

1-1-1993

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Recommended Citation

Ya Qin, *China and GATT: Accession Instead of Resumption*, 27 J. World Trade 77 (1993).

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China and GATT

Accession Instead of Resumption

Ya QIN*

After a long impasse, negotiations finally resumed, in the fall of 1992, on the entry of the People's Republic of China (PRC) into the General Agreement on Tariffs and Trade (GATT).¹ The GATT Working Party on China, authorized by the GATT Council to expedite its work, is expected to enter soon into the final stage of the negotiations. Apart from unsettled substantive issues relating to market access in China, a central legal issue that remains to be resolved is the issue of "resumption" *v.* "accession".

In pursuing its GATT membership, the PRC government has insisted on its resumption of China's original GATT contracting party status, instead of accession as a new member. Resumption instead of accession is one of three basic principles that the Chinese government set out for its entry into GATT. The other two principles are: (1) joining GATT as a developing country; and (2) no special discriminatory provisions attached in the China protocol.² The PRC government felt compelled, legally as well as politically, to take this position in order to denounce the validity of China's withdrawal from GATT in 1950 by the former Chinese government, currently the government in Taiwan. It has been understood between China and GATT, however, that the resumption would serve as a legal formality only: the PRC would not inherit any rights and obligations from China's original contracting party

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This article is based on Chapter 5 of the author's doctoral dissertation *China and GATT: Toward a Meaningful Participation?* completed at Harvard Law School, Cambridge, Mass., U.S.A., in May 1990. The author wishes to thank Professors Detlev Vagts and William Alford of Harvard Law School for their advice and support in supervising the dissertation and Mr Åke Lindén, and through him many other members of the GATT Secretariat, whose help made the completion of the dissertation research possible. The views expressed herein are solely those of the author.

¹ The PRC government requested resumption of China's contracting party status in GATT on 10 July 1986. GATT Doc. L/6017 (14 July 1986). The GATT Working Party on China suspended its meetings after the Tiananmen Square crackdown in June 1989. Subsequently, the negotiations were further stalled by the PRC's hardline position on Taiwan's GATT application, which was submitted in January 1990. A compromise was eventually reached in the fall of 1992 and, in connection with establishing a working party on Taiwan's accession to GATT, the GATT Council authorized the Working Party on China to expedite its work and report to the Council as soon as possible. Statement by Council Chairman on Accession of Chinese Taipei at GATT Council of Representatives Meeting, 29 September 1992, *Statement to GATT Council on Taiwan*, Inside U.S. Trade, Special Report, 2 October 1992, at S-4.

² See Statement by Shen Jueren, Deputy Minister of Foreign Economic Relations and Trade, Head of the Chinese Delegation at the Third Session of the GATT Working Party on China, Geneva, 26 April 1988.

status, and all substantive terms of China's GATT membership would be subject to negotiation. Thus far, the negotiation on China's membership has been conducted in the typical manner of accession, i.e. a working party is set up to examine the economic and trade regime of the applicant which is followed by negotiations of a tariff schedule and other concessions to be made by the applicant, and the conclusion of a protocol embodying all the terms and conditions of the applicant's GATT membership,³ although it has been suggested that the legal instrument governing China's GATT relations should be entitled "protocol of resumption".⁴

The "mere" formality of resumption, however, raises significant legal questions for GATT and imposes certain legal problems on particular GATT contracting parties. Yet, the question of 'resumption' *v.* 'accession' has not been formally discussed within GATT due to the Working Party's decision to postpone the issue until substantive terms of China's membership are agreed upon. Although during the last few years a number of articles on China and GATT have addressed the issue of resumption,⁵ these articles have gone little beyond expounding the Chinese government's position and identifying associated issues, and none of them has questioned the legality of the resumption.

This article presents a different analysis. The author is of the view that the resumption position is legally flawed and mistaken as a result of overlooking the unique legal structure of GATT. Based on an analysis in international law, it is the author's conclusion that the only legally correct way for China to join GATT is through accession under Article XXXIII of the General Agreement.⁶ Following this conclusion, recommendations are made as to legally sound and politically beneficial methods that the Chinese government may wish to adopt in replacing its resumption approach with that of accession.

I. HISTORICAL BACKGROUND

China was one of the twenty-three signatories to the Final Act of 30 October 1947, authenticating the text of the GATT.⁷ The General Agreement, however, has

³ Accession is provided by Article XXXIII of the General Agreement. See *infra*, footnote 6.

⁴ See Chung-chou Li, *Resumption of China's GATT Membership*, 21 J.W.T.L. 4, at 46, 1987.

⁵ See Wenguo Cai, *China's GATT Membership: Selected Legal and Political Issues*, 26 J.W.T. 5, at 35, 1992; Lei Wang, *Separate Customs Territory in GATT and Taiwan's Request for GATT Membership*, 35 J.W.T. 5, at 5, 1991; Yu-shu Feng, *China's Membership of GATT: A Practical Proposal*, 22 J.W.T. 6, at 53, 1988; Li, *supra*, footnote 4; Robert E. Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 Law & Poly Int'l Bus. 371 (1986).

⁶ Article XXXIII provides that a government not party to the General Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in its external commercial relations, may accede to the Agreement, based on negotiation of terms and a two-thirds majority vote. Accession under Article XXXIII is one basic way of becoming a contracting party to GATT. Another method of joining GATT is succession under Article XXVI:5(c) of the General Agreement, which was designed for the former colonial territories to continue their participation in GATT without interruption after independence. See generally, John H. Jackson, *World Trade and the Law of GATT*, 96-100, Indianapolis, Bobbs-Merrill, 1969.

⁷ 55 U.N.T.S. 194, 188 (1947). As the General Agreement on Tariffs and Trade refers to both the text of the treaty and the institution that has developed on the basis of the treaty, the convention is to refer to the institution as GATT and the treaty as the General Agreement or the Agreement. See K. Dam, *The GATT: Law and International Economic Organization*, 3, no. 1, Chicago, The University of Chicago Press, 1970.

never entered into force itself.⁸ Instead, it was first brought into application through the conclusion of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade (the PPA) in 1947⁹ and subsequently by a series of protocols of accession to GATT.¹⁰ The twenty-two governments¹¹ that signed the PPA became the original Contracting Parties of GATT, and China was one of them.¹²

Not long after it joined GATT, the government of the Republic of China (ROC) was defeated in the civil war and replaced by the government of the PRC, which declared its founding on 1 October 1949. Having lost control over mainland China, the deposed ROC government relocated in Taiwan and continued to claim status as the legitimate government of China. For historical reasons, such claim was supported by a majority of the nations at the time and for a long period thereafter.

On 6 March 1950, the ROC government notified the Secretary-General of the United Nations of its withdrawal from the GATT.¹³ Although the validity of the

⁸ Article XXVI:6 of the General Agreement provides that it shall enter into force after governments representing a certain minimum share of world trade have accepted it. Since only one current contracting party, Haiti, has accepted the General Agreement (Liberia accepted the General Agreement on 17 May 1950 but withdrew on 13 June 1953), it has not yet entered into force. See *GATT Analytical Index—Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement*, 1989 ed; Hon (hereafter *Analytical Index*), Introduction-4; Article XXVI: 11. On several occasions the contracting parties considered the question of acceptance of the General Agreement itself. See 3rd Supp. *Basic Instruments and Selected Documents* (hereafter BISD) 48, 1955; GATT Doc. L/2375 (1965); 26th Supp. BISD 61 (1980).

⁹ 55 U.N.T.S. 308 (1947). Reprint in 4 BISD 77-78 (1969). To apply GATT through the PPA was a decision made under special historical circumstances. For the purpose of obtaining immediate tariff concessions, GATT was negotiated parallel to the Charter of the International Trade Organization (ITO), the comprehensive world trade organization envisaged after World War II. To ensure the value of the tariff concessions not to be nullified by non-tariff measures, certain provisions of the Draft ITO Charter (known as the Havana Charter) were incorporated into Part II of the General Agreement. Some delegates, however, indicated their lack of authority to negotiate these provisions. In order to prevent the delay of implementing the tariff concessions already agreed upon, a compromise was made to conclude a protocol to limit the application of Part II to the extent not inconsistent with the existing legislation of the contracting parties and to apply the entire General Agreement on a provisional basis as it was intended that GATT would eventually become part of the ITO. Whereas the negotiation of the ITO and the Havana Charter eventually aborted, GATT has survived on the basis of the PPA. See Jackson, *supra*, footnote 6, at 61-62 (citing U.N. Doc. EPCT/100, 135 (1947); U.N. Doc. EPCT/TAC 1 and 4 (1947)).

