiwanese investor and only US\$202,484 by TTC.<sup>370</sup> The first meeting of the board of directors on April 27, 2004, resolved to dissolve the corporation.<sup>371</sup> On May 11, 2004, the board of directors was granted permission by the Foreign Economy and Trade Commission (對外經濟貿易委員會) of the Chaoyang District to terminate (終止) Beijing Taiqun's articles of incorporation.<sup>372</sup> At the second meeting of the board of directors on May 23, 2004, the board resolved to establish a Liquidation Committee (CTTC) and elected the Taiwanese investor to be CTTC's director (主任).<sup>373</sup> CTTC referred to Article 25 of the *Corporation Law of the People's Republic of China*<sup>374</sup> which "requires each shareholder to pay in full the subscribed amount of capital stipulated in the articles of incorporation,"<sup>375</sup> and Article 31, Section 1 of the *Regulations Implementing Foreign Enterprise Law of the People's Republic of China*,<sup>376</sup> which requires foreign investors to punctually pay all the installments of the subscribed amount of capital.<sup>377</sup> In addition, the board of directors's resolution to terminate and liquidate the corporation was consistent with Article 3 of the *Regulations on Liquidating Foreign Enterprises* (外商投資企業清算辦法).<sup>378</sup> Moreover, "Taiwan's Ministry of Economic Affairs" (臺灣經濟部)<sup>379</sup> had approved UIS's acquisition of TTC on September 18, 2003.<sup>380</sup>

UIS appealed (抗告) the decision of the Taipei District Court and argued that "its contract with the Taiwanese investor was falsified"<sup>381</sup> by the Taiwanese

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. The Romanization of the quoted text is as follows: *zhonghua renmin gonghe guo gongsi fa*. The Taipei District Court used the term "People's Republic of China" (*zhonghua renmin gonghe guo*) instead of "Mainland Area" (*dalu diqu*).

375. Corporation Law of the People's Republic of China at art. 25. The Romanization of the quoted text is as follows: *gudong yingdang zu e jiaona gongsi zhangcheng zhong guiding zhi gezi renjiao chuzi e*.

376. Regulations Implementing Foreign Enterprise Law of the People's Republic of China at art. 31, § 1. The Romanization of its title is as follows: *zhonghua renmin gonghe guo waizi qiye fa shishi xize*. The Taipei District Court used the term "People's Republic of China" instead of "Mainland Area."

377. Sheng Zi Caiding No. 2507 (Taipai Dist. Ct., 2005). The Romanization of the quoted text is as follows: *diyiqi chuzi hou de qita geqi chuzi waiguo touzi zhe renying ruqi*.

378. *Id.* Regulations on Liquidating Foreign Enterprises, at art. 3.

379. I translated this term from the Taipei District Court's summary of the two judgments rendered by courts of the Mainland Area (*dalu diqu fayuan*). I added quotation marks because the courts of the Mainland Area used the phrase "Taiwan's Ministry of Economic Affairs" in their judgments, according to the Taipei District Court.

380. Sheng Zi Caiding No. 2507.

381. The Romanization of the quoted text is as follows: *tongmou er wei zhi xuwei yisi biaooshi*.

investor and Lin Cangmin, the former chairman (董事長), and that the Second Intermediate People's Court of Beijing City and the High People's Court of Beijing, due to their bias, had ignored both important evidence and UIS's requests for further investigation.<sup>382</sup> A three-judge panel at the Taipei District Court dismissed the appeal because the procedure used to recognize a PRC or foreign judgment was not litigious in nature (非訟事件) and the court "could not adjudicate the legal relationship between the parties again."<sup>383</sup>

The UIS then brought another legal action seeking reconsideration (再審) of the decision (裁定).<sup>384</sup> The UIS argued that since the Beijing Taiqun had provided falsified documents to the Foreign Economy and Trade Commission of the Chaoyang District and the two People's Courts in the Mainland Area, and the two PRC judgments in question were inconsistent with public order and good morals (違反公序良俗) of the Taiwan Area, neither judgment should have been recognized by the Taipei District Court.<sup>385</sup> Another three-judge panel at the Taipei District Court dismissed the action<sup>386</sup> because a legal action seeking reconsideration of a decision that had become final (確定) was only allowed in litigation, which was governed by the *Civil Procedure Law* (民事訴訟法).<sup>387</sup> The procedure that is not litigious in nature is governed by the *Law on Non-Litigation* (非訟事件法).<sup>388</sup>

*The Taiqun Committee v. the UIS* is not the only case in which an ROC court has recognized a PRC judgment. For example, in 2004 the Taoyuan District Court<sup>389</sup> recognized a judgment rendered by the High People's Court of Shanghai City<sup>390</sup> for a dispute between the Zhejiang Textile Company and the Evergreen International Storage and Transport Company.

### 3. Conclusion

Part II examines the rules and cases pertaining to civil justice within the PRC-ROC relationship. In so doing, it demonstrates that the PRC-ROC relationship consists of neither purely state-based interaction nor purely nongovernmental interaction. On the one hand, each case in Part II demonstrates that disputes that arise during the course of civil and commercial

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382. Kang Zi Caiding No. 98.

383. *Id.* The Romanization of the quoted text is as follows: *bude jiu dangshi ren jian zhi falu guanxi zhong wei panduan.*

384. Sheng Zai Zi Caiding No. 15.

385. *Id.*

386. *Id.*

387. *Id.*

388. Law on Non-Litigation, The Laws and Regulations Database of The Republic of China, <http://law.moj.gov.tw/Scripts/Query4B.asp?FullDoc=所有條文&Lcode=B0010008> (last visited June 30, 2009).

389. Sheng Zi Caiding No. 1032, The Judicial Yuan Database (Taoyuan Dist. Ct., August 11, 2004) (Taiwan).

390. Hu Gao Min Shi Hai Zhong Zi Judgment No. 39 (High People's Ct. of Shanghai City, September 4, 2003) (P.R.C.), found at Sheng Zi Caiding No. 1032.

relationships are resolved by the legal rules established by the PRC and ROC governments. Although civil and commercial relationships may originate with mutual consent, a wide variety of legal rules exist to resolve the disputes that arise out of civil and commercial relationships.

On the other hand, Part II demonstrates that activities such as investing and conducting other transactions are often undertaken with little regard for government-to-government diplomacy. Government diplomacy does not appear to be a consideration in the judgments rendered by PRC and ROC courts. While it would be naïve to think that the Communist Party has no influence over PRC courts,<sup>391</sup> the PRC and ROC judgments discussed in Part II do not appear to have been influenced by any form of government diplomacy. Even during periods when the PRC-ROC relationship was particularly fraught with tension, courts continued to adjudicate the cases before them.

Part II also describes the ARATS/SEF mechanism that has served as the interface between the PRC and the ROC for more than a decade. Entrusted with the function of authenticating government documents, but organized as a nongovernmental channel, the ARATS/SEF mechanism is an important aspect of the PRC-ROC relationship that defies existing categories of cross-border interaction.

### III. CRIMINAL JUSTICE

Part III has two goals: (1) to demonstrate an important mechanism that has intentionally been made to appear nongovernmental—the repatriation of illegal immigrants and criminal suspects; and (2) to describe activities that have been undertaken with little regard for government-to-government diplomacy but with attention to legal rules established by governments. These analyses will provide further evidence supporting the thesis that the PRC-ROC relationship defies the existing categories of cross-border interaction.

This project contributes to the literature by examining criminal justice more extensively than previous studies. Before beginning this examination, the lack of attention to criminal justice in previous studies warrants some explanation. Some analysts characterize the relationship between the PRC and the ROC as dualistic, with conflict in the political sphere, but cooperation within the economic sphere.<sup>392</sup> Within this political-economic divide, politicians, scholars, and analysts generally consider criminal justice to be encompassed within the political sphere.<sup>393</sup> Many agree with Ralph N. Clough, a former U.S. diplomat, who commented in 1999 that, “[t]he signing of

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391. Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533 (2007).

392. See, e.g., T.J. Cheng, *China-Taiwan Economic Linkage: Between Insulation and Superconductivity*, in DANGEROUS STRAIT: THE U.S.-TAIWAN-CHINA CRISIS 93 (Nancy Bernkopf Tucker ed., 2005); RICHARD C. BUSH, UNTYING THE KNOT: MAKING PEACE IN THE TAIWAN STRAIT 27-35 (2005).

393. See *infra* note 376.

agreements [between the PRC and the ROC] on handling crime is difficult because it raises questions related to the conflicting views on the extent of Taiwan's jurisdiction and the authority of its courts—issues that ultimately bring up the issue of sovereignty.<sup>394</sup>

However, both the PRC and the ROC recognize that the difficulty involved in ratifying agreements pertaining to criminal justice should not cause either entity to neglect fighting cross-border crime. The pressing need to fight crime is supported by the fact that both entities have been forced to address crimes that involve the residents of the other entity. The purpose of Part III is to provide an understanding of both criminal justice systems through the analysis of cases that demonstrate the importance of this issue and raise questions that cannot be easily answered by a sole focus upon the conventional divide between the political and economic spheres.

Before examining PRC and ROC court cases, it is necessary to gain a basic understanding of the mechanism through which the PRC and the ROC repatriate (*qianfan*; 遣返) illegal immigrants and wanted criminal suspects; this mechanism has intentionally been made to appear nongovernmental in nature.

The PRC has no explicit rules for the repatriation process,<sup>395</sup> whereas the ROC maintains extensive rules described in several sections of Article 18 of the Act.<sup>396</sup> Section 1 states that, in any of the following five situations, any person of the Mainland Area who enters the Taiwan Area may be deported by the police authorities, with prior approval obtained from the judicial authorities if a judicial proceeding is pending: (1) the person entered the Taiwan Area without permission; (2) the person entered the Taiwan Area with permission but

394. RALPH N. CLOUGH, COOPERATION OR CONFLICT IN THE TAIWAN STRAIT? 63-64 (1999).

395. Although the PRC has no explicit rules for the repatriation process, it should be noted that a number of sources in the PRC include the Kinmen Accord (*Jinmen xieyi*) reached by the PRC and ROC as a source of law. For example, the website of the Taiwan Affairs Office of the State Council (*guowuyuan Taiwan shiwu bangong shi*) listed the Agreement on Repatriation Reached in Kinmen by the Red Cross Societies of Both Sides of the Taiwan Strait (*haixia liangan hong shizi hui zuzhi zai Jinmen shangtan dacheng youguan haishang qianfan xieyi*) as one of the legal norms (*falü guifan*). Taiwan Affairs Office of the State Council, [http://www.gwytyb.gov.cn/flfg/flfg0.asp?flgf\\_m\\_id=114](http://www.gwytyb.gov.cn/flfg/flfg0.asp?flgf_m_id=114) (last visited May 27, 2009).

396. See Act Governing Relations, *supra* note 95, at art. 18. Section 4 states that when any person of the Mainland Area who, after having entered the Taiwan Area, commits a crime, is remanded to an accommodation center for custody (as referred to in Section 2), and is subsequently found guilty by an irrevocable court judgment, then any single custody day may be counted as an imprisonment or detention day. *Id.* at art. 18, § 4. The single custody day may also be converted into an amount by which to decrease a fine as prescribed by the decision referred to in Article 42, Section 4 of the Criminal Code. ROC Criminal Code, [hereinafter ROC Criminal Code]. Section 5 states that the provisions of the preceding four sections shall apply to any of the people of the Mainland Area who entered the Taiwan Area before this Act took effect. Act Governing Relations, *supra* note 95, at art. 18, § 5. Section 6 authorizes the MOI to promulgate rules governing the administration of deportation referred to in Section 1 and the establishment and administration of the accommodation centers for custody referred to in Section 2. *Id.* at art. 18, § 6. These rules became effective after the Executive Yuan approved them.

remained or resided in the Taiwan Area beyond the authorized duration; (3) the person has engaged in any activity or employment inconsistent with the reason for which he or she had been granted permission to enter the Taiwan Area; (4) there exists sufficient evidence to establish that the person has committed a crime; and (5) there exists sufficient evidence to establish that the person poses a threat to national security or social stability.<sup>397</sup>

Section 2 states that any person of the Mainland Area conforming to any of the situations referred to in Section 1 may be placed in temporary custody before deportation and ordered to perform labor services.<sup>398</sup> Section 3 states that any person of the Mainland Area referred to in Section 1 who breaches the Law Maintaining Social Order (社會秩序維護法), but is not involved in any other criminal offense, may be deported directly by the police authorities after investigation without being transferred to a summary court for ruling.<sup>399</sup>

The process of repatriation from the ROC to the PRC operates as follows: An ROC policeperson arrests an illegal immigrant, sends that person to one of three detention centers specifically for illegal immigrants from the PRC, and then sends a report to the ROC Immigration Office of the National Police Agency of the Ministry of the Interior ("MOI").<sup>400</sup> The Immigration Office then sends a report to the ROC Red Cross, which then faxes a report to the PRC Red Cross.<sup>401</sup> The PRC Red Cross then sends a letter to the provincial police offices to verify whether such persons are actually missing from the PRC.<sup>402</sup> The PRC government then selects a time for the repatriation process before asking the PRC Red Cross to fax the ROC Red Cross the date and time of repatriation and the list of illegal immigrants that the PRC wants repatriated from the ROC.<sup>403</sup> After receiving the fax from the PRC Red Cross, the ROC Red Cross passes the information to the ROC Immigration Office.<sup>404</sup> The ROC Immigration Office then follows the procedure agreed to in the Kinmen Accord and sends the illegal immigrants to Kinmen.<sup>405</sup> On the seashore near a port in Kinmen, PRC and ROC plain-clothes police officers exchange control of the illegal immigrants as employees of the two Red Cross societies "witness" (見證) the entire process of repatriation.<sup>406</sup> When there are ROC repatriates who are wanted criminal suspects in the PRC, the process occurs in the opposite direction, with the PRC and ROC Red Cross societies continuing to

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397. Act Governing Relations, *supra* note 95, at art. 18, § 1.

