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The Impact of Regional Economic Integration under the GATT/WTO Regime toward the Peace Process: The Case of Conflict Resolution between Taiwan and Mainland China

Chen-Yu Wang

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**THE IMPACT OF REGIONAL ECONOMIC INTEGRATION UNDER THE
GATT/WTO REGIME TOWARD THE PEACE PROCESS: THE CASE OF
CONFLICT RESOLUTION BETWEEN TAIWAN AND MAINLAND CHINA**

By

Chen-Yu Wang

Submitted to the

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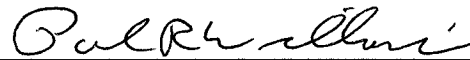
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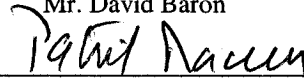
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ABSTRACT

The main idea of this dissertation is to analyze the possible range of expected a bilateral trade agreement toward economic integration between Taiwan and Mainland China as the first step of peace process. By doing this, this dissertation is devoted to the examination of the “regional economic integration under the GATT/WTO regime” and its impacts on the “peace process,” especially in the circumstance of Taiwan Strait.

Although the mutual economic and trade transactions are closer than ever before, the political conflicts between Taiwan and Mainland China are too serious to nearly reach war. Taking into consideration the successful accession into the WTO of both parties, the Cross-Strait Relationship is better be conducted under a broader legal framework in the future. Although there is no official trade agreement between the two parties, actual trade and business transaction are increasing year by year. Here comes a critical question: “Is economic integration between the two parties really pushing toward the peace process?” Taiwan and Mainland China have the same interest of “economic interdependence” in one hand, but also have opposite “sovereignty identity” in the other hand. Thus, the

positive trade expectation from both governments can reduce the tension and hostage and contribute to the prosperity and stability of the regional economy.

In order to analyze the complex political and economic paradox, this dissertation used interdisciplinary researches on international law, international economics, and international relations theory. In fact, Taiwan and Mainland China are both WTO members now, and the deeper economic integration under the GATT/WTO regime is the positive approach for both governments to promote closer economic relationship. This dissertation assumed that economic integration between Taiwan and Mainland China could be the first step of the peace process. To negotiate a possible legal framework of “free trade arrangement” or “common market agreement” examined under the GATT/WTO regime is the best way to avoid the sovereignty conflicts between the two sides. This dissertation would discuss the “substantial negotiation issues” in Cross-Strait economic integration process, and also addressed a new idea of “negotiation institutional system design” and “timetable of the procedure” in this legal framework. Finally, this dissertation would provide the recommendation for establishing the “Three Pillars” (Single Market, Justice & Democracy, and Common Foreign & Security) as the next step of the peace process in the future.

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Chen-Yu Wang (Blake)

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INTRODUCTION

The main propose of this dissertation is to analyze the possible range of expected impacts a regional agreement that increases economic integration between Taiwan and Mainland China would have as the first step of a peace process. By doing this, the dissertation is devoted to the examining the linkage between the Cross-Strait¹ peace process and regional economic integration under the International Economic Law, especially the GATT/WTO regime.

In the last five decades, political conflicts have made it impossible for Taiwan and Mainland China to establish a normal trade and economic relationship on a proper and satisfactory basis. In the face of the two powerful trends of globalization and regional economic integration, increasing the interdependence of economic and trade relationship between Taiwan and Mainland China's economic and trade relations is more and more important. The current circumstance of the two parties is very unique in the world history. Although the mutual economic and trade transactions are closer than ever before, the political conflicts between the two sides are serious enough to threaten war. Taking into consideration the successful accession of both parties into the WTO,² the Cross-Strait Relationship will fare better if it is conducted under a broader international, regional, or multilateral legal framework in the future. Accordingly, this dissertation emphasizes that,

¹ Geographically, the Taiwan Strait separates Taiwan and Mainland China thus "Cross-Strait Relations" refers to the relationship between Taiwan (Republic of China, established in 1911) and Mainland (People's Republic of China, established in 1949). See Richard C. Bush, *Untying the Knot: Making Peace in the Taiwan Strait* 2-5 (Brookings Instn. 2005).

² On Jan. 1, 2002, the "Separate Territory of Taiwan, Penghu, Kinmen and Matzu" officially became a WTO member, and her Permanent Mission to the WTO was established on Mar. 6, 2002. For more information, see Bureau of Foreign Trade, Republic of China, available at <http://cweb.trade.gov.tw> (last visited July 29, 2006).

“the first step to reaching a peace agreement between Taiwan and Mainland China is to initiate economic integration under the GATT/WTO regime.” Negotiating a bilateral trade agreement to fulfill the need for trade and economic liberalization can help two sides move toward harmonization and coalescence.

Even though there is no official trade agreement between Taiwan and Mainland China, the actual trade and business transactions between the two are increasing year by year.³ Taiwan is now Mainland China’s third largest trading partner.⁴ Although the two parties entered into the WTO in 2001 and 2002, the trade barriers between each other have not been reduced or removed.⁵ This raised a critical question: “Is economic integration between the two parties really pushing the peace negotiation?” The people in Taiwan are concerned about the balance of “National Security” and “Economic Development.” The people in Mainland China are always concerned with the balance of “National Sovereignty” and “Economic Growth.” These two parties have the same interest of “Economic Interdependence” in one hand, but the opposite “Sovereignty Identity,” in the other hand. It is interesting that the debate of “whether negotiating economic integration between Taiwan and Mainland China,” is very similar to the debate between the international relations theories of realism and liberalism of international relations theories in the 20th century.

Since the relationship between Taiwan and Mainland China is very different from other regions in the world, the accession into the WTO created a unique situation

³ *Id.* According to statistics obtained from the Bureau of Foreign Trade, Republic of China: Since the opening policy of indirect trade with China in 1987, total trade had reached U.S.D. 22 billion. For all the year of 2005, the estimated value of such trade was as much as U.S.D. 32 billion.

⁴ *Id.* Taiwan’s first and second trading partners are Hong Kong and the United States, respectively.

⁵ *Id.* Taiwan’s import tariff put on Mainland China’s industrial products is still as high as 9.4%, and the import tariff on agricultural products import tariff remains 17%.

occurred under the WTO regime.⁶ Traditionally, “Sovereignty” has been an issue of conflict between Taiwan and Mainland China, but there is no clear and present dispute of Sovereignty under the WTO regime.⁷ As a WTO member, Taiwan is a “Separate Tariff Territory”, which endows it and Mainland China (P.R.C.) with an equal amount of power. Thus, deeper economic integration under the WTO regime (free trade area or customs union) is the best way for both parties to create a closer trade relationship. Specifically, Taiwan and Mainland China need to negotiate economic integration under WTO Article XXIV.⁸ Their attempts at economic integration can learn from the cases of the European Union (EU) and North America Free Trade Area (NAFTA). This dissertation assumes that economic integration between Taiwan and Mainland China could be the first step in peace negotiations. Negotiating the possible legal framework for a free trade agreement or agreement to establish a common market should be examined under the GATT/WTO legal regime in order to avoid the sovereignty conflicts between Taiwan and Mainland China. Moreover, using economic integration as a step toward peace negotiations can

⁶ *Id.* Although Hong Kong and Macao are under PRC’s sovereignty, they own two different, independent WTO memberships. Taiwan used the name “Taiwan, Penghu, Kinmen and Matsu” for WTO membership. This unique and complicated political situation made the Chinese community qualifies the Chinese community for four memberships, namely, Taiwan, Mainland China, Hong Kong, and Macao.

⁷ Mainland China has obstructing Taiwan’s attempt to join any international organizations like the United Nations, which requires sovereignty as a prerequisite to membership. However, Taiwan has successful in joining the WTO despite Mainland China’s objections. See Chin Chien Hong, *The Economic Relation and Economic Integration between Taiwan Strait 兩岸關係與經貿整合* (Shengmin 1994).

⁸ See General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited July 29, 2006). GATT art. XXIV, para. (a)(ii) provided:

A custom union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that ... subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the member of the union to the trade of territories not included in the union.

also reduce Cross-Straits tension, contribute to the prosperity and stability of the regional economy, and provide new impetus for growth of the global economy.

Following the analysis of above paragraphs, there are a number of major reasons, which emphasize the necessity of deeper economic integration between Taiwan and Mainland China to go through deeper economic integration:

(1) A new position for both sides in the emerging global economy

The emergence of common markets like the European Union in 1990, and the North American Free Trade Agreement in 1994⁹ has reduced the importance of traditional concepts such as state boundaries. These models of economic integration are bringing about rapid globalization of production patterns and enhancing the importance of trade and investment.¹⁰ Based on the shared expansion of comprehensive economic exchanges and integration, both Taiwan and China will have a strong incentive to develop constructive relations.

(2) Removal of controversial political & economic impasses

Political and economic issues present potential obstacles to both Taiwan and the PRC's efforts to resolve mutual conflicts and disputes. As a result, major barriers remain in place, and these in turn increase the level of suspicion and confrontation between the two sides. Economic integration can help the two overcome existing

⁹ See North American Free Trade Agreement, U.S.-Can.-Mex., Jan. 1, 1994, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA]. NAFTA was designed to remove tariff barriers among the U.S., Canada and Mexico. NAFTA also included two important side agreements on environmental and labor issues that extended into cooperative efforts to reconcile policies, and created the procedures for dispute resolution among the member states.

¹⁰ See Hong, *supra* n. 7, at 20-22.

political and economic impasses by creating a framework as a result of implementing concrete projects along a timeline of 20 or 30 years.¹¹

(3) Roles played by both sides in the new century

Both Taiwan and China became members of the WTO a few years ago. This relationship will provide an international legal basis on which to build cooperative economic relations. Economic integration between Taiwan and China accomplishes several goals: It provides a practical means to build safe, stable and normal relations between two important economies.¹² It also adds to the efficiency and competitiveness of each economy by promoting the pooling of resources and factors of production.

Roadmap

Chapter 1 of this dissertation is entitled “Regional Economic Integration and the Peace Process” and lays the theoretical foundations needed for a complete understanding of the issues involved. It addresses four principal questions: What could the interdisciplinary researches on existing international law, international economics, or international relations theories apply to regional economic integration? What is the relationship between regional economic integration and the peace process? Is economic integration a practical approach to prevent war and initiate the peace process? Finally,

¹¹ *Id.*

¹² See Chang-Sheng Shieh, *In the View of Economic Strategy to Discuss the Economic and Trade Integration among Mainland China, Taiwan and Hong Kong 兩岸三地的經貿整合策略* (Shengmin 1997).

how are all these discussions related and how should they be applied to the circumstances of Taiwan and Mainland China?

Chapter 2 begins with an overview of the history of “Political Conflict of Cross-Strait Relations.” The starting point for reviewing the Cross-Strait Relationship goes back to 1943, the era of post-World War II era. This era is divided into five periods. The first period, 1943-1949 was marked by the Chinese Civil War. The second period was called the battle between the two parties and occurred from 1949-1987. The next period, called the first peace negotiation occurred between 1987 and 1995. From 1995 to 2000, the fourth period was referred to as the rising crisis of the Cross-Strait relationship. Finally, the last period from 2000 to present is called a new paradox era. The second part of this chapter examines the extent of U.S. foreign power toward Taiwan as well as Mainland China. Finally, the last part discusses the negotiation behavior of each party from three different approaches: National Security, Political System, and Trade and Economic Development.

Chapter 3 explores regional economic integration under the world trading system and the linkage between Taiwan and Mainland China. This chapter begins by introducing the two powers control the international economic relations, multilateralism and regionalism. The main goal of the WTO is improving free trade and removing the trade barriers. WTO Article XXIV, however, is one of the exceptions. It allows the WTO members to set up certain exclusively beneficial closer trade relationships in accordance with established the requirements and criteria. The second part of this chapter examines three questions: First, what is the legal standard, procedure, criteria, or requirement under WTO Article XXIV that members should follow? Second, what impact will the

development of the WTO regional trade committee have, and how do members negotiate Free Trade Agreements (FTAs) under the WTO regime? Finally, what is the relationship between WTO Article XXIV and regional economic integration, especially in the case of Taiwan and Mainland China? The last part of this Chapter contains comparative studies of current developments in regional economic integration around the world and their linkages to Taiwan and Mainland China. This chapter reviews three cases: European integration, the North American Free Trade Agreement negotiation process, and ASEAN plus Three, the potential regional economic integration of countries in Southeast and Northeast Asia. These comparative models can provide insights to two questions: “how far can the economic integration of Taiwan and China go?” And, “what should the negotiation strategy be, in different stages of economic integration process?”

Chapter 4 develops a new model to examine the different levels (from lower to higher degree) of substantial negotiation issues that appear in economic integration. The criteria of the selected issues are based on two tests, the sovereignty test, and multilateralism test. The lower level issues deals less with sovereignty, and more with the regulation of multilateral negotiation. Taiwan and Mainland China would be best served by negotiating the lower level issues at the outset of economic integration. There are eight negotiation issues, which are divided into three categories:

- (1) Lower Level Issues: Trade in Goods (Market Access, Trade Remedy Laws, and Agriculture), Trade in Services (Services and Telecommunication), and Dispute Settlement Mechanisms.
- (2) Intermediate Level Issues: Investment, Intellectual Property Rights, and Environmental and Public Health.

- (3) Higher Level Issues: Non-economic Factors (Labor Standards and National Security), Public Sector (Government Procurement and Competition Policy), and Monetary Integration.

Finally, Chapter 5 concludes this dissertation and offers several recommendations. This Chapter seeks to initiate potential negotiations aimed at increasing economic integration between Taiwan and Mainland China. While Chapter 4 addresses the substantive issues of negotiation, this Chapter provides the process and procedure of negotiation. The “Title” of negotiating commitment will be the first issue addressed. This is followed by institutional system design. This Chapter discusses two different approaches for international institutional systems: inter-governmentalism and super-nationalism. Third, this Chapter discusses three potential negotiation rounds through which Cross-Strait economic integration can proceed: (1) Free Trade Round, (2) Trade plus Round (3) Common Market Round. Finally, this Chapter concludes the dissertation with closing thoughts and formulates a three-pillar methodology of approach Cross-Strait integration: (1) First Pillar – Economic Integration toward a Single Market; (2) Second Pillar – Justice and Democracy; and (3) Third Pillar – Common Security and Foreign Affairs.

CHAPTER ONE

REGIONAL ECONOMIC INTEGRATION AND THE PEACE PROCESS

I. INTRODUCTION

The first Chapter of this dissertation deals with the “theoretical foundations” of economic integration. The following questions will be raised: What is the theory of regional economic integration? How does it relate to international law, international economics, and international relations theory? Is regional economic integration advancing the ability of states to resolve conflict peacefully? How is regional economic integration between Taiwan and Mainland China improving their peace negotiations?

The linkage between “Regional Economic Integration” and the peaceful resolution of conflict is controversial. Thus, the relationship between these two different approaches could be positive or negative in different cases. When discussing the political conflict between Taiwan and Mainland China, it is helpful to discuss whether their economic integration would lead to peace negotiations. To analyze this issue, it is necessary to briefly review the history and background of the theory of international economic relations, especially “regionalism.”

Since the mid 20th century, there were three waves of regional economic integration that have changed the world trading system. The first wave, a “rush to discrimination,” was led by Western Europe, which founded the only substantial new customs union in the second half of the twentieth century and established complex free trade arrangements with other economic partners in West Europe area. At the same time,

the U.S.A. against the European single market by pushing multilateral trade negotiations.¹

A Second wave of regionalism was initiated by U.S. departures from the GATT non-discrimination principle and climaxed at the North America Free Trade Agreement (NAFTA) negotiations in the early 1990s, which coincided with the European Union's 1992 goal of project completing the internal EU market. However, successful conclusion of the Uruguay Round of multilateral trade negotiations and the establishment of the World Trade Organization (WTO) as the successor to the GATT in 1995 reaffirmed the non-discrimination principle.

In the beginning of the 21st century, a third wave of regionalism was led by Asian countries, which had thus far been the strongest bulwarks of non-discrimination. The emergence of Asian regionalism can be dated from Asian financial crisis in 1997 and ushered in the era of monetary co-operation, which involved the so-called ASEAN plus three.² In 2005, 16 countries, including ASEAN plus three, Australia, New Zealand, and India attended the First East Asia Summit. This Summit was partly in reaction to dissatisfaction with the IMF's role in the international monetary system, but the collapse of the 1999 WTO meeting in Seattle and the diminishing significance of APEC forced participants to consider a new approach to trade liberalization in the Asia-Pacific region. The post-Uruguay Round bar for tariff and some non-tariffs barriers to trade is lower, so

¹ Reviewing the history of successful multilateral trade negotiations, the Kennedy Round (1961~1964) was successful in that the European Union negotiated with a single voice for the first time. The Tokyo Round (1973~1979), which for the first time seriously addressed the issue of non-tariff barriers to trade, sent important signals of the leading trading nations' commitment to multilateralism. Further, the Uruguay Round (1986~1994), was an important historical turning point as the members established the World Trade Organization (WTO). See Jeffrey A. Frankel, *Regional Trading Blocs: In the World Economic System* 23-24 (Inst. for Intl. Econ. 1997).

² *Id.* ASEAN plus three means the ten ASEAN countries in addition to Mainland China (P.R.C.), Japan, and South Korea.

effective discrimination requires focus on other aspects. Whether regional agreements that push the liberalization process forward are stepping stones or stumbling blocks to multilateral liberalization remains an open question.³

After the Cold-War era, there was no substantial armed-conflict between the nations in West Europe, North America, and East Asia, which all sought economic interdependence to promote trade liberalization and improve the peace. The Cross-Strait conflict between Taipei and Beijing has remained an issue since the beginning of the Chinese civil war in 1945. The trade relationship between the two parties is full of tension and is still hostage to discrimination. In order to analyze the complex political and economic relations of the Taiwan Strait, it is necessary to address the theoretical foundations from the start.

The hypothesis to be explored within this dissertation deals with the legal structures and enforcement mechanisms of existing international treaties and multilateral, regional and bilateral agreements regarding economic integration issues. The dissertation will discuss the additional questions raised by these treaties and agreements, together with the positive and negative implications of such answers. The new approach to negotiating economic integration across the Taiwan Strait relies upon the following assumptions:

1. Taiwan and Mainland China both agree on ending the hostile state and both presidents give the appropriate government agencies or an NGO the authority to negotiate the Interim or Peace agreement.
2. Taiwan and Mainland China agree to sign certain agreements or reach

³ Richard Pomfret, *The Economics of Regional Trading Arrangements* v ~ vii (Oxford U. Press 2001).

arrangements toward economic integration under the rule of GATT/WTO regime.

3. Taiwan and Mainland China both agree to improve economic and trade relations by reducing the impact of sovereignty issues and political conflict.

Within this Chapter, Part II discusses the interdisciplinary approach among different scholars. The sections include the relationship between “International Law and International Relations,” “International Law and International Economics,” and “International Relations and International Economics.” Part III addresses the issue of “Economic Integration and Peace Negotiations” in two sub-sections: (1) Peace Negotiation Theory, and (2) Economic Integration toward Peace Negotiation. Part IV continues the discussion of “Cross-Strait Economic Integration and Peace Negotiation.”

II. THEORY OF ECONOMIC INTEGRATION

A. Theoretical Approaches

The methodology explored in this dissertation is animated by the spirit of interdisciplinary collaboration. Scholars of law, economics and international politics approach complex global issues from different views.⁴ Unfortunately, the linkages among these three disciplines have not been utilized well in the past few decades. The limitation of study methods has made international negotiation more difficult to

⁴ Anne-Marie Slaughter, *International law and International Relations Theory: A Dual Agenda*, 87 Am. J. Intl. L. 205, 205 (1993). As professor Ann-Marie Slaughter has cogently argued, “Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behavior seek to learn from one another.”

breakthrough. Indeed, as research scholars, governmental negotiators, and trade lawyers improve their ability to better understand international economic law and policy, their development has focused on three academic fields, namely: international law, international relations theory, and international economics. This dissertation explores these theories as a means of explaining this interdisciplinary collaboration (*Table 1*).

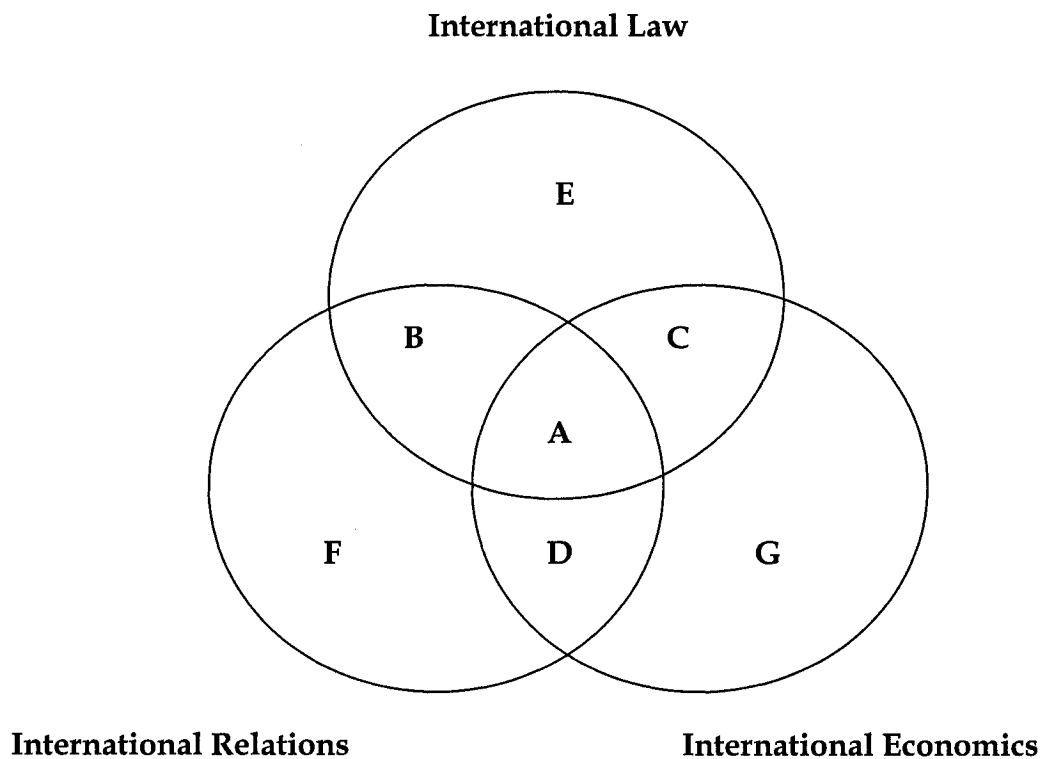


Table 1 Interdisciplinary Research on International Law, Relations, and Economics

Part A in the Figure is the main area, which will be the focus of this dissertation. In other words, “A,” is our “Core Concern.” As the graph depicts, it combines the three scholarly fields. The participants should use these new interdisciplinary analytical

methods not only in trade negotiations, but also in trade dispute resolution, the participants should use the new interdisciplinary analytical methods, which presented in this dissertation, at the negotiation table or standing before the hearing.

Part A+B is the combination of “International Law” and “International Relations theory.” This dissertation examines institutionalism, international regime theory, functionalism, and economic interdependence theory to explore the multilateral trading system, especially the role of traditional international law and the multilateral agreements that effect the future implementation of customary international law, especially the application and enforcement of international treaty.

Part A + C contain “International Law” and “International Economics.” This dissertation discusses the international economic law governing global economic activities as well as the extent to which the multilateral trading system, namely the WTO, would be better suited to balance legal enforcement with economic concerns. This dissertation will also examine the lessons we have learned from Bretton Woods Project to the recent Doha Round negotiations.

Part A+D is entitled “International Relations and International Economics.” Historically, the Bretton Woods System has attempted to solve international economic problems by using international relations theory. In the past decades, “international political economy” became the popular analytical method, attracting the most international scholars’ attention. More and more international trade exporters recognized that “Trade Negotiation and Litigation” is not merely an amalgamation of legal issues, but contains other disciplines inside their “Soul,” most importantly, the “theory of international political economy.”

Parts E, F, and G are the specific fields of the theories in each approach, which will not be discussed in this dissertation.