¹⁰ Countries subsequently acceding to GATT each concluded their protocols of accession containing provisions similar to the PPA. The practice of applying GATT on the basis of protocol of provisional application has been followed throughout GATT history.

¹¹ According to its provision, the PPA was to be signed by eight governments (Australia, Belgium, Canada, France, Luxemburg, Netherlands, the United Kingdom and the United States) by 15 November 1947 and applied by them on and after 1 January 1948, and to remain open for signature until 30 June 1948 by the signatories to the Final Act. All the government signatories to the Final Act but Chile signed the PPA by the cut-off date. Chile became a GATT contracting party afterwards through accession in February 1948. See *GATT—Status of Legal Instruments*, 3-1.1; Jackson, *supra*, footnote 6, at 91.

¹² China deposited its Instrument of Acceptance of the PPA on 21 April 1948 and its application of GATT took effect on 21 May 1948. See *Analytical Index, supra*, footnote 8, Contracting Parties-1.

¹³ GATT/CP/54, *Communication from Secretary-General of United Nations Regarding China*. The withdrawal took effect on 5 May 1950, sixty days after the notice, in accordance with Article 5 of the PPA. The ROC's quick withdrawal from GATT (several months after the founding of the PRC) contrasts with its practice in most of the other international organizations where it retained its presence for as long as it was able to. Although the official reason of withdrawal was not given, it is obvious that, given the nature of GATT obligations, it would be to the disadvantage of the ROC government to be continuously held responsible for the customs territory of mainland China, over which it had lost control.

withdrawal was challenged within GATT at the time,¹⁴ the withdrawal has been consistently treated as effective by GATT and its contracting parties.¹⁵

The ROC government obtained observer status in GATT in 1965,¹⁶ but lost such status in 1971 after the passing of the U.N. General Assembly Resolution No. 2758 (XXVI) recognizing the PRC government as the sole legal representative of China to the United Nations and “expel[ling] the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.”¹⁷ Based on its policy of following decisions of the United Nations on essentially political matters, the CONTRACTING PARTIES¹⁸ re-examined its decision of 1965 and decided that “the Republic of China should no longer have observer status” in GATT. This decision was made through consensus, although a number of contracting parties expressed their disagreement.¹⁹

For a period of three decades after its founding, the PRC had virtually no contact with GATT.²⁰ It was only when China inaugurated extensive economic reforms in the late 1970s that the PRC government began to show interest in GATT and the initial official contact was made in 1980, which resulted in the attendance of a Chinese trade official in the GATT commercial policy training course.²¹ China then obtained

¹⁴ Czechoslovakia challenged the withdrawal on the ground that the ROC government lacked the competent authority to represent China. *Summary Record of the Sixth Meeting of the Tariff Negotiations Committee*, GATT/TN.2/SR.6, 13 November 1950. The Czech representative suggested that an inquiry be sent to Peking on their attitude towards GATT and proposed to include in the Torquay Protocol, which omitted China from the list of contracting parties in its Preamble, a note to the effect that “The Nationalist Government of the Republic of China has notified its withdrawal from the General Agreement with effect from 5 May 1950; the Central People’s Government of China has not yet defined its position with regard to the General Agreement.” The proposal was rejected by the Chairman on the ground that it was unnecessary to mention that point in the Protocol. *Id.* at 2–3.

¹⁵ Subsequent GATT documents have consistently treated China as a withdrawn contracting party. See e.g. *Analytical Index*, Protocol-13, Sec. 5; Contracting Parties—1, no. 2. It was reported that between 1950 and 1962, fourteen GATT contracting parties withdrew the concessions they had originally negotiated with China. F. Liser, *China and the General Agreement on Tariffs and Trade*, in *Joint Economic Committee, Congress of The United States, China under the Four Modernizations*, Part II, 138–139, 1982.

¹⁶ GATT/SR.22/3, 16 March 1965. In discussing the granting of observer status to the ROC, a number of contracting parties stated that they recognized the PRC as the legitimate government of China. The issue was evaded by the announcement of the Chairman of the CONTRACTING PARTIES that admission of observers did not prejudice the position of GATT or of individual contracting parties towards recognition of the government in question, and that the CONTRACTING PARTIES followed the policy expressed in Article 86 of the Havana Charter, namely, to avoid passing judgment in any way on essentially political matters and to follow decisions of the United Nations on such questions. *Id.* at 2–3.

¹⁷ *Resolution on Representation of China*, U.N.G.A. Res. 2758, 26 GAOR Supp. 29 (A/8429), at 2. For history of the question of Chinese representation in the United Nations and other U.N. related organizations, see Frederick L. Kirgis, *International Organizations in their Legal Setting*, 123–144, St. Paul, Minnesota, West Publishing Co., 1977.

¹⁸ The contracting parties acting jointly are designated as the CONTRACTING PARTIES by Article XXV:1 of the General Agreement. The contracting parties in small letters means the individual member countries. The form Contracting Parties is also used in practice to refer to GATT in general. See Olivier Long, *Law and Its Limitation in the GATT Multilateral Trade System*, 6, no. 15, 1985.

¹⁹ *Summary Record of the First Meeting*, GATT/SR.27/1, 19 November 1971, at 2, 3 and 4. For the GATT policy of following the United Nations decisions on political matters, see *supra*, footnote 16.

²⁰ It was reported that the PRC government expressed its appreciation of the GATT decision to terminate the ROC’s observer status, but took no action with regard to its status in GATT. See W. Feeney, *Chinese Policy in Multilateral Financial Institutions, China and World*, 285, S. Kim (ed.) 1984. See also Li, *supra*, footnote 4, at 27.

²¹ Li, *ibid.* at 28.

observer status for the session of the CONTRACTING PARTIES in 1982,²² and observer status in meetings of the Council of Representatives and its subordinate bodies in 1984.²³ Since then, China has been attending GATT meetings regularly in that capacity.

On 10 July 1986, the PRC government formally requested its resumption of China's contracting party status in GATT.²⁴ In connection with this request, China was admitted to full participation in the Uruguay Round of multilateral trade negotiations.²⁵ In March 1987, a GATT Working Party on China's Status as a Contracting Party was set up with the mandate to "examine the foreign trade regime" of the PRC and to "develop a draft Protocol setting out the respective rights and obligations".²⁶

II. THE PRC GOVERNMENT'S RESUMPTION APPROACH

In its communication to the Director-General of GATT dated 10 July 1986, the PRC government advised that, upon recalling that China was one of the original contracting parties to the General Agreement, the PRC government had decided to "seek the resumption of its status as a contracting party to GATT" and was prepared "to enter into negotiations with GATT contracting parties on the resumption of its status as a contracting party."²⁷ The resumption approach was subsequently elaborated in a statement of the Chinese delegation to GATT, which is worth quoting in length:

"The founding of the People's Republic of China in 1949 did not alter China's status as a subject of international law. The withdrawal from GATT in 1950 by the deposed regime in Taiwan was illegal and invalid. The United Nations, in a Resolution adopted in 1971, decided to restore all its rights to the People's Republic of China in the United Nations and in all the organizations related to it and recognize the representatives of the government of the People's Republic of China as the only legitimate representatives of China. On the understanding that the GATT follows decisions of the United Nations on essentially political matters, the CONTRACTING PARTIES terminated the status of the observer from Taiwan . . . Therefore, there is a sufficient political and legal basis for China's request for resumption of its status as a contracting party."

The statement went on explaining the realistic approach of resumption:

²² GATT C/M/160, at 2, 24 September 1982. Mindful of its legal position regarding China's original contracting party status, the PRC government carefully stated in its request for GATT observer status that ". . . this request is without prejudice to the position of the government of the People's Republic of China with regard to its legal status *vis-à-vis* its General Agreement on Tariffs and Trade." GATT Doc. L/5344, 5 July 1982. For a brief description of observer status in GATT, see Long, *supra*, footnote 18, at 46.