398. *Id.* at art. 18, § 2.

399. *Id.* at art. 18, § 3.

400. The Red Cross Society of The Republic of China, <http://web.redcross.org.tw/human4.aspx> (last visited June 30, 2009).

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* See also *infra* Appendix 2.

act as the intermediaries.<sup>407</sup>

As demonstrated by Appendix 2, the entire process of exchanging illegal immigrants and wanted criminals involves both private and public agents. Red Cross societies play a significant role, but they are not police entities. Throughout the process, the PRC and ROC police are responsible for controlling the freedom of movement of illegal immigrants and wanted criminals.<sup>408</sup>

Clough's and other scholars' misunderstanding of the roles that Red Cross societies play reinforces the idea that criminal justice disputes between the PRC and the ROC largely arise from their sovereignty dispute. The reality is that the PRC and ROC have cooperated on the issue of criminal justice for almost two decades. Between June 1991 and November 2005,<sup>409</sup> 168 Taiwan residents suspected of committing crimes in the ROC were arrested and repatriated from the PRC to the ROC, and thirty-one Mainland residents suspected of committing crimes in the PRC were arrested and repatriated from the ROC to the PRC.<sup>410</sup> Between January 1987 and April 2006, the ROC arrested and repatriated 48,797 illegal immigrants to the PRC, pursuant to the Kinmen Accord.<sup>411</sup> On August 14, 2007, the PRC repatriated fourteen wanted criminal suspects to the ROC, while the ROC repatriated two criminals to the PRC.<sup>412</sup>

Apart from records regarding repatriation, little information exists on the extent of collaboration between the PRC and ROC police. The PRC and ROC police may have a normal (常態性的) mechanism of coordination to exchange information helpful in combating phone fraud, kidnapping, murder, and white-collar crime. In an interview with a news agency, Hou You-yi, the ROC police chief in charge of criminal investigations, stated that as long as: (1) the PRC police know the whereabouts in the PRC of criminal suspects fleeing from the ROC, (2) those criminal suspects are involved in criminal activities in the PRC, and (3) the PRC police receive requests from the ROC police; the PRC police would transfer such criminal suspects to the ROC police, either through the Macau model,<sup>413</sup> or, according to the Kinmen Accord, between the PRC and the

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407. *Id.*

408. *Id.*

409. Taiwan Affairs Office of the State Council, <http://www.sef.org.tw/xls/statist/st14.xls> (last visited May 27, 2009).

410. *Id.*

411. *Id.*

412. See Taiwan Affairs Office of the State Council, [http://www.gwytb.gov.cn/gzyw/gzyw1.asp?offset=50&gzyw\\_m\\_id=1340](http://www.gwytb.gov.cn/gzyw/gzyw1.asp?offset=50&gzyw_m_id=1340) (last visited May 27, 2009); Taiwan Affairs office of the State Council, [http://www.gwytb.gov.cn/gzyw/gzyw1.asp?offset=50&gzyw\\_m\\_id=1341](http://www.gwytb.gov.cn/gzyw/gzyw1.asp?offset=50&gzyw_m_id=1341) (last visited May 27, 2009).

413. On March 31, 2003, the PRC police turned over a criminal suspect to the ROC police at the Macau airport. See Kong Ling-qi, *Qiang wu heibai dieduidie taiyang hui chengyuan ji jiuren xinghao jingfang kuai yibu* [Both Police and Gangsters Pursue Wu Tong-tan, a Wanted Criminal and the Senior Leader of a Gang], UNITED EVENING NEWS (*lianhe wanbao*), Apr. 1, 2003, at 5.

ROC.<sup>414</sup>

The process of repatriation between the PRC and the ROC has not received the scholarly attention it deserves. While certainly not as institutionalized as procedures authorized by the International Criminal Police Organization (“INTERPOL”)<sup>415</sup> or the European Arrest Warrant,<sup>416</sup> the process, which has been in place since June 1991, is not a purely *ad hoc* process.<sup>417</sup> Even though Red Cross Societies serve as the interface, the process of repatriation is not entirely at the discretion of the nonprofit sector, as the PRC and ROC police play important roles throughout the process. The process of repatriation and the efforts behind its creation prove that the PRC-ROC relationship defies the existing categories of cross-border interaction.

## A. Cases in PRC Courts

In the pursuit of criminal justice across boundaries, the process of repatriation is important, but not always necessary, because the PRC police may arrest Taiwan residents when they are physically in the PRC. Examining cases that were adjudicated by PRC courts yields another perspective of criminal justice within the PRC-ROC relationship. Past cases in PRC courts show the intensity of the interaction between the PRC and ROC societies and the pressing need to fight cross-border crime. On the one hand, the criminal activities described in the following pages were undertaken with little regard for the diplomacy between the PRC and the ROC. On the other hand, these criminals did know that they were violating criminal laws, and PRC and ROC law enforcement officials did their part to bring these criminals to justice.

Several cases concern “the crime of transporting other people across borders without permission.”<sup>418</sup> The case of Cai Yonghui illustrates the commission of this crime by fishing boat, which is a common means of committing this crime.<sup>419</sup> Cai was paid RMB\$2,000 to transport illegal immigrants from the PRC to the ROC in a fishing boat that he owned.<sup>420</sup> At 1:00 a.m. on December 11, 1995, he left Qiao-wei-an Port, Xiangzhi Town, Shishi City, the PRC, with thirty-four people of the PRC on his fishing boat.<sup>421</sup>

414. Mainland News Center, *Hou You-yi: liangan jingfang lianxi guandao duo daji fanzui shi gongshi Taiwan zhua zhapian luren an dalu bangzhu duo pan liangan hufang miqie* [You-Yi Hou States that Chinese and Taiwanese Police Have Multiple Contacts Urges Closer Cooperation], UNITED DAILY (*lianhe bao*), Feb. 18, 2006, at A13.

415. INTERPOL, <http://www.interpol.int> (last visited May 27, 2009).

416. European Arrest Warrant Project, <http://www.eurowarrant.net> (last visited May 27, 2009).

417. There should be no established procedure in a purely *ad hoc* process.

418. The Romanization of the quoted text is as follows: *yunsong taren touyue guojing huo bianjing zui*.

419. My observation is based on my review of the court judgments.

420. Shi Shin Chu Zi Judgment No. 529, (People’s Ct. of the Shishi City, Fujian Province, December 23, 1996) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009) (P.R.C.).

421. *Id.*



At 10:00 a.m. on December 12, he drove his fishing boat to 23°10 N, 119°30' East, the location where the thirty-four people of the PRC were supposed to be transferred to his counterparts in Taiwan.<sup>422</sup> While waiting for his counterparts, he was arrested by “Taiwan’s coastal guard”<sup>423</sup> and subsequently repatriated to the PRC by the ROC on May 10, 1996.<sup>424</sup> The People’s Court of the Shishi City, Fujian Province, convicted him of the crime of transporting other people across borders without permission, sentenced him to six years in prison, and ordered him to pay a fine of RMB\$1,000.<sup>425</sup> Cai was also forced to forfeit to the court the RMB\$2,000 that he had received in exchange for transporting the illegal immigrants.<sup>426</sup>

Another manner of committing the crime of transporting other people across borders without permission is by exploiting weaknesses in the security of the air transportation system. In one case, a Taiwanese man hired an American and a Macau Special Administrative Region man to commit the crime of transporting other people across borders without permission.<sup>427</sup> Yang Chongxian was a Taiwanese man living in Taipei; Tom Tung was a resident of California who held a U.S. passport; and Yang Caijie was “a man of the Macau Special Administrative Region”<sup>428</sup> who held a Portuguese passport.<sup>429</sup> At 9:00 p.m. on December 12, 1999, Yang Chongxian borrowed three VIP cards issued by the National Capital Airport (首都機場) that would enable Chen Dengsong, Lin Shangyao, both men of the Fujian Province in the PRC, and himself to enter the waiting area of the National Capital Airport.<sup>430</sup> Shortly thereafter, Tom Tung and Yang Caijie entered the waiting area by showing their own American and Portuguese passports.<sup>431</sup> After entering the waiting area, Tom Tung and Yang Caijie exchanged their boarding passes and airplane tickets with the VIP cards that Chen and Lin had shown the police enabling them to enter the waiting area.<sup>432</sup> The Japanese police arrested Chen as he was changing flights in Japan on his way to the United States and subsequently repatriated him to the PRC on December 13.<sup>433</sup> Lin, Yang Chongxian, Tom Tung, and Yang Caijie were arrested when they attempted to board a flight to the United Kingdom.<sup>434</sup> The Second Intermediate People’s Court of Beijing

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422. *Id.*

423. The Romanization of the quoted text is as follows: *Taiwan bao an jingcha diqi zongdui*.

424. Shi Shin Chu Zi Judgment No. 529.

425. *Id.*

426. *Id.*

427. Gao Shin Zhong Zi Judgment No. 655, (The Second Interm. People’s Ct. of Beijing City, April 23, 2001) (P.R.C.) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009).

428. The Romanization of the quoted text is as follows: *aomen tebie xingzheng qu ren*.

429. Gao Shin Zhong Zi Judgment No. 655.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

City convicted all three of the crime of transporting other people across borders without permission.<sup>435</sup> Yang Chongxian was sentenced to three years in prison and ordered to pay a fine of RMB\$30,000.<sup>436</sup> Tom Tung was sentenced to two years in prison, ordered to pay a fine of RMB\$20,000, and expelled from the PRC.<sup>437</sup> Yang Caijie was sentenced to eighteen months in prison and ordered to pay a fine of RMB\$15,000.<sup>438</sup>

A related crime is crossing borders without permission. In one prominent case, a PRC court imprisoned a PRC judge for traveling to the ROC without permission.<sup>439</sup> In February 1997, Zheng Chunteng, an assistant judge (助理審判員) at a PRC court in Fujian Province, approached several people to inquire whether they would drive him to Wu-qiu Isle.<sup>440</sup> At 2 a.m. on April 13, 1997, he hired a captain and a seaman to drive him to Wu-qiu Isle.<sup>441</sup> Soon after arriving at 6 a.m., Zheng was discovered and arrested by the ROC army stationed on Wu-qiu Isle.<sup>442</sup> He was sent to the Processing Center of the People of the Mainland Area in Hsinchu (大陸地區人民新竹處理中心) on April 25, to the Matsu Repatriation Center (馬祖遣返站) on June 23, and then to the PRC police by the ROC police on November 28.<sup>443</sup> The People's Court of Putian County, Fujian Province, convicted Zheng of "the crime of crossing borders without permission" (偷越國境或邊境罪).<sup>444</sup> Having determined that Zheng clearly knew (明知) that Wu-qiu Isle was "under Taiwan's jurisdiction" (台灣轄區) but had still decided to go, the court determined that Zheng indeed "left the PRC illegally" (實施了非法出境行爲).<sup>445</sup> In addition, the court stated that the offense was serious (情節嚴重) because the arrest of Zheng, an assistant judge (法院幹部), had been "widely publicized by Taiwan,"<sup>446</sup> and therefore "the image and reputation of the People's Courts were adversely affected."<sup>447</sup> Zheng was sentenced to one year in prison and ordered to pay a fine of RMB\$5,000.<sup>448</sup> Zheng appealed to the Intermediate People's Court of Putian City of Fujian Province, but the court upheld his conviction and sentence.<sup>449</sup>

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. Pu Xing Chu Zi Judgment No. 154 (People's Ct. of Putian County, Fujian Province, July 16, 1998) (P.R.C.) LAWYEE, <http://www.lawyer.net> (last visited June 27, 2009).

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* The Romanization of the quoted text is as follows: *touyue guojing huo bianjing zui*.

445. *Id.*

446. *Id.* The Romanization of the quoted text is as follows: *Taiwan fangmian dasi xuanchuan*.

447. *Id.* The Romanization of the quoted text is as follows: *baihuai le renmin fayuan de xingxiang he shengyu*.

448. *Id.*

449. Pu Zhong Xing Zhong Zi No. 101 (Interm. People's Ct. of Putian City, Fujian

A 1995 case involved the crime of providing falsified or altered identification documents for the purpose of crossing a border.<sup>450</sup> Chen Shunlai was originally a person of “the Nan County of the Fujian Province,”<sup>451</sup> but later became “a national of the Philippines Republic”<sup>452</sup> who resided in Manila, the Philippines.<sup>453</sup> Together with Gao Chaozong, a Taiwanese man residing in Taipei, Taiwan, Chen conspired to sell fake Philippine passports for profit.<sup>454</sup> According to their plan, Gao was responsible for identifying PRC nationals in need of Philippine passports and collecting their photographs, while Chen was responsible for manufacturing the fake Philippine passports.<sup>455</sup> Between August 1994 and April 1995, Chen and Gao collected RMB\$85,400, HK\$1,000, and US\$700 for selling four fake passports.<sup>456</sup> Chen received RMB\$29,000, HK\$5,000, and US\$1,200 while Gao received RMB\$41,481.95. The Intermediate People’s Court of Xiamen City, Fujian Province, convicted both men of “the crime of offering fake or altered identification documents for crossing borders.”<sup>457</sup> Chen was sentenced to two years in prison, ordered to pay a fine of RMB\$10,000, and expelled from the PRC (驅逐出境).<sup>458</sup> Gao was sentenced to eight months in prison and ordered to pay a fine of RMB\$10,000.<sup>459</sup> In addition, Chen was ordered to forfeit RMB\$29,000, HK\$5,000, and US\$1,200 while Gao was ordered to forfeit RMB\$41,481.95.<sup>460</sup>

A single case may encompass crimes that involve crossing borders and crimes that do not, as criminals may attempt to cross borders to escape justice for crimes committed in the PRC. One 2000 case clearly illustrates such a scenario.<sup>461</sup> Beginning in June 1997, Cao Yufei, a Taiwanese man, paid Gao Zhenyu, a PRC man and general manager (負責人) of the Beijing branch (北京營業部) of the Shandong Zhonghui Futures Brokerage Corporation (“Zhonghui”),<sup>462</sup> RMB\$200,000 a month in exchange for Zhonghui’s corporate seals that were in Gao’s custody.<sup>463</sup> In September 1997, Cao incorporated

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Province, September 3, 1998) (P.R.C.) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009).