B. Interdisciplinary Research on International Law and International Relations

The relationship between international law and international politics is too close to separate. After World War II, the idea of establishing the “United Nations,” as well as the adoption of the “United States Chapters” changed the fundamental principles of international law and international relations. Although the United Nation is the primary international organization managing international affairs, the states still rely on their own “hard power” – sovereignty and the control of economic policy.⁵

There were many international relations theories presented beginning in the mid 20th century, and of course, there were various debates amongst different theoretical approaches.⁶ Among the multitude of contemporary international relations theories, “Realism” established itself as the critical one.⁷ The key assumption of realism is that mankind is not inherently benevolent and kind, but self-centered and competitive. This is in contrast to other theories of international relations such as Liberalism.⁸ Secondly, it also fundamentally assumes that the international system is anarchic, in the sense that there is no authority above states capable of regulating their interactions; states must arrive at relations with other states on their own, rather than being controlled by some

⁵ Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* 20 (Pub. Affairs, 2004).

⁶ Stephen Krasner, *International Regimes* 33-36 (Cornell U. Press 1983). “The three important debates of international relations theories are: (1) The First Debate: Idealism vs. Realism, (2) The Second Debate: Scientific Behaviouralism vs. Traditionalism, (3) The Third Debate: Neo-realism vs. Neo-liberalism.”

⁷ Michael Smith, *Realist Thought from Weber to Kissinger* 2 (La. St. U. Press 1986).

⁸ Andrew Moravcsik, *Liberalism and International Relations Theory* 32 (Harv. U. Press 1992).

higher controlling entity (that is, no true authoritative world government exists). Finally, it assumes that sovereign states, rather than international institutions, non-governmental organizations (NGOs), or multinational corporations, are the primary actors in international affairs. According to Realism, each state is a rational actor that always acts in its own self-interest, and the primary goal of each state is to ensure its own security. Realism holds that in pursuit of that security, states will attempt to amass resources, and that relations between states are determined by their relative level of power. That level of power is in turn determined by the state's capabilities, both military and economic. Moreover, Realists believe that States are inherently aggressive, and that territorial expansion is only constrained by opposing powers. As a logical extension, realists do not focus on the weight of international law or international institutions, and they emphasize the capabilities of sovereignty and state power instead.

1. The Challenge and Limitation of Realism

Although the Realism was the main trend among international relations theories, there were lots of debates and opposition from other theoretical concerns.⁹ The realists believe in the polarity of law and power, one diametrically opposes the other as the respective emblems of the “domestic vs. the international realm,” “normative aspiration vs. positive description,” “cooperation vs. conflict,” “soft vs. hard,” “idealist vs. realist.”

⁹ *Id.* at 42-48. The discipline of international relations was born after World War I in a haze of aspirations for the future of world government. Notable Realists scholars include Hans Morgenthau, Georg Schwarzenberger, E. H. Carr and George Kennan, Reinhold Niebuhr, Arnold Wolfers and Robert Strausz-Hupe. These seasoned observers of the interwar period reacted against Wilsonian liberal internationalism, which presumed that the combination of democracy and international organization could vanquish war and power politics.

They also believe that states in the international society seek only to protect their own national interest, and that “International Law” has no place in this world. The only relevant laws are the “laws of politics,” and politics is “a struggle for power.”¹⁰ The Realist, in the long run, has argued with international lawyers about the possibility of establishing the “relevance” of international law. International legal theorists always focus on the theoretical conundrum of the sources of international legal obligations -- of the law being simultaneously “of” and “above” the state.¹¹ The better solution assumes that international legal rules have some effect on state behavior, that law and power interact in some way, rather than marking opposite ends of the domestic-international spectrum.

The rapid changes in global economic interdependence after the Cold-War era made realism have less power in driving international affairs. Beginning in the late 20th century, an important group of mainstream international relations theorists laid the foundation for a more fundamental attack on core Realist propositions concerning the role and relevance of international institutions.¹² The result was a new emphasis on the role and impact of “international regimes,” which focus more on the principles, norms, rules and decision-making procedures that pattern state expectations and behavior. This

¹⁰ Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 4-5 & 25-26 (Brief ed., McGraw-Hill 1993). The author indicated in his book:

Although many of the fathers of the United Nations would have argued that it was founded precisely on a Realist recognition of the necessities of power politics -- hence the special privileges for the great powers sitting on the Security Council, Morgenthau specifically cites “the great attempts at organizing the world, such as the League of Nations and the United Nations,” as efforts to implement the wrongheaded “conviction that the struggle for power can be eliminated from the international scene.

¹¹ Slaughter, *supra* n. 4, at 208.

¹² *Id.* Cooperation theory, System theory, Interdependence Theory, international political economy, international regime theory, and collective security theory oppose tenets of Realism.

new approach, “Regime Theory,”¹³ soon became a development of “International Law.” Regime theory was subsumed under the more general rubric of Institutionalism,¹⁴ a powerful alternative to Realism. The dawning of a new era in terms of “Global Governance”¹⁵ to some extent may mean greater consistency in the areas of international law and international relations than ever before. The result is a dual agenda in interdisciplinary scholarship, bridging two distinct theoretical traditions in political science:¹⁶ Institutionalism and Liberalism.

2. Mix of Realism and Liberalism

Although the mix of Realism and Liberalism is a new interdisciplinary approach to international relations theory and international law, the debates between them demonstrate that there are similarities, and in the end, both approaches will supplement each other.¹⁷ Most liberal and institutional research studies focus on liberal states, but further studies would be particularly applicable to the analysis of relations between liberal and non-liberal states. The world is likely to remain heterogeneous, and the

¹³ See Krasner, *supra* n. 6; also see Stephen Haggard & Beth Simmons, *Theories of International Regimes*, 41 Intl. Org. 491, 491-517 (1987).

¹⁴ See Martin Hollis & Steve Smith, *Explaining and Understanding International Relations* (Oxford U. Press 1990).

¹⁵ See Errol Mendes & Ozay Mehmet, *Global Governance, Economy and Law: Waiting for Justice*, (Routledge, 2003).

¹⁶ Slaughter, *supra* n. 4, at 210.

¹⁷ *Id.* at 211.

Institutionalists will continue to believe that systemic explanations provide the most powerful and parsimonious starting point, but that explanations focusing on domestic politics and individual action will be important residual tools. However, Liberals will claim that Liberal theories are necessary to explain the formation of state interests, but that Institutional theories are critical at the bargaining stage. In either case, legal adherents of both schools will find a bridge to each other, as well as to fellow-traveling political scientists.

accumulated store of knowledge about how to ensure at least minimal regulation of the relations between competing sovereigns will serve diplomats and decision makers for a long time to come.¹⁸

In sum, the history of national development among various states will increasingly differ in their modalities, consequences and implications for the political, economic, social, and legal aspects of liberal and non-liberal states relationships. Liberal international relations theory provides international legal scholars with a conceptual apparatus to understand and analyze this phenomenon and gradually to build it into law. Overall, international legal scholars cannot ignore the growing wealth of international political circumstances and their impact on the world they seek to regulate. As an emerging discipline, international political science long rejected the insights of international law. As time has gone by, international political scientists have rediscovered what international lawyers never forgot, adding insights of their own. This dual interdisciplinary agenda of “mixing realism and liberalism” offers a new hope of reaching both goals.¹⁹

C. Interdisciplinary Research on International Law and International Economics

1. The Foundation of International Economic Law

The linkages between international economics and international law are based on the interdependence of international economic activities, which put pressure upon

¹⁸ Slaughter, *supra* n. 4, at 238-239.

¹⁹ *Id.* at 239.

existing economic and governmental institutions, both national and international. The causes of contemporary economic developments are numerous, and almost every conceivable type of government economic regulation must now take account of the international and competitive implication of its activity. Often national government officials feel frustrated at their relative inability to control economic forces that vitally affect their constituents and prevent the fulfillment of official goals and promises made to their constituents.²⁰

The term “international economic law” was coined after World War II. Generally speaking, international economic law governs various aspects of international economic activities, including embracing the law of economic transactions, government regulation of economic matters, and related legal relations including litigation and international institutions for economic relations. Much of international economic law does not regulate nation-state relations (use of force, human rights, intervention etc.), but does indeed involve many questions of traditional international law, particularly treaty law.²¹ There

²⁰ John H. Jackson, *Global Economics and International Economic Law*, 1 J. Intl. Econ. L. 1, 1-2 (1998).

The rapid changes in world trading activities included incredible advances in the efficiency of communication, extraordinary reductions in transport costs, the growing prevalence of instant tele- and cyber- transactions, treaty and other norms causing reduction of governmental barriers to trade, an economic climate more favorable to principles of market economics, cross-border influences on competition which have driven increases in production and service efficiencies, and the blessing of relative peace in the world.

²¹ John H. Jackson, *International Economic Law: Reflections on the “Boilerroom” of International Relations*, 10 Am. U. J. Intl. L. Policy 595, 595-606 (1995). Professor Jackson also indicated:

To some extent IEL can be divided into two broad approaches which cut across most of the subjects embraced by IEL. These approaches can roughly be termed “transactional” or “regulatory.” Transactional IEL refers to transactions carried out in the context of international trade or other economic activities and focuses on the way mostly private entrepreneurs or other parties carry out their activity. Regulatory IEL, however, emphasizes the role of government institutions (national, local or international). Although it cannot be argued that international trade transactions are the most regulated

are three characteristics of international economic law. First, international economic law cannot be separated or compartmentalized from traditional “public international law.” The economic activities relating to international economic law involve much practice, which is relevant to general principles of international law, especially treaty law and practice. Conversely, public international law has considerable relevance to international economic relations and transactions. Second, the relationship of international economic law to national or “municipal” law is particularly important, especially the application of treaty norms to municipal law expressed by such terms as “self-executing” or “direct application.”²² Third, there is a request for interdisciplinary research and thinking, both of which are required for the field of international economic law.²³

International economic law also refers to the “regulation of economic behavior which crosses national borders.” Generally speaking, market-oriented economists talk about avoiding governmental interference, except when there is “market failure.”²⁴ One of the interesting features of this fairly traditional economic analysis is that it almost always develops in the context of a single-market domestic economy. However, the international economic system is totally different from the single domestic market

of all private economic transactions, nevertheless, most attention, traditionally, to IEL has been focused, perhaps for practical and pragmatic reasons, on transactions.

²² See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Intl. L. 310, 310 (1993); also see Thomas Cottier, *The Relationship between World Trade Organization Law, National and Regional Law*, 1 J. Intl. Econ. L. 83, 83-122 (1998).

²³ See Jackson, *supra* n. 20, at 10.

Of course, ‘economics’ is important and useful, especially for understanding the policy motivations of many of the international and national rules on the subject. In addition to economics, of course, other subjects are highly relevant. Political Science (and its intersection with economics found generally in the “public choice” literature) is very important, as are many other disciplines, such as cultural history and anthropology, geography etc.

²⁴ See Richard Lipsey, Paul Courant, Douglas Purvis & Peter Steiner, *Microeconomics* Ch. 4 (10th ed., Addison-Wesley 1993).

because of various formal, or informal, linkages of various kinds of “market failure.” One important “market failure” in international economic activities is “peace and national security,” i.e., peacemaking in the United Nations and human rights. Accordingly, there are broader values in international economic law than just economic market-oriented values. When there is market failure, the government’s response is, naturally to solve the market failure. In economic literature, there are generally several kinds of responses that have been suggested – ways that governments can intervene, such as taxes, tariffs, and subsidies etc. However, some of the governmental responses to national market failure suggested in the literature cannot easily be used in a global situation.

Game theory (particularly the so-called “prisoners dilemma”) is sometimes with the aid of analyzing these international economic relations,²⁵ and the international society is pushing toward mutual cooperation as a necessary ingredient for handling these issues. However, there are arguments for and against such internationalization. Governments may or may not be acting in the best interests of their society because of the described by public choice theories.²⁶

2. International Economic Policy and Institutions

The establishing of international institutions always fulfilled certain goals in international economics, politics, or legal perspectives. “Institutionalism” and “Regime Theory” provided a lot advantages for international institutions, which can reach the

²⁵ Avinash K. Dixit & Barry J. Nalebuff, *Thinking Strategically: The Competitive Edge in Business, Politics and Everyday Life* 44 (W. W. Norton & Co. Inc. 1991).

²⁶ See Jackson, *supra* n. 20, at 14.

purpose of better regulating international affairs as well as international economic activities. However, there are risks in international cooperation activity or international governance. Some of those risks are in the institutional fundamental principles, such as the danger of decision rules like “consensus” in GATT/WTO regime, which led to the lowest common denominator approach that inhibits some countries from embracing higher standards concerning product safety or environmental considerations.²⁷

Trade liberalization increases the free movement of goods or public welfare for the international society overall, but there is no direct evidence showing that every state, or their people, are better off as a result. In fact, international affairs are like a series of games; there are always some winners and some losers. Winners and losers are not merely determined from an economic perspective, but also from a political perspective. For example, beyond international economics activities, the “peace-keeping” process and “human rights protection” are important elements of international relations theory and international economic theory.²⁸

Thus, many international economic institutions, like the WTO, World Bank, and IMF, have had to construct institutions that will follow or mediate the many “public interest” goals such as human rights, environmental protection, and labor standards, etc. However, it’s still uncertain whether the relevant international economic institutions are the appropriate place to resolve these complicated public affairs issues. In a number of cases, the optimum approach would be some kind of international, or global, response,

²⁷ *Id.* at 15.

²⁸ Alan O. Sykes, *Comparative Advantage and the Normative Economic of International Trade Policy*, 1 J. Intl. Econ. L. 49, 49-50 (1998).

but the institution concerned may be weak, or so fraught with the potential for abuse that institution fails to make certain decisions.²⁹

D. Interdisciplinary Research on International Relations and International Economics

1. Political Economy of Regional Economic Integration

The movement toward regional economic integration or regionalism, which appeared in the mid - 1980s differs from the prior economic integration of the 1950s and 1960s. The later regionalism and the successful multilateral trade negotiations that established the World Trade Organization (WTO) significantly improved the world economy. The regional economic integration of today is not merely focused on trade and economic issues, but also includes goals with non-economic purposes, such as political and security concerns.³⁰ Traditional economic theory cannot clearly explain the current

²⁹ See Jackson, *supra* n. 20, at 16.

There are goals for the institutions that we might need and some of these goals are addressed, for example, in the WTO. It is not clear that the WTO is going to be able to succeed with respect to all these goals, however, but they deserve some thought. One important goal is the concept of a rule-oriented system that provides the predictability and stability for the system for which many see a need for a variety of reasons.

³⁰ Robert Gilpin & Jean M. Gilpin, *The Political Economy of International Relations* 343 (Princeton U. Press 1987). Professor Gilpin indicated:

Albert Fishlow and Stephan Haggard have made a useful distinction between market-driven and policy-driven regional integration; certainly both political and economic considerations are involved in every regional movement. However, the relative importance of economic and political factors differs in each. Whereas the movement toward integration of Western Europe has been motivated primarily by political considerations, the motivation for North American regionalism has been more mixed, and Pacific Asian regionalism has been principally but not entirely market-driven.

regional economic integration.³¹ Thus, there are two, new interdisciplinary approaches, “neo-functionalism”³² and “economic regionalism,”³³ which involve international economics and international relations, that have taken efforts to explain the regional economic integration of free trade areas and customs union

As powerful domestic interests and individual states learn the utilitarian value of international organizations, and as international civil servants transfer loyalty from their own states to international organizations the role of international institutions in managing regional and global affairs will grow. Thus, “neo-functionalism”³⁴ believes that economic

³¹ See Jacob Viner, *The Customs Union Issue* (Carnegie Endowment for Intl. Peace 1950). Economic theories did not provide a satisfactory explanation of economic integration. This is because economic analysis generally assumes that a political decision has been made to create a large economic entity, and that economists need only analyze the welfare consequences of that decision and concern themselves with just a few aspects of the process of economic integration. The classic work on the welfare consequences of regional trade agreements is in Jacob Viner's *The Customs Union Issues* (1950), a study stimulated by growing concerns in the United States and elsewhere about the accelerating movement toward a western European Common Market.

³² Gilpin & Gilpin, *supra* n. 30, at 353.

The new institutionalism approach assumes that international, including regional, institutions, such as those of Western Europe, are established to overcome market failure, solve coordination problems, and/or eliminate other obstacles to economic integration. These institutions create incentives for states to cooperate and, through a variety of mechanisms, to facilitate such cooperation. Although the new institutionalism provides valuable insights, it does not consider the political reasons for regional arrangements.

³³ *Id.* at 354.

The new political economy explanation emphasizes interest group politics and the distributive consequences of economic regionalism; it assumes that such regional trade arrangement as custom union and free trade arrangements have significant redistributive consequences that are usually harmful to nonmembers and create both winners and losers among the members themselves. Indeed, economists frequently explain economic integration as resulting from efforts of domestic interests to redistribute national income in their own favor. This approach provides important insights into the domestic politics of economic integration but fails to explain the costly efforts by Europeans to achieve regional integration.

³⁴ *Id.* at 356.

Forces leading to an integrated economic system tend to be self-reinforcing, as each stage of economic integration encourages further integration. Neo-functionalism assumes that economic and other welfare concerns have become, or at least are becoming, more important than such traditional concerns as national security and interstate rivalry. Underlying this assumption is a belief that industrialization,

cooperation will lead to political integration at either the regional or global level. The core idea of neo-functionalism is that economic and technological forces are driving the world toward greater political integration. In other words, international political scholars have recognized the way that neo-functionalists think about regional integration. Neo-institutionalism, domestic politics, and inter-governmentalism have influenced the research interests in economic and political integration. Many scholars have studied the effects of various factors including the pressures of domestic economic interests and the interests of political elites on economic and political integration. Their literature emphasizes the importance of the distributive consequences of integration for domestic groups and has noted that winners support integration while losers oppose it. It has also recognized that political leaders are guided by the consequences of integration for their own political survival, and domestic interests and institutions may facilitate or discourage integration. In this regard, many political scientists share a viewpoint very similar to those of economists.

The historical experience of national development reveals that, despite neo-functionalist assertions, economic unification has followed rather than preceded political unification. Once a political decision has been made to achieve economic and monetary union, neo-functionalist logic and the solution of technical issues may lead to deeper integration. However, there is no example of the trend operating in the other direction. In other words, spillover from economic and monetary unification does not necessarily lead to political unification. Indeed, in some cases, even the movement toward economic and

modernization, democracy, and similar forces have transformed behavior. The theory assumes as well that the experience of integration leads to redefinition of the national interest and eventual transfer of loyalty from the nation-state to emerging regional or global entities.

political unification, such as the case of the European Union, has been historically unique. Peaceful integration of such a large region had never been attempted before, and there were simply no precedents to provide guidance regarding the future of European regionalization.³⁵

2. Economic Regionalism

In late 1990s, economic regionalism became an important component in the national strategies of the major economic powers to strengthen their respective domestic economies and international competitiveness. They attempted to achieve at the regional level what they were no longer able to achieve at the national level.³⁶ Efforts to develop a general theory of regional integration are unlikely to succeed. Realist approaches also have serious limitations. There are too many different factors involved in regional movements around the world. The differences among various regional efforts are too great to be tested in a general rule. A universal theory explaining such a diverse and wide-ranging phenomenon is undoubtedly impossible to formulate. In fact, all the recent regional economic integration involves some degree of political motivation. Sometimes the outcomes are ambitious. Although the interests and pressures of powerful domestic groups may shape regional arrangements, those arrangements are produced primarily by specific national interests.³⁷

³⁵ *Id.* at 354-357.

³⁶ Richard Gibb & Wieslaw Michalak eds., *Continental Trading Blocs: The Growth of Regionalism in the World Economy* 1 (John Wiley & Sons Inc. 1994).

³⁷ Gilpin & Gilpin, *supra* n. 30, at 359.

Other factors influencing the movement toward economic regionalism include the increasing importance of world trade competition, the theory of strategic trade, and economies of scale. The earlier economists approached regionalism by emphasizing trade creation and diversion of consequences of regional trading arrangements. But more recently the focus has been on the importance of internal and external economies of scale that could be achieved through economic integration.³⁸ In principle, the best route to promote economies of scale would be through free trade and completely open markets. Besides, the failure of multilateral negotiations under the WTO is another reason countries are seeking regional trading partners. However, many businesses and political leaders believe that protected regional arrangements enable local firms to achieve such economies and thereby increase their competitiveness vis-à-vis foreign firms. Such reasoning and efforts to increase international competitiveness have certainly been factors underlying the movement toward regional integration.³⁹

III. ECONOMIC INTEGRATION AND THEORY OF PEACE PROCESS

A. Theory of Peace Process

The 20th century was the first time attempts to establish international organizations which would protect the peoples of the world against war. After the World War II, the United Nations was established “to save succeeding generations from the

³⁸ Desmond Dinan ed., *Encyclopedia of the European Union* 153-158 (Lynne Rienner 1998).

³⁹ Gilpin & Gilpin, *supra* n. 30, at 361.

scourge of war,”⁴⁰ and the Security Council was given the “primary responsibility for the maintenance of international peace and security.”⁴¹ The founders of the United Nations tried to ensure that the Council would have necessary means for discharging this responsibility, and Member States agreed to make available to the Council for this purpose: armed forces sufficient for maintaining peace.⁴² However, the whole efficacy of the Charter depends on the unity of the United Nations, especially the great nations with a permanent seat on the Security Council; they must remain truly united.

In a 1992 report on the work of the United Nations, the prior Secretary General, Boutros Boutros-Ghali, pointed out that the United Nations’ main invention was “peacekeeping in Supplement to An Agenda for Peace.”⁴³ To meet this demand, the United Nations adapted peacekeeping methods to meet the new requirements. It ceased to be solely a military function, and recent operations included “civilian police, electoral

⁴⁰ U.N. Charter pmbl., para. 1.

⁴¹ *Id.* at art. 24, para. 1.

⁴² *Id.* at art. 43, para. 1.

⁴³ Boutros Boutros-Ghali, *An Agenda for Peace* (Report of the U.N. Secretary-General, pursuant to the statement adopted by the Summit Meeting of the Security Council), U.N. Doc. A/47/277, S/24111 (17 Jun., 1992).

The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate. To blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel... Peace-keeping and the use of force (other than in self-defense) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other....To seek to identify at the earliest possible stage situations that could produce conflict, and to try through diplomacy to remove the sources of danger before violence results; Where conflict erupts, to engage in peacemaking aimed at resolving the issues that have led to conflict; Through peace-keeping, to work to preserve peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers; To stand ready to assist in peace-building in its differing contexts: rebuilding the institutions and infrastructures of nations torn by civil war and strife; and building bonds of peaceful mutual benefit among nations formerly at war; And in the largest sense, to address the deepest causes of conflict: economic despair, social injustice and political oppression. It is possible to discern an increasingly common moral perception that spans the world's nations and peoples, and which is finding expression in international laws, many owing their genesis to the work of this Organization.

personnel, human rights experts, information specialists and a significant number of political advisory staff.”⁴⁴ It became clear that new forms of conflict required a comprehensive approach, combining peacekeeping with preventive diplomacy and peacemaking.

In Sum, The Secretary-General’s report defined the three main peace processes (or regimes) as followings:

- (1) Preventive diplomacy is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts, and to limit the spread of the latter when they occur.⁴⁵
- (2) Peace-keeping: The deployment of a United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.
- (3) Peace-making: Actions taken to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations.
- (4) Peace-building: Action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.
- (5) Peace-enforcement: Involves peace-keeping activities which do not necessarily involve the consent of all parties concerned. Peace-enforcement is foreseen in Chapter VII of the Charter.⁴⁶

⁴⁴ Boutros Boutros-Ghali, *Report on the Work of the Organization from the Forty-sixth to the Forty-seventh Session of the General Assembly*, U.N. GAOR 47th Sess., Supp. No. 1, U.N. Doc. A/47/1 (Sept. 11, 1992), at 17.