²³ GATT Doc. L/5712, 26 October 1984; GATT C/M/183, at 4. The Council of Representatives is the inter-sessional body of the CONTRACTING PARTIES open to all contracting parties that request its membership. The Council has the authority to take up all the questions the CONTRACTING PARTIES deal with at their sessions, as well as any urgent matter, and oversees the work of the various subsidiary GATT bodies. See 9th Supp. BISD 8 (1961). For an introduction to the organization of the GATT, see LONG, *supra*, footnote 18, at 44-54.

²⁴ GATT Doc. L/6017, 14 July 1986.

²⁵ The Ministerial Declaration on the Uruguay Round states that the Uruguay Round is open to "countries that have already informed the CONTRACTING PARTIES . . . of their intention to negotiate the terms of their membership as a contracting party." 33rd Supp. BISD 19 (1987), Part I, F(a)(iv). The provision was said to accommodate China's situation in particular. Li, *supra*, footnote 4, at 39. It was the hope of the PRC government that participation in the new round of multilateral trade negotiations would facilitate the process of its entry into GATT.

²⁶ See GATT Doc. L/6191/Rev. 2, 26 April 1988. As of the time of this writing, the Working Party's examination appears to be nearing conclusion, which is to be followed by tariff negotiations and drafting of the protocol.

²⁷ *Supra*, footnote 24.

“However, having taken into account the contractual nature of the General Agreement, we agree to enter into substantive negotiations with contracting parties for the resumption of China’s contracting party status and set the rights and obligations. In view of considerable changes having taken place during the suspension of relations between China and GATT, my government proposes to take a non-retroactive approach to issues which occurred during the period of suspension.”²⁸

The statement set forth three basic propositions

- (1) that the PRC’s resumption of China’s status as a GATT contracting party is justified under international law and supported by international practice, and the PRC has the right to request such resumption;
- (2) that in view of the considerable changes that have taken place during the period of suspension and the contractual nature of GATT, the PRC is willing to enter into substantive negotiations to set its rights and obligations on the basis of contemporary conditions; and
- (3) with respect to issues from the period of China’s absence from GATT, a non-retroactive approach should apply, i.e. to forget about the past so that potential legal issues arising out of old rights and obligations can be avoided. Thus, the PRC’s position regarding its entry into GATT essentially amounts to resumption in form, accession in substance.

III. THE LEGAL IMPLICATIONS OF “RESUMPTION”

Substantive rights and obligations aside, however, resumption is a legal concept.²⁹ Its application could arise to a number of legal issues, including the applicability of Article XXXV of the General Agreement, the availability of the “existing legislation” exemption for China, and potential complications of the legal structure of China’s GATT applications.³⁰

²⁸ Statement by Shen Jueren, *supra*, footnote 2.

²⁹ It is significant that the PRC government carefully chose the word “resumption” in the GATT context, whereas “restoration” was used in the context of the United Nations, IMF, World Bank or other related organizations where the China seat had been occupied uninterrupted by the ROC until replaced by the PRC. The differentiation in the choice of words suggests the recognition that relations between China and GATT have been suspended, while relationship in the other cases was continuous. Note that there is no equivalent distinction between “resumption” and “restoration” in Chinese; the term *hui fu* (meaning to restore, resume, rehabilitate, regain) is used in both contexts.

³⁰ In addition, the resumption issue took on a new dimension of significance when Taiwan requested accession to GATT as “Customs Territories of Taiwan, Penghu, Kinmen and Matsu” in January 1990. Arguing that the PRC government is the sole legitimate government of China and Taiwan is an inseparable part of China, the PRC government vigorously opposed Taiwan’s request and insisted that Taiwan cannot join GATT before the PRC government resumes China’s original GATT membership. For an elaboration of the PRC government’s position, see Wang, *supra*, footnote 5. From the PRC’s perspective, Taiwan’s GATT application is part of its attempt to regain international recognition of its political regime. Consequently, the PRC government may well consider resumption all the more important since the very purpose of resumption is to affirm the legitimacy of the PRC government as the sole legal government of China. For an analysis of Taiwan’s legal capacity to join GATT under international law, see Ya Qin, *GATT Membership for Taiwan: An Analysis in International Law*, 24 N.Y.U.J. Int’l L. & Pol. 1059 (1992).

A. *Applicability of Article XXXV*

Article XXXV of the General Agreement (Non-application of the Agreement between Particular Contracting Parties) provides a contracting party with the right not to apply the General Agreement with another, if either party does not consent to such application and has not entered into tariff negotiations with the other at the time either accedes to GATT.³¹ The right is so provided so that no contracting party would be forced to enter into GATT relations with another without its consent.³² In GATT history, Article XXXV has been commonly used by the contracting parties.³³

Since Article XXXV can only be invoked at the time of accession pursuant to article XXXIII, it would not be applicable to China in the case of resumption. As a result, unless special arrangements are made, all the contracting parties would be required to apply GATT with China regardless of whether or not they consent to such application. The inability to invoke Article XXXV, however, would be particularly unfair to those contracting parties which acceded to GATT after China's "withdrawal" in 1950 and thus never knowingly entered into GATT relations with China.³⁴ For these countries, this would be their first opportunity to consider whether to apply GATT with China. Legally speaking, resumption is inapplicable to GATT relations between these countries and China, since no such relations ever existed before.

The inability to invoke Article XXXV against China may also pose problems for certain contracting parties, especially the United States. The U.S. domestic legislation traditionally imposes restrictions on the extension of most-favoured-nation treatment (MFN) to non-market economy countries.³⁵ Because GATT mandates extension of MFN unconditionally among its contracting parties, the

³¹ Article XXXV, para. 1. Note that a contracting party which invokes Article XXXV against another at the time of the latter's accession may, however, vote in favour of such accession pursuant to Article XXXIII. *Analytical Index, supra*, footnote 7, Article XXXV:6, Sec. 8. Invocation of Article XXXV can be subsequently withdrawn; and once withdrawn, it cannot be restored. For discussion of Article XXXV and its origin and application in GATT history, see Jackson, *supra*, footnote 6, at 98-102; *Analytical Index, ibid.*, Article XXXV:1.

³² Historically, Article XXXV was drafted to accommodate the change of voting requirement under Article XXXIII from unanimity to a two-thirds majority, which raised the possibility that a contracting party could be forced to enter into GATT relations with another country without its consent. See Jackson, *supra*, footnote 6, at 92; *Analytical Index, ibid.*, Article XXXV. Article XXXV does not apply in the case of succession under Article XXVI:5(c), see *supra*, footnote 6, since tariff negotiations are not required thereunder. A succeeding contracting party may inherit the invocation of Article XXXV from its sponsor. See *Analytical Index, ibid.*, Article XXXV:3.

³³ For the list of all invocations in GATT history and their current status, see *Analytical Index, ibid.*, Article XXXV:3-6, Secs. 6 and 7. The most extensive use of the article in GATT history was with respect to Japan, which acceded to GATT in 1955, although most of these invocations were eventually withdrawn. A large number of new contracting parties which acceded to GATT through sponsorship under Article XXVI:5(c) succeeded the invocation of Article XXXV against Japan from the contracting parties formerly responsible for their customs territories. See M. Bronckers, *A Legal Analysis of Protectionist Measures Affecting Japanese Imports in the European Community—Revisited*, Protectionism and the European Community, 60, E. Volker (ed.), 1987. The extensive use of Article XXXV against Japan caused the CONTRACTING PARTIES to conduct several studies of the situation. See 10 Supp. BISD 69 (1962).

³⁴ China's withdrawal from GATT has been consistently treated as effective. See *supra*, footnote 15. However, this analysis does not apply to those contracting parties which were former colonies of the original contracting parties (PPA signatories) and succeeded to GATT pursuant to Article XXVI:5(c). See *supra*, footnotes 32 and 33.

³⁵ Currently, under the U.S. Trade Act of 1974, the U.S. government may not extend MFN treatment to a non-market economy country unless such country permits free emigration. A waiver for this restriction may be granted by the President if he determines that progress has been made in such country towards the goal of free emigration; the President's waiver authority is subject to various checks by the United States.