450. Xia Shin Chu Zi No. 97 (Interm. People’s Ct. of Xiamen City, Fujian Province, December 13, 1995) (P.R.C.).

451. The Romanization of the quoted text is as follows: *yuan ji fu jian sheng nan xian*.

452. The Romanization of the quoted text is as follows: *feilubin gonghe guo ren*.

453. Xia Shin Chu Zi No. 97.

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.* The Romanization of the quoted text is as follows: *tigong weizao bianzao churu jing zhengjian zui*.

458. Xia Shin Chu Zi No. 97.

459. *Id.*

460. *Id.*

461. Xing Zhong Zi Judgment No. 207 (High People’s Ct., Beijing City, December 14, 2000) (P.R.C.) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009).

462. *Id.* The Romanization of its title is as follows: *shandong zhonghui qihuo jingji youxian gongsi*.

463. *Id.*

Beijing Jindeng Petroleum Chemical Corporation (“Jindeng”).<sup>464</sup> In December 1997, Cao bought the Shinguoda Futures Brokerage Corporation (“Shinguoda”) without the approval of the China Securities Regulatory Commission of the PRC.<sup>465</sup> Cao then hired Gong Congying, a PRC woman, to take charge of the finances of Zhonghui, Jindeng, and Shinguoda.<sup>466</sup> The Second Intermediate People’s Court convicted Cao, Gao, and Gong of the crime of “fraud by fundraising” (集資詐騙罪), finding that they had defrauded more than 4,100 people of more than RMB\$500 million.<sup>467</sup> Cao, Gao, and Gong appealed to the High People’s Court of Beijing City, but the court affirmed the lower court’s judgment.<sup>468</sup>

Cao was also convicted of the crime of bribery.<sup>469</sup> Between March and July 1998, Cao paid Guo Lienzhang, chief executive officer (總經理) of the Yanxing Beijing Corporation (“Yanxing”), RMB\$500,000 to pretend that Yanxing had acquired Shinguoda for RMB\$3,800,000, when Yanxing applied for approval from the China Securities Regulatory Commission.<sup>470</sup> In fact, Cao, not Yanxing, paid the RMB\$3,800,000.<sup>471</sup>

In the same judgment, the Second Intermediate People’s Court convicted Chen Huifang, Zheng Zihua and Li Feili of the crime of organizing other people to cross borders without permission, (組織他人偷越國境罪) and convicted Zhou Bugang and Cheng Zhonghan of “the crime of transporting other people crossing borders without permission.”<sup>472</sup> Gong Congying, a PRC woman hired by Cao, hired Chen Huifang and Zheng Zihua between December 1997 and July 1998 to falsify personal identification documents (身分證) so that Gong could immigrate to the Philippines. Later, Cao hired Chen and Zheng to falsify personal identification documents for Cao, Gao Zhenyu, and Gong. On August 1, 1998, Cao, Gao, Gong, Chen, and Zheng attempted to leave the PRC from Guilin City, Autonomous Region of the Zhuang Race (壯族自治區), Guangxi Province, but were unable to do so. After Cao, Gao, and Gong fled to Shanghai, Chen and Zheng introduced Xu Haiping to Cao Yufei. They planned that Xu would apply for diplomatic passports (外交護照) for the Republic of Guinea-Bissau and support Cao, Gao, and Gong after Chen and Zheng had transported them to Thailand. Chen and Zheng asked Li to help plan crossing the PRC border without permission. Li asked Zhou Bugang and Cheng Zhonghan to help transport Cao, Gao, and Gong from the PRC across

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464. *Id.* The Romanization of its title is as follows: *beijing jing deng shiyou huagong youxian gongsi.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.* The Romanization of the quoted text is as follows: *yunsong taren touyue guojing zui.*

the border between the PRC and Burma. When Chen, Zheng, Li, Zhou, and Cheng went to Jinghong City, Yunnan Province, to test their plan to cross the PRC-Burma border without permission, the PRC police arrested them. Cao, Gong, Gao, Chen, Zheng, Li, Zhou, and Cheng were convicted of the various crimes they committed by High People's Court, Beijing City, the PRC.<sup>473</sup> The case was sufficiently prominent to have been picked up by the American media, with *The New York Times* reporting, "China executed a Taiwanese businessman for his role in a big investment scam . . . . Cao Yufei was manager of a brokerage firm that collapsed in 1998, taking about \$39 million in investors' money with it. The collapse led to protests in Beijing and embarrassed many government leaders who had been photographed in Mr. Cao's company."<sup>474</sup>

The fact pattern of this case is powerful evidence of the creativity of criminals in evading state control when conducting cross-border travel. Many criminals do not confine their illegal activities within the PRC-ROC relationship; for example, the criminals of this case considered illegal entry into the Philippines, the Republic of Guinea-Bissau, Thailand, and Burma. This creativity of criminals suggests a need for governments to cooperate more extensively to control crime.

A noteworthy 2003 case concerned a Taiwanese man operating a business in the PRC that infringed upon the trademarks of cell-phone companies.<sup>475</sup> In August 2002, Wang Minghui, a Taiwanese man, established the Sanli Electronics Factory ("Sanli")<sup>476</sup> with RMB\$200,000 to manufacture the outside covers for cell phones (手機外殼) and hired Wang Hua, a man born and living

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473. *Id.* Cao was sentenced to death, deprived of political rights for life, and ordered to forfeit all his personal property for the crime of "fraud by fundraising," although the court found that he deserved eight years in prison for the crime of bribery. *Id.* Gong was sentenced to death, deprived of political rights for life, and ordered to forfeit all personal property, but the court delayed the enforcement of her death sentence for two years (*huanqi ernian zhixing*) for the crime of fraud by fundraising. *Id.* Gao was sentenced to life imprisonment, deprived of political rights for life, and ordered to forfeit all his personal property, but the court delayed the enforcement of his death sentence for two years for the crime of fraud by fundraising. *Id.* Chen was sentenced to eight years in prison, deprived of political rights for one year, and ordered to pay a fine of RMB\$100,000 for organizing other people to cross borders without permission. *Id.* Zheng was sentenced to eight years in prison, deprived of political rights for one year, and ordered to pay a fine of RMB\$100,000 for organizing other people to cross borders without permission. *Id.* Li, born and residing in Singapore, was sentenced to four years in prison, ordered to pay a fine of RMB\$40,000, and expelled from the PRC (*quzhu chujing*) for organizing other people to cross borders without permission. *Id.* Zhou was sentenced to two years in prison and ordered to pay a fine of RMB\$20,000 for transporting other people across borders without permission. *Id.* Cheng, "whose nationality was unclear" (*guoji bumin*), was sentenced to two years in prison and ordered to pay a fine of RMB\$20,000 for transporting other people across borders without permission. *Id.*

474. Craig S. Smith, *World Briefing Asia: China: Taiwan Businessman Executed*, N.Y. TIMES, May 30, 2001, at A10.

475. Huang Xing Chu Zi Judgment No. 248 (People's Ct. of Huang-pu Dist., Guangzhou City, Guangdong Province, September 28, 2003) (P.R.C.) LAWYEE, <http://www.lawyee.net> (last visited June 27, 2009).

476. The Romanization of its title is as follows: *sanli dianzi chang*.

in Hengyang City, Hunan Province, the PRC, as his production manager.<sup>477</sup> Wang Minghui neither registered Sanli with the PRC government nor obtained the permission of the trademark owners—Nokia, Motorola, Siemens, Philips, Panasonic, and Alcatel—to use their trademarks in connection with the cell phone covers.<sup>478</sup> Between its establishment and December 18, 2002, Sanli sold 79,639 cell phone covers worth a total of RMB\$400,256.<sup>479</sup> On December 23, 2002, the PRC police searched Sanli and found production equipment, finished products, partially finished products, and wrapping materials together valued at RMB\$12,710,727.50.<sup>480</sup> Wang Minghui argued that he was merely an investor (投資者) and had not participated in trademark infringement while Wang Hua argued that he was merely a worker and had not known that what Wang Minghui was doing was illegal.<sup>481</sup>

The People's Court of Huangpu District, Guangzhou City, Guangdong Province, the PRC, was not persuaded by these arguments because witnesses had testified that Wang Minghui often brought clients to see Sanli, sometimes at night, and because the witnesses' testimony and Wang Minghui's statement agreed on the fact that Wang Hua was authorized to manage all aspects of Sanli, a factory without a license from the PRC.<sup>482</sup> Both Wang Minghui and Wang Hua were convicted of "the crime of trademark infringement" (假冒註冊商標罪).<sup>483</sup> Wang Minghui was sentenced to five years in prison and ordered to pay a fine of RMB\$100,000, while Wang Hua was sentenced to two years and six months in prison and ordered to pay a fine of RMB\$2,000.<sup>484</sup> The court also ordered the police to seize and destroy the production equipment (作案工具), finished products, partially finished products, and wrapping materials.<sup>485</sup>

In a 2003 case, a Taiwanese man and four men of the PRC were convicted of "the crime of producing and selling fake or inferior products."<sup>486</sup> In March 2002, Wang Zhengmei, a Taiwanese man, persuaded Zhang Weiming and Zhang Weicheng, both men of the PRC, to help produce ostensibly brand-name cigarettes in the PRC for sale in Taiwan.<sup>487</sup> Wang was responsible for contacting clients in Taiwan and notifying Zhang Weiming of the brands and volume desired by the clients.<sup>488</sup> Zhang Weiming was responsible for

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477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.*

481. *Id.*

482. Huang Xing Chu Zi Judgment No. 248.

483. *Id.*

484. *Id.*

485. *Id.*

486. Zhang Xing Chu Zi Judgment No. 25 (Interm. People's Ct. of Zhangzhou City, Fujian Province, June 9, 2003) (P.R.C.). The Romanization of the quoted text is as follows: *shengchan xiaoshou weilie chanpin zui*.

487. *Id.*

488. *Id.*

conveying such information to Zhang Weicheng and receiving payment from the clients in Taiwan via a bank account registered under his name.<sup>489</sup> Zhang Weicheng was responsible for producing fake cigarettes, buying additional fake cigarettes, and for transporting the fake cigarettes to the designated locations.<sup>490</sup> After receiving orders from Wang and Zhang Weiming, Zhang Weicheng ordered Xie Yongwen, another defendant and a man of the PRC, to transport 700 packs of fake Seven Stars (七星) and 200 packs of fake Big Brothers (大哥大) brand-name cigarettes, worth a total of RMB\$2,300,000, in four installments to Jinjiang Weitou and Nan-an Shuitou, both places in Fujian Province, the PRC, between March and June 2002.<sup>491</sup> Of the 700 packs of fake Seven Stars cigarettes, 150 were packaged by workers hired by Tang Rongjiang, another PRC defendant, as instructed by Zhang Weicheng.<sup>492</sup> In May 2002, Zhang Weicheng ordered Xie to hide 174 packs of fake Seven Stars cigarettes, not yet sold, worth RMB\$1,131,278 at friends' places in the Zhangpu County, Fujian Province, the PRC. The Intermediate People's Court of Zhangzhou City, Fujian Province, the PRC, convicted all the defendants of the crime of producing and selling fake or inferior products.<sup>493</sup>

#### B. Cases in ROC Courts

The intensity of the interaction between the PRC and ROC societies and the pressing need to fight cross-border crime are revealed by an examination of cases both in PRC courts and ROC courts. Criminal cases tried in ROC courts have generally concerned smuggling and "helping people of Mainland Area enter the Taiwan Area illegally,"<sup>494</sup> as well as crimes that did not involve the crossing of a border.