⁴⁵ *Id.*

At the outset, it is worth recalling the very first purpose of the United Nations as set out in the Charter,⁴⁷ which provides:

“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

B. Economic Integration toward Peace Process

1. Realism vs. Liberalism

From a historical perspective, there is no direct evidence that proves regional economic integration increases or decreases regional peace and security. The long-term debate between realists and liberals on the theory of war and peace centers on largely different viewpoints about the relative salience of different causal variables. Regarding the causes of global and regional conflict, realists stress factors such as relative power, while liberals focus on the absence or presence of collective security regimes and the pervasiveness of democratic communities.⁴⁸

In one hand, liberals believe that economic interdependence and integration between the states lower the likelihood of war by increasing the value of trading over the alternative of aggression: interdependent states would rather trade than invade. As long as a high level of interdependence can be maintained, liberals assert that they have enough

⁴⁶ *Id.*

⁴⁷ See U.N. Charter, chapters VI & chapters VII spell out concrete measures that the UN Security Council can take to achieve this purpose.

⁴⁸ John J. Mearsheimer, *Back to the Future: Instability in Europe after Cold War*, 15 Intl. Sec. 5, 5-56 (Summer 1990); also see Robert O. Keohane, *International Liberalism Reconsidered* in *The Economic Limits to Modern Politics* 165, 165-194 (John Dunn ed., Cambridge U. Press 1990).

reason for optimism. However, in the other hand, realists dismiss the liberal's assumptions, and indicate that high integration and interdependence increases rather than decreases the probability of war. In anarchy, states must constantly worry about their national security. Accordingly, interdependence – meaning mutual dependence and thus vulnerability – gives states an incentive to initiate war, if only to ensure continued access to necessary materials and goods.⁴⁹

The different policy approaches of liberals and realists have had a deep impact on the political leaders and decision-makers of the state. Summarizing the analysis above: (1) Liberals contend that high economic dependence reduce a state's likelihood of initiating war by providing a material "constraint" on unit-level forces for aggression. Low dependence will increase this likelihood, since this constraint on unit-level motives for war is removed. (2) Realists argue that high dependence heightens the probability of war as dependent states struggle to reduce their vulnerability. In the realist world, low dependence should have no impact on the likelihood of war or peace; that is, other factors should become causally determinant of war. Still, since economic interdependence is at least eliminated as a possible source of conflict, realists would predict that the overall likelihood of war should fall when mutual dependence is low.⁵⁰

2. Theory of Trade Expectation

⁴⁹ Björn Hettne, András Inotai & Osvaldo Sunkel eds., *Globalism and the New Regionalism* 116-120 (St. Martin's Press 1999).

⁵⁰ Michael E. Brown, Owen R. Cote, Jr., Sean M. Lynn-Jones & Steven E. Miller eds., *Theories of War and Peace: An International Security Reader* 11-15 (MIT Press 1998).

The theory of trade expectation could help to resolve the problem discussed in the above section. The theory starts by clarifying the notion of economic interdependence, fusing the liberal insight that the benefits of trade give states an incentive to avoid war with the realist view that the potential costs of being cut off can push states to war in order to secure vital goods.

Trade expectation theory introduces a new causal variable, the expectations of future trade, examining its impact on the overall expected value of the trading option if a state decides to forgo war. This supplements the static consideration in liberalism and realism of the level of interdependence at any point in time with the importance of leaders' dynamic expectations into the future. The theory of trade expectations extends liberal and realist views regarding the linkage between interdependence and war by synthesizing their strengths and formulating a dynamic perspective in state decision-making.

The strength of liberalism lies in its consideration of how the benefits or gains from trade give states a material incentive to avoid war, even when they have unit-level predispositions to favor it. The strength of realism is its recognition that states may be vulnerable to the potential costs of being cut off from trade on which they depend for wealth and ultimately security.⁵¹

Trade expectation theory departs from the two other approaches by incorporating both the level of dependence and the dynamic expectations of future trade. It is somewhat consistent with realism in that low dependence implies little impact on the prospects for

⁵¹ Dale C. Copeland, *Economic Interdependence and War: A Theory of Trade Expectations in Theories of War and Peace: An International Security Reader* 464, 464-500 (Michael E. Brown, Owen R. Cote, Jr., Sean M. Lynn-Jones & Steven E. Miller eds., MIT Press 1998).

peace or war: if there are few benefits from trade and few costs if trade is cut off, then trade does not matter much in the state's decision to go to war. When dependence is high, peace will be promoted only when the state has positive expectations of future trade. Here, the liberal logic applies whereby the positive benefit of trade gives the dependent state an incentive not to disrupt a profitable peace.

If, however, expectations of future trade fall, then realist concerns about the downside of interdependence – the costs of being cut off – enter in, dramatically increasing the likelihood that the dependent state will initiate war. Importantly, the decision for war does not hinge on the present trade levels; rather, it is the leaders' expectation of the future that drives whether the expected value of trade is positive and peace-inducing or negative and war-inducing. To summarize, the new theory shows that high levels of dependence will cause deep interaction, and it will raise the possibilities of shifting towards the desire for peace or war. When expectations for trade are positive, leaders expect to realize the benefits of trade into the future and therefore have less reason for war now; trade will indeed “constrain” them. If, however, leaders are pessimistic about future trade, fearing to be cut off from vital goods or believing that current restrictions will not be relaxed, then the negative expected value of peace may make war the national strategic choice.

We must turn back to the fundamental question of whether economic interdependence, or integration, between two states might help preserve the peace.⁵² After

⁵² The case of Northern Ireland Case Arab-Israeli relations are also useful for the post-war peace process. See Mervyn T. Love, *Peace Building Through Reconciliation in Northern Ireland* (Avebury 1995); Marianne Elliott ed., *The Long Road to Peace in Northern Ireland: Peace Lectures from the Institution of Irish Studies at Liverpool University* (Liverpool U. Press 2002); and Karen A. Feste, *Plans for Peace: Negotiation and the Arab-Israeli Conflict* (Greenwood Press 1991).

so many years and rounds of multilateral negotiation, the value of maintaining an open trading system through the WTO regime is clear: any significant trend towards regionalization may force dependent, great powers to use military force to protect their trading realms. In this regard, the analysis turns to support the liberal view that multilateral negotiation as well as economic integration may help reinforce chances for peace.

Insofar as international institutions solidify positive expectations about the future, they reduce the incentive for aggression. Conversely, trade expectation can be shattered by poor bilateral diplomacy even within the context of an overarching international regime. To a large degree, whether interdependence leads to war or to peace thus becomes a question of political foresight. Those leaders who understand that an adversary's decisions rest not on the static situation of the present, but on the dynamic expectations for the future will be better able avoid the tragedy of war.⁵³

IV. CROSS-STRAIT ECONOMIC INTEGRATION AS PEACE PROCESS

This dissertation is the first legal and policy-oriented, interdisciplinary research on Cross-Strait relations. In fact, there are some relevant works in this field regarding WTO negotiation and litigation,⁵⁴ economic integration theory,⁵⁵ and Cross-Strait

⁵³ Copeland, *supra* n. 51, at 500.

⁵⁴ Such as the research of MFN, national treatment, trade and environment, trade and competition policy, trade and intellectual property, dispute settlement, *infra* n. 56-59.

⁵⁵ See Yun-Wing Sung, *Non-Institutional Economic Integration Via Cultural Affinity: The Case of Mainland China, Taiwan and Hong Kong*, Occasional Paper (H.K. Inst. of Asia-Pacific Stud., Chinese U. of H.K., 1992)(Copy on file with Chinese U. of H.K. Lib.); see Thomas G. Rawski, *Economic Growth and Integration in Prewar China* (Dep. of pol. Econ., U. of Toronto 1982); also see Kuo-Fa Chao, *Economic Integration of a Great New China* (Sonoma St. U. Press 1990).

relations.⁵⁶ This section will start by highlighting the academic work of individual authors and then discussing their main ideas, as a way of comparing them to this dissertation. Dr. Chang-Fa Lo in his book “WTO and the Trade relationships between Taiwan, Hong Kong, and Macao” discussed the legal aspects of foreign direct investment issues and the intellectual property protection policy under the WTO rules.⁵⁷ However, these books didn’t focus on economic integration issues. Dr. Ying-Wen Tsai concentrates on Hong Kong legal system and Taiwan’s accession to the WTO in her article “Taiwan’s WTO Accession-Meeting the Requirement”⁵⁸ and “Taiwan’s Trade Negotiation Policy.”⁵⁹ Dr. Ya-Chun Chang in his book “Integration of Taiwan Strait”⁶⁰ applies the integration theory to international law and political issues. He generally discussed the process of political integration between Taiwan and China. However, his book focuses on political issues and reaches neither WTO rules, nor international economic laws. Dr. Hsin-Hsin Wu in his book “Integration Theory and China-Taiwan relationship”⁶¹ examines the political conflicts and future trends for integration between Taiwan and China. His research reflects the organizational and political issues between Taiwan and China. Mr. Vincent C. Siew, former Premier of the R.O.C. government, established the

⁵⁶ Anne Mi-Kyeong Suh, *Economic Integration of China and Newly Industrialization Economies: Case of Taiwan - Fujian and South Korea - Shandong* (unpublished M.A. thesis, U. Cal. Berkeley, 1996) (Copy on file with U. Melbourne Lib.).

⁵⁷ See Chang-Fa Lo, *WTO and the Trade Relationships between Taiwan, Hong Kong, and Macao* WTO 與台港澳經貿關係 (Sanmin 2001).

⁵⁸ Ying-Wen Tsai, *Taiwan’s WTO Accession-Meeting the Requirement*, 1995 Intl. Harmonization of Comp. L. 297, 297-315.

⁵⁹ Ying-Wen Tsai, *Integration of Taiwan Strait* (P. Econ. Coop. Council 1997)(Copy on file with Natl. Taiwan U.).

⁶⁰ Ya-Chun Chang, *Integration of Taiwan Strait 兩岸統合論* (Shengzhi 2001).

⁶¹ Hsin-Hsin Wu, *Integration Theory and China-Taiwan Relationship 整合理論與兩岸關係* (Shengzhi 1998).

“Cross-Straits Common Market Foundation”⁶² and has begun to hold some conferences, but no related thesis or papers have been published.

In summary, the preliminary literature consists of historical papers and obsolete research. There are no scholars that have done the study which this dissertation expects to do. First, this dissertation is unique because after Taiwan and China entered into the WTO, there were lots of legal issues that needed to be discussed. The prior research could not address this new, changing situation.

Second, most legal scholars have done their research on introducing the GATT/WTO rules, but there are no formal scholarly papers that combine “Cross-Strait Economic Integration under the WTO regime” with “Cross-Strait Peace Negotiation” and compare it to the EU integration process, NAFTA, East Asia economic integration, and peace negotiation theory. There are lots of scholars that have written papers and books on Asia-Pacific Economic Integration, especially with a focus on Japan and ASEAN,⁶³ but no study directly reaches Taiwan and Mainland China.

⁶² See Vincent C. Siew, *Toward the Creation of a ‘Cross-Strait Common Market’*, available at <http://www.crossstrait.org/version3/index.html> (Jan. 22, 2001)(last visited July 29, 2006). This Foundation’s mission is similar to this dissertation’s. Mr. Vincent C. Siew clearly declared that:

The establishment of a ‘cross-strait common market’ will lead both sides into a new era, where cooperation takes the place of conflict, and exchange takes the place of confrontation. The “cross-strait common market” provides a comprehensive framework under which both sides can work progressively to build areas for improving relations and achieving reconciliation. While both sides are doing their best to join the WTO, the establishment of a ‘cross-strait common market’ will add to the relationship by providing a new framework for cooperation. I sincerely hope that both authorities will have the long-range perspective and broadmindedness to embrace and promote the promise of a ‘win-win’ situation for those on both sides of the Taiwan Strait.

⁶³ See C.H. Kwan, *Yen Bloc: Toward Economic Integration in Asia* (Routledge 2001); Ian G. Cook, Marcus A. Doel & Rex Li eds., *Fragmented Asia: Regional Integration and National Disintegration in Pacific Asia* (Avebury 1996); Akio Hosono & Barbara Stallings, *Regional Integration and Economic Development* (Palgrave Macmillan 2001); Sekiguchi Suelo & Noda Makito, *Road to ASEAN-10: Japanese Perspectives on Economic Integration* (Japan Cen. for Intl. Exch. 1999).

Third, there are lots of economists and political scholars in Taiwan that specialize in economic integration theory, but just a few legal scholars use this approach. Economists have written papers on the effects and the benefits of regional economic integration, while political scholars have focused on the constitutional, international political and institutional framework issues surrounding regional integration. These researchers do not meet today's urgent need for extensive academic research and an analytical approach to future trade negotiation, regional development, and the emerging peace negotiation between Taiwan and Mainland China. This dissertation is an attempt to find the best strategy for the countries of the Taiwan Strait to improve their economic relationship as the first step in peace negotiations by using interdisciplinary research methods.

IV. CONCLUSION

The methodology explored in this dissertation is animated by the spirit of interdisciplinary collaboration. The scholars of law, economics and international politics are facing complex global issues from different views. The limitations of study methods in each field have made the international negotiation process more difficult to breakthrough. This Chapter explored the theories of international law, international relations, and a little bit of international economics to explain the interdisciplinary collaboration used.

For analyzing the relationship between international law and international relations, Realist theory is critical. The realist does not focus on the weight of

international law or international institutions, instead they follows the capabilities of sovereignty and state power. However, rapid changes after the Cold-War era in global economic interdependence decreased Realism's ability to explain the factors driving international affairs. "Regime Theory," soon thereafter, became a powerful alternative to Realism. The result was a dual agenda in interdisciplinary scholarship: Institutionalism and Liberalism. This dual agenda offers a new hope of reaching both goals in international law and politics.

The relationship between international law and international economics is based on the interdependence of international economic activities. The new term "International Economic Law (IEL)" was used after the World War II. IEL does not regulate nation-state relations, but does involve many questions of traditional public international law, particularly treaty law. IEL is important to national or "municipal" law, and there is a request for interdisciplinary research focusing on IEL in many different subject matters such as law, economics, and social science.

Combining international relations and international economics, two, new interdisciplinary theories – "Neo-Functionalism" and "Economic Regionalism" – seek to explain regional economic integration. "Neo-functionalism" assumes that economic cooperation leads to political integration at either the regional or global level, and "Economic Regionalism" is an important component in the national strategy of major economic powers to strengthen their respective domestic economies as well as international competitiveness.

There is no direct evidence proving that regional economic integration would increase or decrease regional peace and security. The long-term debate between realists

and liberals on the theory of war and peace has been largely the result of different view points on the relative salience of different causal variables. Liberals contend that high economic interdependence, as manifest in high trade levels; reduce a state's likelihood of initiating war by providing a material "constraint" on unit-level forces for aggression. Low interdependence will increase this likelihood, since the constraint on unit-level motives for war is removed. Realists argue that high interdependence heightens the probability of war as dependent states struggle to reduce their vulnerability.

Theory of trade expectations introduces a new causal variable, the expectations of future trade, examining its impact on the overall expected value of the trading option if a state decides to forgo war and emphasizing the importance of a leader's dynamic expectations of the future. It extends liberal and realist views regarding interdependence and war by synthesizing their strengths while formulating a dynamic perspective of state decision-making. This theory shows that high levels of interdependence could lead to peace or to war. When expectations for trade are positive, leaders expect to realize the benefits of trade into the future and therefore have less reason for war now; trade will indeed "constrain." If, however, leaders are pessimistic about future trade, fearing to be cut off from vital goods or believing that current restrictions will not be relaxed, then the negative expected value of peace may make war the national strategic choice.

To better understand the Cross-Strait relationship and how economic integration between Taiwan and Mainland China could have a positive impact on the peace process, this dissertation uses interdisciplinary research as an analytical method. This dissertation conducts brand new research on Cross-Strait relations, and attempts to provide an action plan for negotiating an agreement on economic integration as the first step of the peace

process. Based on the theories addressed above, the next Chapter introduces the “Cross-Strait Political Conflict” of the past half century. The dynamic attitudes of the leaders (or government) of Taiwan and Beijing deeply influenced the development of the Cross-Strait relations.

CHAPTER TWO

POLITICAL CONFLICT OF CROSS-STRAIT RELATIONS

I. INTRODUCTION

The critical interdisciplinary trade expectation theory addressed in the last chapter made the important assumption that if the two states had a “high level” of trade and economic interdependence, the possibility of peace or war would be determined by “the leaders’ or governments’ expectation for the future trade.” The more positive the future trade expectation, the higher the possibility for peace. Conversely, the more negative the future trade expectation, the greater the chances of war. Upon reviewing the past half-century (from the post-War World II era to today) of interaction between Taiwan and Mainland China, the bilateral relationship is very complicated to analyze, in that the attitudes of leaders from both sides sit on varied ends of the spectrum – from “unification” to “independence.”¹

Over the past half century, Taiwan and Mainland China have not peacefully negotiated their relationship. If the political leaders cannot solve this conflict with wisdom, it may potentially lead to war. Analysis of this conflict resolution should not simply involve an examination of the two governments, but also the three political parties

¹ For more discussions on the history and background of Cross-Strait Relations, see Chi Su, *Brinkmanship: From Two-States-Theory to One-Country-On-Each-Side* 危險邊緣: 從兩國論到一邊一國 4-66 (TianxiaYuanjian 2003); also see Ya-chung Chang & Ying-min Lee, *Mainland China and Relations Across the Taiwan Strait* 中國大陸與兩岸關係概論 207-246 (Shengzhi 2000).

ruling the governments. These three main political parties include the Kuomintang (KMT), Democratic Progressive Party (DPP) in Taiwan, and the Communist Party of China (CPC) in Mainland China. These three powers control the future negotiation as well as the development of cross-strait relations. In the past, these three political parties have allowed many negative emotions to affect the making of both domestic and cross-straight policies. Thus, the more negative the policies, the worse the conflict has become. To avoid the possibility of war in the Taiwan Strait and build momentum for the peace process, the best strategy would be to try to initiate the possibility of negotiations in the future.

Part II explores the history and background of political conflict between Taiwan and Mainland China. It is divided into five sections based on the time periods. The first section, the “Civil War Period (1943 – 1949),” reviews the “Chongqing Meeting and the Chinese Civil War,” “The International Status of Taiwan,” and “The 228 Incident in Taiwan.” The second section, “Battle between the Two Parties (1949 – 1987),” is divided into two sub-sections: “Era of Military Conflict” and “Era of Political Conflict.” The third section, “First Peace Negotiation (1987 – 1995),” also consists of two sub-sections: “National Unification Council and Guidelines for National Unification” and “Ku-Wang Meeting and the 92 Consensus.” The Fourth section is the “Rising Crisis (1995 – 2000)” and is divided into four sub-sections: (1) “President Lee’s speech in Cornell University;” (2) “The Changing U.S. Foreign Policy;” (3) “The Proposal of ‘Jiang Eight Points’ and ‘Lee Six Lines’”; and (4) “State-to State Statement.” Finally, the last section, “An Era of Paradox (2000 – present),” is comprised of three sub-sections: “President Chen’s Five NOs,” “Beijing’s Dual Agenda,” and “Taiwan’s Different Responses.”

Part III discusses United States foreign policy towards Taiwan and Mainland China. Analysis of the United States' power toward Taiwan includes sections entitled "KMT Ruling Era" and "DPP Ruling Era." The examination of U.S.-Mainland China (PRC) relations includes four parts: (1) International Politics; (2) Bilateral and Regional Economic and Trade; (3) Democratic Values and Human Rights; (4) Cross-Strait Relations.

Part IV addresses the negotiation behavior of Taiwan and Mainland China. The analysis of the two sides' negotiation strategies is divided into three different sections: (1) National Security; (2) Political System; and (3) Economic and Trade Relations.

II. HISTORY AND BACKGROUND OF POLITICAL CONFLICT OF TAIWAN AND MAINLAND CHINA

A. Civil War Period (1945 – 1949)

1. Chongqing Meeting and the Civil War

The starting point for analysis of the relationship between Taiwan and Mainland China goes back to the end of World War II in 1945. After Japan surrendered on August 15, 1945, Chiang Kai-shek,² the Kuomintang's (KMT) Chairman, invited Mao Zedong³

² Mr. Kai-shek Chiang (October 31, 1887 – April 5, 1975) was a Chinese political leader who assumed the leadership of the Kuomintang (KMT) after the death of Dr. Sun Yat-Sen in 1925. He unified the whole of Mainland China by attacking Chinese warlords and secured a total victory in 1928 as the overall leader of the central government of the Republic of China. Chiang later led the Chinese people in World War II, and defended the Japanese attack on China. He was the chief commander of the Allies' Far East field in World War II. During the Chinese Civil War with the Chinese Communist Party in 1945, Chiang attempted to eradicate the Communists but ultimately failed. In 1949, Chiang led his government to retreat to Taiwan, where he continued serving as the president of the R.O.C. and the chief of the KMT for the remainder of

for a negotiation meeting in Chongqing (Sichuan province, Mainland China) to discuss the nation's reconstruction plan. From the beginning of August, KMT and Chinese Communist Party (CCP) officials conducted the "Chongqing Meeting,"⁴ in which both Chiang Kai-shek and Mao Zedong participated.

In this meeting, the KMT and CCP agreed on six critical issues: (1) peaceful reconstruction of the post-war nation, (2) creation of a Democratic Political System, (3) protection of civil rights and justice, (4) equality of all political parties, (5) autonomy and direct elections of local government, and (6) release of the political prisoners and other prisoners of conscience. However, the two parties did not agree on the issue of military control. The KMT insisted that the CCP return its military weapons to the central government in advance, and that the KMT would then implement the "political democracy" afterwards. However, the CCP insisted that "military reorganization" and "political democracy" be enforced at the same time, and further asked the KMT to release their single-party control of the central government. By proposing these conditions, the CCP thought that China would become a real democratic country and that the military

his life. For more information about Mr. Chiang Kai-Shek, see the Kuomintang's web-site at <http://www.kmt.org.tw> (last visited July 29, 2006).

³ Mr. Zedong Mao (December 26, 1893 – September 9, 1976) was the Chairman of the Chinese Communist Party [hereinafter CCP] from 1943 and the chairman of the Central Committee of the Communist Party of China from 1945 until his death in 1976. Under his leadership, the CCP became the ruling party of Mainland China after the victory over the Kuomintang in the Chinese Civil War. In 1949, Mao established the new country and named it the "People's Republic of China (PRC)" in Beijing. From the 1950s until his death, Mao initiated various economic and political campaigns, such as the "Anti-Rightist Campaign," the "Great Leap Forward" and the "Cultural Revolution," which resulted in the deaths of more than ten million people. Mao also founded the People's Liberation Army in 1927 after Kai-Shek Chiang began leading a series of purges against the Communists, and finally won the Chinese Civil War later in 1949. Mao initiated a transformation of the economic and social system through a process of collectivization and transformed China into a Communist state. For more information about Zedong Mao, see the Chinese Communist Party's web-site, at http://news.xinhuanet.com/ziliao/2003-01/17/content_693606.htm (last visited July 29, 2006).

⁴ See Gao-Jheng Jhu, *Apology: The Future of Taiwan and the Cross-Strait Relationship* 獄中自白：台灣前途與兩岸關係 45-46 (Syuesih, 2000).

force would belong to the nation and its people rather than owned by the KMT. Because these two parties could not settle the dispute over the issue of military control, they broke off negotiations, leading to subsequent armed conflict between the two sides and the “1945 Chinese Civil War.”⁵

After 1946, there were serious military conflicts in Mainland China between KMT and CCP forces. Although the KMT owned the better and stronger weapons and in more quantities than the CCP, KMT officers of the central government were seriously corrupt at that time. The Chinese people, the farmers and laborers especially, supported the CCP more than the KMT,. Many young Chinese people joined the CCP Army to fight against the central government led by the KMT. In 1947, the CCP changed the name of their military to the “People’s Liberation Army” and used the strategy of “Countryside encircling the City” together with revolutions led by students, laborers, and farmers.

During the three-year Chinese Civil War (1945 - 1948), the KMT lost nearly all battles, not having received any extra military support from the U.S. government or any other foreign countries. After the CCP crossed the Yangtze River, the KMT and the central government of the Republic of China (ROC) moved to Taiwan, thus beginning the separation of Mainland China and Taiwan in 1949. That same year, Mao established the People’s Republic of China (P.R.C.) in Beijing.