United States has, in the past, resorted to invocation of Article XXXV to avoid entering GATT relations with certain non-market economy countries.³⁶ Since China is considered a non-market economy, the United States may also decide to refrain from entering into GATT relations with China.³⁷ However, it would not be able to do so by utilizing article XXXV if China were to resume its original contracting party status. Negotiation of an *ad hoc* exception would be necessary in the case of resumption.

B. The "Existing Legislation" Exemption

Another issue raised by resumption concerns the availability of the "existing legislation" exemption for China. The existing legislation clause, also known as the grandfather clause, is provided in the PPA and every protocol of accession. It permits each contracting party to apply Part II of the General Agreement, which covers mostly restrictions on the use of non-tariff barriers, only "to the extent not inconsistent with existing legislation" at the time of its entry into GATT.³⁸ Should China join GATT through accession, it would be entitled to the exemption of its inconsistent legislation existing as of the date of its accession. Such exemption, however, would not be available to China should it "resume" its original membership, since the applicable date of existing legislation for the original contracting parties is 30 October 1947, the date of the PPA³⁹ and any Chinese legislation existing on that date has long since been abolished by the PRC government.⁴⁰ Realizing that this was the case, the Chinese delegation requested that the applicable date for its existing legislation exemption be the date of its resumption instead of the date of the PPA.⁴¹ Obviously, this position is inconsistent with the logic

³⁶ The United States invoked Article XXXV against Romania and Hungary despite its support for their accession to GATT. See e.g. *Working Party Report on Accession of Romania*, adopted on 6 October 1971, 18 Supp. BISD 94 (1972). The United States did not invoke Article XXXV against Yugoslavia or Poland at the time of their respective accessions to GATT based on its judgment that these two countries were not under Soviet control. Historically, as a result of the enactment of such restrictive legislation in the early 1950s, the United States ceased to apply GATT to Czechoslovakia, an original GATT contracting party, which led to a GATT decision granting the suspension of GATT relations between the two countries. See 2 BISD 36 (1952). For a brief account of the history of U.S. legislation with respect to non-market economy countries, see John H. Jackson, *The World Trading System, Law and Policy of International Economic Relations*, 292-295, Cambridge, Massachusetts, The MIT Press, 1989. See also K. Grzybowski, *East-West Trade Relations in the United States: The 1974 U.S. Trade Act, Title IV*, 11 J.W.T.L., December 1977.

³⁷ Since the U.S.-China bilateral trade agreement first came into effect China has been receiving MFN treatment from the United States under the waiver authority of the U.S. President, and its MFN status is subject to annual renewal by the President and approval of the U.S. Congress under the Trade Act of 1974. *Agreement on Trade Relations Between the United States and the People's Republic of China*, 7 July 1979 (effective 1 February 1980), 31 U.S.T. 4652 and *supra*, footnote 35.

³⁸ See *supra*, Section I.

³⁹ Since PPAs provided different dates for their entering into force with respect to different contracting parties, a GATT ruling was made that PPA "refers to legislation existing on 30 October 1947, the date of the Protocol as written at the end of its last paragraph." *Date of Reference for the Phrase "Existing Legislation" in Paragraph 1(b) of the Protocol: Ruling by the Chairman on 11 August 1949*, 2 BISD 35 (1952).

⁴⁰ In contrast, the PRC government did not abrogate all the treaties its preceding governments had concluded. Instead, it adopted an analytical approach towards the existing treaty obligations. See text *infra* at footnote 57.

⁴¹ The Chinese delegation stated at the meeting of the Working Party on China that "upon the resumption of its membership, China would apply Part II of the General Agreement to the fullest extent not inconsistent with domestic legislation existing at the time of resumption." GATT Doc. Spec (88) 13/Add.5, at 2.

of its proposed resumption of China's original contracting party status. The significance of this issue, however, is diminished in practice since the PRC hardly ever imposes its non-tariff barriers in the form of legislation of "mandatory character" as strictly interpreted by the GATT rules.⁴²

C. *Complication of the GATT Legal Structure*

The proposed resumption would cause further complications to the already complex legal structure of GATT, thanks to the significant development of GATT in the last four decades. During China's absence from GATT, the General Agreement has been amended numerous times and a new part (Part IV) regarding developing countries has been added to the Agreement.⁴³ If China were to resume its original membership, its legal status with respect to each of the subsequent amendments would require clarification. Moreover, during the years of China's absence, the number of GATT contracting parties has increased from the original twenty-two to over one hundred. Whereas China may seek resumption of its GATT application with other original contracting parties (and probably those which succeeded to GATT under the sponsorship of the original contracting parties⁴⁴), it cannot possibly "resume" GATT applications with those contracting parties which acceded to GATT during China's absence and have never before applied GATT with China. In order to establish GATT relations between China and these countries, separate agreements (from the agreement of "resumption") would have to be concluded between them.⁴⁵ The criss-cross GATT relations China may have with respect to different contracting parties and different GATT legal instruments could result in overwhelming legal and technical complications for the GATT system.

IV. THE FALLACY OF THE RESUMPTION APPROACH

The PRC government is correct in arguing that the withdrawal from GATT by a deposed Chinese government is invalid under international law. According to generally accepted principles of international law, the essential criterion in recognition of a government that came into power through force is whether that government has established effective control over most of the territory of the State and if such control

⁴² See *Analytical Index, supra*, footnote 8, Protocol—5-8, Sec. 4(b); Panel Report on Norway—*Restrictions on Imports of Apples and Pears*, adopted on 22 June 1989, GATT Doc. L/6474, 36 Supp. BISD 306, 321 (1990).

⁴³ For status of amendments to the General Agreement, see *GATT Status of Legal Instruments—2*. See also *Analytical Index, ibid.*, Article XXX.

⁴⁴ In accordance with Article 2 of the PPA, the General Agreement is also applied to the territories of the original contracting parties. Subsequently, most of these territories became independent and succeeded to GATT under the sponsorship of the original GATT members pursuant to Article XXVI:5(c). Since the succeeding contracting parties inherit application of GATT from their sponsors, China's resumption claim should apply to them as well as to their sponsors. See *Analytical Index, supra*, footnote 8, Article XXVI: 6-7 for a list of succeeding contracting parties. See also, Jackson, *supra*, footnote 6, at 96-100; Tatsuro Kunugi, *State Succession in the Framework of GATT*, 59 Am. J. Int'l L. 268 (1965).

⁴⁵ The same problem would also arise in the context of Article XXXV. See *supra*, text at footnote 34.

is likely to continue.⁴⁶ Recognition of a new government is retroactively effective from the time the government was established.⁴⁷ Inasmuch as GATT followed the 1971 U.N. General Assembly Resolution on China and terminated the ROC's observer status, GATT has recognized the PRC as the legal representative of China,⁴⁸ and such recognition should be retroactively effective from the date of the founding of the PRC government on 1 October 1949. Consequently, the ROC's withdrawal from GATT in 1950, subsequent to the founding of the PRC, can only be null and void as a matter of international law.

A. *A Question in the Law of Treaties*

The PRC government's resumption approach, however, is mistaken for reasons other than the validity of ROC's withdrawal. The legal issue in the GATT context is not whether the ROC's withdrawal ever validly terminated China's contracting party status. As far as GATT is concerned, the question of Chinese government representation has been settled since 1971. Thus, unlike the case in the United Nations and various other international organizations, the issue of China's membership in GATT does not lie in government representation.⁴⁹ Rather, the question goes to the continuing validity of China's original membership itself: after non-application of GATT for more than four decades during which substantial changes have taken place, is China's original contracting party status in GATT still valid?

This question is essentially a question in the Law of Treaties. The GATT is first and foremost an inter-governmental agreement.⁵⁰ As a treaty, the General Agreement provides the rights and obligations of its contracting parties and serves as the constituent instrument of the GATT organization. The continuation of a government's

⁴⁶ For general theory and State practice regarding the prerequisites and legal effects of recognition of government in international law, see 2 *Whiteman Digest of International Law*, Sec. 4 *Prerequisites*; Secs. 61–65 *Recognition of Governments*; Hersch Lauterpacht, *Recognition in International Law*, Part II (1947); Ti-Chiang Chen, *The International Law of Recognition*, Part II (1951). For discussion on recognition of the PRC government in international law, see Chen Tiqiang, *The People's Republic of China and Problem of Recognition*, 1985 *Chin. Y. B. Int'l L.* 3. See also, *Legal Implications of Recognition of the People's Republic of China*, 72 *Proc. Am. Soc'y Int'l L.* 240 (1978).