The crime of smuggling can be divided into two categories. The first category, smuggling by sea, and the related issue of "territory," is best illustrated by a 2003 case.<sup>495</sup> Li Shiyin and Zhuang Jiapeng, captain and chief engineer (輪機長), respectively, of a fishing boat registered at Kaohsiung City, Taiwan, left Donggang, Pintong County, Taiwan, at 11:50 a.m. on May 29,

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489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.* Zhang Weicheng was sentenced to life imprisonment, deprived of political rights for life, and ordered to pay a fine of RMB\$3,450,000. *Id.* Wang Zhengmei was sentenced to fourteen years in prison and ordered to pay a fine of RMB\$2 million. *Id.* Zhang Weiming was sentenced to thirteen years in prison and ordered to pay a fine of RMB\$1,800,000. *Id.* Xie Yongwen was sentenced to thirteen years in prison and ordered to pay a fine of RMB\$3 million. *Id.* Tang RongJiang was sentenced to one year and ten months in prison and ordered to pay a fine of RMB\$200,000. *Id.*

494. The Romanization of the quoted text is as follows: *shi dalu diqu renmin feifa jinru Taiwan diqu.*

495. Shang Su Zi Judgment No. 1163, The Judicial Yuan Database (Kaohsiung Branch of Taiwan High Ct., August 26, 2003).

2001, and sailed to 23°50' N, 118° East, a place in the “sea territory of the Mainland Area” (大陸地區海域), 8.5 nautical miles away from Baijiao, Fujian Province, the PRC.<sup>496</sup> There, Li and Zhuang bought 3,200 kilograms of *paphia amabilis*, a kind of seafood, and 990 kilograms of *Ruditapes variegates*, another kind of seafood, from a person whose name was unknown to the Taiwan High Court.<sup>497</sup> When Li and Zhuang entered the Kaohsiung Port, 3,200 kilograms of *paphia amabilis* and 990 kilograms of *ruditapes variegates* were found on their boat and confiscated.<sup>498</sup> Li and Zhuang were subsequently convicted of “importing controlled goods in excess of the permitted amount without permission.”<sup>499</sup>

Li and Zhuang appealed to the ROC Supreme Court, arguing that the Taiwan High Court had failed to explicitly explain its finding that the place where they bought 3,200 kilograms of *paphia amabilis* and 990 kilograms of *ruditapes variegates* was located in the “sea territory of the Mainland Area.”<sup>500</sup> In addition, they argued that they had caught some of the *paphia amabilis* themselves, which was lawful because the ROC Executive Yuan had declared an Exclusive Economic Zone (EEZ) of two hundred nautical miles in September 1979.<sup>501</sup> However, the ROC Supreme Court affirmed the judgment of the Taiwan High Court.<sup>502</sup> It determined that Article 12 of the *Law Punishing Smuggling* (懲治走私條例), as revised in 1992, stated that “shipping goods from the Mainland Area to the Taiwan Area without permission”<sup>503</sup> or “shipping goods from the Taiwan Area to the Mainland Area without permission”<sup>504</sup> “is importing and exporting without permission”<sup>505</sup> and “should be punished by this Law.”<sup>506</sup> The court added that the phrases “Taiwan Area” and “Mainland Area” had been defined by the Legislative Reason (立法理由)<sup>507</sup> to include “Taiwan, Penghu, Kinmen, Matsu, and other areas

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.* The Romanization of the quoted text is as follows: *siyun guanzhi wupin jinkou yu gonggao shu e.*

500. Tai Shang Zi Judgment No. 6315, The Judicial Yuan Database (Sup. Ct. of the ROC, November 13, 2003) (Taiwan).

501. *Id.*

502. *Id.*

503. The Romanization of the quoted text is as follows: *zi dalu diqu siyun wupin jinru Taiwan diqu.*

504. The Romanization of the quoted text is as follows: *zi Taiwan diqu siyun wupin qianwang dalu diqu zhe.*

505. The Romanization of the quoted text is as follows: *yi siyun wupin jinkou chukou lun.*

506. Tai Shang Zi Judgment No. 6315; Law Punishing Smuggling, art. 12 [hereinafter Law Punishing Smuggling] available at The Laws and Regulations Database of The Republic of China, <http://law.moj.gov.tw/Scripts/Query4A.asp?FullDoc=all&Fcode=C0000006> (last visited June 30, 2009). The Romanization of the quoted text is as follows: *shiyong ben tiaoli guiding chuduan.*

507. The Legislative Reason is a column in draft statutes that are submitted by ROC administrative offices to the ROC Legislative Yuan for deliberation purposes.



governed by the government”<sup>508</sup> and “the territory of the Republic of China other than the Taiwan Area;”<sup>509</sup> therefore, the place where the defendants had bought 3,200 kilograms of *paphia amabilis* and 990 kilograms of *ruditapes variegates* was “in the Mainland Area” (屬於大陸地區).<sup>510</sup> Regarding whether Li and Zhuang had caught some of the *paphia amabilis* and *ruditapes variegates* themselves, the ROC Supreme Court cited the finding of the Taiwan High Court that the Kinmen Seafood Experiment Institute (金門水產實驗所) could not find any *paphia amabilis* and *ruditapes variegates* in the waters near Dongdian Isle, adding that the Taiwan High Court had not abused its investigative power when making this discovery.<sup>511</sup>

Scholars of international law may be intrigued by the phrase “sea territory of the Mainland Area (大陸地區海域),” and debate whether it constitutes a formal declaration of Taiwanese independence. Although it is a valuable perspective, I urge that more attention be paid to the consequences of the current manner in which these kinds of cases are handled. As stated earlier, the PRC-ROC sovereignty dispute may not possibly be resolved in the short term, but smuggling by sea is a real threat that must be addressed now. In my view, the current manner in which ROC courts handle these kinds of cases deserves scholarly examination in and of itself.

Another type of the crime of smuggling is that of making untrue statements about the origin of imported goods, which is best illustrated by a 2004 case.<sup>512</sup> The defendant, a Taiwanese man,<sup>513</sup> bought 75,262 kilograms of apples from the Mainland Area in the name of Yiyu Trade Inc., and hired Hansheng Transportation Inc. and the Evergreen International Company,<sup>514</sup> both unaware of the defendant’s intent to smuggle goods, to ship 75,262 kilograms of apples worth NT\$2,372,121, in four containers controlled for temperature (冷凍貨櫃) from Dalian Port, the Mainland Area, to Busan Port, South Korea.<sup>515</sup> The defendant then hired the ship Uni Forward, the captain and owner of which were also unaware of the defendant’s intent to smuggle goods, to ship 75,262 kilograms of apples in four containers controlled for temperature from Busan Port, South Korea, to Keelung Port, Taiwan.<sup>516</sup> Uni Forward arrived at Keelung Port, Taiwan, on February 4, 2003.<sup>517</sup> When these

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508. The Romanization of the quoted text is as follows: *taiwan penghu jinmen mazu ji zhengfu tongzhi quan suoji zhi qita diqu*.

509. The Romanization of the quoted text is as follows: *taiwan diqu yiwai zhi zhonghua minguo lingtu*.

510. Tai Shang Zi Judgment No. 6315.

511. *Id.*

512. Su Zi Judgment No. 699, The Judicial Yuan Database (Taiwan Keelung Dist. Ct., June 6, 2005).

513. Reports in the database did not disclose the name of the defendant due to privacy concerns.

514. The Romanization of its title is as follows: *zhangrong guoji gufen youxian gongsi*.

515. Su Zi Judgment No. 699.

516. *Id.*

517. *Id.*

four containers were reported to ROC customs, the Custom Office of Keelung Port (基隆關稅局) found them suspicious and asked the Representative Office of the ROC in Korea (我韓國駐外代表處) to help investigate.<sup>518</sup> The defendant argued that he had bought the apples from the Due Bvone Company, a Korean corporation, and did not know why the Due Bvone Company had sold him apples from the Mainland Area.<sup>519</sup> The court asked the Representative Office of the ROC in South Korea to ask the Due Bvone Company whether it had sold apples to the defendant.<sup>520</sup> The Due Bvone Company replied that it had not.<sup>521</sup> Article 2, Section 4 of the *Law Punishing Smuggling* authorized the ROC Executive Yuan to promulgate the *Item and Amount of Controlled Goods*<sup>522</sup> prosecuting the crime of importing controlled goods as listed between the first and eighth chapters of the *Customs Schedule of Imported Goods* (海關進口稅則) in an amount exceeding 1,000 kilograms or worth more than NT\$100,000.<sup>523</sup> In this case, apples were listed in the eighth chapter of the *Customs Schedule of Imported Goods* and the defendant had imported 75,262 kilograms of apples without permission.<sup>524</sup> Therefore, the court convicted the defendant of the crime of importing controlled goods in excess of the amount permitted and sentenced him to ten months in prison.<sup>525</sup>

Another important type of cross-border crime in ROC courts is the crime of helping Mainland residents enter the Taiwan Area illegally, which has resulted in dozens of cases.<sup>526</sup> Article 79, Section 1 of the ROC Act prescribes criminal penalties for violations of Article 15, Section 1 of the Act, which prohibits any person from helping any person of the Mainland Area enter the Taiwan Area illegally.<sup>527</sup> Violators may be imprisoned for a period of between one and seven years and fined up to NT\$1 million.<sup>528</sup> Article 79, Section 2 prescribes imprisonment of a period between three and ten years, and a fine up to NT\$5 million for people who violate Article 15, Section 1 of the same Act with the intent to make profits (意圖營利).<sup>529</sup>

While Article 79, Section 1 of the Act imposes penalties for anyone helping any person of the Mainland Area enter the Taiwan Area illegally, it does not impose penalties for the person of the Mainland Area who enters the Taiwan Area illegally.<sup>530</sup> Instead, it is the *National Security Law* (國家安全法)

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

522. The Romanization of its title is as follows: *guan zhi wu pin xiang mu ji qi shu e*. It is an administrative regulation promulgated by the ROC Executive Yuan.

523. *Law Punishing Smuggling*, *supra* note 506, at art. 2, § 4.

524. Su Zi Judgment No. 699; *Customs Schedule of Imported Goods*, ch. 8.

525. Su Zi Judgment No. 699.

526. The Judicial Yuan Database. *See infra* Appendix 1.

527. *Act Governing Relations*, *supra* note 95, at art. 79, § 1 & art. 15, § 1.

528. *Id.*

529. *Id.* at art. 79, § 2 & art. 15, § 1.

530. *Id.* at art. 79, § 1.

of the ROC that imposes penalties for the person of the Mainland Area who enters the Taiwan Area illegally.<sup>531</sup> Article 3, Section 1 of the *National Security Law* provides that “any person who enters or exits the border should apply for permission from the National Immigration Agency, an office under the Police Bureau of the MOI”<sup>532</sup> and that “any person shall not enter or exit the border without permission” (未經許可者,不得入出境).<sup>533</sup> Article 6, Section 1 of the *National Security Law* punishes violations of Article 3, Section 1 by less than three years of imprisonment and a fine of less than NT\$90,000, which may be imposed independently or in conjunction with imprisonment.<sup>534</sup>

A manner of violating Article 15, Section 1 of the Act and Article 3, Section 1 of the *National Security Law* is transporting people of the Mainland Area into the Taiwan Area by sea.<sup>535</sup> Dozens of cases resulting from this violation share the same basic fact pattern.<sup>536</sup> The violators usually work in groups that include both Mainland residents and Taiwan residents.<sup>537</sup> The Mainland residents lure other Mainland residents to work in Taiwan illegally, while the Taiwan residents persuade employers to hire Mainland residents that had been transported to Taiwan. A captain and crew would drive Mainland residents from a place in the Mainland Area to an appointed area in the middle of the Taiwan Strait to meet a captain and crew from the Taiwan Area, who would transport these Mainland residents to Taiwan.

An illustrative case is one decided by the Taiwan High Court on March 22, 2007, in which four people of the Taiwan Area persuaded and later helped a captain of the Taiwan Area transport twelve people of the Mainland Area from the Mainland Area to the Taiwan Area by sea.<sup>538</sup> Defendant A,<sup>539</sup> one of the four defendants, had served an earlier sentence of one year and ten months in prison for transporting twelve people of the Mainland Area to the Taiwan Area by sea.<sup>540</sup> After being released on probation (假釋) on May 11, 2005, Defendant A prepared to commit the same crime again.<sup>541</sup> Defendant A

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531. National Security Law, [hereinafter National Security Law] available at The Laws and Regulations Database of the Republic of China, <http://law.moj.gov.tw> (last visited June 28, 2009).

532. The Romanization of the quoted text is as follows: *renmin ruchujing yingxiang neizhengbu jingzhengshu ruchujing guanliju shenqing xuke*.

533. National Security Law, *supra* note 531, at art. 3, § 1.

534. *Id.* at art. 6, § 1.

535. See Act Governing Relations, *supra* note 95, at art. 15, § 1; National Security Law, *supra* note 531, at art. 3, § 1.

536. See, e.g., *infra* note 538.

537. *Id.*

538. Shang Su Zi Judgment No. 4650, The Judicial Yuan Database (Taiwan High Ct., March 22, 2007).

539. Reports in the database did not disclose the names of the defendants due to privacy concerns.

540. Shang Su Zi Judgment No. 1907, The Judicial Yuan Database (Taiwan High Ct., August 14, 2003), *aff'd*, Tai Shang Zi Judgment No. 6865, The Judicial Yuan Database (Sup. Ct., December 4, 2003) (Taiwan).

541. *Id.*

persuaded Defendant B to help him, Defendant B persuaded Defendant C to help, Defendant C persuaded Defendant D to help, and Defendant D persuaded a captain of the Taiwan Area to transport people of the Mainland Area from the middle of the Taiwan Strait (24°15'N, 119°45'East) to Taiwan.<sup>542</sup> Their plan was discovered due to the information gathered through eavesdropping permitted by a prosecutor at the Procuracy for Keelung District Court.<sup>543</sup> Therefore, at midnight on April 1, 2006, when the ship transporting twelve people of the Mainland Area went “illegally into the sea territory of our country”<sup>544</sup> and was at 24° N, 120°13' East, about five nautical miles away from Fangyuan Town in the Changhwa County of Taiwan, the captain of the Taiwan Area and the twelve people of the Mainland Area were arrested by the police.<sup>545</sup> The captain, who was sentenced by the Changhwa District Court<sup>546</sup> to three years and six months in prison, appealed to the Taichung Branch of the Taiwan High Court.<sup>547</sup> The Procuracy for the Changhwa District Court decided not to prosecute the twelve people of the Mainland Area.<sup>548</sup> Defendants A, B, C, and D were convicted and sentenced by the Taiwan High Court.<sup>549</sup>

A number of cases concern the commercial dealings between PRC and ROC corporations and individuals. A recurring theme in these cases is the question of whether ROC courts have jurisdiction over crimes that have been committed in the PRC. ROC courts have concluded that they have jurisdiction over crimes that have been committed in the PRC.

For example, in one significant case, a Taiwanese man was initially acquitted because a district court of the ROC found itself lacking jurisdiction over the case,<sup>550</sup> but he was ultimately convicted by an appellate court of the

542. *Id.*

543. *Id.*

544. The Romanization of the quoted text is as follows: *feifa jinru woguo linghai*. The Taiwan High Court used the phrase “our country.” Shang Su Zi Judgment No. 4650.