2. The International Status of Taiwan

⁵ *Id.* at 48-62.

There were two important historical events that happened during the five hectic years of the China Civil War period which made Cross-Strait relations highly complicated: “The International Status of Taiwan” and “The 228 Incident in Taiwan.”

First, the issue of Taiwan’s unclear international status indirectly impacted the development of Taiwanese independence. During the late World War II period, the problem of “Taiwan’s” legal status was solved by the Cairo Declaration in 1943,⁶ the Potsdam Proclamation in 1945,⁷ and the Japanese Instrument of Surrender in 1945. Because of both the Cold War between the U.S. and U.S.S.R. that began right after World War II and the Chinese Civil War, the peace treaty with Japan was delayed for six years after Japan surrendered. In 1951, the “Confederation Members,” winners of World War II, finally signed the peace agreement with Japan in San Francisco. However, “China” was not invited to participate in this peace meeting with Japan at that time.

Because of the separation of China by civil war, the international society was confused and debated at that time which government could legally represent “the whole China” (both Taiwan and the Mainland). At the end, neither the People’s Republic of China led by Mao Zedong, or the Republic of China led by Chiang Kai-shek, was invited

⁶ See Final Text of the Communiqué (Cairo Declaration), Dec. 1, 1943, 3 Bevens 858, 1943 For. Rel. of the U.S., The Conf. at Cairo & Tehran 448. In 1943, three leaders, including Great Britain, the United States, and China discussed the Japan issues in Cairo. President Roosevelt, President Generalissimo, Chairman Kai-shek Chiang and Prime Minister Churchill, together with their respective military and diplomatic advisers, had completed a conference in North Africa. The following general statement was issued in Cairo Declaration art. 2:

Japan shall be stripped of all the islands in the Pacific, which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed.

⁷ See Potsdam Proclamation, Proclamation by the Heads of Governments (July 26, 1945), U.S.- R.O.C. – U.K., 3 Bevens 1204, 1945 For. Rel. of the U.S., 2 The Conf. of Berlin (The Potsdam Conf.) 1474, art. 8: “The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.”

to that peace meeting. In other words, “China” was excluded from signing the peace treaty with Japan in 1951. In order to prevent “Taiwan” from being attacked by the People’s Republic of China led by the CCP, the U.S. insisted that the determination of the future status of Formosa (Taiwan) await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.

Furthermore, in “the Peace Treaty with Japan,”⁸ and “the Treaty of Peace between the Republic of China and Japan,”⁹ the U.S. only concluded that “Japan renounced all right, title and claim to Formosa and the Pescadores.” There was no indication that Japan should return Taiwan and the Pescadores to the Chinese government. Because of the unclear status of Taiwan, this statement became the legal basis for the United States’ participation in the Cross-Strait conflict. In sum, the unclear status of Taiwan resulting from the lack of clarity in the peace treaties deeply impacted the future development of Cross-Strait relations because it provided the fundamental theory behind the Taiwanese Independence Revolution.¹⁰

However, over a half century has passed since the end of World War II. Although the description of Taiwan’s status was unclear in the peace agreement with Japan, the sovereignty of Taiwan as belonging to the ROC is clear based on the fifty-year principle of prescription under international law,¹¹ and the absence of PRC rule over Taiwan since

⁸ Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 46 (entered into force Apr. 28, 1952) [hereinafter Peace Treaty of Japan]. The Peace Treaty of Japan art. 2 addressed “Japan renounces all right, title and claim to Formosa and the Pescadores.”

⁹ *Id.*, art. 4: “It is recognized that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war.”

¹⁰ See Ya-Chung Chang, *Issue of Sovereignty between Mainland China and Taiwan* 兩岸主權論 27 (Shengjih, 1998); also see Ming-Min Peng & Shao-Tang Huang, *The Status of Taiwan in International Law* 台灣的國際法地位 15 (Yushan, 1995).

¹¹ Ian Brownlie, *Principles of Public International Law* 127 (6th ed., Oxford U. Press 2003).

they established the PRC in 1949. Nowadays, it has become unnecessary to discuss the issue of “the status of Taiwan.”¹²

3. The 228 Incident in Taiwan

The second important event during the post-World War II era was the “228 Incident,” which laid a foundation for the desire of Taiwanese people to seek independence and separation from Mainland China. When the Japanese surrendered and returned Taiwan to “China” after World War II, the KMT army received Taiwan from Japan. However, the KMT officers were corrupt and enforced political restrictions toward Taiwanese people at that time. This deeply disappointed the Taiwanese people. In February 1947, after an altercation between a cigarette vender and tax officers, popular discontent erupted into a full-scale rebellion.¹³ The KMT government sent in reinforcements and indiscriminately killed local residents, quickly suppressing the insurgency. The uprising, during which thousands of people were killed, became known as the 228 Incident, in reference to its first day, February 28. The 228 Incident continued for two weeks and ended in March 1947.

Taiwan was returned from Japan to the ROC government only for one and half years before the 228 Incident occurred. The brutal suppression of the rebellion embittered the Taiwanese toward the ROC government for decades.¹⁴ One year later, the

¹² Hung-Dah Chiu, *Xian Dai Gou Ji Fa* 現代國際法 531-535 (Sanmin 1995). In Professor Chiu’s book, he provided evidence to prove that Taiwan and Peng Hu were under the sovereignty of the Republic of China.

¹³ Richard C. Bush, *Untying the Knot: Making Peace in the Taiwan Strait* 17 (Brookings Instn. 2005).

¹⁴ For the best single volume on U.S.-Taiwan relations after 1945, see Nancy Bernkopf Tucker, *Taiwan, Hong Kong, and the United States, 1945-1992: Uncertain Friendships* (Twayne Publishers 1994). For the

KMT lost political and military ground in Mainland China in the Chinese Civil war. Chiang Kai-shek led about thirty thousand people to Taiwan in preparation for a long-term plan to strike back at the PRC and take back Mainland China. Declaring a state of emergency, the KMT government instated martial law over Taiwan, justifying the limitation of the peoples' fundamental rights. Because of these incidents, the emotions of some Taiwanese people toward the idea of "China" changed from positive to negative, from distaste towards the KMT to hostility towards China, and then from hostility towards China to the makings of the Taiwan Independence Revolution.

Reviewing Chinese history in the post-World War II era, although China was a victor, there were riots in most of Mainland China's provinces because of serious corruption on the part of government and military officers during the process of receiving prior Japanese-occupied territories. The 228 Incident in Taiwan followed the same historical pattern as all the other provinces in Mainland China. However, the difference was that Taiwan had been under Japanese control for fifty years since the late Ching Dynasty. The Taiwanese people had viewed the return of Taiwan to China with positive emotions and high expectations in the beginning of the post-war era only to have their hopes dashed after the military suppression and harsh political control. The 228 Incident was an important historical turning point and deeply impacted the domestic political development in Taiwan, as well as the Cross-Strait relationship in the future.

immediate postwar period, see Steven Phillips, *Between Assimilation and Independence: Taiwan Political Aspirations under Nationalist Chinese Rule: 1945-1948* in *Taiwan: A New History* 275, 275-319 (Murray A. Rubinstein ed., E. Gate Bk. 1999); George H. Kerr, *Formosa Betrayed* (Eyre & Spottiswoode 1965); and Tse-Han Lai, Ramon H. Myers & Wei Hou, *A Tragic Beginning: The Taiwan Uprising of February 28, 1947* (Stan. U. Press, 1991).

B. Battle between The Two Parties (1949 – 1987)

In the forty years between 1949 and 1987, the cross-straight conflict was as serious as the post-war era. We can divide this later era into two periods. The first period is called the “Era of Military Conflict” (1949 – 1978), and the second is the “Era of Political Conflict” (1979 – 1987). The central line between these two periods was the year 1978. In that year, the United States established official foreign relations with the People’s Republic of China (PRC). However, on the flip side, the Republic of China (ROC) abandoned its restrictive political regulations that had lasted for almost thirty-nine years and changed to an open policy toward Mainland China in the private sector.¹⁵

1. Military Conflict Era

The first period was characterized by military conflict. The intentions of Chiang Kai-shek and Mao Zedong were very clear: they both indicated that their own government, as well as political party, was the official representative of the “Whole China” (including the Mainland and Taiwan). While Chiang Kai-shek refused to give up striking back at Mainland China, Mao Zedong refused to give up liberating Taiwan by military force. Although Chiang and Mao still used military confrontation during this period, they both insisted on a “One China Policy.” In other words, they each believed their own government was the “only” and “one legal” representative of China, treating the other as the armed rebellious organization.

¹⁵ Zong-Hai Shao, *Contemporary Mainland China Policy* 當代中國大陸政策 1-16 (Shengjih, 2003).

In 1954, Beijing seriously attacked Kinmen Island, engaging in the so-called “First Cross-Strait War.” Later, Taipei and Washington signed the Mutual Defense Treaty between the United States and the Republic of China in Washington, D.C., and the U.S. Congress ratified the treaty in 1955. Article 7 of the Treaty gave the U.S. the legal authorization to defend Taiwan as well as the R.O.C. government.¹⁶ However, according to Article 6, the terms “territorial” and “territories” meant “in respect of the Republic of China, Taiwan and the Pescadores.” In other words, the Treaty did not include the small islands surrounding Mainland China.¹⁷ Mao Zedong knew that Chiang Kai-shek had limited his defensive military power over those surrounding islands under the Treaty, so he continued attacking those islands. In a few years, the Communist Liberation Army won the battles and occupied many small islands surrounding the Taiwan Strait.

In 1958, Beijing attacked Kinmen Island again,¹⁸ and the “Second Cross-Strait War” started. During that time, the United States government did not want to be involved in direct military conflict with the Communist Liberian Army, so the U.S. asked Chiang Kai-shek to retreat from Kinmen Island and Matsu Island. At the same time, Mao Zedong also used military force to test whether the Chiang Kai-shek administration was under the

¹⁶ See Mutual Defense Treaty between the United States and the Republic of China, U.S.-R.O.C. (Dec. 2, 1954), 6 U.S.T. 433, 248 U.N.T.S. 213, art. 7: “The Government of the Republic of China grants and the Government of the United States of America accepts, the right to dispose such United States land, air, and sea forces in and about Taiwan and the Pescadores as may be required for their defense, as determined by mutual agreement.”

¹⁷ *Id.*, art. 6: For the purposes of Articles 2 and 5, the terms “territorial” and “territories” shall mean in respect of the Republic of China, Taiwan and the Pescadores; and in respect of the United States of America, the island territories in the West Pacific under its jurisdiction. The provisions of Articles 2 and 5 will be applicable to such other territories as may be determined by mutual agreement.

¹⁸ Kinmen is a small archipelago of several islands administered by the Republic of China (ROC) government in Taiwan. Administratively, it is Kinmen County of Fujian (Fuchien) province. Some islands of other counties, such as Wuciou, were transferred to the jurisdiction of Kinmen County by the R.O.C. government following its retreat to Taiwan. The famous 823 battle occurred in Kinmen in 1958, and the R.O.C. won the battle which prevented the P.R.C. Army from attacking Taiwan.

control of the United States. Chiang Kai-shek would not accept retreat. He transferred most of the military and economic resources from Taiwan in order to defend Kinmen and Matsu Island on the one hand, and rejected the United States' recommendation to retreat on the other hand. Mao Zedong's intention for starting the Second Cross-Strait War was based on domestic political reasons. The main purpose for Mao was to make sure that Taiwan (R.O.C. government) was not fully controlled by U.S. power. After Mao's forces succumbed to Chiang Kai-shek's defense, the Second Cross-Strait War ended in ROC victory.

There has not been any military conflict between Mainland China and Taiwan since 1958. However, there was also no official interaction between the two governments in the twenty years from 1958 to 1978. In Taiwan, the KMT government was led by Chiang Kai-shek and his son Chiang Ching-Kuo¹⁹. They implemented political restrictions in their domestic policies and never gave up striking back at the Mainland.

However, the KMT leaders made impressive achievements in improving Taiwan's economy.²⁰ These achievements included land innovation and economic construction. They made Taiwan become an "Economic Miracle"²¹ among East Asian

¹⁹ Mr. Ching-Kuo Chiang (April 27, 1910 - January 13, 1988), chairman of the Kuomintang, was the son of Mr. Kai-shek Chiang and held numerous posts in the government of the Republic of China (from 1949 in Taiwan). He succeeded his father, serving as Premier of the R.O.C. from 1972 to 1978, and President of the R.O.C. from 1978 until his death in 1988. During his leadership, the ROC government became much more open and tolerant of political dissent. In the earlier period, his policy toward Mainland China was known as the "Three NOs." Later, closer to the end of his life, Chiang relaxed government controls on the press and speech and put native Taiwanese in positions of power, including his successor Mr. Teng-hui Lee who furthered the course of democratic reforms. He is the most popular president in ROC history since 1945 in Taiwan. For more information about Mr. Ching-Kuo Chiang, see Kuomintang's web-site, *supra* n. 2.

²⁰ Wen Sun, *San Min Jhu Yi 三民主義演講本* 189-267 (Cheng Chung Publisher 1956).

²¹ "Economic Miracle of Taiwan": Taiwanese economic growth in the past fifty years has been phenomenal. In 1962 Taiwan had a per capita gross national product (GNP) of \$170, placing the island's economy squarely between Zaire and Congo. By 1997 Taiwan's per capita GNP, adjusted for purchasing power parity (PPP), and had soared to \$19,197, contributing to a Human Development Index similar to that

countries. In Mainland China, Mao Zedong started a cruel “Cultural Revolution” between May 1966 and October 1976. China’s economy virtually froze in this ten-year political and social struggle, and it made China lose any opportunity of economic development. After 1977, Deng Xiaoping²² was selected to be the leader of the Chinese Communist Party as well as the Chairman of the government. He started the “Open and Innovation Economic Plan” and established the fundamental foundations for economic development of China in 20th century.

2. Political Conflict Era

The second period of interest is the ten years of political conflict from 1978 to 1987. The first important historical issue was the establishment of the official relationship between the United States and the People’s Republic of China by former U.S. President Jimmy Carter, resulting in the breaking-off of official relations with the government of the Republic of China (ROC). In 1971, eight years before the decision of the Carter administration, the United States had suggested that Taipei accept the proposal

of European countries such as Spain, Portugal, and Greece. This economic feat has been well recognized in business and scholarly communities, with Taiwan often touted as the prime example of growth with equity. In popular discourse in both Taiwan and abroad, this rapid economic growth has been called the “Economic Miracle of Taiwan.” See Qi-Min Yin, *Taiwan Jing Ji Zhuan Lei Shi Ke* 台灣經濟轉捩時刻 10-12 (Shangzhou 2004).

²² Mr. Xiaoping Deng (August 22, 1904–February 19, 1997) was a leader of the Chinese Communist Party (CCP). Deng served as the ruler of the People’s Republic of China (PRC) from the late 1970s to the early 1990s. He provided a new policy, named “Socialism with Chinese characteristics” and conducted economic reform in Mainland China. He also transferred the Chinese market to the well-known “Socialist market economy.” However, Anti-revisionist communists accused him of returning the country to capitalism. Mr. Xiaoping Deng formed the core of the “Second Generation” CCP leadership. Under his tutelage, China developed one of the fastest growing economies among the developing countries, while preserving the Communist Party’s tight overall control. For more information about Mr. Xiaoping Deng, see the web-site source of Chinese Communist Party, *supra* n. 3.

of “Dual Representation Resolution” for both Mainland China and Taiwan, with each having independent membership in the United Nations. However, Taipei rejected this proposal and reiterated that there was only “One China” in the world and that it was the “Republic of China.” In 1971, Albania presented the proposal at the United Nations Meeting, suggesting that the U.N. accepted the membership application of the People’s Republic of China and rejected the membership of the R.O.C. At that time, more than half of the U.N. member countries agreed to Albania’s proposal, and the result became the No. 2758 Resolution.²³ According to the resolution, the R.O.C. lost representation in the U.N., and Chiang Kai-shek declared that the R.O.C. therefore rejected its U.N. membership automatically. The relationship between the R.O.C. and the United States deteriorated during that period. In 1979, the Carter administration declared that the United States established official diplomatic relations with the People’s Republic of China (Mainland), and broke off relations with the government of the Republic of China (ROC). From that point, the PRC completely replaced the ROC in the international arena. However, Chiang Kai-shek continued to insist on the “One China Policy” at that time, so the numbers of official foreign relationships between the ROC and other countries around

²³ See Restoration of the Lawful Rights of the People’s Republic of China in the United Nations, G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29 (1971), U.N. Doc. A/RES/2758 (1971), reprinted in 11 I.L.M. 561 (1972).

The General Assembly, Recalling the principles of the Charter of the United Nations, Considering the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter. Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council. Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith 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.

the world decreased to only about thirty countries. The U.N. No. 2758 and the change in the foreign policy of the United States deeply impacted the Cross-Strait relationship and had far-reaching ramifications into the future.

The second important historical issue during this era involved a series of political episodes aimed toward Taiwan and conducted by the Chinese Communist Party. On September 30, 1981, the National Standing Committee of the National People's Congress Chairman Ye Jianying proposed the nine peaceful unification advocates to Taiwan, which was called "Ye Nine Points."²⁴ The "Ye Nine Points" became the guideline for the Chinese Communist Party to solve the "Taiwan Issue," and the most important part was the clear statement later formulated as the "One Country, Two Systems" policy, which continues as the landmark of the fundamental policy toward Taiwan to present day. In 1983, PRC's Chairman Deng Xiaoping elaborates deferred to "The One Country, Two Systems" solves the Taiwan problem, realizes the national unification concrete conception.

However, the KMT's leader, former President Chiang Ching-Kuo, responded to Beijing with what was known as the "Three No's Policy": no contact, no negotiation, and no compromise. As his domestic policy, Chiang Ching-Kuo kept banning any kind of interaction between the Taiwanese and Mainland China. As his foreign policy, he criticized the countries in the world that recognized Communist China on the one hand

²⁴ In 1981, Mr. Jianying Ye announced the "Ye Nine Points" of principles for peaceful reunification, in which he suggested a third-time cooperation between the KMT and the Chinese Communist Party and introduced the preliminary idea of the "One country, Two systems" formula. Mr. Xiaoping Deng further elaborated the idea with another six points of principles in 1983. After the Chinese mainland reached an agreement with the United Kingdom in 1984 over the handover of Hong Kong, Beijing's tactic of "peaceful reunification under 'One country, two systems'" was formed. In the meantime, Beijing still refused to renounce the use of force and continued to suppress Taiwan by isolating the ROC in the international community. See the web-site source of Chinese Communist Party, *supra* n. 3.

yet insisted on the possibility of a “Two China Policy.” In other words, any country in the world could only select “One” Chinese government to establish official foreign relations – either the PRC or the ROC – but not both. For this reason, there was no way to set up the “Dual Acknowledgement Model” between Beijing and Taipei in the international society. This zero-sum game involving staunch foreign policies between the two parties continued for almost forty years, and has never ceased even in today’s globalize environment.

C. First Peace Negotiation (1987 – 1995)

In 1987, Chiang Ching-Kuo withdrew the political restrictions which had been in place for thirty-nine years and declared a new open policy that allowed Taiwanese people travel to Mainland China. From that time, the interaction between the two sides started, and cross-strait history transformed into a new age. In 1990, the Taipei Administrative, ruled by the KMT, established the “National Unification Council,” which was in charge of the general policy for Mainland affairs and the unification process. In 1991, the government established the “Mainland Affairs Council,” which was in charge of Mainland Affairs toward Mainland China. In addition, Taipei also established the “Cross-Strait Association,” a private NGO authorized by the government to negotiate cross-strait affairs. During the same year, Taipei declared that the ROC would give up seeking unification by force and acknowledged the PRC as a legal and political entity. Responding to the Taipei administration, Beijing also adjusted its governmental institution and agency of Taiwanese Affairs to communicate with Taipei. However,

Beijing did not agree to give up using military force as the possible solution for the cross-strait conflict.

1. National Unification Council²⁵ and Guidelines for National Unification²⁶

In 1991, the National Unification Council adopted the “Guidelines for National Unification,” and it became the framework for ROC policies toward Mainland affairs. In its preamble, it stated that

“The unification of China is meant to bring about a strong and prosperous nation with a long-lasting, bright future for its people; it is the common wish of Chinese people at home and abroad. After an appropriate period of forthright exchange, cooperation, and consultation conducted under the principles of reason, peace, parity, and reciprocity, the two sides of the Taiwan Straits should foster a consensus of democracy, freedom and equal prosperity, and together build a new and unified China. Based on this understanding, these Guidelines have been specially formulated with the express hope that all Chinese throughout the world will work with one mind toward their fulfillment.”

²⁵ The National Unification Council, established in 1990, was a governmental body in the Republic of China on Taiwan whose aim was to promote unification with Mainland China. The council has been out of operation under the administration of Chen Shui-bian since 2000, who leans toward Taiwan independence and opposes Chinese reunification. At the same time, in his “Five No’s” policy, Chen promised not to formally abolish the Council or the Guidelines for National Unification in order to appease the international doubt on his potential move for declaring independence. Following the defeat of his Democratic Progressive Party in the ROC local elections in 2005, however, in his lunar New Year speech in 2006, Chen instructed the DPP to formally begin debating on permanently abolishing the National Unification Council and the guidelines set out therein. On February 27, 2006, Chen formally announced that the council would “cease to function” and its guidelines would “cease to apply.” See Democratic Progressive Party web-site, available at <http://www.dpp.org.tw/> (For General Reference Regarding to the Policy of DPP)(last visited July 29, 2006).

²⁶ The Guidelines for National Unification were written by the National Unification Council, an advisory body of the Republic of China government, regarding the reunification of China. The Guidelines for National Unification were adopted by the Executive Yuan Council on February 23, 1991. The guidelines have a three-step process for the gradual unification of mainland China and Taiwan. The Guidelines for National Unification declared both sides of the Taiwan Strait to be Chinese territory, which paved the groundwork for the so-called “1992 Consensus” and the “Ku-Wang Meeting” between two sides. The first stage called for increased exchanges between the two sides. The second stage called for the opening of the three links and visits by high-ranking officials on both sides for negotiations on equal footing. The final stage called for a consultative organization to be formed for the two sides to map out a constitutional arrangement for unification under a “democratic, free, and equitably prosperous China.” See Kuomintang’s web-site, *supra* n. 2.

It also included four major principles to establish a democratic, free, and equitably prosperous China:

1. Both the mainland and Taiwan areas are parts of Chinese territory. Helping to bring about national unification should be the common responsibility of all Chinese people.
2. The unification of China should be for the welfare of all its people and not be subject to partisan conflict.
3. China's unification should aim at promoting Chinese culture, safeguarding human dignity, guaranteeing fundamental human rights, and practicing democracy and the rule of law.
4. The timing and manner of China's unification should first respect the rights and interests of the people in the Taiwan area, and protect their security and welfare. It should be achieved in gradual phases under the principles of reason, peace, parity, and reciprocity.

The guidelines also provided three stages for unification:

1. Short term -- A phase of exchanges and reciprocity.
 - a. To enhance understanding through exchanges between the two sides of the Straits and eliminate hostility through reciprocity, and to establish a mutually benign relationship by not endangering each other's security and stability while in the midst of exchanges and not denying the other's existence as a political entity while in the midst of effecting reciprocity.
 - b. To set up an order for exchanges across the Straits, to draw up regulations for such exchanges, and to establish intermediary organizations so as to

protect people's rights and interests on both sides of the Straits; to gradually ease various restrictions and expand people-to-people contacts so as to promote the social prosperity of both sides.

- c. In order to improve the people's welfare on both sides of the Straits with the ultimate objective of unifying the nation, in the mainland area economic reform should be carried out forthrightly, the expression of public opinion there should gradually be allowed, and both democracy and the rule of law should be implemented; while in the Taiwan area efforts should be made to accelerate constitutional reform and promote national development to establish a society of equitable prosperity.
- d. The two sides of the Straits should end the state of hostility and, under the principle of one China, solve all disputes through peaceful means, and furthermore respect -- not reject -- each other in the international community, so as to move toward a phase of mutual trust and cooperation.