⁴⁷ See 2 *Whiteman*, *supra*, footnote 46, Sec. 70 *Effect of Recognition*, at 728–738.

⁴⁸ It should be noted that the question of government representation in an international organization is distinct from the question of recognition of a government by individual members of that organization. It has long been accepted that recognition of a State or government is an individual act subject to the national policy of each member, whereas admission to membership or acceptance of representation in an international organization is a collective act of the organization subject to the Charter and Rules of the organization. The acceptance of representation, therefore is not conditioned on recognition by individual members. See Kirgis, *supra*, footnote 17, 124–127, citing *Legal Aspects of Problems of Representation in the United Nations*, Memorandum by the Secretary-General of the United Nations, U.N. Doc. S/1466 (1950).

⁴⁹ From a legal standpoint, one could also argue that the issue of government representation does not exist in GATT because GATT members are governments acting on behalf of separate autonomous customs territories, not representatives of sovereign States. See definition of "contracting party" in Articles XXXII and XXXIII of the General Agreement and the PPA (which specifically refers to "governments" in each of its six Articles). This is in contrast with other major international organizations, e.g. the United Nations, whose members are defined as "States". U.N. Charter, Article 4, para. 1. See Qin, *supra*, footnote 30, at 1074–5.

⁵⁰ Because GATT was originally intended to be a temporary trade agreement only and most of its institutional framework has been developed gradually over the years, after ITO failed, see *supra*, Section I, GATT retains a salient contractual character, distinguishing it from other international organizations. For discussion of the legal nature of GATT, see Jackson, *supra*, footnote 6, at 119; Long, *supra*, footnote 18, at 44.

membership in GATT is therefore contingent upon the continuation of its being a contracting party to the General Agreement—the underlying treaty of the GATT organization. Thus, the current legal status of China in GATT can only be determined by defining the current status of China with respect to the General Agreement.

B. *Suspension or Termination?*

The PRC's request for resuming China's original contracting party status is based on the assumption that, absent any valid withdrawal from GATT, China is technically still a contracting party to GATT. This assumption, however, cannot sustain if there are other factors that can also cause termination of China's original contracting party status.

It is a matter of fact that the General Agreement has not been applied between China and any other GATT contracting parties for more than forty years (with respect to mainland China, since the founding of the PRC in 1949). During this period of non-application, neither the Chinese government nor any other GATT contracting party has ever regarded the General Agreement as applicable, or remaining in force, between them,⁵¹ albeit each may have relied on different legal grounds.⁵²

Under the Law of Treaties, the non-application (or discontinuance in force) of the General Agreement between China and other GATT contracting parties may be the result of either suspension or termination of the treaty.⁵³ By requesting resumption, the PRC government clearly indicates its interpretation of the situation as "suspension"⁵⁴—should the non-application of GATT be viewed as the result of "termination" of the General Agreement between China and other contracting parties, accession would be in order.

Suspension of the operation of a treaty, however, normally requires a clear understanding by the parties, evidenced either by consent or by provisions of the treaty.⁵⁵ This principle has also been borne out in the GATT practice. The General Agreement contains no provision regarding suspension of the entire Agreement between particular contracting parties. Nonetheless, it does contain provisions

⁵¹ If any contracting party had considered the General Agreement as "in force" between China and itself, there would have been claims on breach of treaty obligations on either side, since neither has observed the provisions of the General Agreement in their mutual relations. In fact, the PRC government did not make any official contact with GATT until 1980 and there is no evidence showing that the Chinese government considered itself a GATT member during this period. See *supra*, footnotes 20 and 21 and accompanying text.

⁵² While the Chinese government may have believed that its status as a GATT contracting party is an unsettled issue, see the PRC's disclaimer in its application for GATT observer status, *supra*, footnote 22, the GATT contracting parties took the 1950 withdrawal by the deposed Chinese government as a valid action. See *supra*, footnote 15 and accompanying text.

⁵³ The Vienna Convention on the Law of Treaties, 23 May 1969, Part V, 1155 U.N.T.S. 311, defines non-application of treaties in three categories: invalidity, termination and suspension of the operation of treaties. Invalidity of treaties involves wrong-doing, error or conflict with a peremptory norm of general international law, which is irrelevant to the present situation.

⁵⁴ The term of "resumption" is referred to Article 72 of the Vienna Convention, *supra*, footnote 53, Consequences of the suspension of the operation of a treaty: "During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty."

⁵⁵ Article 57 of the Vienna Convention, *supra*, footnote 53, provides that suspension may take effect either "in conformity with the provisions of the treaty, or by consent of all the parties after consultation . . ."

regarding suspension of GATT obligations in respect of particular products under specified circumstances, such as suspension of GATT obligations in the case of emergency action on imports of particular products (Article XIX) and suspension of concessions or other obligations in the case of nullification or impairment (Article XXIII:2). In any of such circumstances, the parties affected would have a clear understanding of the situation since the consequences of the suspension and the procedures to be followed are clearly provided in the General Agreement. In GATT history, suspension of an overall application of the General Agreement between particular contracting parties occurred once when the CONTRACTING PARTIES authorized such suspension between the United States and Czechoslovakia in 1951.⁵⁶ In that case, the suspension and the legal consequences thereof were also clearly understood by the parties, as was evidenced by the GATT decision.

In contrast, the understanding of China's legal status regarding the General Agreement appears to be, in retrospect, anything but clear. Apparently there has been no mutual consent with respect to China's status. On the part of GATT, the non-application of the General Agreement with China has been consistently treated as the result of China's withdrawal from the GATT, i.e. termination of the GATT Treaty relations with respect to China. On the part of China, the PRC government did not clarify its understanding of the situation until it formally requested resumption in July 1986. Historically, it is well known that the PRC government would not automatically succeed to the treaties concluded by former Chinese governments with foreign countries; instead, it would make its determination as to whether to "recognize, abrogate, revise or renegotiate" each of such treaties according to its content.⁵⁷ While it maintained an unequivocal, positive attitude towards its succession of China's membership in the United Nations and various other international organizations, the PRC government did not express its interest in GATT until the late 1970s and its official position regarding its status in GATT remained unknown and undefined until its formal request for resumption.

Furthermore, during the period of non-application of GATT, the PRC government entered into separate bilateral trade agreements with most of the GATT contracting parties, providing for MFN treatment in their respective bilateral trade and other trade-related matters.⁵⁸ Under the Law of Treaties, the conclusion of a later treaty relating to the same subject-matter of an earlier treaty may terminate the earlier one between the same parties, unless it can be established that the parties intended only to suspend the operation of the earlier treaty.⁵⁹ Thus, it is at least arguable that, to the

⁵⁶ Declaration of the Contracting Parties on 27 September 1951, 2 BISD 36 (1952). For the context of the decision, see Jackson, *supra*, footnote 6, 749-750.

⁵⁷ This principle was stipulated in Article 55 of the Common Program of the Chinese People's Political Consultative Conference (1949), which served as a quasi constitution of the PRC from 1949 to 1954. See J. Cohen and H. Chiu, *People's China and International Law*, v. II, 1121-1129 (1974); *International Law*, T. Wang (ed.), 1981, 121.

⁵⁸ China had bilateral trade agreements containing MFN clauses with over ninety countries and regions, as at 1988, and most of such countries are GATT members. GATT Doc. Spec(88) 13/Add 4.

⁵⁹ Vienna Convention, *supra*, footnote 53, Article 59, Termination or suspension of the operation of a treaty implied by conclusion of a later treaty. See *infra*, text at footnote 72 for quotation of the provision.

extent the bilateral trade agreements between China and GATT contracting parties relate to the same subject-matter as the General Agreement, the conclusions of such later bilateral agreements have the effect of terminating any GATT relations that might have existed between them, absent a clear understanding, by express reservation or otherwise clear from the context, that the General Agreement was being suspended between them.