545. *Id.*

546. Su Zi Judgment No. 791, The Judicial Yuan Database (Taiwan Changhwa Dist. Ct., November 28, 2006).

547. *Id.*

548. *Id.*

549. Shang Su Zi Judgment No. 4650. Defendant A was sentenced to four years and six months in prison because he had committed this crime after he had just finished a sentence for the same offense and because he was secretly transporting (*toudu*) as many as twelve people. *Id.* Defendant B was sentenced to three years and six months in prison because he had previously been convicted of the crime of gambling and because he was secretly transporting as many as twelve people. *Id.* Defendant C was sentenced to three years and four months in prison because he had previously violated the National Security Law and committed burglary (*qiedao*) and battery (*shanghai*) before, and because he was secretly transporting as many as twelve people. *Id.* Defendant D was sentenced to three years and two months in prison because he had previously been convicted of the crimes of hurting family (*fanghai jiating*), of “forging securities (*weizao youjia zhengquan*)” had violated the *Act Controlling Gun, Ammunition, and Killer Knife* (*qiangpao tanyao daoxie guan zhi tiaoli*); and because he was secretly transporting as many as twelve people. *Id.*

550. Reports in the database did not disclose the name of the defendant due to privacy concerns.

crime of disloyalty (背信) and sentenced to six months in prison, a sentence that could be commuted to a fine at the rate of NT\$900 a day.<sup>551</sup> Guangjian Corporation (“Guangjian”), based in Kaohsiung City, Taiwan, established Guangjian Electronics Factory in Dongguan City, Guangdong Province, the Mainland Area.<sup>552</sup> The defendant, a consultant to Guangjian Electronics Factory,<sup>553</sup> was responsible for brokering business deals between companies and clients.<sup>554</sup> In 2000 and 2001, the defendant successfully brokered sales contracts between Guangjian and its clients, Cha-si-te Information Inc. (“Cha-si-te”), Songsen Electronics Factory (“Songsen”), and Fenglin Electronics Inc. (“Fenglin”).<sup>555</sup> On June 15, 2001, Guangjian asked the defendant to go to Fenglin’s headquarters in Shenchou City, Guangdong Province, the Mainland Area, to negotiate the payment of the HK\$354,000 that Fenglin owed Guangjian under the sales contract brokered by the defendant.<sup>556</sup> Without authorization from Guangjian, the defendant accepted a cash payment of HK\$174,000 from Lin Bi-yang, the chairman (負責人) of Fenglin, and signed an agreement (協議書) with Lin, stating that Fenglin had transferred the debt of HK\$150,000 owed by Cha-si-te and the debt of HK\$30,000 owed by the defendant, to Guangjian, which, in combination with a cash payment of HK\$174,000, satisfied all of Fenglin’s monetary obligations to Guangjian.<sup>557</sup> When the defendant did not return the cash payment of HK\$174,000 to Guangjian, Guangjian asked a prosecutor in Kaohsiung, Taiwan, to prosecute the defendant for business embezzlement.<sup>558</sup>

Although the Kaohsiung District Court acquitted the defendant because “the act was committed outside the territory of our country” (在我國領域外犯罪),<sup>559</sup> the Taiwan High Court Kaohsiung Branch Court repealed the judgment of the Kaohsiung District Court because “the Mainland Area was still the territory of our country” (大陸地區猶屬我國領域) and because “the defendant, a person of our country” (被告為我國人民) “should stand trial for the crimes committed in the territory of our country.”<sup>560</sup> In support of its view, the Taiwan High Court Kaohsiung Branch Court cited (1)

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551. Shang Yi Zi Judgment no. 341, The Judicial Yuan Database (Kaohsiung Branch of Taiwan High Ct., September 21, 2004).

552. *Id.*

553. The judgment did not clearly distinguish between the Guangjian Corporation and the Guangjian Electronics Factory. It appears that the Guangjian Corporation wholly owned the Guangjian Electronics Factory. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*

557. *Id.*

558. *Id.*

559. Yi Zi Judgment No. 299, The Judicial Yuan Database (Taiwan Kaohsiung Dist. Ct., April 26, 2004). I add quotation marks here because I want to make the English translation of the phrases used by the court as close to its Chinese version as possible.

560. Shang Yi Zi Judgment No. 341. The Romanization of the quoted text is as follows: *zai woguo lingyu nei fanzui zi ying shou woguo falu zhi shenpan.*

Article 4 of the ROC Constitution; (2) the Eleventh Amendment to the ROC Constitution; (3) Article 2, Section 2, and Article 75 of the Act; and (4) the Tai Fei Zi Judgment No. 94 issued by the ROC Supreme Court in 2000.<sup>561</sup>

The court then explained that it had convicted the defendant of the crime of business embezzlement because, although the defendant had argued that the loan of HK\$30,000 had been between Guangjian and Fenglin, the court was convinced by the testimony by Wang Weifeng, chairman of Guangjian, and Lin Bi-yang, chairman of Fenglin, that the loan of HK\$30,000 had been between Fenglin and the defendant.<sup>562</sup> In addition, the court noted that the defendant had testified during interrogation by a prosecutor that he had returned HK\$174,000 to Wang Weifeng's wife.<sup>563</sup> After Wang Weifeng's wife testified during the trial that she had not received any money from the defendant, the defendant instead testified that he had returned HK\$174,000 to a woman whose family name was Jiang.<sup>564</sup> The defendant's inconsistent testimony led the court to find it unreliable.<sup>565</sup> The court found that the defendant had been "an agent who managed business for Guangjian,"<sup>566</sup> that he had "acted contrary to his mission" (為違背其任務之行爲)<sup>567</sup> with "the intent to enrich himself illegally" (意圖爲自己不法之利益), and that his act had "caused a loss of Guangjian's assets."<sup>568</sup> Although the prosecutor for this case argued that the defendant had committed the crime of embezzlement, the court found that the defendant had committed the crime of disloyalty (背信), prohibited and punished by Article 342, Section 1 of the ROC Criminal Code.<sup>569</sup>

561. Shang Yi Zi Judgment No. 341.

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. The Romanization of the quoted text is as follows: *wei guangjian gongsi chuli shiwu zhi ren.*

567. The Romanization of the quoted text is as follows: *wei weibeiqi renwu zhi xingwei*

568. Shang Yi Zi Judgment No. 341. The Romanization of the quoted text is as follows: *zhi sheng sunhai yu Guangjian gongsizhi caichan.*

569. *Id.*; ROC Criminal Code, *supra* note 396, art. 342, § 1. The prosecutor for this case argued that the defendant had committed the crime of disloyalty separately because, in the prosecutor's view, the defendant had persuaded Guangjian to sign sales contracts with Cha-si-te, Songsen, and Fenglin, even though the defendant had known that these three companies had poor credit histories. Shang Yi Zi Judgment No. 341. After Guangjian had shipped its products, none of the three companies had paid Guangjian in a timely manner, and Cha-si-te and Songsen subsequently went bankrupt. *Id.* However, the court was convinced by the defendant's testimony that Wang Weifeng, Guangjian's chairman, had the final authority to decide whether to sign any sales contract; that the defendant had not known that these three companies had bad credit history; and that the defendant had had no intention of misrepresenting his company because his commission had been conditioned on payment by these three companies to Guangjian. *Id.* In addition, the court noted that Cha-si-te had gone bankrupt on June 26, 2001, and that Songsen had gone bankrupt sixty days after Guangjian shipped its products; that there was no evidence that the defendant had known that these three companies had bad credit history at the time that he brokered the sales contracts; and that the fact of subsequent bankruptcies alone could not prove that the defendant could have foreseen their occurrence at the time that he

A 2007 case concerned a popular type of fraud scheme that involved both people of the Taiwan Area and people of the Mainland Area.<sup>570</sup> A group of criminals (詐騙集團)<sup>571</sup> called a Taiwanese person (the “victim”)<sup>572</sup> by telephone on September 2, 2006, to tell the victim that they had insider tips (內線消息) about professional baseball in Taiwan (中華職棒) and that they could help the victim win when gambling on professional baseball (簽賭職棒).<sup>573</sup> The criminals called the victim again on September 18, 2006, to abet his gambling on professional baseball, gave the victim the information about a bank account registered in the name of the defendant, and instructed the victim that gambling on professional baseball would require him to transfer a setup fee of NT\$30,000 to the designated bank account.<sup>574</sup> The next day, September 19, the victim went to an automatic teller machine and transferred NT\$30,000 to the designated bank account.<sup>575</sup> Then the group of criminals ordered the defendant to withdraw NT\$30,000 from his account on September 22, 2006 and give the cash of NT\$30,000 to the group of criminals by traveling to Fujian Province, the Mainland Area on September 27, 2006.<sup>576</sup> When the victim could not later contact the group of criminals, he reported this case to the ROC police on October 25, 2006.<sup>577</sup> The bank account was in the defendant’s name only and the names of the other criminals are unknown.<sup>578</sup>

The defendant denied any wrongdoing, arguing that he had simply helped his friend in the Mainland Area collect transferred funds from his friend’s clients in Taiwan and that he had not known that “funds in Taiwan could be wire transferred to the Mainland Area.”<sup>579</sup> However, the Keelung District Court noted that the defendant had testified during police interrogation that he had promised to wire transfer funds in his account to his friend in the Mainland Area and that a witness, a banker, had testified at the trial that “the defendant had once asked him whether the bank for which the witness worked was

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had brokered the sales contracts. *Id.* Although the court “found no proof of crime for the prosecution of brokering sales contracts with Cha-si-te, Songsen, and Fenglin,” (*ci bufen shang buneng zhengming beigao fanzui*) the court “did not acquit the defendant separately” (*bu ling wei wuzui zhi yuzhi*) because both the crime discussed earlier and the crime of which he was accused occurred within the period when the defendant was a consultant to Guangjian. *Id.* If there had been enough evidence for the crime of which he was accused (如成立犯罪), the crime discussed earlier and the crime of which he was accused would be “one single crime in trial for their continuity.” (即有連續犯之裁判上一罪關係). *Id.*

570. Yi Zi Judgment No. 423, The Judicial Yuan Database (Taiwan Keelung Dist. Ct., October 23, 2007).

571. The judgment referred to the defendants by the phrase “a group of criminals” (詐騙集團). *Id.* They have yet to be identified. *Id.*

572. Reports in the database did not disclose the victim’s name due to privacy concerns.

573. Yi Zi Judgment No. 423. Gambling is illegal in the ROC.

574. *Id.*

575. *Id.*

576. *Id.*

577. *Id.*

578. *Id.*

579. *Id.* The Romanization of the quoted text is as follows: *Taiwan kuanxiang keyi zhijie huizhi dalu diqu.*

permitted to wire transfer funds to the Mainland Area.”<sup>580</sup> In addition, the court cited a relevant judgment issued by the ROC Supreme Court<sup>581</sup> and stated that, in the face of “widespread instances of fraud in society”<sup>582</sup> “repeatedly covered by newspaper, magazines, and other news media,”<sup>583</sup> everyone with common sense (常識) knew that the act of “using other people’s bank accounts” (徵求他人提供帳戶) was “an attempt to hide the true flow of funds and the true identity of actors.”<sup>584</sup> The court found that the defendant had intended to help the group of criminals defraud the victim (幫助詐欺取財); that “the aforementioned bank account had always been in the defendant’s custody,”<sup>585</sup> and that the defendant had given the group of criminals the funds that the victim had transferred to his bank account.<sup>586</sup> The defendant had received (收受) funds from the victim, and the act of receiving the funds itself was part of the crime.<sup>587</sup> The court convicted the defendant of fraud (詐欺取財罪), prohibited and punished by Article 339, Section 1 of the Criminal Code, and sentenced him to six months in prison, commutable (易科罰金) to a fine at the rate of NT\$1,000 a day.<sup>588</sup> Pursuant to the *2007 Act Reducing Criminal Sentence*, the court reduced the sentence to three months in prison, commutable to a fine at the rate of NT\$1,000 a day.<sup>589</sup>

### C. Conclusion

As previously discussed, the process of repatriation defies the existing categories of cross-border interaction. On the one hand, when compared with experiences elsewhere in the world, the process of repatriation is surely not the most institutionalized channel of cross-border police cooperation. On the other hand, even though Red Cross Societies are the interface, the process of repatriation is not entirely a matter confined to the nonprofit sector. The PRC and ROC police play important roles throughout the process; they make arrests, maintain custody of, transport, and exchange criminal suspects and illegal immigrants. Even though the Red Cross societies transmit information between the PRC and ROC police and witness their exchange of criminal suspects and

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580. *Id.* The Romanization of the quoted text is as follows: *beigao you zhi yi fuwu zhi yinhang xunwen youwu congshi huikuan zhi dalu yewu.*

581. Tai Shang Zi Judgment No. 31, The Judicial Yuan Database (Sup. Ct. of the ROC, January 8, 2004).

582. The Romanization of the quoted text is as follows: *zai shehui shang cengchu buqiong.*

583. The Romanization of the quoted text is as follows: *lujing baozhang zazhi ji qita xinwen meiti zaisan pilou.*

584. The Romanization of the quoted text is as follows: *youyi yinman qi liucheng ji xingweiren shenfen puguang.*

585. The Romanization of the quoted text is as follows: *shangshu yinhang zhang huzi shizhi zhong jun zai beigao zhi chiyou zhanling zhong.*

586. Yi Zi Judgment No. 423.

587. *Id.*

588. *Id.*

589. *Id.*



illegal immigrants, they do not have the power to restrain a person's freedom of movement, not even that of a criminal suspect or an illegal immigrant.<sup>590</sup> The PRC and ROC governments invented this process of repatriation, defying existing categories of cross-border interaction.