2. Medium Term -- A phase of mutual trust and cooperation.

- a. Both sides of the Straits should establish official communication channels on equal footing.
- b. Direct postal, transport and commercial links should be allowed, and both sides should jointly develop the southeastern coastal area of Chinese mainland and then gradually extend this development to other areas of the mainland in order to narrow the gap in living standards between the two sides.

- c. Both sides of the Straits should work together and assist each other in taking part in international organizations and activities.
- d. Mutual visits by high-ranking officials on both sides should be promoted to create favorable conditions for consultation and unification.

3. Long term -- A phase of consultation and unification.

A consultative organization for unification should be established through which both sides, in accordance with the will of the people in both the mainland and Taiwan areas, and while adhering to the goals of democracy, economic freedom, social justice and nationalization of the armed forces, jointly discuss the grand task of unification and map out a constitutional system to establish a democratic, free, and equitably prosperous China.

2. Ku-Wang Meeting and the "92 Consensus"²⁷

According to the analysis above, after 1987, the Cross-Strait relationship took a positive turn. The most important event in this period was the "Hong Kong Meeting" in 1992, which was the first peace negotiation authorized by the two governments. As economic interaction increased between the two sides, both governments acknowledged

²⁷ The "92 Consensus" describes an implicit agreement between the two sides that both "Mainland China" and "Taiwan" belong to "One China" with both sides having different interpretations over the meaning of that term. For Taipei, the "One China" means "Republic of China (ROC)," but for Beijing, the "One China" means "People's Republic of China (PRC)." The achievement of 92 Consensus was that two sides "Agree to Disagree," and set aside the political conflict and turned focusing on daily affairs. PRC has stated that any group in Taiwan that it has formal talks with must support the 1992 Consensus. In Taiwan, the 1992 Consensus is supported by the political parties of the Kuomintang and the People's First Party, and was the basis by which the leaders of those parties visited Mainland China in 2005 to meet with the Chairman of CCP. However DPP, who is ruling the ROC government officials now rejected the very existence of 92 Consensus and argue that the name is misleading because no consensus was reached over the issue of "One China" in meetings between PRC and ROC representatives in 1992 and 1993. See Su, *supra* n. 1, at 50-62.

that the issue of defining one another's "status" was a fundamental one and that no one could ignore this problem. Accordingly, the National Unification Council of the R.O.C. adopted on August 1, 1992 "The Meaning of One China" as follows:

1. Both sides of the Taiwan Straits agree that there is only one China. However, the two sides of the straits have different opinions as to the meaning of "one China." To Peking (Beijing), "one China" means "the People's Republic of China (PRC)," with Taiwan to become a "Special Administrative Region" after unification. Taipei, on the other hand, considers "one China" to mean the Republic of China (ROC), founded in 1912 and with de jure sovereignty over all of China. The ROC, however, currently has jurisdiction only over Taiwan, Penghu, Kinmen, and Matsu. Taiwan is part of China, and the Chinese mainland is part of China as well.
2. Since 1949, China has been temporarily divided and each side of the Taiwan Straits is administered by a separate political entity. This is an objective reality that no proposal for China's unification can overlook.
3. In February 1991, the government of the Republic of China, resolutely seeking to establish consensus and start the process of unification, adopted the "Guidelines for National Unification." This was done to enhance the progress and well-being of the people, and the prosperity of the nation. The ROC government sincerely hopes that the mainland authorities will adopt a pragmatic attitude, set aside prejudices, and cooperate in contributing its wisdom and energies toward the building of a free, democratic and equitably prosperous China.

This statement gave Taipei strong negotiation power as well as a clear definition of “One China” from Taiwan’s perspective. Earlier in the same year, the Taipei administrative suggested that Beijing consider solving the “One China” issue in oral descriptions by each side without any written agreement. Beijing responded to Taipei by telephone that it “fully respected and accepted [the] suggestion.” Beijing also gave written notice to the Cross-Strait Association, indicating that “both Cross-Straits persist [on the] One China principle [and] diligently seek the unification of the country. But... the negotiation does not [necessarily involve the] One China principle for... political implication[s].”²⁸

In 1992, the Sea Association invited Taipei to start the pre-negotiation process for the “Ku-Wang Meeting.” After two rounds of pre-negotiation meetings, negotiators represented each government for the first negotiation on April 27 and 28, 1993 in Singapore. Although this negotiation was limited to the so-called folk, efficiency, business, and function scope, its significant features resulted in greater awareness among the Taiwanese people as well as more prominent notice of Taiwan in the international society. The common purpose of both sides was to establish the communication regime between the two sides, to solve legal disputes through interaction, and to promote economic, cultural, and technological cooperation. Both parties signed the “Ku-Wang Meeting Arrangement” after negotiations. This was the first agreement signed by the associations authorized by the two governments.

The core negotiation issues between 1993 and 1995 were known as “Returned Across violates,” “Fishery dispute,” and “Hijack.” Because there were many legal terms

²⁸ *Id.*, at 76.

involved in each of these three issues, the negotiators of both sides tried hard to find the appropriate descriptions to respect, or at least not impinge upon, the autonomy of both governments, yet at the same time to create more concrete definitions for future enforcement by each jurisdiction. After 11 sub-meetings, the two parties agreed on the issues of “Returned Across violates” and “Hijack,” but “Fishery dispute” involved too many sensitive jurisdictional issues to reach agreement. At this time, Taipei insisted on finishing “the single negotiation package” at “one time,” so there was still one little step left to reach the final agreement.

At the last meeting on May 28, 1995, both parties agreed to prepare for the Second Round of the “Ku-Wang Meeting,” and the negotiation issues extended to “Protection of Investment” and “Cooperation in Agriculture, Media, and Technology.” However, all the commitments broke and negotiations ceased because of then ROC President Lee Teng-Hui’s visit to Cornell University in the United States in June 1995. After his speech in the U.S., there was a fundamental change in Cross-Strait relations from positive to negative, and the situation shifted again into a hostile era.²⁹

D. Rising Crisis (1995 – 2000)

The relationship between Taiwan and Mainland China experienced fundamental changes after 1995. Although the possibility of military conflict was reduced, there was still a shadow of possibility for future war. Because of the bold actions taken by former president Lee, the Cross-Strait peace negotiation stopped and shifted toward a much more

²⁹ *Id.* at 22-27.

negative approach. In this regard, there were four important historical turning points in the five years between 1995 and 2000: (1) President Lee's speech at Cornell University; (2) The changing of U.S. foreign policy; (3) The proposals of "Jiang Eight Points" and "Lee Six Lines"; (4) State to State Theory.

1. President Lee's Speech at Cornell University

In June 1995, Lee Teng-Hui,³⁰ the president of the R.O.C., visited the United States and presented a speech at Cornell University. This was the first time the R.O.C. president visited the U.S. on official travel and the first time he gave a public speech on U.S. soil. This result made Beijing freeze the schedule for negotiation with Taiwan, especially the second round of the "Ku-Wang Meeting." In late 1995, Beijing published many news articles criticizing President Lee Teng-Hui in the media and conducted six large military exercises in Southeast China from 1995 to 1996, including two missile test launches to the Taiwan Strait. Beijing's reactions shocked the Taiwanese people as well as the entire world. Some of the Asian political leaders worried that this military conflict would escalate into a new war. The Clinton Administration sent the U.S. Navy 7th fleet with two aircraft combat teams, "the Independence" and "the Nimitz," to the Taiwan-

³⁰ Mr. Teng-hui Lee (born January 15, 1923) was a former president of the Republic of China, and the first president born in Taiwan. He was also the Chairman of Kuomintang (KMT) from 1988 to 2000. His tenure was marked with major extensions to the democratic reforms initiated by former president Chiang Ching-kuo that ceded power to the Taiwanese. He also promoted the Taiwan localization movement and led an aggressive foreign policy to gain diplomatic allies. His critics accused him of being a secret supporter of Taiwan independence who was trying to undermine the party he headed. After leaving office, Mr. Lee has confirmed some of these accusations by emerging as a radical Taiwan independence activist, and currently serves as the "spiritual leader" of the pro-independence Taiwan Solidarity Union. In 1991, KMT's central administration meeting withdrew Mr. Lee's political identity of KMT. More information about Mr. Teng-hui Lee, see Kuomintang's web-site, *supra* n. 2.

Strait to defend Taiwanese security as well as threaten Mainland China in 1995 and 1996. This was the biggest military maneuvering of the U.S. Navy in Asia since the Korean War in the 1950s. However, Beijing's true intent behind these military exercises was to influence the result of the first direct presidential election of the Republic of China in 1996. Because Beijing threatened the Taiwanese people with military force, Mr. Lee Teng-Hui won a 54% majority in the election. Mr. Lee Teng-Hui therefore became the first R.O.C. president directly elected by the people.

2. Changing of U.S. Foreign Policy

The Clinton administration realized that the United States was too passive in the 1995 and 1996 crisis, and this policy made the Cross-Strait relationship even worse than before. To change U.S. foreign policy toward Mainland China and Taiwan, former U.S. President Clinton provided the "New Three-No's Policy" in 1998, which included the following terms:

- (1) The United States does not support Taiwan's independence;
- (2) The United States does not support "two Chinas" or "one Taiwan, one China;"
- (3) The United States does not support Taiwan to join the United Nations or any other international organization that requires national sovereignty membership.

President Clinton also stated that the United States supports a "One China policy" and acknowledged that the People's Republic of China was the only legitimate

government. Furthermore, the Clinton administration declared that the Cross-Strait conflict should be solved by the two parties in a peaceful way, and the U.S. government would not allow Taiwan and Mainland China to change the “status quo” unilaterally.

From the Cornell event, to the military threat of Mainland China, to the maneuvering of the U.S. Navy, to the direct presidential election of the R.O.C., the evidence shows that Taiwan’s domestic and foreign policies largely influence the interaction and relationship between two big powers, the U.S. and Mainland China. After establishing a fully democratic election system, the dynamic political development in Taiwan is hard to predict. This conclusion was to be highly obvious in subsequent years, particularly when Mr. Chen Shui-Bian, representing the DPP for Taiwan independence, won the presidential elections twice, in 2000 and 2004.

3. The Proposals of “Jiang Eight Points and “Lee Six Lines”

On January 30, 1995, Jiang Zemin³¹ provided the “Eight Points” on Taiwan issues, which were as follows:

- (a) Starting with the necessity to uphold the principle of one China as the basis and premise of peaceful reunification, Jiang reiterated the Party’s opposition to any idea of independence or separatism and to the notion of two Chinas for a transitional period.

³¹ Mr. Zemin Jiang (born August 17, 1926) was the “the third generation” of the Chinese Communist Party, serving as General Secretary of the Communist Party of China from 1989 to 2002, as President of the PRC from 1993 to 2003, and as Chairman of the Central Military Commission from 1989 to 2004. His theory of the Three Represents has been written into the party and state constitutions. Under his leadership, China experienced substantial economic growth through reforms and improved its relations with the outside world while the Communist Party maintained its tight control over the government. More information about Mr. Zemin Jiang, available at Chinese Communist Party’s web-site, *supra* n. 3.

- (b) Beijing had no objection to Taipei's development of non-governmental economic and cultural relations with foreign countries, provided this was not intended to enlarge Taiwan's international living space with the aim of creating "Two Chinas" or "One China, One Taiwan."
- (c) During the process of talks, representative personalities from all political parties and all organizations on both sides of the Straits could be admitted. Commenting on what he had said at the Fourteenth Party Congress, Jiang reiterated that any problem could be discussed, including all the problems that Taiwanese authorities had with political negotiations, and that the venue and format of the meetings could be agreed upon through consultations on the basis of equality.
- (d) The Chinese should not fight among themselves. The use of military force cannot be discarded, but will only be directed at foreign powers who interfere in the reunification process and engage in a plot for Taiwan independence.
- (e) The fifth point dealt with the development of economic exchanges and cooperation and called for concrete measures to be taken to speed up the setting up of the three direct links (post, air/sea traffic, and commerce).
- (f) The 5,000 year-old Chinese culture, a spiritual link holding together China's sons and daughters, was then hailed as an important basis for reunification.
- (g) This was followed by a proclamation that all Taiwan compatriots, whether from Taiwan province or from other provinces, are all Chinese and that their remarks and demands will be listened to. Special mention was made of the hope that all political parties would promote the development of relations across the Straits with a rational, forward-looking and constructive attitude.
- (h) A welcome is made to Taiwan's leading authorities to visit Mainland China in an appropriate capacity, and the PRC expresses the desire to receive an invitation to visit

Taiwan. There is no need for an international occasion, as the Chinese people must handle its affairs internally.

Soon after “Jiang’s Eight Points,” in view of the cross-straits situation at its current stage, former president Lee Teng-Hui set forth the following position in hopes of normalizing bilateral relations :

- (a) Pursue China’s unification based on the reality that the two sides are governed respectively by two governments: The fact that the Chinese mainland and Taiwan have been ruled by two political entities in no way subordinate to each other has led to a state of division between the two sides and separate governmental jurisdictions, hence the issue of national unification. Therefore, to facilitate national unification, we have to be realistic and recognize the historical fact that China is currently divided so that we may search for a feasible means to unify our nation. Only by facing up to this reality can both sides build greater consensus on the one China issue and at the earliest possible date.
- (b) Strengthen bilateral exchanges based on Chinese culture: Chinese culture, known for its comprehensiveness and profundity, has been the pride and spiritual support of all Chinese. In Taiwan, we have long taken upon ourselves the responsibility for safeguarding and furthering traditional Chinese culture, and advocate that culture be the basis for exchanges between both sides to help promote the nationalistic sentiment for living together in prosperity and to foster a strong sense of brotherliness. In the immense field of cultural activities, both sides should improve the breadth and depth of various exchanges and programs, and further advance media, academic, scientific, and sports exchanges and cooperation.
- (c) Enhance trade and economic relations to develop a mutually beneficial and complementary relationship: In the face of the global trend of economic development,

Chinese on both sides must complement each other's efforts and share their experience. In this connection, Taiwan should make the mainland its economic hinterland, while the mainland should use Taiwan as a model of development. We are willing to provide our technical know-how and development experience to help improve agriculture and the life of farmers on the mainland. Meanwhile, we will continue to assist the mainland in developing its economy and upgrading the living standards of its people based upon our existing investments and trade relations. As for trade and transportation links with the mainland, the agencies concerned have to make in-depth evaluations as well as careful plans since these are very complicated issues. When the time and the conditions are right, representatives from both sides can meet to exchange views on, and gain a thorough understanding of, all the related issues.

- (d) Ensure that both sides join international organizations on an equal footing and that leaders on both sides meet in a natural setting: I have indicated on several occasions that if leaders on both sides could meet with each other on international occasions in a natural manner, this would alleviate the political confrontation between both sides and foster a harmonious atmosphere for developing future relations. At present, both Taiwan and the mainland are members of several important international economic and sports organizations. If leaders of both sides were able to meet each other very naturally when attending meetings of these organizations, this would assuredly help dispel enmity between the two sides, nurture trust, and lay the groundwork for cooperation through consultation in the future. It is our firm belief that the more international organizations both sides join on an equal footing, the more favorable the environment will become for the growth of bilateral relation and for the process of peaceful unification. By doing so, both sides can also show to the world that the Chinese on both sides can surmount their

political divergences to work hand in hand for the good of the international community and usher in a new era of pride for the Chinese people.

- (e) Adhere to the principle of resolving all disputes by peaceful means: We believe that Chinese people should be sincere with each other and should never again resort to killing each other. We cannot bear to see any further suffering in civil wars, and sincerely hope that both sides will soon turn their swords into ploughshares. Therefore, in 1991 I terminated the Period of National Mobilization for Suppression of the Communist Rebellion, publicly recognized the fact of the temporary division of China, and declared that Taiwan would renounce the use of force against the mainland. It is indeed a matter of regret that mainland authorities for their part over the past four years have refused to renounce the use of force against Taiwan, Penghu, Kinmen and Matsu, so a state of hostility remains between the two sides. We believe the mainland authorities should demonstrate their goodwill by publicly renouncing the use of force and refrain from making any military move that might arouse anxiety or suspicion on this side of the Taiwan Straits, thus paving the way for formal negotiations between both sides to put an end to the state of hostility. I would like to emphasize that using Taiwan independence or foreign interference as an excuse for refusing to give up using military force against Taiwan willfully ignores and misconstrues the nation-building spirit and policy of the Republic of China. This only deepens mutual suspicion and dampens mutual trust. It is necessary for both sides to work together sincerely to foster the right conditions for holding formal cross- straits talks to end the state of hostility. On our part, the pertinent government agencies will carefully study and make plans concerning issues connected with ending the hostility. After the Chinese Communists publicly state their decision to renounce the use of force against Taiwan, Penghu, Kinmen and Matsu, we are ready to

enter into preparatory consultations at an opportune time on how to hold formal negotiations to end hostility.

- (f) Jointly safeguard prosperity and promote democracy in Hong Kong and Macau: Hong Kong and Macau are integral parts of the Chinese nation and the Chinese residents there are our brothers and sisters. Post-1997 Hong Kong and post-1999 Macau are naturally a matter of great concern to us. In this regard, the ROC government has reiterated its determination to maintain normal contact with Hong Kong and Macau, further participate in affairs related to Hong Kong and Macau, and provide better services to our compatriots there. Continued prosperity and life under freedom and democracy are the common aspiration of the people of Hong Kong and Macau; they are also a major concern for Chinese around the world as well as countries. What's it more important, they are a responsibility both Taiwan and the mainland cannot shirk. We hope the mainland authorities would respond positively to the calls of the Hong Kong and Macau residents in this regard so that both sides may work in unison with them to plan for continued prosperity and stability in these areas.

However, Chairman Jiang Zemin did not agree to withdraw using military force, nor to meet R.O.C. president in the international arena, and nor to acknowledge Taipei as a political entity. At the same time, Lee Teng-Hui did not agree to accept the "One Country, Two Systems" proposal, nor Beijing's "One China Policy." For these reasons, negotiations between the two parties still have a long way to go.

4. "State-to-State" Theory

Deutsche Welle (Voice of Germany) interviewed formal president Lee Teng-hui on July 9, 1999.³² Former President Lee indicated that,

“The 1991 constitutional amendments have designated cross-strait relations as a state-to-state relationship or at least a special state-to-state relationship, rather than an internal relationship between a legitimate government and a renegade group, or between a central government and a local government. Thus, the Beijing authorities’ characterization of Taiwan as a “renegade province” is historically and legally untrue ... I have already explained very clearly that the Republic of China has been a sovereign state since it was founded in 1912. Moreover, in 1991, amendments to the Constitution designated cross-strait relations as a special state-to-state relationship. Consequently, there is no need to declare independence.”

This statement came as a shock to Taipei, Beijing, as well as Washington. Because the statement of “State-to-State” essentially overthrew the “1992 consensus,” it made both Beijing and Washington angry at this new proposal. The impacts of the “State-to-State” theory on the Cross-Strait conflict are next explored.³³

First, the domestic impact of the “State-to-State” theory on Taiwan are divided into two aspects: “Mainland Affairs” and “Constitution Amendment Issues.” Under the “Mainland Affairs” policy approach, the statement indicated that Taiwan was not part of China and objected Beijing’s “One China Policy” as well as the notion that “Taiwan and Mainland China belong to One China” and the “92 Consensus.” Under the “Constitution Amendment Issues,” former president Lee Teng-Hui wanted to adjust Article 4 of the ROC constitution from “The territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly” to “The territory of the Republic of China shall be limited to the enforcement of this

³² Teng-hui Lee, Interview, *Responses to Questions Submitted by Deutsche Welle*, the full text available is at <http://www.fas.org/news/taiwan/1999/0709.htm> (July 9, 1999)(last visited July 29, 2006).

³³ See Minyi Wang, *Liang An He Tan: Taiwan Yu Zhong Guo De Dui Hua* 兩岸和談:台灣與中國的對話 (Cai Xun 2001).

constitution.” In other words, President Lee Teng-Hui’s proposal was to break the historical link between Taiwan and Mainland China. Lee’s “State-to-State” policy would have an enormous impact on Taiwan’s development, so these policy approaches would not pass in the government legislature because of varying pressures from domestic and international bodies. However, this theory became the fundamental basis for President Chen Shui-Bian’s³⁴ platform in the future.

Second, Beijing’s response to the “State-to-State” theory was strong and serious. Beijing placed diplomatic pressure on the United States while placing military pressure on Taiwan. Beijing worried that the United States would support President Lee Teng-Hui’s “State-to-State” theory, so Beijing asked the Clinton Administration to restate its support of the “One China Policy,” and also asked the U.S. Government to threaten Taipei to withdraw the “State-to-State” approach as well as to stop the sale of weapons to Taiwan. Notwithstanding the Taiwan issue, the relationship between Mainland China and the U.S. was not stable at that time because the U.S. air force mistakenly bombed China’s embassy in the former Yugoslavia. The circumstances made the two parties nearly start war, and also put surrounding islands on pre-war status alert.

Third, the United States was angry about the unexpected “State-to-State” approach provided by Taipei. As its foreign policy with respect to this issue, the Clinton Administration reiterated the “One China” policy, and provided “Three Principles” to manage the Cross-Strait Relationship. These principles were: “Acknowledge One China,”

³⁴ Mr. Shui-Bian Chen (born, 1950), Taiwanese politician, has been the President of the Republic of China since May 20, 2000. He is colloquially and affectionately referred to as *A-Bian*. Chen, whose Democratic Progressive Party (DPP) has traditionally been supportive of Taiwan independence, took office in 2000 ending more than fifty years of Kuomintang rule in Taiwan and won the second presidency election in 2004. For more information about Mr. Shui-bian Chen, see Democratic Progressive Party’s web-site, *supra* n. 25.

“Expect Cross-Strait Talk,” and “Settle the Dispute Peacefully.” The Clinton Administration clearly restated the policy toward Taipei and Beijing. However, the U.S. did not agree to Beijing’s request to ask Taipei to withdraw the “State-to-State” approach, nor did it agree to cease providing Taiwan defense weapons. However, the U.S. government hoped that Taipei would accept and go back to the “92 consensus.”

Finally, Beijing published “White Book of One China Principle and the Policy toward Taiwan” in 2000. It stated the three situations in which Beijing would use military force toward the Taiwan Strait.

- (1) If Taiwan declares independence and separates from China;
- (2) If a foreign country occupies Taiwan;
- (3) If Taiwan’s administration refused negotiations of unification for an unlimited duration.

This white book was published in 2000, a few months before the R.O.C. presidential election, and it made Taiwanese people very angry about Mainland China’s attitude. This white book partially influenced the result of the election, which was unexpected by Washington, Beijing, and Taipei: the DPP³⁵ won the presidential election in 2000. It was the first time that Taipei’s administration would be ruled by the political party that staunchly supported Taiwan independence. The KMT lost its fifty-year rule

³⁵ See *id.* The *Democratic Progressive Party* (DPP) is a major political party in the Republic of China on Taiwan which has traditionally been associated with the pan-green coalition and Taiwan independence although it has moderated its stance as it has gained control of the presidency. The DPP is a member of Liberal International and a founding member of the Council of Asian Liberals and Democrats. It represents Taiwan in the Unrepresented Nations and Peoples Organization. While the DPP is often classified as liberal and its opposition as conservative, these classifications do not necessarily correlate to views regarding such issues as economic policy or the role of government in society.

over the central government, and it brought cross-strait relations into a new and even more complicated era.