The above analysis challenges the assumption underlying the PRC's request for resumption. It shows that, independent of the issue of the 1950 withdrawal, it is nevertheless uncertain whether China can legally resume its original contracting party status. The current non-application of the General Agreement between China and GATT contracting parties may not be the result of suspension of GATT applications between them. Given the lack of mutual understanding and the conclusion of later bilateral trade agreements covering the same subject-matter as the General Agreement, the original GATT relations between China and certain other contracting parties may have already been terminated as a matter of law.⁶⁰

C. Which Treaty is the Right Object of Resumption?

Even assuming that the GATT relation between China and other contracting parties has indeed been suspended rather than terminated, the PRC's resumption position is nevertheless flawed for one simple reason: it has confused the General Agreement with the PPA as the object of resumption. As already noted above, a most peculiar legal aspect of GATT is that the General Agreement itself has never entered into force, instead it has been applied under the PPA and a series of accession protocols.⁶¹ As one of the signatories of the PPA, China once applied the General Agreement by and in accordance with the PPA. Logically, any "suspension" of GATT relations between China and other contracting parties can only result from suspension of the operation of the PPA between them; and any "resumption" of such GATT relations can only mean the resumption of the operation of the PPA between them.

The PPA and subsequent accession protocols are each independent treaties under international law.⁶² They are registered with the Secretariat of the United Nations in accordance with the treaty registration requirement under Article 102 of the U.N. Charter.⁶³ The PPA and the accession protocols set forth specific terms and conditions

⁶⁰ There is also the possibility of termination of the GATT Treaty relations as a result of "fundamental change of circumstances". See *infra*, text accompanying footnotes 84-90.

⁶¹ *Supra*, footnotes 8-10 and accompanying text.

⁶² Vienna Convention, *supra*, footnote 53, Article 2(a), defines "treaty" for its purposes as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Technically, since the GATT contracting parties are not States but governments acting on behalf of separate customs territories, see *supra*, footnote 49, there is a question whether the Convention applies to their agreements. However, the question is rendered insignificant since the Convention also provides that the fact that it does not apply to international agreements concluded by subjects of international law other than States shall not affect "the application to them of any of the rules set forth in the present Convention" (Article 3) and that "the present Convention applies to any treaty which is the constituent instrument of an international organization." (Article 5).

⁶³ Article 102(1) of the Charter of the United Nations requires that: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." U.N. Charter, Article 102, para. 1.

defining the extent to which the General Agreement shall be applied between one particular contracting party and others. For example, the PPA provides that its contracting parties shall “apply provisionally . . . (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.”⁶⁴ This clause, which has been similarly adopted by all subsequent accession protocols, limits the effect of Part II of the General Agreement and puts the application of the General Agreement on a provisional basis indefinitely. Also, certain protocols of accession, particularly those for countries with a centrally-planned economy at the time of accession (e.g. Poland, Romania and Hungary), contain additional substantive obligations not provided for in the General Agreement (e.g. import commitment, quantitative restrictions, selective safeguards and periodical reviews).⁶⁵ To the extent that such additional obligations are inconsistent with the General Agreement, these accession protocols modify the General Agreement with respect to these countries. Furthermore, the tariff schedule of a particular contracting party, which embodies its concrete undertakings under GATT, is also annexed to the individual protocol of that party and thereby takes effect as an integral part of the General Agreement.⁶⁶ As the former GATT Director-General summarized, “. . . the [accession] Protocol is tantamount to a trade agreement which sets out the conditions on which the Contracting Parties accept the acceding country.”⁶⁷

D. *The Resumption of the PPA is Impracticable*

While it is theoretically possible to resume the operation of the PPA between China and other PPA signatories, it is practically impossible for the PRC government to negotiate such a resumption. Over the last four decades, China’s economic and trade conditions have undergone such a substantial transformation that it is unlikely that the contracting parties would agree to let China rejoin GATT by simply resuming the operation of the PPA. China’s old tariff schedule, which was part of the PPA, is totally obsolete; a new schedule reflecting China’s contemporary economic and trade conditions would have to be negotiated. More importantly, because the PRC has established and maintained an economy that is generally perceived as centrally planned (on-going economic reforms notwithstanding) and therefore incompatible with the GATT system, the contracting parties may demand special provisions addressing this concern to be included in the China protocol as they did in the case of Poland, Romania and Hungary.⁶⁸ Although the Chinese government has strongly

⁶⁴ 55 U.N.T.S. 308 (1947).

⁶⁵ See 15th Supp. BISD 52 (1967); 18th Supp. BISD 10 (1972); 20th Supp. BISD 3 (1974). For a general introduction to GATT and centrally-planned economies, see M. M. Kostecki, *East-West Trade and the GATT System*, New York, St. Martin’s Press for the Trade Policy Research Center, London, 1979; Jackson, *supra*, footnote 36, ch. 13, *State Trading and Nonmarket Economies*.

⁶⁶ Pursuant to Article II:7 of the General Agreement, the tariff schedules are made an integral part of Part I of the General Agreement.

⁶⁷ Long, *supra*, footnote 18, at 37.

⁶⁸ See *supra*, footnote 65 and accompanying text.

opposed the imposition of any special discriminatory terms on China,⁶⁹ it has nevertheless agreed that China's rights and obligations under the General Agreement would have to be re-established in the modern context.

One might ask, however, is it technically possible for China to resume the PPA in a revised form or by an amendment thereto? The answer is probably negative. The PPA is a multilateral agreement effective since 1948. It would be difficult to revise or amend the PPA just to accommodate one of its signatories' changed conditions, as any amendment or revision would have to be approved or ratified by each of its contracting parties pursuant to their domestic legal procedures. Furthermore, any special provisions regarding China under the PPA would constitute an additional agreement between China on the one hand and other PPA contracting parties on the other. And since the PPA is effective among its own contracting parties only (nineteen in total, excluding China⁷⁰), any amendment to the PPA would not apply to the contracting parties that acceded to GATT after China supposedly suspended its GATT relations.

E. *Conclusion of New Protocol Inevitably Terminates the PPA*

Recognizing that a simple resumption of the PPA is impracticable, China and the GATT contracting parties have agreed to conclude a new agreement—the China Protocol—to define their GATT relations.⁷¹ However, as a matter of law, the conclusion of a new agreement governing application of the General Agreement between China and other PPA contracting parties would inevitably terminate the PPA with respect to China.

Termination of a treaty may be implied by conclusion of a later treaty with the same subject-matter. According to Article 59 of the Vienna Convention on the Law of Treaties:

“1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.”⁷²

It is obvious that the new agreement between China and the GATT contracting

⁶⁹ See *supra*, footnote 2.

⁷⁰ See *Analytical Index, supra*, Protocol-1. See also *supra*, text at footnote 44 regarding the effect of “resumption” on contracting parties that were territories of the PPA signatories and succeeded to GATT under Article XXVI:5(c).

⁷¹ See *supra*, text at footnote 26.

⁷² Vienna Convention, *supra*, footnote 53, Article 59.

parties would be “relating to the same subject-matter” as that of the PPA—the provisional application of the General Agreement—and that all the parties to the new agreement would intend the matter of China’s GATT application to be governed by the new agreement, not the PPA. It also goes without saying that by concluding the new agreement, the parties would not wish to keep the PPA suspended in operation with respect to China.

One may question whether the PPA could be deemed terminated with respect to China if not “all the parties” to the PPA would enter into the new agreement. Under the Law of Treaties, when there are successive treaties relating to the same subject-matter and the parties to the later treaty do not include all the parties to the earlier one, as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.⁷³ Theoretically, therefore, if an existing PPA contracting party should refuse to enter into the new agreement with China, the PPA would remain “suspended” between such party and China. In practice, however, since the PPA has not been in use between China and any of the PPA contracting parties, it would be inconsequential, as between China and a PPA contracting party that would not enter into the new agreement, whether the PPA should be deemed as “terminated” or “suspended”.

In sum, the conclusion of a new protocol on China’s application of GATT would terminate the PPA with respect to China as a matter of international law. And the termination of the PPA with respect to China would render the PRC’s “resumption” of China’s original contracting party status legally impossible. This conclusion will stand regardless of whether the new China Protocol should be (mistakenly) entitled “the Protocol of resumption”.