In addition, cross-border criminal activities and their punishment by the PRC and ROC courts demonstrate that these activities have been undertaken with little regard for government-to-government diplomacy. As Arnold D. McNair, Reader in Public International Law at the University of Cambridge, stated in 1933, "[t]he only persons likely to benefit [from nonrecognition] are the alleged criminals."<sup>591</sup> Criminals have little or no consideration for government-to-government diplomacy; they care only for their ability to garner illegal profits. Therefore, an understanding of the PRC-ROC relationship is incomplete without understanding the activities of these criminals and the threats they present to PRC and ROC societies.

### CONCLUSION

By describing the PRC's and the ROC's official policies and attitudes, their efforts to make governmental mechanisms appear nongovernmental, and actual court cases, I have attempted to demonstrate that the PRC-ROC interaction differs from state-based and nongovernmental cross-border interaction as these terms are typically understood in literature. I recognize that the PRC-ROC interaction may resemble state-based or nongovernmental cross-border interaction in some ways. However, mere resemblance is not precise enough.

The PRC-ROC relationship is not state-based for three reasons. First, to say that the PRC-ROC relationship is unambiguously state-based is to ignore the official attitudes of the PRC and the ROC. The PRC has always vehemently contended that its relationship with the ROC is not state-based, while the ROC's attitude is more ambiguous.<sup>592</sup> Several indicators of the ROC's attitude, which change in tandem with changes in its administration, present mixed signals. Second, several mechanisms of enormous importance in the PRC-ROC relationship have intentionally been made to appear nongovernmental. Third, activities such as marriage, trade, investment, and even crime have been undertaken with little, if any, regard for government-to-government diplomacy.

While the current PRC-ROC relationship cannot be characterized as state-based, neither can it be characterized as composed of purely nongovernmental interaction of the type that has informed the basis of much current scholarly writing regarding informal government networks. First, PRC

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590. Neither PRC law nor ROC law authorizes Red Cross societies to restrain a person's freedom of movement.

591. McNair, *supra* note 131, at 72.

592. See *infra* Part I.

and ROC courts, which are clearly governmental in nature, adjudicate and resolve a variety of conflicts that arise out of nongovernmental interaction. Second, the efforts to make several mechanisms of enormous importance in the PRC-ROC relationship appear nongovernmental underscores that they are indeed, or were initially, governmental mechanisms. Third, even though activities such as marriage, trade, investment, and crime have been pursued with little or no regard for government-to-government diplomacy, they have been undertaken with the legal rules established with governments in mind.

#### *A. Long-term Stability*

Some may doubt the stability of the current mode of PRC-ROC interaction in the long run. Whereas the unique mechanisms have allowed the PRC and the ROC to interact for over a decade, the centuries-old institution of state-to-state diplomacy is clearly more time-tested. The stability of the current mode of PRC-ROC interaction is difficult to assess. On the one hand, the fact that the SEF/ARATS and Kinmen Accord mechanisms have weathered political turbulence for years suggests some stability. For instance, even though the PRC-ROC relationship worsened between 1996 and 2008<sup>593</sup> the SEF-ARATS and Kinmen Accord mechanisms continue to work to this day. In addition, no serious proposal has been set forth in either the PRC or the ROC that would fundamentally alter either the SEF/ARATS or the Kinmen Accord mechanism. Such a lack of competing alternatives tends to suggest that the SEF/ARATS and the Kinmen Accord mechanisms are stable. At the same time, the root causes of the unique nature of the PRC-ROC interaction—the sovereignty dispute and the ensuing mutual nonrecognition—remain seemingly unshakable.<sup>594</sup> As long as the PRC and the ROC continue to refuse to recognize each other, it is likely that their cross-border interaction will continue to be neither state-based nor purely nongovernmental.

On the other hand, this does not mean that the PRC-ROC cross-border interaction will be as stable as other contexts of cross-border interaction. Some influential scholars consider the uniqueness of the PRC-ROC interaction a “deviation” from the more readily accepted categories of state-based and nongovernmental cross-border interaction.<sup>595</sup> An even more widely shared

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593. See *infra* Part I.

594. The PRC and the ROC engaged in extensive negotiations through the SEF/ARATS mechanism in November 2008. Although these extensive negotiations are significant, they have not shaken the sovereignty dispute and the ensuing mutual nonrecognition. Later I will discuss the development in November 2008 in more detail. See Straits Exchange Foundation, <http://www.sef.org.tw/> (last visited May 27, 2009) or the Web site maintained by the Taiwan Affairs Office under the PRC's State Council, <http://www.gwytb.gov.cn/> (last visited May 27, 2009).

595. See, e.g., Jau-yuan Hwang, *The Evolution of the Legal Nature of the Cross-Strait Relationship in Taiwan's Domestic Law* (兩岸關係法律定位的演變(1987-2007): 台灣觀點), in *THE DEVELOPMENT OF THE CROSS-STRAIT RELATIONSHIP IN THE PAST TWENTY YEARS*

belief is that the current PRC-ROC cross-border interaction is only a transitional arrangement that awaits a more fundamental and permanent solution to the PRC-ROC dispute.<sup>596</sup> These ideas can be easily reconciled with recent studies on the effects of socialization on international law and politics,<sup>597</sup> which suggest that an outlier state faces pressure to conform to widely shared behavioral or organizational norms. To the extent that the PRC and the ROC feel pressured to conform to the existing categories of cross-border interaction, as studies of the effects of socialization on international law and politics would predict, the PRC-ROC cross-border interaction will be less stable than other contexts of cross-border interaction.

### B. Two Implications

Two implications are suggested by the uneasy relationship between the PRC-ROC interaction and the contemporary scholarship on (non-) compliance with international law.<sup>598</sup> First, for scholars and analysts who consider, at least

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(近二十年兩岸關係的發展與變遷) 67 (You Yin-rong ed., 2008); Tay-sheng Wang, *The Taiwanization of the Law of the Republic of China* (中華民國法體制的台灣化), in TAY-SHENG WANG, *THE BREAK AND CONTINUITY OF TAIWAN LAW* (台灣法的斷裂與連續) 147 (2002).

596. See, e.g., Biography of President Ma Ying-jeou, *supra* note 42 (“Regarding cross-Strait relations, Ma Ying-jeou has been promoting the policy of “no unification, no independence, and no use of force.” In particular, he advocates the maintenance of the status quo under the framework of the ROC constitution and the resumption of mainland negotiations based on the “92 Consensus.” Ma calls for Taiwan and the mainland to reconcile their differences in cross-Strait relations and in the international community so that both sides can pursue win-win strategies that will contribute to the peaceful development of the region.”); Platform of the Democratic Progressive Party, [http://www.dpp.org.tw/index\\_en/](http://www.dpp.org.tw/index_en/) (follow “The Party” hyperlink; then follow “Platform” hyperlink) (last visited June 27, 2009) (“According to this reality of sovereignty and independence, Taiwan should draw up a constitution and establish a nation. Only then is it possible to guarantee respect and security for Taiwanese society and for individual citizens, and to offer the people the opportunity to pursue freedom, democracy, prosperity, justice and self-realization.”); Embassy of the People’s Republic of China in the United States of America, *White Paper--The One-China Principle and the Taiwan Issue*, <http://www.china-embassy.org/eng/zt/999999999/White%20Papers/t36705.htm> (last visited June 27, 2009) (“As the Chinese government has successively resumed the exercise of sovereignty over Hong Kong and Macao, the people of the whole of China are eager to resolve the Taiwan issue as early as possible and realize the total reunification of the country. They cannot allow the resolution of the Taiwan issue to be postponed indefinitely. We firmly believe that the total reunification of China will be achieved through the joint efforts of the entire Chinese people including compatriots on both sides of the Taiwan Straits and those living overseas.”).

597. See, e.g., ALASTAIR IAIN JOHNSON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS, 1980-2000* (Princeton Univ. Press 2007); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181-207 (1996); Finnemore, *supra* note 3.

598. For a survey of the “compliance” scholarship, see, e.g., Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in HANBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes, Thomas Risse, and Beth A. Simmons eds., SAGE Publications, 2002).

implicitly or inadvertently, existing international legal rules and compliance with them to be an unqualified good, the PRC-ROC interaction sounds a cautionary note. Second, for scholars and analysts who stress the limits of international law and cross-border coordination, the PRC-ROC interaction is a cause for optimism. Taken together, these two implications suggest that there should be more focus on the substance of the international law. Moreover, an additional focus on the substance of the international law may, in the longer term, have implications for the PRC-ROC context.

By offering rationales that explain states' obedience to or compliance with international law in general terms,<sup>599</sup> scholars may have inadvertently implied that existing international legal rules and compliance with them are an unqualified good. In reaction to critics who have argued that international law is merely morality or rhetoric,<sup>600</sup> defenders have offered various rationales explaining why states obey or comply with international law. Both critics and defenders have supported their theories by offering historical and contemporary examples, but their efforts at theorizing by the application of such theories as socialization theory<sup>601</sup> or rational choice theory<sup>602</sup> have said relatively little about the specific content of international legal rules. The defenders' omission implies that whenever a rule can become international law through treaty-making, customary law, or the decisions of international organizations, that rule should be obeyed.<sup>603</sup> For example, if states comply with international law because they participate in state socialization or are concerned with maintaining their reputation in order to engage in subsequent cross-border interaction, what occurs when a state believes that it should not comply with specific international legal rules but it is unable to change those legal rules? As state socialization and reputational considerations are the process through which states are brought into compliance with international law, the same reason why state socialization and reputational considerations ensure states' compliance with international law also forces a state to comply with the specific

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599. See, e.g., FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (Oona A. Hathaway & Harold Hongju Koh eds., Foundation Press 2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (Oxford Univ. Press 2008).

600. Realists in international relations scholarship since Hans Morgenthau and Edward Hallett Carr have put forward the idea that international law is merely morality or rhetoric. More recently, some legal scholars have reached nearly the same conclusion by applying rational choice theory. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford Univ. Press 2005). Cf. George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005), (employing rational choice theory but reaching a conclusion different from that of Goldsmith and Posner).

601. See, e.g., Goodman & Jinks, *supra* note 599.

602. See, e.g., GUZMAN, *supra* note 599; GOLDSMITH & POSNER, *supra* note 600; Norman & Trachtman, *supra* note 600.

603. The critics' insufficient discussion about the specific content of international legal rules will be discussed *infra*.

international legal rules when it believes that it should not be forced to do so. The insufficient discussion regarding the specific content of international legal rules implies that if specific international legal rules should be changed, they can be changed through the international law-making process, and that if the proposed changes have yet to proceed through the international law-making process, the pre-existing international legal rules must have been functioning relatively well.

For the optimism regarding existing international legal rules and compliance with them, the PRC-ROC interaction sounds a cautionary note for two reasons. First, the application of current international legal rules has not helped resolve the PRC-ROC dispute. James Crawford, a professor of law at the University of Cambridge and a former member of the International Law Commission, provided a thoughtful analysis of the relevant legal rules in 2006, where he asserted, “The conclusion must be that Taiwan is not a State because it still has not unequivocally asserted its separation from China and is not recognized as a State distinct from China.”<sup>604</sup> Although Crawford’s knowledge of international law in general and of state creation in particular lends his legal analysis enormous weight, it has not contributed to resolving the PRC-ROC dispute. First of all, Crawford’s conclusion that Taiwan is not a state has persuaded neither ROC politicians nor average ROC citizens to abandon their bid to join the United Nations and its affiliated organizations such as the World Health Organization. Based on theoretical and empirical reasons listed earlier when discussing the stability of the PRC-ROC interaction, it would indeed be surprising if ROC politicians and citizens abandoned their bid to join international organizations. Theories of and empirical studies on the effects of socialization on international law and politics have demonstrated the potential strength of the will to join international organizations and become part of the world order. If ROC politicians and citizens abandon their bid to join international organizations, that fact would fly in the face of these theories and empirical studies. At the same time, I acknowledge that mere theories and

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604. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 219 (2d ed., Oxford Univ. Press 2006). Crawford explained his analysis in more detail on page 211:

The point is that there is even now widespread agreement that Taiwan is not a State but part of a larger China. China takes this view, other States take this view and Taiwan itself has by no means rejected it. The ROC and the PRC have long both insisted that there is only one Chinese State; and, notwithstanding the more ambiguous position communicated from time to time by officers of the Taiwanese government, that view has been acquiesced in, or even explicitly recognized, by all or almost all other international actors. As [Daniel Patrick] O’Connell pointed out in 1956, ‘a government is only recognized for what it claims to be.’ Statehood is a claim of right. Claims to statehood are not to be inferred from statements or actions short of explicit declaration; and in the apparent absence of any claim to secede the status of Taiwan can only be that of a part of the State of China under separate administration. *Id.* at 211. Crawford cites Daniel Patrick O’Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 AM. J. INT’L L. 405, 415 (1956). In a footnote, Crawford adds that “[t]he contrary proposition is not of course true: a government may be recognized for *less* than it claims” (emphasis in original).

empirical studies regarding socialization outside the PRC-ROC context cannot perfectly forecast what will actually occur within the PRC-ROC context. However, the development in the ROC to this point has demonstrated the unlikelihood of ROC politicians and citizens abandoning their bid to join international organizations. For example, Ma Ying-jeou, the ROC's President from 2008 to 2012, has not abandoned his government's bid to join international organizations, even though his government and political party are widely considered to desire better relations with the PRC.<sup>605</sup>

In addition, some prominent international legal scholars in the ROC interpret Crawford's statement that "Taiwan is not a State because it still has not unequivocally asserted its separation from China" as a warning that urges Taiwan to unequivocally assert its separation from China soon.<sup>606</sup> However, the United States and the PRC oppose a formal declaration of Taiwanese independence and have pressured the ROC not to make such a declaration. To be sure, these prominent scholars may have misinterpreted Crawford. When Crawford quotes Daniel Patrick O'Connell, a late Australian professor of international law, regarding the proposition that "a government is only recognized for what it claims to be,"<sup>607</sup> Crawford adds in a footnote that "[t]he contrary proposition is not of course true: a government may be recognized for less than it claims."<sup>608</sup> By drawing a conceptual distinction between necessary conditions and sufficient conditions, Crawford has not explicitly urged Taiwan to unequivocally assert its separation from China at this point in time.<sup>609</sup> The possibility that prominent scholars may have misinterpreted Crawford does not provide much comfort. As of 2008, scholars and policymakers of all interested entities disagreed significantly over the application of international legal rules to the PRC-ROC relationship. The disagreement seems to be at odds with the optimism toward current international legal rules and their compliance.