E. A New Paradox Era (2000 – present)

President Chen Shui-Bian and his DPP won the presidential election in the year 2000, ending the KMT's fifty-year rule over the central government, beginning from former President Chiang Kai-shek's leadership in 1949. The DPP was established in 1986 in Taipei with many KMT opponents and their lawyers. The DPP cited the existing political democracy, or lack thereof, as its major complaint. Their achievements included withdrawing all political restrictions and abolishing other bans on freedom of expression and association. After the DPP was established, its members played important roles in the legislative Yuan (Congress). However, in 1991, some members pushed the member's committee to pass the principle of independence into their by-laws, and sought the notion of "Establishing an Independent and Autonomous Republic of Taiwan" as their future goal. After that, the DPP was not only seeking a democratic political regime, but also pushing for the independence of Taiwan. This "Taiwan Independence" approach could have been censored when the DPP was the opposing party, but after 2000, when the DPP became the ruling party of the ROC government, this statement acted as a "huge bomb" for the Cross-Strait relationship. It also renewed the U.S. foreign policy toward Mainland China as well as Taiwan. After 2000, the relations between Taipei and Beijing were moving back to an era characterized by "opposition," "jealousy," and "hostility." The

following are two periods categorizing cross-strait relations under the ruling DPP administration in Taipei:

1. President Chen's "Five NOs in 2000"

President Chen Shui-Bian won the presidential election with 39% support in 2000, and at the time, he did not have a very clear approach toward Mainland Affairs. Before the election, in order to reduce the worry of Taiwanese people, the DPP amended its by-laws to include the principle of independence, and passed the "Taiwan Future Resolution Article" in 1999.³⁶ The major purpose of this article was to oppose Beijing's "One Country, Two Systems" proposal and to introduce the following terms: "Promote Taiwan to join international organizations," "Referendum," and "Seek the independent sovereignty of Taiwan." In 2000, the DPP knew that Beijing as well as Washington were seriously concerned about Cross-Strait relations, so in order to satisfy the United States, the international community, and appease Beijing, President Chen Shui-Bian in his "2000

³⁶ *Id.* In May 8th, 1999 the 8th session of annual meeting of Democratic Progressive Party passed the "Taiwan future resolution article," which comprised of 7 points:

- (1) Taiwan is "an independent sovereign," and any situation change must be a decision by way of the residents of all of Taiwan;
- (2) Taiwan certainly does not belong to the People's Republic of China, and the Chinese one-sided position regarding the one center principle and the one country two systems, shall not be used in Taiwan;
- (3) Taiwan should widely participate in the international community, and seek international acknowledgement, making membership into the United Nations and other international organizations a primary goal;
- (4) Taiwan should abandon the "one China" position, avoid recognition confusion in the international social arena, and not be a mere annex to China;
- (5) Taiwan should complete the legal system project as quickly as possible, carry out the direct civil rights of the people, and when necessary so as to condense national mutual recognition, express all the peoples' will;
- (6) Taiwan's government and the people from all walks of life should not divide the parties and groups, but should establish mutual recognition in foreign policy, and face China with ambition;
- (7) Taiwan and China should engage in full dialogue, seeking to sincerely and mutually understand the economics of each and the importance of trade cooperation, the establishment of peaceful overhead construction, with the aim to achieve long-term peace and stability on both sides.

Inaugural Speech” provided the “Five NOs:” “No declaration of independence, No change in the national name, No introduction of state-to-state into Constitutions, No referendum of changing the status quo, and No withdrawal from the National Unification Council or the Guidelines of National Unification.” This statement earned nearly 90% of the support of the Taiwanese people. However, Beijing did not trust President Chen Shui-Bian and supposed that he was merely pushing independence from definite to implicit.

In August 2000, Beijing changed its attitude regarding the “One China Principle,” and redefined it as such: “There is only one China in the world, both Taiwan and the Mainland belong to one China, and the sovereignty of China is considered one whole and cannot be separated.” Beijing changed its prior description that “Taiwan is part of China,” and put “Taiwan and Mainland” into the “Whole China.” This provided a unique window of opportunity for both Beijing and Taipei to move back to the negotiation table. Washington also supported the positive emotions of both sides, and encouraged Beijing and Taipei to quickly set a timetable for negotiations. However, although President Chen Shui-Bian once supported the Mainland policy of “Cross-Strait Integration,” those positive approaches did not stand very long. The main strum of Chen Shui-Bian’s mainland policy can be divided into three points: (1) No acknowledgement of the “92 Consensus,” (2) No acceptance of the “One China Principle,” and (3) No contact, negotiation, or compromise with Beijing.

On August 3, 2002, President Chen Shui-Bian provided a “One Country, One Side” statement, providing that:

“Taiwan is our country, and our country cannot be bullied, downgraded, marginalized, nor treated as a local government. Taiwan is not a part of any other country, nor is it a local government or province of another country. Taiwan can never be another Hong

Kong or Macau, because Taiwan has always been a sovereign state. In short, with Taiwan and China standing on opposite sides of the Strait, there is one country on each side. This should be clear... A referendum is a basic human right, and thus a basic right of the 23 million people of Taiwan, a right that cannot be deprived and restricted. I sincerely call upon and encourage everyone to give thought about the importance and urgency of initiating referendum legislation.”³⁷

This statement immediately caused serious concern in Beijing. However, Beijing changed its policy from directly threatening Taiwan to placing diplomatic pressure on Washington, asking Washington to communicate with Taipei. Bush’s administration clearly told Taipei that although the United States would help defend the Taiwan Strait, the U.S. would not support any unilateral change of the “status quo,” especially if caused by Taipei. However, because of the weakness of President Chen Shui-Bian’s support upon entering the 2004 presidential election, he kept pushing the principles of “One Country, One Side,” “Referendum,” “Formulate New Constitution,” and “Change the national’s title” in order to satisfy his supporters who preferred Taiwan independence. In November 2003, Chen Shui-Bian provided a clear timetable for the “New Constitution”: to introduce the referendum in December 2006, and enforce the new constitution in 2008. According to these facts, President Chen Shui-Bian declared the “referendum” and the establishment of a “Republic of Taiwan” as the major components of his second presidential platform.

The Bush administration changed its foreign policy in order to prevent possible conflict, and stated that it did “not support Taiwan independence.” President Bush redefined the “One China Policy” as “Based on Three Agreements: the PRC, the Taiwan Relations Act, and denial of support for Taiwan’s moving toward independence.” The

³⁷ At The 29th Annual Meeting of the World Federation of Taiwanese Associations (WFTA) in Tokyo, available at Democratic Progressive Party’s web-site, *supra* n. 25.

fundamental change in U.S. policy was to treat “Taiwan Independence” as a dynamic issue; in other words, the U.S. neither supported the “result” of Taiwan independence, nor the “process” toward independence. In addition, the United States also opposed any “referendum of changing Taiwan’s status quo toward independence.” Although the Bush administration made clear its policy approach, President Chen Shui-Bian declared that he would hold the first national referendum together with the presidential election on March 20, 2004, and he called it the “Defense Referendum.” It was a surprise that Beijing did not have any response for this series of developments in Taiwan, but Beijing instead asked Washington about Beijing’s “Red Line” for using military force, hoping that Washington could stop Taipei’s movement toward a dangerous border. The Bush administration was angry this time, as this series of actions was not merely “Election Talk,” but rather part of a “Political Action Plan.” President Bush firmly stated:

*“The U.S. opposes any unilateral decision to change the “status quo” by Taipei or Beijing, and according to the talks and actions by Taiwan’s leader, he seemed to change the status quo unilaterally, and this is also opposed by the United States.”*³⁸

Finally, President Chen Shui-Bian picked two referendum questions: “Whether to buy missiles from the United States for Taiwan’s defense,” and “Whether to establish a peaceful and stable regime with Mainland China.” However, these two questions were rejected due to a lack of legal votes. At the same time, President Chen Shui-Bian was shot by an unknown person with two bullets one day before the presidential election. He

³⁸ Su, *supra* n. 1, at 72.

gained the sympathy of the Taiwanese people, and won his second election by less than 30,000 votes.³⁹

2. Beijing's Dual Agenda

President Chen Shui-Bian's power is weak in his second term. Almost half of the Taiwanese people doubted the legitimacy of his election, and the opposing party, KMT, sued in the highest court to invalidate the election results. In the last five years of his term, Taiwan's GDP has decreased and most of the industries have sought to invest in Mainland China regardless of the restrictions and barriers established by the DPP's Mainland policy. President Chen Shui-Bian has been unable to solve the serious economic problems or reduce Cross-Strait tensions. In 2005, after it was uncovered that many high level governmental officials were involved in corrupt dealings and judicial investigations, President Chen Shui-Bian's support rate dropped more than ever before. Under Taiwan's local government elections in December 2005, the DPP lost many of their seats as a result (DPP got only 6 spaces of the 23 county commissioner positions available, and KMT, with the help of its political allies, got 17 spaces). In 2005, there were two important events that may influence the cross-strait relationship:

(a) Strong Side: The Anti-Secession Law

³⁹ *Id.*, at 96. President Shui-Bian Chen gain 50.11% of 6,471,970 votes, compared to Mr. Chan Lien 49.89% of 6,442,452 votes.

Beijing's new leader, Chairman Hu Jintao, created a new policy toward Taiwan: "More Soft in Soft power; and More Strong in Strong power." On the strong side, Chairman Hu Jintao made clearly defined the policy toward Taiwan as well as set up a "Red Line," using military force to backup an Anti-Secession Law. This was the first time that Beijing transferred the political issue of using military force toward Chinese unification to a legal perspective. At the same time, on the soft side, Chairman Hu Jintao gave Taiwan more open and flexible conditions for negotiation, especially with regard to economic integration and trade facilities. The Anti-Secession Law includes the "Red Line" in Article 8,⁴⁰ the "One Country, Two Systems" proposal in Article 5,⁴¹ and "Integration and Peace Negotiation" in Article 6⁴² and 7.⁴³

⁴⁰ Fan Fenlie Guo Jia Fa [Anti-Secession Law] (promulgated by the Standing Comm. Natl. People's Cong., Mar. 14, 2005, effective Mar. 14, 2005) 2005 Fa Gui Hui Bian, translated in ISINOLAW (last visited Aug.1, 2006)(P.R.C.)[hereinafter Anti-Secession Law]. In Anti-Secession Law art. 8

In the event that the "Taiwan independence" secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful re-unification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity. The State Council and the Central Military Commission shall decide on and execute the non-peaceful means and other necessary measures as provided for in the preceding paragraph and shall promptly report to the Standing Committee of the National People's Congress.

⁴¹ *Id.* Anti-Secession Law art. 5

Upholding the principle of one China is the basis of peaceful reunification of the country. To reunify the country through peaceful means best serves the fundamental interests of the compatriots on both sides of the Taiwan Straits. The state shall do its utmost with maximum sincerity to achieve a peaceful reunification. After the country is reunified peacefully, Taiwan may practice systems different from those on the mainland and enjoy a high degree of autonomy.

⁴² *Id.* Anti-Secession Law art. 6

The state shall take the following measures to maintain peace and stability in the Taiwan Straits and promote cross-Straits relations: (1) encourage and facilitate personnel exchanges across the Straits for greater mutual understanding and mutual trust; (2) encourage and facilitate economic exchanges and cooperation, realize direct links of trade, mail and air and shipping services, and bring about closer economic ties between the two sides of the Straits to their mutual benefit; (3) encourage and facilitate cross-Straits exchanges in education, science, technology, culture, health and sports, and work together

After Chairman Hu Jintao declared the “Anti-Secession Law,” Taiwanese people as well as the international society protested the military threat and worried that Beijing had a legal basis for attacking Taiwan. However, Chairman Hu Jintao set up the “Red Line” for two reasons: first, to prevent the possibility of Taiwan Independence and second, to establish superior economic conditions for the Taiwanese people, or in other words, economic incentives. These conditions include: (1) duty free access to Mainland China’s domestic market for many kinds of Taiwanese fruit, (2) direct flights of civil aircraft between Taiwan and the Mainland, (3) tax exemption for Taiwanese businessman investing in Mainland China.

In sum, Chairman Hu Jintao’s strategies toward Taiwan are very different in comparison to prior CCP leaders, and his purpose has been to try to communicate with the Taiwanese people instead of the ROC government, especially the DPP administration. Chairman Hu Jintao further indicated that Beijing would welcome any person, political party, or even official of the Taiwanese government to visit Mainland China and be willing to negotiate any issue regarding Cross-Straits relations on a conditional basis. The only condition is that whoever comes to negotiate must acknowledge the “92

to carry forward the proud Chinese cultural traditions; (4) encourage and facilitate cross-Straits cooperation in combating crimes; and (5) encourage and facilitate other activities that are conducive to peace and stability in the Taiwan Straits and stronger cross-Straits relations. The state protects the rights and interests of the Taiwan compatriots in accordance with law.

⁴³ *Id.* Anti-Secession Law art. 7

The state stands for the achievement of peaceful reunification through consultations and negotiations on an equal footing between the two sides of the Taiwan Straits. These consultations and negotiations may be conducted in steps and phases and with flexible and varied modalities. The two sides of the Taiwan Straits may consult and negotiate on the following matters: (1) Officially ending the state of hostility between the two sides; (2) Mapping out the development of cross-Straits relations; (3) Steps and arrangements for peaceful national reunification; (4) The political status of the Taiwan authorities; (5) Taiwan region's room of international operation that is compatible with its status; and (6) Other matters concerning the achievement of peaceful national reunification.

Consensus.” Half a century since the meeting at Chongqing in 1945, the KMT initiated historical talks with the CPP in 2005 and 2006, which were called “Lian-Hu Meeting,” regarding mutual economic cooperation between the two parties based on the “92 Consensus.”

(b) The Soft Side: “Lien-Hu meeting”

Mr. Lien Chan,⁴⁴ former KMT Chairman, visited Hu Jintao,⁴⁵ Chairman of the Chinese Communist Party in April 2005. This was the first talk between leaders of KMT and CPP since the 1945 “Chongqing Negotiation.” Although the KMT was not the ruling party of Taipei’s administration, some media hailed this historical talk held sixty years after War World II era as the “Third meeting between the KMT and the CCP”. On April 29, 2005, the two leaders made an announcement as follows⁴⁶:

For the past 56 years, both parties were on different paths and displayed different social systems and life styles. More than 10 years ago, both sides, in line with good intentions, in the foundation which seeks common ground while maintaining difference, opened the consultation, the dialogue and the folk exchange, let the both sides’ relations fill the peace the hope and the cooperation vitality. But in recent years, both sides confidence has suffered destruction; both sides’ relations continue to worsen. At present, both sides’ relations are occupying, in the historical development, a key point, that both sides should not fall into the vicious cycle, but march into the benign circle of cooperation, which together seeks peace, stable development, and opportunity. The mutual confidence and cooperation, again makes the new aspect, which the peace double wins, realize the Chinese nation’s bright hopes.

⁴⁴ Mr. Chan Lien (born August 27, 1936) is a Taiwanese politician. He was Vice President of the Republic of China from 1996 to 2000, and was the Chairman of the Kuomintang from 2000 to 2005. In August 2005, he left that post after not running for re-election and was succeeded by Mr. Ying-jeou Ma. For more information about Mr. Lien Chan, see Kuomintang’s web-site, *supra* n. 2.

⁴⁵ Mr. Jintao Hu (born December 21, 1942) is the current President of the People’s Republic of China and General Secretary of the Communist Party of China, succeeding Mr. Jiang Zemin in the Fourth Generation Leadership of the People’s Republic of China. Mr. Hu continued Mr. Deng Xiaoping’s policies of economic reform and has a moderate stance on media censorship. More information about Mr. Jintao Hu is available at Chinese Communist Party’s web-site, *supra* n. 3.

⁴⁶ For information about Lien-Hu meeting announcement, see Kuomintang’s web-site, *supra* n. 2.

Two parties together realize:

Persists “92 Consensus,” oppose “the Taiwan independence,” seeks stable peace of the Taiwan Strait, promotes the development of cross-strait relations, maintains the both compatriot benefit, is two parties' together positions.

Promotes the both compatriot's exchange and the intercourse, together carries forward the Chinese culture, is helpful to extinguish the barrier, promotes the mutual confidence, the accumulation mutual recognition.

The peace and the development is 21st century tidal current, the Cross-Strait relations peace development serves the both sides compatriot's common interest, also conforms to Asian and Pacific local and the world benefit.

Two parties based on above realize, together promotes below to work:

- (1) The promotion as fast as possible restores negotiations from the both sides, altogether seeks the both people blessing.
 - Promotes the both sides in “92 Consensus” in the foundation as fast as possible restores the equality consultation, both sides together care about with the question which respectively cares about carries on the discussion, advances the both sides relations benign health development.
- (2) The promotion termination hostile condition, reaches the peace agreement
 - Promotes officially to end the both sides hostile condition, reaches the peace agreement, constructs the both sides relations peace stable development the overhead construction, includes the establishment military mutual confidence mechanism, avoids the both sides military conflict.
- (3) Promotes the both sides economy comprehensive exchange, establishes the both sides economic cooperation mechanism.
- (4) Promotes the both sides to launch the comprehensive economic cooperation, establishes the close economics and trade cooperation relations, includes comprehensively, is direct bidirectional, “the Three Contacts,” the open sea and air flies straight, strengthens the investment and the trade intercourse and the safeguard, carries on the agricultural fishery cooperation, solves the Taiwan agricultural product in the mainland sales question, the improvement exchange order, together attacks the crime, then the establishment stable economic cooperation mechanism, after and the promotion restores the both sides consultation first discusses the both sides common market issue.
- (5) The promotion consults the participation international activity question, which the Taiwan populace cares about

The after promotion restores the both sides consultation, discusses participation international activity issue which the Taiwan populace cares about, includes first

discusses participates the question which the World Health Organization moves. Both sides together try hard, create the condition, gradually seeks finally solves the means. Five, the establishment of party-to-party regular communication platform.

Builds two parties regular communications platform, includes the development different level the party affairs personnel exchange visits, carries on the related improvement both sides relations subject deliberate, the hold related both sides compatriot vital interest subject consultation, invites the personalities from all walks of life to participate, the organization discusses the close both sides exchange the measure and so on.

Two parties hope, this visit and the discussion achievement, is helpful to promote the both sides compatriot's blessing, opens the both sides relates the new prospect, will found Chinese nation's future.

After this meeting, the KMT provided a “Win-Win Solution” negotiation strategy rather than “Zero-Sum Game.” Once the government moved back to the consensus set in the 1992 Ku-Wang Meeting, the two parties could continue peace negation. The spirit of negotiation strategy is “Temporarily putting aside the political conflicts, and focusing on economic integration.”⁴⁷

III. THE U.S. FOREIGN POLICY IMPACT TOWARD TAIWAN AND CHINA

The United States always plays an important role in Cross-Strait relations. During the Chinese Civil War in 1945, Washington’s attitude was not involved in this conflict too deeply because of it was a domestic military conflict in China. However, when the Korean War began on June 25, 1945, Washington decided to help the R.O.C. defend against the P.R.C.’s attacks. Former U.S. president Truman indicated, “The determination of the future status of Formosa must await the restoration of security in the Pacific, a

⁴⁷ Yin, *supra* n. 21, at 99-135.

peace settlement with Japan, or consideration by the United Nations.” This statement on the “Uncertain Status of Taiwan” had an important impact on people who intended to push for further Taiwan independence.

Because of the Cold War, former president Nixon made a fundamental change in foreign policy towards China. In other words, Washington planned to cooperate with the PRC in order to protect against the U.S.S.R. For this reason, Washington’s relationship with Taipei transformed from an official into an unofficial one. On February 28, 1972, the United States signed the Shanghai Agreement with the PRC, and indicated that, “the United States recognizes that all Chinese people in the Cross-Strait acknowledged there is only one China in the world, and Taiwan is part of China, and that the United States didn’t object to this statement.” Then the United States further signed the Agreement which established an official relationship in 1979. At the same time, Washington broke off its relationship with the ROC, stopped the “Mutual Defense Treaty between the United States and the Republic of China,” and canceled the economic support for Taiwan. The U.S. Congress passed the Taiwan Relations Act (TRA)⁴⁸ in 1979. The major reason for passing this Act was because “the President terminated governmental relations between the United States and the governing authorities on Taiwan, recognized by the United States as the Republic of China prior to January 1, 1979,” and Congress found that the Act was necessary “(1) to help maintain peace, security, and stability in the Western Pacific; and (2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.” The Act also provided that “the United States

⁴⁸ Taiwan Relations Act, Pub. L. No. 96-8, 2, 93 Stat. 14 (1979), codified at 22 U.S.C. 3301 et seq. (1979).

would make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.”

On August 17, 1982, Mainland China discussed the issue of the U.S.’s decision to provide Taiwan with self-defense weapons. Soon thereafter the two parties signed the “817 Communique” and jointly stated that “considering the bilateral statement, the United States government will not sell weapons to Taiwan as a long term policy, and the weapons which its sells to Taiwan after this agreement will not surpass the level of performance and quantity which China and America established in diplomatic relations recently. Further more, the United states prepared to gradually reduce selling weapons to Taiwan year by year.” The framework of American foreign policy towards China and Taiwan was established at that time. From 1982, every U.S. president followed the statement: “The United States Foreign Policy toward Cross-Strait Relations is based on the One China Policy, three Communiques⁴⁹ with the PRC, and the Taiwan Relations Act.” The Clinton administration further described clearly the “Three Principles” to maintain the Cross-Strait Policy, which were the “One China Policy” (towards the PRC), “Peace Resolution” (towards Taiwan), “Negotiation between two parties” (reduce tense and promote trust). These statements and principles efficiently helped to reduce the military conflict in the 1900s as well as prevent the potential war in that era.

⁴⁹ Three Communique signed by the U.S. government and the P.R.C. government include the following: (1) Shanghai Joint Communique (Signed Feb. 27. 1972), 66 Dept. St. Bull., at 437-438 (1972), reprinted in 11 I.L.M. 443 (1972); (2) Joint Communique on Establishment of Diplomatic Relations between the United States of America and the People’s Republic of China (Signed Dec. 18, 1978), 79 Dept. St. Bull., at 25(1979), reprinted in 18 I.L.M. 274 (1979); and (3) *U.S.-China Joint Communique, Statement before the House Foreign Affairs Committee* (Aug. 17, 1982), 82 Dept. St. Bull., at 19, (1982).

A. U.S. Foreign Policy toward Taiwan

During the World War II era, the United States treated the ROC government as a strong ally as well as a partner in the Asian war zone. When the Chinese Civil War began, the United States initially didn't want to get involved in this conflict. However, once the Korean War started, Washington turned to support the ROC in military actions by signing the "Mutual Defense Treaty between the United States and the Republic of China"⁵⁰ with Chiang Kai-shek in 1954, aimed against Mao Zedong's communist party. Besides military support, the United States gave Taiwan economic support as well as trained technological professionals.

1. KMT Ruling Era

In 1972, U.S. president Nixon agreed to support the PRC's application in the United Nations, in effect removing ROC from its seat on the U.N. Security Council. The United States suggested that Taipei accept the "Two Chinas Model" (Dual Representatives), much like the two Germany in the United Nations. However, former president Chiang Kai-shek didn't accept that proposal and insisted on a "One China Principle." In other words, he insisted that the "ROC [was] the only legal government

⁵⁰ See Su, *supra* n. 1, at 122-125. The Republic of China (ROC) maintains a large military establishment, which accounted for 16.8 % of the central budget in the fiscal year of 2003. It is historically continuous with the Nationalist Army that fled from mainland China to Taiwan with the Kuomintang at the end of the Chinese Civil War, when the mainland was taken over by the Communist Party of China. Until the 1970s, the military's primary mission was to retake mainland China. However, the military's current foremost mission is the defense of the islands of Taiwan, Penghu, Kinmen, and Matsu against an invasion by the Communists People's Liberation Army, which is seen as the predominant threat to the ROC, as the Communists have not renounced the use of military force against Taiwan in an ongoing dispute over the political status of Taiwan.

represent[ing] China, and [the] ROC would not accept dual representatives in any international organization, or with any country.” After Albania’s proposal accepting the PRC and excluding the ROC passed in the U.N. general meeting, the ROC withdrew its U.N. membership. The United States kept negotiating with the PRC, and soon thereafter in 1979, the United States established official governmental relations with the PRC and broke off official relations with the ROC. Although there was no official governmental relationship between the United States and the R.O.C., the U.S. Congress passed the Taiwan Relations Act, which provided the legal basis for the U.S. to keep up informal relations with the ROC. According to the Act, the United States would provide efficient weaponry for Taiwan to use in defense against a potential attack from Mainland China. There was no problem when the KMT ruled the central government of ROC. However, after 2000 when the DPP became the ruling party of the ROC’s central government, the situation changed. Washington acknowledged that the PRC had been the troublemaker in the past and that the United States had had sufficient reason to provide appropriate defensive weapons to Taiwan. However, Washington didn’t realize that once Taipei became a troublemaker, the issue would become more complicated. In other words, the United States could get involved in a direct military conflict with Mainland China.