V. SOLUTION: TERMINATION OF CHINA’S OLD STATUS IN GATT

As resumption is legally untenable, the best solution for all would be to officially terminate China’s old status in GATT and proceed with a normal accession in accordance with the procedure of Article XXXIII. Evidently, the termination/accession approach would eliminate the issues and problems that resumption may impose on the particular contracting parties, and avoid all the technical complications that may entangle the GATT legal system.⁷⁴

As for the PRC government, a formal termination of China’s original contracting party status in GATT would be a clear statement that China’s withdrawal from GATT in 1950 was invalid and that the PRC government alone has the legal authority to determine China’s application of GATT after 1 October 1949. Such a position would be perfectly consistent with the legal principle of the PRC government on its succession of treaties, i.e. it shall not automatically succeed to treaties concluded by a former Chinese government; instead it shall decide whether to

⁷³ Vienna Convention, *supra*, footnote 53, Article 30, para. 4(b).

⁷⁴ See *supra*, Part III.

recognize, abrogate, revise or re-negotiate each of such treaties according to its content.⁷⁵

A. *The Advantages of Accession for China*

Procedurally, a formal termination of China's old status in GATT would open the door for the PRC government to accept an Article XXXIII accession. Accession to GATT would provide a number of advantages to China. First of all, pursuing a normal accession to GATT would facilitate the negotiation process for China's GATT membership. Because the resumption position is legally unsound and may cause legal problems for certain contracting parties, the issue may well become a significant obstacle in the last stage of the negotiations, in which case, the Chinese government may find itself wasting time and resources in defending a position that is both legally untenable and politically unnecessary.

In addition, accession would make the form and substance of China's entry into GATT consistent, which would enable the PRC government to take legally coherent positions on issues concerning its GATT membership. For example, pursuant to accession, China would be able to avail itself of the "existing legislation" clause without having to resort to legally inconsistent positions.⁷⁶

Furthermore, accepting accession may actually help China to obtain application of GATT with the United States, one of the major trading partners of China. As discussed above, due to its domestic legal constraints the United States may decide to refrain from applying GATT with China, but resumption would technically prevent the United States from invoking Article XXXV of the General Agreement for non-application.⁷⁷ Since establishing a stabilized MFN relationship with the United States is one of the major motivations for China to join GATT, the possibility that the United States may invoke Article XXXV against China naturally causes great concern on the part of the PRC government. For both political and economic reasons, the extension of China's MFN status by the United States has proven to be increasingly precarious and troublesome in recent years. Thus, it has become all the more important for China to enter into GATT relations with the United States so that the conditional bilateral MFN can be replaced by the GATT unconditional MFN in China-U.S. trade.⁷⁸

However, it has also been realized that resumption cannot effectively prevent recourse to non-application of GATT.⁷⁹ That being the case, resumption can only complicate the legal process without yielding any practical results on this issue. In contrast, by accepting accession, the Chinese government would be able to take advantage of the U.S. Omnibus Trade and Competitiveness Act of 1988 which makes it legally possible for the United States to enter into GATT relations with China.

⁷⁵ See *supra*, footnote 57 and accompanying text.

⁷⁶ See *supra*, Part III. 2.

⁷⁷ See *supra*, footnotes 35 to 37 and accompanying text.

⁷⁸ See *supra*, footnote 37 on China's current MFN status in the United States. See Cai, *supra*, footnote 5, at 44-46.

⁷⁹ Li, *supra*, footnote 4, at 45; Cai, *ibid.*, at 46-47.

Pursuant to the 1988 Act, the United States may consent to the accession of a major non-market economy country to GATT if such country enters into agreement with the United States restricting its State trading activities or if the U.S. Congress specifically approves the application of GATT to such country.⁸⁰ Technically speaking, because the Act refers to accession only, China would not be able to utilize this procedure unless it accepts accession as the legal form of its entry into GATT.

Finally, since Article XXXV may be invoked by the acceding country as well as the existing contracting parties, accession would also avail China of its right to invoke Article XXXV against any existing contracting party with which it may not wish to enter into GATT relations immediately.

B. *Methods of Terminating the PPA*

Under the Vienna Convention on the Law of Treaties, a treaty may be terminated on one of the following grounds:

- (1) in accordance with the provisions of the treaty (Article 54(a));
- (2) by consent of the parties (Article 54(b));
- (3) by conclusion of a later treaty (Article 59);
- (4) as a consequence of its breach (Article 60);
- (5) supervening impossibility of performance, if the impossibility results from permanent disappearance or destruction of an object indispensable for the execution of the treaty (Article 61);
- (6) fundamental change of circumstances (Article 62); or
- (7) in conflict with a new peremptory norm of general international law (Article 64).⁸¹

Thus, in addition to termination by the conclusion of a new agreement discussed above, the PPA may be terminated with respect to China by one of the following methods:

(1) *Withdrawal from the PPA*

The PRC government's request for resumption of China's status as a contracting

⁸⁰ See Title I of the Omnibus Trade and Competitiveness Act of 1988, Sec. 1106, Pub. L. 100-418, 102 Stat. 1133. Section 1106, *Accession of State Trading Regimes to the General Agreement on Tariffs and Trade*, essentially provides that, before any major country accedes to GATT, the U.S. President must determine whether State trading enterprises account for a significant share of its trade with the United States and whether such State trading enterprises unduly burden the economy and trade of the United States. If so, the United States may apply GATT to such country only if: (1) the country enters into an agreement with the United States providing that State trading enterprises will act in accordance with commercial considerations; or (2) Congress approves the application of GATT to such country by enacting law under specified procedures. It should be noted that the Act was enacted after the negotiation had begun on China's contracting party status in GATT.

⁸¹ Vienna Convention, *supra*, footnote 53. For termination of treaties, see generally, A. McNair, *Law of Treaties*, Oxford, Clarendon Press, 1961; 14 Whiteman, *supra*, footnote 46, Secs. 36-38; A. Vamvoukos, *Termination of Treaties in International Law*, Oxford, Clarendon Press, New York, Oxford University Press, 1985; R. Plender, *The Role of Consent in the Termination of Treaties*, 1986 Brit. Y. B. Int'l L. 132; B. Simma, *Termination and Suspension of Treaties*, 1978 Germ. Y. B. Int'l L. 74; Q. Wright, *The Termination and Suspension of Treaties*, 61 Am. J. Int'l L. 1000, 1967.

party to GATT indicates that it recognizes the validity of the PPA and considers China still a party to the PPA. Based on this assumption, the PRC government could decide to exercise its right to withdraw from the PPA in accordance with Article 5 thereof, which provides:

“Any government applying this Protocol shall be free to withdraw such application, and such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Secretary-General of the United Nations.”⁸²

In its written notice, the PRC government could advise that its decision to withdraw is based on the assessment that the resumption of the PPA is no longer adequate in view of the substantial changes that have occurred during the period of suspension. A formal act of withdrawal from the PPA by the PRC government would procedurally clear the way for its accession to GATT, with the effect of reaffirming its position on the invalidity of the 1950 withdrawal.

(2) *Express mutual consent*

The termination of a treaty may take place at any time by consent of all the parties. The power of the parties to terminate a treaty by mutual consent whenever they wish to do so is incontestable, and such power could not be denied without denying the right of States to enter into treaties.⁸³ Undoubtedly, China and other original contracting parties could terminate the PPA between them at any time through their mutual consent. A simple statement to this effect, either by a joint declaration or incorporated in China's accession protocol, would be sufficient for this purpose.

(3) *Fundamental change of circumstances*

International law has long recognized fundamental change of circumstances as a valid ground for termination of a treaty (*rebus sic stantibus*).⁸⁴ In contrast with termination by consent of the parties, termination of a treaty on the ground of fundamental change of circumstances is by operation of law.⁸⁵ The doctrine is codified under Article 62 of the Vienna Convention on the Law of Treaties:

“A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

⁸² 55 U.N.T.S. 308 (1947).

⁸³ Harvard Research Draft Convention on the Law of Treaties, with Comment, 29 (Supp. 2) Am. J. Int'l L. 1163, 1935.