The PRC-ROC interaction sounds an additional cautionary note for the optimism because, if scholars and policymakers are obsessed with compliance, they may lack the kind of creativity that has been crucial in making the PRC-ROC interaction as it currently is. If the PRC and the ROC had been obsessed with conforming to the existing categories of cross-border interaction, they would not have invented their own distinct interaction. I am not arguing that the PRC and the ROC have violated international law by inventing their own cross-border interaction, as this is clearly not the case. However, as I have demonstrated, the PRC-ROC interaction defies existing categories of cross-

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605. See, e.g., Rigger, *supra* note 48.

606. ee, e.g., Lung-chu Chen, *James Crawford Warns Taiwan*, LIBERTY TIMES, November 19, 2006, available at <http://www.libertytimes.com.tw/2006/new/nov/19/today-o7.htm> (last visited May 27, 2009).

607. CRAWFORD, *supra* note 604, at 211.

608. *Id.* at 211.

609. Crawford's text and footnote imply that Taiwan's declaration of independence is a necessary condition for its independence, yet Taiwan's declaration of independence may possibly be insufficient for Taiwan's independence.

border interaction. International lawyers who approach every problem with the question, “Does it comply with international law?” may lose sight of opportunities to develop a unique type of cross-border interaction or fail to appreciate the functionality of a particular situation.

The failure to appreciate the uniqueness of a particular situation is a particularly serious problem. Even when researchers are not preoccupied with the question, “Are the entities in question complying with international law?” it is not easy to gain understanding of a foreign legal system, particularly as outside observers tend to view it through the lens of their own value system rather than that of those whom they observe. Professor William P. Alford of Harvard Law School insightfully cautioned scholars of comparative law to be flexible and tentative in framing an initial inquiry into foreign, especially non-Western, legal systems.<sup>610</sup> Alford urged scholars to distinguish the stage of framing the initial inquiry from the stage of evaluating the data collected.<sup>611</sup> If an initial inquiry into foreign, especially non-Western, legal systems is framed in universal terms or terms not sensitive to local contexts, Alford cautioned that scholars may risk failing to truly understand the foreign legal systems.<sup>612</sup>

When researchers are preoccupied with the question, “Are the states in question complying with international law?” they have greater tendency to frame their inquiry in universal terms or terms not sensitive to local contexts, and thereby misunderstand a foreign legal system. Admittedly, to some extent the question must be framed in universal terms; the same international legal rule cannot have different meanings for different entities. However, compliance may not always be determined by simply answering “yes” or “no” to the question, “Is the state complying with international law?” As the PRC-ROC interaction has demonstrated, the process in which governments adjust local circumstances to conform to the more readily accepted categories of cross-border interaction is too important to be ignored. As discussed earlier, the SEF/ARATS and Kinmen Accord mechanisms have intentionally been made to appear nongovernmental.<sup>613</sup> If researchers only examine the end result—the nongovernmental appearance of the mechanisms—they lose sight of the PRC’s and ROC’s efforts to make them appear nongovernmental. Indeed, the very fact that efforts had to be expended to make the SEF/ARATS and Kinmen Accord mechanisms appear nongovernmental underscores the fact that they were, at least initially, government mechanisms. In terms of the end result—their nongovernmental appearance—the SEF/ARATS and Kinmen Accord mechanisms may appear to differ little from other contexts of nongovernmental interaction. However, a narrow focus on the end result leads one to lose sight of the efforts that created the end result. Ignoring these efforts is unfortunate, as it leads one to misunderstand the past and current situation and, by

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610. Alford, *supra* note 19, at 950.

611. *Id.*

612. *Id.*

613. *See supra* Part II.B.

extension, fail to grasp opportunities to make improvements in the future.

Indeed, a better understanding of the efforts to make governmental mechanisms appear nongovernmental may help policymakers grasp opportunities to make improvements in the future. The benefits and limits of the current PRC-ROC interaction are evident in the development of the PRC-ROC relationship in November 2008. As stated in Part I, observers of Asia expect that the PRC government and the KMT-led ROC government improve their bilateral relationship by focusing on their agreement that there is one China while remaining ambiguous regarding which entity represents one China.<sup>614</sup> Ambiguity, achieved by the use of the SEF/ARATS mechanism, played a key but underappreciated role in the development of the PRC-ROC relationship in November 2008. According to the Xinhua News Agency, the PRC's official state news agency, Chen Yunlin, Chief (會長) of the ARATS, met "Taiwan leader" Ma Ying-jeou in Taipei, Taiwan, on November 6, 2008.<sup>615</sup> Foreign news media, however, see Chen Yunlin's status very differently. For example, *The Economist* describes Chen Yunlin as "the most senior mainland official to [visit Taiwan] since 1949."<sup>616</sup> *The New York Times* describes the meeting between Chen and Ma as "one of the highest-level exchanges between officials from mainland China and Taiwan since 1949."<sup>617</sup> Both the Xinhua News Agency and foreign news media see only part of the whole picture. Foreign news media are accurate as to the so-called "historic" nature of Chen Yunlin's visit to Taiwan and his meeting with the ROC's President Ma Ying-jeou. If the organization led by Chen Yunlin—the ARATS—were an ordinary people's association in the PRC, either he would not be able to meet Ma or their meeting would not have generated such a buzz. Nonetheless, the Xinhua News Agency is also accurate in avoiding the word "official" in its coverage, probably deliberately, as the SEF/ARATS mechanism has to keep its nongovernmental appearance. The benefits of the SEF/ARATS mechanism are obvious, as it allows the PRC and the ROC to develop their cross-border interaction despite their unresolved sovereignty dispute. The limits of the SEF/ARATS mechanism are also obvious, as even when the PRC-ROC relationship is as good as it now is, the PRC-ROC relationship has to be centered upon the SEF-ARATS mechanism.

I do not intend to criticize the SEF/ARATS mechanism, but its benefits and limits have not been adequately understood. Running the risk of stating it too boldly, the SEF/ARATS and Kinmen Accord mechanisms have been built upon the fiction that nongovernmental interface may be built to cloak government interaction in the PRC-ROC relationship. The word "fiction" is

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614. See *supra* Part I.

615. ChinaView.cn, Taiwan Leader Ma Ying-jzou Meets ARATS Chief, [http://news.xinhuanet.com/english/2008-11/06/content\\_10316005.htm](http://news.xinhuanet.com/english/2008-11/06/content_10316005.htm) (last visited November 16, 2008).

616. *The World This Week*, ECONOMIST, November 8th-14th, 2008.

617. Edward Wong, *Taiwan's Leader Meets Chinese envoy*, November 6, 2008, N.Y. TIMES.



chosen not to diminish the genius of inventing such an idea, but to allude to the wise words written in 1967 by Lon L. Fuller, a renowned legal philosopher: "A fiction taken seriously, i.e., believed, becomes dangerous and loses its utility . . . A fiction becomes wholly safe only when it is used with complete consciousness of its falsity."<sup>618</sup> As demonstrated earlier, the nongovernmental appearance of government interaction in the PRC-ROC relationship is a fiction, created and maintained by the PRC and ROC governments. It is a useful fiction as it has been the foundation of the PRC-ROC cross-border interaction for more than a decade. It loses its utility and may even become dangerous, however, if people get confused by the state-based/nongovernmental vocabulary and take the vocabulary more seriously than it deserves. Just as nongovernmental appearance enables PRC-ROC interaction, the idea that government interaction must be cloaked by nongovernmental appearance in the PRC-ROC relationship also limits its development.

For example, Chen Yunlin did not address Ma Ying-jeou as the ROC's President. According to Edward Wong of *The New York Times*, addressing Ma as the ROC's President "would have implied that the mainland [PRC] recognizes Taiwan's de facto independent status,"<sup>619</sup> and "[some] Taiwanese were irate . . . after learning that Mr. Chen avoided using Mr. Ma's formal title."<sup>620</sup> Avoiding formal, official title is consistent with the nongovernmental appearance put up by the PRC and ROC governments, but it also accentuates the widely shared belief that the current PRC-ROC interaction is only a transitional arrangement that awaits a more fundamental and permanent solution. Although a transitional arrangement is better than a fiercely fought dispute, the sense of awaiting a more fundamental and permanent solution may easily translate into a sense of rejection and perhaps a sense of insecurity. Chen's avoidance of Ma's formal title may be taken by some people as evidence of the PRC's intention to deprive the ROC of its President and democracy in the future. Just as it was predictable that Chen would avoid the use of Ma's formal title, it was also predictable that some ROC citizens would be "irate"<sup>621</sup> because of its omission and even engage in violent protests.<sup>622</sup> Although the nongovernmental appearance of government interaction has been helpful in the PRC-ROC relationship, it is not sufficient.

According to Fuller, the key to making a fiction safe is to be conscious of

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618. LON L. FULLER, LEGAL FICTION 9-10 (1967). It should be noted that Fuller urges "complete consciousness" of the falsity of legal fictions. *Id.* However, the extent to which a person can be "completely" "conscious" of one thing is debatable. For example, some scholars have examined issues of sensibility and imagination. See, for example, Richard D. Parker, "Here, the People Rule": A Constitutional Populist Manifesto, 27 VALPARAISO U. L. REV. 531-584 (1993), which was later revised to become the book RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (Harvard U. Press, 1994).

619. Edward Wong, *supra* note 617.

620. *Id.*

621. *Id.*

622. *Id.*

its falsity.<sup>623</sup> In the PRC-ROC interaction, the fiction is the distinction between state-based and nongovernmental interaction. As demonstrated earlier, the PRC-ROC interaction suggests that while activities such as marriage, trade, investment, and even crime may be undertaken with little, if any, regard for government-to-government diplomacy, they are still undertaken with the legal rules established by governments in mind.<sup>624</sup> The prevailing scholarship on the PRC-ROC relationship characterizes the relationship between the PRC and the ROC as dualistic,<sup>625</sup> with conflict within the public (political) sphere but cooperation within the private (economic and social) sphere. The dualistic characterization is accurate, but its underlying assumption regarding the separation between state and society is misguided. Although conflict and cooperation do paradoxically co-exist in the PRC-ROC context, state and society are actually inseparable. It is useful to compare Part II and Part III with a thoughtful paragraph written by Alford in 1987 when considering the treatment of “nonmarket economy” in the antidumping and countervailing duty laws of the United States:

Adam Smith notwithstanding, there are no major segments of any national economy here [in the United States] or abroad operating as pure markets, wholly responsive only to supply and demand. Nor have there ever been any, for that matter, either at the time that Smith wrote or at any point prior to or since then. The simplest of national markets envisioned by Smith presumes a massive degree of government involvement in such things as maintaining national security and domestic tranquility, establishing a physical infrastructure of roads, harbors, sewers, and the like, issuing and regulating currency, protecting property rights, and providing a mechanism for the peaceful resolution of disputes that arise in that market. Without these, the forces of supply and demand—and, indeed, society itself—would not operate as they do now in the United States or anywhere else. To this skeleton, we [the United States] and other modern welfare states have added a vast array of government activities that clearly impinge upon the free operation of the forces of supply and demand including, among other things, the mandating of primary and secondary education, the operation of public schools and universities, the provision of certain basic health services, the regulation of use of the airwaves, the outlawing of prostitution and slavery, and the establishment and enforcement of worker, consumer, and

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623. FULLER, *supra* note 618, at 9-10.

624. *See supra* Parts I, III.

625. *See, e.g.,* Cheng, *supra* note 7; BUSH, *supra* note 8.

environmental safety measures.<sup>626</sup>

The parallels between Alford's paragraph and Part II and Part III are obvious. In the criminal justice cases in Part III and domestic violence cases in Part II, the PRC and ROC governments maintain domestic tranquility. In Part II and Part III, the PRC and ROC courts are the mechanism for the peaceful resolution of disputes that arise in market and society. Although this article does not explicitly touch upon the outlawing of prostitution and slavery, Part III discusses illegal immigration. The parallels are both shocking and unsurprising. They are shocking because the two contexts are very different but indeed demonstrate some parallels. They are unsurprising because the economic and social interaction between the PRC and the ROC requires legal foundations, as pointed out by Alford and even earlier by American Legal Realism.<sup>627</sup> The nongovernmental appearance of governmental mechanisms is a fiction, created by the PRC and ROC governments to facilitate the social and economic exchanges between their people.

Although the word "fiction" carries negative connotations, nongovernmental appearance of governmental mechanisms has been a useful fiction. Nongovernmental appearance has allowed the PRC-ROC interaction to develop despite their mutual nonrecognition. The PRC-ROC context is by no means the first or the only context where the idea "nongovernmental" plays a role in cross-border politics. As discussed in Part I, for the purpose of avoiding embarrassment, track-two or multi-track diplomacy is designed by scholars and politicians to appear nongovernmental.<sup>628</sup> Compared with track-two or multi-track diplomacy, government networks are more "genuinely" nongovernmental as they denote the networking activities of government officials. Indeed, the "nongovernmental" quality of these networking activities is a major reason why Slaughter sees government networks as a viable proposal to improve global governance while avoiding a world government.<sup>629</sup> However, the enormous importance of purely unregulated networking activities may cause problems to democratic accountability, and Slaughter thoughtfully devotes a chapter of her book to this issue.<sup>630</sup> The need for democratic accountability and the proposed solutions such as greater transparency suggest that these networking activities are not as "nongovernmental" as they may seem.