2. DPP Ruling Era

After the DPP became the ruling party, they overlapped the safeguards of the “Taiwan Relations Act,” which provided for U.S. participation in a common defense and the sale of weapons to Taipei. The DPP tried to test the bottom line between Beijing and

Washington.⁵¹ Of course, Bush's administration recognized that the Taiwan issue would always be a sensitive issue in PRC relations and that the United States might unexpectedly become involved in a military conflict because of Taipei's actions toward independence. For American's national interests, relations with Mainland China could be a constructive partnership. Washington did not want Taipei to become a troublemaker on one hand, but also didn't want its power to fade to weakness on the other. To deal with this paradoxical situation, Washington's strategy was to limit the explanation of its common obligation. Although the United States would provide enough security aid to maintain peace in the Taiwan Straits, it also meant that Taiwan would take the responsibility for its own dangerous actions. The United States would not defend Taiwan on just any condition. Bush further indicated that the United States (1) did not support "Taiwan Independence" and "unilaterally changing the status quo"; (2) according to the Taiwan Relations Act, would keep providing weapons to Taipei, but would be strictly limited to defensive weaponry only; (3) would encourage peace negotiations between the two parties, but that the United States would not mediate the Cross-Strait conflict.

B. U.S. Foreign Policy toward Mainland China

The relationship between the United States and the PRC is very complicated. After World War II, the United States' foreign policy was aimed originally at preventing the spread of communism. But because the Cold War continued longer than expected, the

⁵¹ The Democratic Progressive Party pushed several policies to test the red-line of Washington and Beijing. For example: declaring a "Referendum," "Changing the National Name and Territory," and "Drafting a New Taiwanese Constitution," etc... More information is available at the Democratic Progressive Party's web-site, *supra* n. 25.

United States changed its foreign policy toward the PRC from one of hostility to cooperation. The main purpose for this shift was to align the PRC against Russia. Under this general guideline, former President Nixon visited Mainland China even though the two countries did not have any official diplomatic relations. The United States soon supported the PRC's bid to join the United Nations and, finally, established an official diplomatic relationship with the PRC in 1979.⁵² After the Cold War era, the United States became the only super power in the world. The United States' strategy to maintain its economic and national interests was to push the PRC into various international regimes and share the obligation to promote regional security and peace among Asia countries. For this reason, the relationship between United States and the PRC was "competitive and corporate" in the areas of international relations, economic development, the United Nations, and regional security and development. To analyze the paradox, conflict, competition, and cooperation between the United States and the PRC, the relationship will be divided into four aspects: International Politics, Bilateral and Regional Economics and Trade, Democracy and the value of Human Rights, and Cross-Strait Relations.

1. International Politics

In the Cold war era, the United States established official diplomatic relations with the PRC in order counter balance Soviet Union, or at least prevent the PRC and Russia from cooperating together to attack the U.S. From China's perspective, the Chinese Communist Party used to receive support from Russia International Communist

⁵² See Joint Communiqué on Establishment of Diplomatic Relations between the United States of America and the People's Republic of China, *supra* n. 49.

Alien. However, because China and Russia were experiencing conflicts in economic and border issues, China agreed to cooperate with the U.S. With this background, it is clear that China and the United States had some common national interests. These helped the two parties cooperate together as a partnership. However, after the Soviet Union collapsed, the United States became the only super power. China was the only remaining communist country with highly developed economic, political, and military aspects. The U.S. thought that Mainland China would become a “potential competitor” in the future. Recently in world politics, the United States must face, directly or indirectly, the impact of cooperation or conflict with China. The following are four important viewpoints for examining the relationship between China and the U.S.:

- (a) After the 9/11 terrorist attack in 2001, Bush’s administration started the Afghanistan war and the Iraq war. According to the regional power distribution in Central Asia as well as the Middle East, the United States needed China’s support. However, when the United States decided to attack Iraq, China, France, and Russia voted in opposition in the U.N. Security Council. Further more, these three countries insisted on refusing to support the U.S. until the U.N.’s nuclear weapon investigation team published its report. It isolated the U.S. from most of the international society, and decreased the United States’ reputation for acting justly..
- (b) The issue of North Korean nuclear weapons, marked a decreased role for the United States. The “Six Party Multilateral Negotiation” meeting was not only mediated by China, but also held in Beijing. Besides Japan, all the other countries, such as North and South Korea, and Russia agreed with China. It strengthened

North Korea's position in the negotiation process, meaning only China could become the mediator.

- (c) After Beijing's "Tiananmen Incident" on June 4th 1989, the United States criticized China's lack luster performance in protecting human rights and insisted on a ban on selling weapons to China. In recent years, the EU has planned to remove the strict ban on arms sales to China, but the United States insisted and hoped that the EU would continue to respect the limited trade embargo against China. This issue was a potential dispute between the U.S. and China.
- (d) The United States plans to establish a Theater Missile Defense System (TMDS) in Asia and has invited Japan to participate. This plan was focused on threats from China, which understandably upset Beijing. In 2005, Beijing and Moscow held joint military exercises in response to U.S. and Japan collaboration. Although these military exercises occurred recently, the U.S. and China have controlled this potential conflict very carefully.

2. Bilateral and Regional Economic and Trade

The United States didn't feel threatened when China began its policy of economic flexibility and innovation. After the Asian Financial Crisis, the Chinese market did not crash as expected; instead it became the most stable financial market. China became the "world's factory" in this decade because of its huge market, low labor cost, natural resources, etc In 1994, former president Clinton separated China's "Economic Issues" and "Human Rights Issues". Further in 2000, the U.S. Congress granted

Permanent Normal Trade Relations (PNTR)⁵³ status to China. This policy helped the two countries move towards a closer economic relationship. In the same year, the United States and China finished the final tariff negotiation of accession into the WTO. China became a WTO member at the end of 2000; Taiwan also entered into the WTO only months after China's accession. However, the framework above is only to prevent a "Trade War" between two countries. The U.S. and China still face trade and economic disputes in particular areas at regional and bilateral levels.

- (a) The United States felt pressure from China's huge import of textiles, iron, and agriculture products and asked Beijing to use export quotas on those products. Otherwise, the U.S. would file an anti-dumping complaint. At the same time, the U.S. also complained that China did not take intellectual property protection seriously. These trade disputes have continued year after year. Some of them have already reached settlement, but some of them are still under negotiation.
- (b) In East Asia regional economic integration, there are lots of challenges for the U.S. to influence APEC's policy. In recent years, China negotiated the Asian Free Trade Agreement with ASEAN countries called "ASEAN plus Three," which included Japan and South Korea. Moreover, the first meeting of the East Asia

⁵³ Permanent NTR (PNTR) describes the unconditional Normal Trade Relations tariff status that members of the World Trade Organization (WTO) accord each other as part of their mutual commitments as WTO members. Frequently called Most Favored Nation tariff status in international law, PNTR refers to the standard or "general" tariff treatment the United States extends to other countries in return for mutually favorable tariff treatment for US exports. PNTR is neither a special privilege, nor a reward, nor the most favored tariff treatment the United States provides to its trading partners. Over 130 member countries of the WTO enjoy PNTR tariff status with the United States, and provide the same treatment to US exports. See Wang, *supra* n. 33, at 103-105.

Summit⁵⁴ held in December 2005 excluded the U.S. from participating. Accordingly, the central issues shifted from APEC toward “ASEAN plus Three.” China’s power in Asia is stronger than ever before and soon she will become the leader in Asia politics and economics. In other words, U.S. power in East Asia will be softer than before.

- (c) Although the U.S. made all efforts possible to convince Latin American countries to negotiate a pact for regional economic integration, Venezuela and Brazil strongly oppose free trade negotiations with the U.S. The U.S.’s combined trade and national security policies after the Iraq war, have made the Latin American countries mad and confused. The United States seems not care about the poor economic environment in Latin American countries, but. cares about market access and reducing tariff rates in Latin American and Caribbean countries. Because of protests from many developing countries, the FTAA was indefinitely delayed. However, at the same time, China established some economic partnerships with Latin American and Caribbean countries. China invested huge amounts of money to finance their economic development and infrastructure construction. The United States was very angry about this situation.

3. Democratic Value and Human Rights

⁵⁴ The new proposals for an East Asian Summit system were floated at the 2005 ASEAN Summit in Vientiane, Laos, with Malaysia offering to host the first summit in Kuala Lumpur in Nov. 2005, and then to host the permanent secretariat. For detail discussion about ASEAN, *see infra* Ch. 3.

The United States and China have always debated the issues of “Democratic Values” and “Human Rights.” Because of the Tiananmen Incident in 1989, the United States decided to establish three types of sanctions against China: economic, diplomatic, and arms embargoes. The United Nations, EU, and Japan followed suit, setting up economic and political sanctions against China. From that time forward, China was isolated from the international society. However, ten years later in 1999, the Clinton administration changed U.S. foreign policy towards China; he thought that it was more dangerous to isolate China from the international society. Washington brought China further into the World Trading System and hoped that economic development could spillover toward political innovation. Although the United States supported China’s accession into the WTO as well as passed the PNTR, U.S. presidents have complained about human rights issues with Chinese leaders at every summit talk. The U.S.’s major complaints fall into three categories: (1) Freedom of Religion; (2) Tibetan Autonomy; and (3) Democratic Values. Even during this decade, the United States and China have not reached a consensus in the area of human rights and democratic values.

4. Cross-Strait Relations

The Taiwan issue is the most sensitive problem between the U.S. and China. Beijing thought Washington should take the responsibility of the Taiwan issue because of the “Taiwan Relations Act” and the United States’ continued sale of weapons to Taipei. Beijing thought this was one of the more important reasons Taiwan was moving toward independence. In the past, the United States had always reminded Beijing “to not use

military force toward Taiwan.” However, after the “State-to-State” proposal provided by formal president Lee Teng-Hui, and the “One Country, One Side” proposal provided by President Chen Shui-Bian, the United States recognized that reminding Beijing was not enough. Washington began to remind Taiwan that “the United States did not support Taiwan independence” at the time.⁵⁵

According to the analysis above, the relationship between China and the United States shifted from “strategic competitor” to “strategic partner;” it was both a cooperative and competitive relationship not far from the four aspects described above. Further more, international politics, bilateral and regional trade and economic and democratic values and human rights” would not lead either country to immediately engage in war. , The “Cross-Strait Relations,” however, could cause clear and present danger” between the members of the triangle. According to these reasons, the United States’ attitude will deeply impact the development of peace negotiations between Taiwan and China. The best role for Washington is to remain uninvolved, not misjudge, and maintain the principles that former president Clinton provided: the “One China Principle,” peaceful solutions, and encouraging negotiation.

IV. NEGOTIATION BEGAVIOR OF EACH PARTY

According to the analysis in the above sections, and reviewing the history of Cross-Strait relations, Taiwan and Mainland China have maintained a hostile relationship

⁵⁵ Washington acknowledged that the Cross-Strait conflict is more difficult than the Iraq War or the Middle East. The United States cannot get involved too much, but cannot ignore it either. During these years, Washington was very careful to maintain itself as a balancing power, not mediator. Washington did not want to get involved in an unexpected war, especially with Beijing. *See* Bush, *supra* n. 13, at 122-124.

over the past half-century with the positive negotiations in 1992-1993 as an exception. There is a fundamental conflict based on political issues between the two parties. The United States has gotten involved as a third party in order to balance Cross-Strait relations. Although tension between the parties has existed all the time, Cross-Strait relations have taken shape around a constructive framework.

Historically, the framework of Cross-Strait Relations together with U.S. foreign policy, has included: (1) Beijing's "One China Principle" and "Three Communiques with the U.S."; (2) Taipei's "Autonomy, Peace, and Democracy" and the Taiwan Relations Act; (3) Washington's "One China Policy, Peaceful Resolution, and cross-Strait dialogue."⁵⁶ This constructive framework has continued over the past sixty years, and all of the negotiating behaviors of the two parties fit within its scope. To deeply analyze the negotiation behaviors of Taiwan and China, there are three "Core Concerns": (1) National Security; (2) Political System; (3) Trade and Economic Development. This section concludes the history of Cross-Strait relations since 1945, and further analyzes the negotiating behavior of the two parties.

A. Taiwan's Negotiation Behavior

After the R.O.C. government moved to Taiwan, there were four presidents, namely, Chiang Kai-shek, Chiang Ching-Kuo, Lee Teng-Hui, and Chen Shui-Bian. Their

⁵⁶ In the past sixty years, if either Taiwan or China wanted to unilaterally break this constructive framework, the unseen power would be pulled back. There are only two ways to reconstruct the framework – war and peace negotiation. Of course, the two parties would not want to fight a war, but they would not compromise in the negotiations either, even though they both know that peace negotiation is the only way to go. *See Su, supra* n. 1, at 125.

negotiating behaviors have differed from president to president. Chiang Kai-shek and Chiang Ching-Kuo policy approach on Mainland Affairs I was to maintain the hostilities of the Civil War era. In other words, the negotiation behavior took the shape of “There is No Policy” – “No contact,” “No Negotiation,” “No Compromise.” During their presidencies, there were no official diplomatic talks between the two parties besides the Chongqing Negotiation in 1945.

During Lee Teng-Hui’s administration, he changed the policy on Mainland Affairs, promoted the National Unification Guideline, and set up the first negotiation in 1992. Because the negotiators were fully authorized by the two governments, this was the only true negotiation between Taiwan and China in the past half-century. However, Lee Teng-Hui changed his policy right after the first year of the negotiation process. He indicated that Taiwan would adopt a “State-to-State” approach instead of the prior “92 consensus,” which was “One China with different description”. The whole process was canceled by Beijing in 1993.

Chen Shui-Bian won the presidential election in 2000, ending the KMT’s fifty-year reign over Taiwan. Because Chen Shui-Bian’s political party (DPP) embraced independence for Taiwan, his Mainland affairs policy mirrored, in some ways, the “There Is No Policy” of Chiang Kai-shek and Chiang Ching-Kuo. The major difference between them is the “One China Principle.” Chiang’s policy insisted that there was only one China in the world, and the ROC was the only legal government representing China,” but Chen Shui-Bian’s policy was that “China and Taiwan are one country, one side. Taiwan is not part of China.” The following is an analysis of Taiwan’s negotiation behaviors over

the past sixty years divided into three categories: National Security, Political System, and Trade and Economic Development.

1. National Security

(a) Military Security Issue

In the beginning, Chiang Kai-shek and Chiang Ching-Kuo rejected all negotiation with Mainland China and insisted on using military force to strike back. In the last years of Chiang Ching-Kuo's presidency, the R.O.C. withdrew the political restrictions on negotiation with the Mainland. In other words, Taipei gave up using military force to attack the Mainland. Beijing, however, did not treat Taiwan in the same way. It still insisted that it would not exclude the use of force as an option to resolve the Taiwan problem. Under threats from Beijing, during Lee Teng-Hui and Chen Shui-Bian's presidencies, Taiwan's negotiation strategy was to ask Beijing to reject the use of military force against Taiwan." Of course, Beijing rejected Taipei's request.

(b) Sovereignty Issue

Sovereignty is a very sensitive issue, especially in relation to national security, because Taiwan and China have divergent perspectives. Even among Taiwanese people, there are different views. The negotiation behaviors of Taiwan and China with regards to the issue of sovereignty can be divided into four statements. First, Chiang's approach was that the R.O.C. was sovereign and that the R.O.C. was the only legal government of

China. Second, Lee Teng-Hui recognized that the communist party controls Mainland China, and that the CCP is a political entity. Under this statement, both Taipei and Beijing accepted “One China with a different description from each party” (92 Consensus). Third, Lee Teng-Hui changed his policy towards Mainland Affairs and indicated that Taiwan and China would have a State-to-State relationship, or at least special State-to-State relations. Fourth, during Chen Shui-Bian’s presidency, his administration overruled the “92 Consensus” and then indicated that Taiwan and China were “One country, one side.”

(c) Diplomacy Issue

All the presidents of the R.O.C. indicated that the R.O.C. is an independent, sovereign country.” Towards this purpose, diplomatic negotiations are nothing but a zero-sum game. In other words, if one country established official diplomatic relations with the R.O.C., then that country could not have official relations with the P.R.C. Beijing always rejected R.O.C. national sovereignty and limited the R.O.C.’s participation in international organizations. For this reason, the R.O.C. can only use alternative titles to participate in a few international organizations that do not require members to be sovereign countries. For example, the R.O.C. uses “Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” as its title for World Trade Organization (WTO) membership and “Chinese Taipei” for the APEC. The more politically sensitive an international organization, and the more it requires sovereignty, the less likely that the can R.O.C. participate. As summarized above, Taiwan’s negotiation strategy has focused

on asking the PRC to give up military force in dealing with the Taiwanese conflict, recognize the fact of Cross-Strait separation, and recognize the national sovereignty of the R.O.C.”

2. Political System

In the early 1950s, Taiwan was under military rule and could not really be considered democratic. After removing the military from control, the government removed the bans on political parties and the media. At the same time, the government implemented direct elections of congress, county chiefs, and even the president. So the political system in Taiwan became as democratic as the United States and other developing countries. The major difference in political systems between Taiwan and China is that the R.O.C. is run by a democratic government while the P.R.C. is controlled by a communist government. The issue of protecting civil rights” could be a potential conflict area in the peace negotiation process. Lee Teng-Hui established the “Democracy Test” as a condition to negotiation with Beijing. Chen Shui-Bian continued this policy, indicating that Taiwan refused to negotiate unification until the PRC implemented a democratic political system.” It is a pity that Taiwan did not define the specific aspects of democracy.

3. Economic and Trade Development

Taiwan is surrounded by the sea, and major economic development stems from its import and export trade. During Chiang's era, although Taiwan's political system was not democratic, it had impressive economic achievements. Trade and economic development was Taiwan's strongest bargaining chip in negotiations with Mainland China; especially since China's economy was weak in the 1960s and 1970s. It is a pity that Taiwan was focused more on national security and political issues than expanding trade and economic development over the past sixty years, because it lost many chances for beneficial negotiations.

In Chiangs' era, the KMT stopped all trade and economic interaction with Mainland China. President Lee Teng-Hui's policy was not to hurry, and be patient," which meant that national security was more important than any other trade policies. The more Taiwan interacted with China, the more dangerous it would be for Taiwan's national security. President Chen Shui-Bian followed former president Lee Teng-Hui's policy of restricting Mainland China's policy and indicated that Taiwan would attempt positive dialogue and efficient management. However, during his 5-year rule, Taipei's administration did not implement any open trade policy toward China. Instead, Taipei set up lots of trade barriers as well as import/export restrictions on trade with Mainland China.

According to the analysis above, Taipei never used trade and economic development as a focal point of its negotiation strategy. This could have happened because Taiwanese leaders thought that the Chinese economy would crash in the future, and refusing to negotiate, as well as restricting their interaction, would improve the R.O.C.'s national security. Even after the United States established the PNTR status with Mainland China, Taiwan still applied realist thinking toward Mainland Affairs. Taiwan's

comparative economic strength is decreasing year by year, especially as globalization and the rapid process of regional economic integration in Asia improve the P.R.C.'s economic stance.

B. Mainland China's Negotiating Behavior

Since the establishment of the PRC, there have been four leaders, namely Mao Zedong, Deng Xiaoping, Jiang Zemin, and Hu Jintao. After the Chongqing Negotiation broke down in 1945, Mao Zedong started a military revolution against Chiang Kai-shek. This is known as the Chinese Civil War, and it directly caused the separation of Taiwan and Mainland China. Deng Xiaoping sought peaceful unification, and further provided for the "One Country, Two Systems" proposal as Mainland China's fundamental negotiation strategy.

The "One Country, Two Systems" proposal was based on the "One China Principle," which meant Taiwan and Mainland China were one country but that the political systems in each were different. The famous laboratory for experimenting with the "One Country, Two Systems" proposal was Hong Kong and its return to PRC control in 1997. Jiang Zemin followed in Deng Xiaoping's footsteps in using the "One Country, Two Systems" proposal as the negotiation framework toward Taiwan. However, his definition of the "One China Principle" was more flexible.

In 1993, Beijing accepted Taipei's proposal – "One China, different description from each party" (92 Consensus), and started the first negotiation with Taiwan. Although Taiwan subsequently refused to recognize the "92 Consensus," the negotiation

framework was still the same as in the past. Hu Jintao's negotiation strategies can be divided into two categories: "Soft became Softer" and "Strong became Stronger." The following is an analysis of Beijing's negotiation behavior over the past sixty years. It is divided into three subcategories: National Security, Political System, and Trade and Economic Development.

1. National Security

(a) Military Security Issues

Beijing has made it clear that it takes Taiwanese action towards independence seriously by threatening to use military force against Taiwan. This is the bottom line of Beijing's position, and it is non-negotiable. Before 2005, Taiwan did not take this position seriously, because Taiwanese leaders thought Mainland China would not use military force if it meant certain economic disaster for Beijing. However, in 2005, Beijing passed the Anti-Secession Law, in which Hu Jintao clearly stated the conditions upon which China would use military force against Taiwan, making this "Red-Line" very clear. Although the United States complained about Beijing's Anti-Secession Law, Washington did not ask Beijing to amend the law because Taiwan independence would lead to war and harm U.S. interests. This greatly changed the nature of Cross-Strait negotiations. In other words, Taiwanese independence was no longer an option, unless Taiwan was ready for war with China.

(b) Sovereignty Issues

Beijing's position toward the sovereignty of the PRC over Taiwan did not change once in sixty years. The PRC administration firmly believes that Taiwan is part of China's sovereignty and territory, and that Beijing would use military force to maintain China's sovereignty and territory without any exception. The four leaders of PRC did not deviate from this fundamental position, and it became Beijing's non-negotiable condition. The only change came in the definition of the "One China Principle." In the early era, Beijing insisted that China meant the People's Republic of China. But later on, its explanation became more flexible-PRC and Taiwan both belong to one China. This "One-China Principle" was and continues to be Beijing's prerequisite to negotiation. Beijing's minimum condition and basis for the sovereignty issue is the "92 Consensus."

(c) Diplomacy Issues

Beijing has yet to compromise a diplomatic negotiating position. Beijing did not allow the ROC (or Taiwan) to join any international organization requiring sovereignty as a membership requirement. Beijing also insisted on playing a zero-sum game in the diplomatic war with Taipei for about sixty years. Due to this negotiation behavior, countries were forced to select either the PRC or the R.O.C. as the government with which they would establish official governmental relationships. Although Beijing agreed to give Taipei some freedom to participate in international organizations, this liberty would not be extended very far.

Summarizing from above, Beijing's negotiation behaviors are based on (1) using military force to prevent Taiwanese independence, (2) upholding the One China Principle, (3) Promoting "One country, two systems," (4) Insisting that China's sovereignty and territory are complete, and (5) Refusing to allow the ROC to participate in international organizations. Although Chairman Hu Jintao changed policy, which is divided into strong and soft parts, toward Taiwan, the CCP's fundamental approach has not changed much.

2. Political System

Beijing insisted on keeping a communist political system, but it has never been used as a focal point in negotiations with Taiwan. Although the United States has always complained about Beijing's human rights record, PRC leaders have avoided these charges. In 2005, however, Hu Jintao stated that the PRC would implement a Chinese style political democracy. Unfortunately, no one, including Beijing, knows what a Chinese style political democracy is.

Beijing has always used the "One Country, Two Systems" proposal as its basic negotiation strategy. In other words, Beijing insisted on applying the "One China Principle" to the sovereignty issue. This meant that Taiwan could keep its democratic government, and Beijing would fully respect Taiwan's autonomy. The major purpose of this proposal was to prevent any party from broaching the question of implementing democratic reforms in Mainland China itself. Taking Hong Kong as an example, it is obvious that Beijing did not fully respect Hong Kong's autonomy, especially when it

rejected the direct election of Hong Kong's chairman. This is also an important reason why Taiwan cannot trust that Beijing's "One Country, Two Systems" proposal would fully respect Taiwan's autonomy.