⁸⁴ See O. Lissitzyn, *Treaties and Changed Circumstances*, 61 Am. J. Int'l L. 895, 1967; G. Haraszti, *Treaties and the Fundamental Change of Circumstances*, 146/III Recueil des Cours d'Académie de Droit International 7, 1975; Vamvoukos, *supra*, footnote 81, Part I.

⁸⁵ Haraszti, *ibid.*, at 8. Because the doctrine is usually invoked by one or more parties of the treaty against another party or parties of the treaty, it is not uncommon that invocation of the doctrine has given rise to international disputes. See Vamvoukos, *supra*, footnote 81: 61–124 for State practice with respect to invocations of the doctrine; 152–185 for invocations of the doctrine in adjudications and pleadings.

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”⁸⁶

In the light of these provisions, other PPA contracting parties could claim that the substantial changes that have occurred during the non-application of GATT to China constitute “a fundamental change of circumstances . . . unforeseen” at the time of the conclusion of the PPA, and the occurrence of such a change warrants the termination of the PPA with respect to China.⁸⁷ Arguably, both conditions provided in Article 62 have been met in the present case. First, there is no question that the substantial changes during the last forty years have the effect to “radically transform” the extent of the GATT obligations originally undertaken by China *vis-à-vis* other contracting parties under the PPA. As the PRC government has acknowledged, as a result of the considerable changes that have taken place during those years, rights and obligations must be re-set regarding the application of GATT between China and other contracting parties.⁸⁸ Secondly, given that the General Agreement is premised upon the institution of market economy, the contracting parties could argue that the existence of a market economy in China was “an essential basis” of their consent to establishing GATT relations with China in 1948, and that China’s subsequent adoption of a centrally planned economy fundamentally changed such basis of their consent.⁸⁹ Thus, at least in theory, the contracting parties could claim “a fundamental change of circumstances” as the ground for terminating their application of the PPA with China,⁹⁰ and reject the resumption request of the PRC government accordingly.

⁸⁶ The doctrine is an exception to the basic doctrine of the law of treaties, *pacta sunt servanda*, which is codified by Article 26 of the Vienna Convention as follows: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” The restrictive language of Article 62 reflects the traditional view, shared by the International Law Commission of the United Nations (the drafter of the Vienna Convention), that the doctrine of *rebus sic stantibus* should be applied in exceptional cases only and the conditions under which it may be invoked should be strictly regulated. As the circumstances are always changing, international legal relations would become hopelessly insecure if a State could release itself from its treaty obligations at will. See 14 Whiteman, *supra*, footnote 46, Sec. 40, *Effect of Changed Conditions*, at 480.

⁸⁷ The application of Article 62 in this case should not cause concern over the strict construction policy of the Article, *supra*, footnote 86, since the treaty in question has not been in use with respect to China for most of its term and its termination will not upset the existing treaty relations.

⁸⁸ See *supra*, text at footnote 28.

⁸⁹ In GATT history, two original contracting parties, Czechoslovakia and Cuba, also radically changed their market economy into centrally-planned economies after joining GATT. As a result, the United States suspended its GATT application with Czechoslovakia in 1951. See *supra*, footnotes 36 and 56. Although other original contracting parties maintained their formal GATT relations with Czechoslovakia and Cuba thereafter, thanks to the reciprocal nature of GATT obligations, many were able to suspend *de facto* their application of GATT with the two countries without having to resort to formal termination or suspension of the PPA. See Kostecki, *supra*, footnote 65, at 23–35; Ya Qin, *China and GATT: Toward a Meaningful Participation?* in *A Study of Legal Issues Concerning China’s Entry into the General Agreement on Tariffs and Trade*, 298, 1990 (unpublished S.J.D. dissertation, Harvard University Law School, available in Harvard Law School Library). The incompatibility of the centrally-planned economy with the GATT regime has also been proven by GATT’s unsuccessful efforts to incorporate centrally-planned economies as such into the GATT system. See Qin, *id.*, at 34–39.

⁹⁰ In accordance with Articles 65 and 67 of the Vienna Convention, *supra*, footnote 53, a party which invokes a ground for terminating a treaty must notify the other parties of its claim in writing. If no other party raises objection within a period of no less than three months after the receipt of the notification, the termination will take effect through an instrument communicated to the other parties. If objection has been raised by any other party, the matter shall be resolved pursuant to the procedure of dispute settlement provided for by the Convention.

Of these three possible ways of termination, a formal withdrawal or express mutual consent is clearly preferable for the PRC government, since either of the two methods would afford the PRC government with an opportunity to formally consent to the termination and affirm its legal position regarding the 1950 withdrawal. Although in this case there is no reason why the termination cannot be realized through consent, it should be recognized that, as a matter of international law, other PPA contracting parties do have a claim of unilateral termination on the ground of a fundamental change of circumstances. Recognition of this potential claim should also motivate China to take the initiative in terminating the PPA.

VI. CONCLUSIONS

The PRC government's request for resumption of China's original contracting party status in GATT is essentially a request for accession in the name of resumption. From the PRC government's perspective, it is a matter of principle to declare the 1950 withdrawal from GATT by a deposed Chinese government null and void in international law, and the PRC government must claim its right to resume China's original contracting party status and, despite the substantive terms of such status, it should be re-set in the modern context.

In taking this resumption position, the PRC government appears to have confused the question of government representation with the question of treaty application, and mistaken the General Agreement for the 1947 Protocol of Provisional Application as the object of "resumption."

China's membership in GATT is not a question of government representation, but a question of treaty application. In so far as GATT is concerned, the question of which government has represented China since 1949 has long been settled. Therefore, the validity of the 1950 withdrawal is not the real issue. What is at issue is the continuing validity of China's original contracting party status. The validity of such status has been brought into question by the non-application of GATT between China and other GATT contracting parties for a period of more than forty years—a period equal to the entire life of the PRC—and the substantial changes that have taken place during this period of non-application. The answer to this question can only be found in the Law of Treaties.

The PRC government's resumption position is ultimately untenable under the Law of Treaties because it has overlooked the unique legal structure of GATT and mistaken the General Agreement itself as the object of resumption. For historical reasons, the General Agreement has never entered into force. Instead, GATT contracting parties concluded the 1947 Protocol of Provisional Application and a series of accession protocols to effect the application of the General Agreement. Under this legal structure, it is the PPA and accession protocols that are treaties effective among the GATT contracting parties. Since China became an original contracting party to GATT by being a contracting party to the PPA, the resumption of

China's original contracting party status in GATT can only mean the resumption of the operation of the PPA with respect to China. However, due to the substantial changes that have taken place during the period of non-application of GATT between them, China and GATT contracting parties have agreed to conclude a new China Protocol to redefine their respective rights and obligations under GATT. In accordance with the Law of Treaties, however, the conclusion of such a new protocol would terminate the PPA with respect to China, thereby rendering the resumption groundless. This result would occur regardless of whether the parties so acknowledge.

In view of the inevitability of the PPA's termination with respect to China, it is recommended that the Chinese government take the initiative in announcing such termination and proceed with a normal accession to GATT. Since the question of government representation—the chief concern underlying the PRC's resumption position—turns out to be irrelevant in determining of China's current status in GATT, there appears to be no policy reason for the PRC government to insist on the resumption approach. Once the legal myth is solved, the PRC government should feel free to pursue its accession under Article XXXIII of the General Agreement. A simple accession would not only avoid generating unnecessary complications and incoherence for the GATT legal system, but also help to strengthen China's negotiation position and facilitate the negotiation process on its membership.

A self-initiated termination of the PPA would procedurally clear the way for China to pursue an accession to GATT. This can be achieved either through a formal withdrawal of the PRC government from the PPA, or by a statement in connection with the China protocol expressing the mutual consent of China and other PPA contracting parties to the effect of such termination.

This issue of resumption *v.* accession, albeit perceived by many as a matter of mere procedural formality, may have an encumbering effect on the GATT legal system. While GATT might be flexible enough to accommodate China's request despite the fallacy of the resumption, such accommodation would have to be made at the expense of due respect for law, an expense that is neither necessary nor unavoidable as demonstrated by the above analysis.