After appreciating the falsity of the fiction, the next question is how to

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626. William P. Alford, *When Is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other "Nonmarket Economy" Nations*, 61 S. CAL. L. REV. 79, 108-09 (1987) (citing KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1975)).

627. See, e.g., *AMERICAN LEGAL REALISM* (William W. Fisher, Morton J. Horwitz, and Thomas A. Reed eds., Oxford U. Press 1993).

628. See *supra* Part I.A.

629. See SLAUGHTER, *supra* note 13.

630. SLAUGHTER, *supra* note 13, at 216-60; see also Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2000-2001).

move forward. There are several options. First, the PRC and the ROC may do well to apply the inhabitant-welfare approach used by the ICJ in the 1971 Namibia Advisory Opinion, as the inhabitant-welfare approach does not require nongovernmental appearance of governmental mechanisms.<sup>631</sup> Second, based upon their unique needs, the PRC and the ROC may attempt to negotiate a unique formula for their bilateral relationship. As long as the PRC and the ROC do not violate international human rights and respect third-party rights, hardly any state would object to a peaceful resolution of the PRC-ROC dispute. The key obstacle, of course, is that the PRC and the ROC have failed to resolve their sovereignty dispute for decades. The pessimism is found not only in the PRC-ROC context but also more broadly in international legal scholarship.

Perhaps surprisingly, the PRC-ROC interaction presents no less of a challenge to pessimistic scholars and analysts who have stressed the limits of international law and cross-border coordination. They assert that it is dangerously naïve to think that international law can truly regulate international affairs. The tense diplomatic relationship between the PRC and the ROC may appear to support the pessimistic perception that international law can hardly regulate interstate relations.<sup>632</sup> However, the development of the SEF/ARATS and Kinmen Accord mechanisms, discussed in Part II and Part III, demonstrates the efforts that have been made by the PRC and the ROC to pursue their mutual goals regarding civil and criminal justice.<sup>633</sup> Although the SEF/ARATS and Kinmen Accord mechanisms are not “international law” as the term is usually understood, they demonstrate that cross-border coordination is possible even under the trying conditions created by the unresolved sovereignty dispute between the PRC and the ROC.

Although criticism of international law or cross-border interaction provides valuable insights into the nature of international politics, such criticism may become more persuasive if more focus is put on the substance of the international law. Although analysis of international law has had little relevance to the development of the PRC-ROC interaction since 1987, some kind of cross-border coordination still develops in the PRC-ROC context. In addition, on some issues, such as combating cross-border crime, cross-border coordination is clearly a desirable outcome. Therefore, the PRC-ROC interaction suggests that the substance of international law or cross-border interaction is important in the consideration of the best approach to particular cross-border issues.<sup>634</sup>

When criticizing international law or cross-border interaction, critics have

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631. *See supra* Part I.B.2.

632. *See supra* Part I.

633. *See supra* Parts II, III.

634. Gabriella Blum, a professor at Harvard Law School, develops a similar theme when examining conflict management in the contexts of protracted armed conflicts. *See* GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES (Harvard U. Press 2007).

not always been selective with the substance of international law. To be sure, critics have insightfully pointed out problems with some specific international legal rules,<sup>635</sup> and I admire the courage and wisdom to point out problems with international legal rules that are popular. In fact, their courage and analysis inspires me to urge more focus on the substance of international law. However, some criticisms of international law and cross-border interaction may be too general to be fair. For example, in their influential book *The Limits of International Law*, Jack L. Goldsmith of Harvard Law School and Eric A. Posner of University of Chicago Law School cite Adolf Hitler's Nazi Germany as a prime example of an entity that used international law as rhetoric to "mislead his enemies, avoid alienating neutrals, and pacify domestic opposition."<sup>636</sup> Indeed, Goldsmith and Posner's invocation of the Nazi Germany experience powerfully proves that it is possible for the language of international law to be abused and that failing to recognize such abuse can be enormously and tragically dangerous. However, not every use of international law is an abuse. If it is acknowledged that international law can be harnessed for both positive and negative purposes, it is useful to attempt to distinguish between such purposes. Moreover, if it is acknowledged that international law can achieve desirable goals in some contexts, it is useful to attempt to distinguish such contexts from others.

While critics may argue that it is a futile endeavor to attempt to distinguish positive from negative uses of international law, I respectfully disagree. Distinguishing between positive and negative uses is admittedly difficult, but to dismiss all uses of international law as abusive may amount to throwing out the baby with the bathwater. As demonstrated by the PRC-ROC interaction, cross-border activities—migration, marriage, crime, trade, and investment, to name just a few—have a variety of attributes and require a variety of government responses. While the debate continues regarding whether cross-border trade and migration are beneficial or harmful, few would think that cross-border crime should not be prohibited and punished. In addition, it would be difficult to identify a scholar who could sensibly argue that human trafficking is not a cross-border crime. In order to regulate these various cross-border activities, cross-border coordination among governments seems a beneficial, if not sufficient, governmental response.

As long as there is cross-border coordination among governments, entities make promises, have expectations, and perhaps sign documents through their representatives. As demonstrated earlier, the SEF/ARATS and Kinmen Accord mechanisms both involve documents signed by the representatives of the PRC and ROC governments.<sup>637</sup> Certainly, I appreciate the distance between, on the

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635. See, e.g., Jack Landman Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

636. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 168 (Oxford U. Press 2005).

637. See *supra* Part II.B.

one hand, current international legal rules and, on the other hand, merely promises, expectations, and documents signed by government representatives. Still, are they not evidence of cross-border coordination between the PRC and the ROC? In addition, the fact that the PRC-ROC relationship has been fraught with tension tends to support a more optimistic attitude. More specifically, the fact that the PRC and the ROC have been able to maintain cross-border coordination for more than two decades despite their sovereignty dispute appears to call for optimism regarding the future of cross-border interaction and the international legal rules that foster it.

Taken together, the two implications suggest that there should be more focus on the substance of international law and promises, expectations, and documents that do not readily enjoy the “classification” as international law. As discussed above, international law should adapt to contemporary challenges as they change over time.<sup>638</sup> On the one hand, critics of international law may need to recognize or account for the undeniable need for international law, or more broadly, cross-border coordination. On the other hand, proponents of international law may need to recognize or account for the fact that the current international legal rules may have to be reformed to fit contemporary needs. Policymakers and scholars should ask, “Are the specific international legal rules just or unjust? Do they enhance welfare or not?” The answers to these kinds of questions regarding the specific content of international legal rules can further enrich international legal scholarship.

In the longer term, enriched international legal scholarship may steer the PRC-ROC context toward a different, and potentially better, direction. Sovereignty is an important factor in the PRC-ROC dispute and, as a result, the PRC-ROC context may change if the importance of the sovereign state norm in international law changes. If scholars place an additional focus upon the substantive goals that international law should achieve, the PRC-ROC context may move in a different direction, which, to be sure, is only a very remote possibility. However, after examining the implications of the PRC-ROC interaction for international legal scholarship, it would be interesting to speculate about the implications that an enriched international legal scholarship may have for the PRC-ROC context.

Placing an additional focus upon the substantive goals that international law should achieve may lead to a re-examination of the importance of the sovereign state norm in international law.<sup>639</sup> According to some sociologists, the sovereign state norm prevails in the modern and contemporary eras not because—or at least not primarily because—it achieves more substantive goals than do other competing norms, but rather because entities emulate one another

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638. *See supra* Part IV.

639. Some scholars have done admirable research on this issue. *See, e.g.*, *PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES* (Stephen D. Krasner ed., Columbia U. Press, 2001). Their work should gain more attention and attract more scholars to conduct further research.

and put pressure upon those that do not yet conform to the prevailing social norm. A particularly apt explanation of such organizational behavior was provided by Martha Finnemore, a political scientist at the George Washington University, when she described the lessons that political scientists may draw from sociologists:

The modern bureaucratic state has become the sole legitimate form of political organization in the world; virtually all others have been eliminated. Empires, colonies, feudal arrangements, and a variety of other forms have become extinct and, perhaps more important, unimaginable in contemporary politics. This is not a functional result. . . . Extreme valuation on statehood as the only legitimate form of political organization makes many kinds of political conflict difficult to resolve. It means that self-determination requires having a state. If you are not a state, you are nobody in world politics, and national liberation groups understand this. This creates an all-or-nothing dynamic in many conflicts that might be more easily resolved if other organizational forms were available.<sup>640</sup>

Finnemore made an overstatement but might indeed capture the psychological dynamic underlying sovereignty-related disputes. Clearly, Finnemore's nobody-in-world-politics metaphor does not reconcile with either the PRC-ROC interaction examined in this article or the fact that the ROC is a member of the World Trade Organization and some other international organizations. On the other hand, some people (for instance, the protesters in Taiwan in November 2008) seem to hold the view that "[i]f you are not a state, you are nobody in world politics." Therefore, placing an additional focus upon the substantive goals that international law should achieve would lead to a thorough examination of Finnemore's observation that the dominance of the sovereign state norm in international law and politics "creates an all-or-nothing dynamic in many conflicts that might be more easily resolved if other organizational forms were available."<sup>641</sup> If such an examination confirms Finnemore's finding, then scholars of international law who care about the substantive goals of international law should be concerned with and attempt to ameliorate the all-or-nothing dynamic that makes cross-border conflicts difficult to resolve.

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640. Finnemore, *supra* note 3, at 332. In support of her argument, Finnemore cites John W. Meyer, *The World Polity and the Authority of the Nation-State*, in *STUDIES OF THE MODERN WORLD-SYSTEM* (Albert Bergesen ed., Academic Press 1980) and David Strang, *From Dependency to Sovereignty: An Event-History Analysis of Decolonization*, 55 *AM. SOC. REV.* 846-60 (1990).

641. *Id.*

For example, in 1992, Lori Fisler Damrosch, a professor at Columbia Law School and Co-Editor-in-Chief of *American Journal of International Law* since 2003, attempted, albeit implicitly, to ameliorate the all-or-nothing dynamic that might arise from the importance of the sovereign state norm in international law when she wrote:

GATT's framers were prescient in devising formulas for participation going beyond 'states' or 'governments' in the classic sense. What motivated them in 1947 was the concern to provide for a workable approach to decolonization, but their pragmatic solution, focusing on functional autonomy rather than formalistic legal constructs, fits well with the realities of Taiwan's situation today. Other international agreements and organizations, based on more rigid formulations, can be expected to come under pressure for change as the state system itself changes. The GATT model is not the only one, but it has much to recommend it.<sup>642</sup>

As discussed earlier, both the PRC and the ROC are now members of the WTO (the progeny of the GATT) although the ROC is listed as "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" rather than "the Republic of China" in WTO records.<sup>643</sup> More attempts to ameliorate the all-or-nothing dynamic, such as that made by Damrosch in 1992, could potentially lead to a more fundamental change of the status of the sovereign state norm, and in turn affect the dynamic of the PRC-ROC context and other contexts similarly perplexed by the all-or-nothing dynamic. Of course, it is exceedingly difficult or unimaginable to change an international legal norm as fundamental as the sovereign state norm. However, the international legal rules that comprise the sovereign state norm are "not unassailable and immutable rules of science that dictate particular actions, but human constructs that can be manipulated."<sup>644</sup> If, over the longer term, governments around the world can put less emphasis upon their status or sovereignty and greater emphasis upon regulating and facilitating their cross-border interaction, many cross-border conflicts, including the PRC-ROC dispute, would take a very different shape.

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642. Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19, 38 (1992).

643. See *supra* note 101.

644. Alford, *supra* note at 19. What Alford describes with the quoted text are economic principles, not the international legal rules that comprise the sovereign state norm. I use the quoted text because it conveys the message I want to convey. See also STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., Cambridge U. Press 1996).



## APPENDIX I: SOURCES OF MATERIALS

The materials used by this project come from a variety of sources. This Appendix discusses the sources and method of my research.

Both the PRC and ROC maintain a fairly useful and up-to-date catalog of laws and regulations. On the PRC side, the most useful source is the website for the Taiwan Affairs Office of the State Council (*guowu yuan Taiwan shiwu bangong shi*).<sup>645</sup> On the ROC side, two websites are useful: (1) the website for the Mainland Affairs Council of the Executive Yuan (*xingzhengyuan dalu weiyuanhui*);<sup>646</sup> and (2) the website for the Straits Exchange Foundation (*caituan faren haixia jiaoliu jijinhui*).<sup>647</sup>

This Article relied on two online databases for the PRC and ROC case law. The PRC has no centralized reporting system for court cases. In my experience, Lawyee,<sup>648</sup> a database for the law of the PRC, renders more cases for each search inquiry than other databases do. On the ROC side, the Judicial Yuan, the judicial department of the ROC government, maintains a centralized reporting system for court cases.<sup>649</sup> Both databases are in the Chinese language.

The way I did my research is both modern and old-fashioned. I relied on the online databases to search for relevant case law. I used “Taiwan” as my keyword in the Lawyee database and “mainland” (*dalu*) as my keyword in the database maintained by the Judicial Yuan. Both databases rendered hundreds of cases for my search inquiries. Then I read each case to determine its relevance.

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645. Taiwan Affairs Office of the State Council, <http://www.gwytb.gov.cn/> (last visited May 27, 2009).

646. Mainland Affairs Council, <http://www.mac.gov.tw/> (last visited May 27, 2009).

647. Straits Exchange Foundation, <http://www.sef.org.tw/> (last visited May 27, 2009).

648. Lawyee.net, <http://www.lawyee.net/> (last visited May 27, 2009).

649. The Judicial Yuan of the Republic of China Law and Regulations Retrieving System, <http://jirs.judicial.gov.tw/Index.htm> (last visited May 27, 2009).