3. *Economic and Trade Development*

China's trade and economic development have experienced impressive achievements during the last ten years. In the past, lower economic development meant that China had less bargaining power in negotiating trade and economic development issues than it does now. During Mao Zedong's era, the Chinese economy was seriously harmed by the ten-year Cultural Revolution. When Deng Xiaoping started the open economic policy, China's situation improved. At that time, China was still isolated from the world economic system, especially after most of the developed countries placed economic sanctions on China after the Tainanmen event. In the 1990s, China became the most newly developed economic market in the past ten years because of the stable economic policy in place during the Asian Financial Crisis, the PNTR with the U.S. f, and accession into the WTO.

In recent years, China has undergone a tremendous amount of economic development. This stems mainly from Beijing's decision to separate economic development from political innovation. By doing this, China has become an important player in the world trading system, as well as Asian economic integration, and has more negotiation power. Historically, China has not used trade and economic development to its advantage in negotiations with Taiwan. However, in recent years, as the Chinese

market becomes more and more attractive, many of Taiwanese industries have moved their factories to Mainland China. During his presidency, Hu Jintao provided for the Closer Economic Partnership Arrangement (CEPA) as well as “Economic Integration” as the proposal for future negotiations between Taiwan and Mainland China. Within China’s “Strong Power” approach, Beijing instated the “One China Principle” and “the Anti-Secession Law” to threaten the Taiwanese independence movement. However, under China’s “Soft power” approach, Beijing opened domestic markets to Taiwanese businessmen as well as Taiwan’s farmers. Accordingly, Beijing’s negotiation strategies involving trade and economic development toward Taiwan are becoming more important.

V. CONCLUSION

To summarize the complexity of the Cross-Strait political conflict over the past half century as discussed in this chapter, the following Table 2 is helpful. There are fifteen important events from 1945 to 2006 that influenced the relationship between Taiwan and Mainland China. Some of them were positive for the peace process, but the majority of them led the Cross-Strait relation in a negative direction. Besides the interaction between these two parties, U.S. foreign policy has also played a critical role in the Taiwan Strait. These fifteen important events are summarized as follows:

1. The “Chong Qing Meeting” in 1945 (*point 1 in Table 2*). This meeting was held by Chiang Kai-shek, Chairman of the Kuomintang (KMT) and Mao Zedong, Chairman of the Chinese Communist Party (CCP). Chiang and Mao couldn’t reach a mutual agreement on two issues: military control and democratic political systems.

Negotiation between the two parties broke down and they began fighting against each other in the Chinese Civil War.

2. From 1945 to 1949, the KMT lost most of the important battles in Mainland China and moved the central government to Taiwan. The Chinese Civil War split the two political parties and separated Taiwan from Mainland China, leaving each to control its respective territory. Chiang Kai-shek led the Republic of China's government as well as the KMT in Taiwan and planned to attack Mainland China. At the same time, Mao Zedong led the CCP in Beijing and established the People's Republic of China in Mainland. The two leaders (Chiang and Mao) all agreed with a "One China Policy." This "One China" was excluded the other side's China because each party believed that their own government was the legally governing authority. As such, both parties treated each other as the enemy. *Point 2 in Table 2* indicates the different positions of the two parties: in Chiang's (KMT) view, the one China was the Republic of China with its central government in Taipei; however, in Mao's (CCP) view, the one China was the People's Republic of China with its central government in Beijing. The U.S., along with most of the countries in the world, recognized the PRC's version as the "One China Policy" after the ROC rejected U.N. membership in 1971.

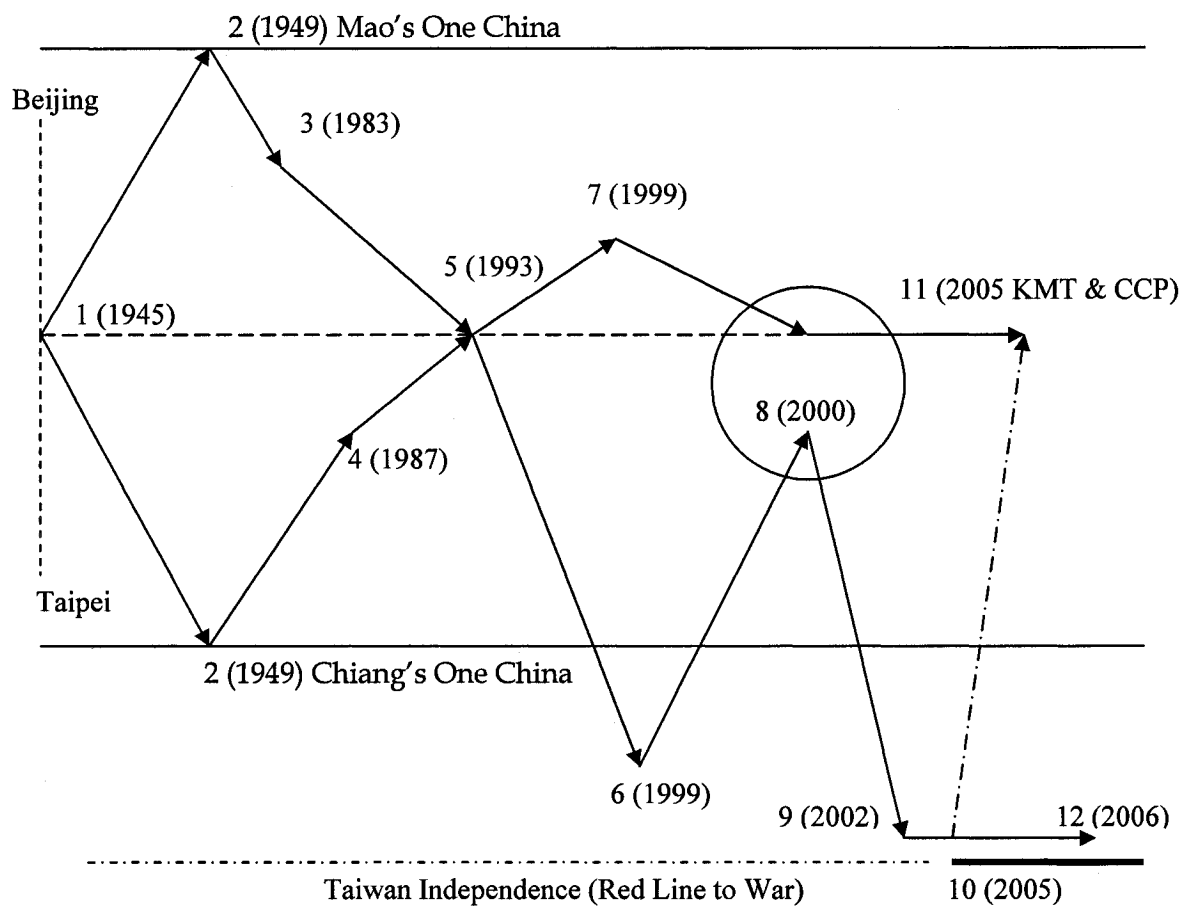


Table 2 Dynamic Political Conflicts of Cross-Strait Relationship

3. In 1983, Deng Xiaoping, Chairman of CCP after Mao Zedong, proffered a new proposal named “One China, Two Systems” (*point 3 in Table 2*). The main point of this policy was to treat Taiwan as a local government like Hong Kong after 1997. Based on the history of hostility between the two sides, Chiang Ching-Kuo, president of the ROC after his father Chiang Kai-shek, rejected this policy, by offering the “Three NOs” -no negotiation, no contact, and no compromise. Although Beijing pushed for negotiation, Taiwan’s status remained unsolved at this time.
4. Chiang Ching-Kuo changed his policy toward Mainland China in 1987 before the end of his presidency. Chiang’s open policy towards China was a very few “positive” approach at that time (*point 4 in Table 2*). In addition to the open policy, he removed all political restrictions in Taiwan and allowed the opposing political party to run in democratic elections for positions in central or local legislative institutions. After 1987, the ROC became a truly democratic government, and Taipei declared that it would give up the use of military force to attack Mainland China. Instead it would seek unification through peaceful negotiations. Based on these policies, Taipei passed the National Unification Guidelines and established the National Unification Council, which was in charge of mainland affairs.
5. Following Taipei’s institution of an open policy, Beijing agreed to return to the negotiation table. Taipei and Beijing used institutions specifically authorized by their respective governments to initiate negotiations in 1992. One year later, the famous and first cross-Strait peace negotiation since 1945 called the Ku-Wang Meeting, took place in Singapore (*point 5 in Table 2*). In this meeting, the two parties agreed to

disagree about the definition of One China. Taipei's version of the One China policy defined China as the Republic of China, while Beijing's version indicated that China meant the People's Republic of China. Although both parties had different descriptions of "One China," there was an implied consensus that both parties would respect each others' concerns. It is a pity that there were no legal documents signed at that time to officially record this mutual consensus because the DPP took issue with the "92 Consensus when it became the ruling party.

6. One year after the Ku-Wang Meeting, Lee Teng-Hui, president of the R.O.C. after Chiang Ching-Kuo, visited the U.S. and gave a speech at Cornell University. This was the first time that the R.O.C. president had set foot in the U.S. Beijing was angry about this and cut off all ongoing negotiations. In 1999, the relationship between Taiwan and Mainland China took a turn for the worse when President Lee adopted the State-to-State theory (*point 6 in Table 2*). He stated that Taiwan and Mainland China should approach diplomatic negotiations as equal States- Relations, or at least acknowledge the special relations of the two different States. This dramatically increased the tension in the Taiwan Strait.
7. In the same year after the Taiwan Strait crisis, Jiang Zeming, chairman of the CCP after Deng Xiaoping, outlined what are referred to as "Jiang's Eight Points" (*point 7 in Table 2*). These eight points followed the "One China, Two Systems" policy, and did not give up the option of using military force against Taiwan in the case of any moves toward independence. Of course, Jiang's Eight Points were rejected by Taipei.
8. 2000 was a very special year. The Taiwanese opposition party, the DPP, won its first presidential election and became the ruling party. DPP's main policy goal was

Taiwanese independence. This forced Beijing and Washington to worry about the possibility of the situation in the Taiwan Strait becoming tenser. However, President Chen Shui-Bian instituted the “Five Nos” policy toward Mainland China (*point 8 in Table 2*), and created positive momentum in negotiations with Beijing.

9. From 2000 – 2002 was the best time for Taiwan and Mainland China to return to the negotiation table. Not only because of the Taipei’s “Five Nos” policy, but also because Mainland China and Taiwan joined the WTO in 2001 and 2002, respectively. This was the first and only times that Taipei and Beijing participated together in an important international organization (*Circle in Table 2*). If Taiwan and Mainland China had negotiated economic integration under the GATT/WTO regime that year, history would have changed in a different direction.
10. However, in 2002 President Chen Shui-Bian changed Taipei’s position to include “One Country, One Side” as a description of the Cross-Strait relationship. Washington and Beijing were very angry about this unilateral policy change intended to change the status quo (*point 9 in Table 2*). This was a dangerous time close to war.
11. To avoid letting the situation run out-of-control, Beijing’s new leader, Hu Jintao, chairman of the CPP after Jiang Zemin, used two approaches: “Stronger in Strong side” and “Softer in Soft side.” On the strong side, the CPP passed the “Anti-Secession Law” in 2005 (*point 10 in Table 2*), which was the first time Beijing set up the conditions upon which Beijing would use military force against Taiwan in a legal document.
12. On the soft side, Hu Jintao met Lein Chan, chairman of the KMT, at the first “Lein-Hu Meeting” in 2005, discussing economic issues and the “92 consensus” with

regards to the peace negotiation process (*point 11 in Table 2*). This was the first time that the chairmen of the KMT and the DPP sat at the negotiation table since the 1945 Chiang-Mo Chongqing Meeting. The second “Lein-Hu Meeting,” held in 2006 again in Beijing, covered many economic issues. Taiwan’s ruling party, the DPP, however, still refused to recognize the 92 consensus and rejected a request to return to the negotiation table.

13. In 2006, Chen Shui-Bian refused to recognize one of his “Five Nos.” He declared that the National Unification Council would cease to function, and that the National Unification Guideline would cease to apply (*point 12 in Table 2*). This statement made Beijing and Washington worry again.
14. U.S. foreign policy toward Taiwan. The U.S. policy toward Taiwan is based on the U.S.-Taiwan Act. It provided that the U.S. government would help defend Taiwan and maintain peace in the Taiwan Strait.
15. U.S. policy toward Mainland China was based on the “One China” principle, the “Three declarations,” and encouraging open dialogue. These three pillars created a framework that has maintained the status quo of the Taiwan Strait for the past sixty years.

This Chapter discussed the long history of political conflict between Taiwan and Mainland China. Based on the analysis above, the negotiation strategies of the two parties have focused most of the time on the political and sovereignty issues. This is because the leaders believed and acted according to realist theory. Although the WTO provided the best platform for the two parties to negotiate economic integration while avoiding political conflicts, the two parties preferred the “Realist” approach, focusing on national

sovereignty as well as political and diplomatic power in international relations (the discussion in Chapter 1).

Because the leaders (and governments) of Taipei and Beijing had negative expectations of future trade, the two parties were unwilling to return to the negotiation table over the past half century. The situation, however, may change after the “Lien-Hu Meetings” in 2005 and 2006. The peace process could be initiated if the DPP and the CCP adopted positive attitudes toward each other. Based on the analysis above, economic integration would be the first step to reaching the peace process, and the GATT/WTO regime already provides guidelines for negotiating “Free Trade Agreements” (FTA) between two parties. In fact, the trade interdependence of the Taiwan Strait has increased in recent years. The only way to maintain the peace process is to create positive expectations of future trade between the governments. Otherwise, higher trade and economic interdependence will increase the likelihood of war by increasing negative expectations.

However, the next Chapter will discuss this issue more deeply and answer the following questions: why did regionalism become so important in the recent world order? And how does regionalism impact the Taiwan Strait? How should regional trade agreements be negotiated under the GATT/WTO system? And why are all these factors so important for Cross-Strait relations? The next Chapter will provide critical reasons for Cross-Strait economic integration under the GATT/WTO regime by comparing case studies of European Integration, negotiation of the America Free Trade Area, and negotiation of the ASEAN plus Three in East Asia.

CHAPTER THREE

**REGIONAL ECONOMIC INTEGRATION UNDER THE WORLD TRADING
SYSTEM AND THE LINKING BETWEEN TAIWAN AND MAINLAND CHINA**

I. INTRODUCTION

In Chapter I, this dissertation discussed the interdisciplinary research on international law, international economic, and international relations history together with the theory of trade expectation. Following by these theoretical foundations, Chapter II examined the complicated political conflict between Taiwan and Mainland China in the past half century. The important conclusion for the prior chapters is that “Cross-Strait economic integration is possible the first step for the peace negotiation process, and the GATT/WTO provided a unique opportunity for each party to negotiate, which ignored the barriers from political conflicts, such as national sovereignty.” This chapter extended the assumptions in the above chapters, and begins with the following questions: (1) what is the development of “Multilateralism” and “Regionalism” in 20th century? And how they influence each other? (2) what is the legal framework under the GATT/WTO regime regarding the members negotiating regional economic integration? (3) what are the current regional economic integration in important markets of the world, such like Europe, America, and East Asia”? (3) how are these entire legal framework as well as the successful cases relating to the Cross-Strait relationship?

The contemporary development of the international economic relations from four to five decades based on groups of institutions and multilateral agreements which was the family of “Bretton Woods System.” Back to the early days after World War II, global leaders have strong motivation to rebuild the international economic relations as well as an expressed mission to establish basic framework for the economic development. The objectives of this policy goal is not only promoting corporation among the nations in order to improve human life, but also preventing or inhibiting the damaging economic crisis that led the Second World War in the early 20th century.

In 1944, the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, produced charters for the World Bank (International Bank for Reconstruction and Development or IBRD) and the International Monetary Fund (IMF). It also proposed the establishment of the International Trade Organization (ITO) for which negotiations were held separately, and later reached an unexpected outcome in the form of General Agreement of Tariffs and Trade (GATT). These three pillars are sometimes called the “Bretton Woods institutions,” which governed the world economic relations in the past century. Multilateral negotiation is playing its important role cross-the Millennium age.

Not like the successful running of World Bank and IMF, the ITO has never been established. The proposal of establishing ITO originally came from the idea of Bretton Wood conference, and they were trying to cover a wide range of economic issues, such like investment, commodity agreements, restrictive business transactions, international trade rules, and trade issues related to economic development. All these topics were

subject to intensive negotiations at Havana in 1947 and 1948.¹ However, since United States is the strongest economy in the post-war world, and since the initiative draft of establishing ITO came from the United States, all other countries waited to see if the United States would accept ITO. Unfortunately, the U.S. congress had shifted to a stance less liberal on trade matters and less internationally oriented tight after the World War II, the ITO chapter was dead.²

Although ITO dead, multilateral negotiation has never been stopped. Few years later, the WTO established on 1 January 1995, one of the youngest of the international organizations, and which is the successor to the General Agreement on Tariffs and Trade (GATT) established in the wake of the Second World War. The system was developed through a series of trade negotiations, or rounds, held under GATT. The first rounds dealt mainly with tariff reductions but later negotiations included other areas such as anti-dumping and non-tariff measures. The last round, the 1986-94 Uruguay Round, led to the WTO's creation.³ At the same time, regional trade blocs developed even more than multilateral negotiation, especially by the well-known European Union (EU), North America Free Trade Area (NAFTA), and Association of South Eastern Asia Nations (ASEAN). Thus, there is now increasing attention given to the question of "whether the world is better served with an over all multilateral system, or by various trading blocs."⁴

¹ Walter Goode, *Dictionary of Trade Policy Terms* 201-202 (4th ed., Cambridge U. Press 2003).

² John H. Jackson, William J. Davey & Alan O. Sykes, Jr., *Legal Problems of International Economic Relations: Cases, Materials, and Text* 213 (4th ed., West 2002).

³ See WTO Secretariat, *WTO in Brief - The Multilateral Trading System: Past, Present and Future*, available at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited July 29, 2006)

⁴ John H. Jackson, *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* 99 (Cambridge U. Press 2000).

This chapter will explore this complex debate and provide legal analysis both in theory and practicing international economic law.

Part II of this Chapter reviews “The Regional Economic Integration in the World Trading System.” The first section is “Two Powers Control the International Economic Relations.” It divided into four sub-sections: (1) Definition - What is the Multilateralism? What is the Regionalism? (2) Development of Regionalism; (3) Benefits and Critiques of Regionalism; and (4) Regionalism, Multilateralism, or Both? The section examines the GATT Article XXIV by its legal practice. It divided into two sub-sections: (1) Most-Favour-Nation (MFN) Principle and GATT Article XXIV, and (2) GATT Article XXIV – Theory and Practice, including “Type of Formation,” “Substantial All” Criteria, “Not on the Whole Higher Than” Requirement, and “Procedures: Plan, Schedule, and Notification.” Finally, the last section provides “Future Improvement for Regional Negotiation under Multilateral Trading System.”

Part III of this Chapter compares “Current Development of Regional Economic Integration around the World.” The first section is the general discussion of “Current Development of Economic Integration in the New World Order.” Then, this part provides three different regional economic integration experiences as the case study: (1) First case is Europe – European Union (EU), (2) Second case is America – Free Trade Area of America (FTAA), and (3) Third case is East Asia – ASEAN plus Three and East Asia Summit. The analytical methods of these three cases divided into three different viewpoints:

- (1) “Regional Background Analysis” by reviewing “History and Development” and “Political Economy”;

(2) “Negotiation Strategies Analysis” by reviewing “Key Negotiation Interests” and “Negotiation Barriers”;

(3) “Institutional Framework analysis” by reviewing “Strengthen and Opportunity” and “Weakness and Threaten”

Part IV of this Chapter looks back to the issue of “Possible Economic Integration between Taiwan and Mainland China in World Order.” The first section is “Multilateral Negotiation.” This section includes “Mainland China’s Accession into the WTO” and “Taiwan’s Accession into the WTO.” The second section is “Regional Negotiation.” This section includes “Mainland China’s Impact toward Asia Economic Integration” and “Taiwan’s Role of in East Asia Economic Integration.”

Part V of this Chapter is the conclusion by addressing the issue of “Bilateral Negotiation between Taiwan and Mainland China” as the Win-Win Strategy.

II. REGIONAL ECONOMIC INTEGRATION IN THE WORLD TRADING SYSTEM

To review the history of international economic development in the past decades, there are two strong powers pushing the world going forward. These two powers, like two different sides of the spectrum, deeply affect each other as well as the modern history. Indeed, they change the world image in politics, economy, society, culture, and of course, law. This section will experience the journey as the “Free Trade Adventure.”⁵

⁵ Graham Dunkey, *Free Trade Adventure: The Uruguay Round and Globalism – A Critique* (Melbourne U. Press, 1997).

The first power is the trend of “Multilateralism.” The starting point for better understanding of this power is looking through the primary goals for General Agreement on Tariff and Trade (GATT). The Preamble to the Agreement addressed that “raising of income, ensuring full employment, developing full use of resources and increasing the production and exchange of goods.”⁶ In order to establish better trade liberalization and create non-discrimination international business environment for the whole world, the 23 countries signed the GATT in 1947 to ensure that the provisions set in the agreement would be agreed by the contracting parties and treated as the basic framework of the new world trading system.⁷ Following up the spirit of GATT, the world leaders aware the rapid changes of the international economics, and the necessary to improve the quantity of multilateral negotiations. Based on these reasons, after ten-year negotiation process in the Uruguay round, the World Trade Organization (WTO) was established in 1995.

The opposite side of the spectrum is the “second power” known as “Regionalism.” This power is sometimes called “Regional Trade Bloc”⁸ in international

⁶ See Preamble of General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [Hereinafter GATT], available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited July 29, 2006).

... Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods... Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce ...

⁷ Gray Sampson, *Regional Trading Arrangements and the Multilateral Trading System in Regional Trade Blocs, Multilateralism, and the GATT: Complementary Paths to Free Trade?* 13, 13-14 (Till Geiger & Dennis Kennedy eds., Pinter Press 1996).

⁸ A “trade bloc” is a large free trade area or free trade area formed by one or more tax, tariff and trade agreements. Typically trade pacts that define such a bloc specify formal adjudication bodies, e.g. NAFTA trade panels. This may include even a more democratic and participative system, as the EU and its parliament. Particularly since the demise of most of the world's empires, a number of international—

economic relations. The nature of the Regionalism is against “Open Trade Policy” as well as the “Non-discrimination” principle, because regional economic integration gives their bloc members preferential trade conditions than non-member countries.⁹ Not only the well-known regional bloc established in European Union (EU), but also the Americas and the West Hemisphere negotiated integration as Free Trade Agreement of America (FTAA); China and Association of South Eastern Asia Nations (ASEAN) together with Japan and South Korea negotiated the “ASEAN plus three,” the future Asia economic framework. The more regional trade agreements agenda put into the negotiation table, the stronger this power will growth.

This section focus on the interaction of these two powers, analyze how the legal framework of the GATT/WTO regime responds to the “Regionalism,” and the future improvement of the world trading system.

A. Two Powers Control the International Economic Relations

1. Definition

Definition of “Multilateralism” and “Regionalism” is the fundamental element to understand the complex relationship between these two terms.

generally regionally based—economic blocs have been developed to promote trade between member states. Several blocs also have stated or implicit political goals—notably the EU. Varieties of economic blocs include free trade areas, customs unions, single markets, and economic and monetary unions. One of the first economic blocs was the German Customs Union (*Zollverein*) initiated in 1834, formed on the basis of the German Confederation and subsequently German Empire from 1871. A trade bloc is established through a trade pact (or pacts) covering different issues of the economic integration. See Nejdett Delener, *Strategic Planning and Multinational Trading Blocs* 22 (Quorum Bk. 1999).

⁹ Sampson, *supra* n. 7, at 13-30.

“Multilateralism” is “an approach to the conduct of international trade based on cooperation, equal rights and obligations, non-discrimination and the participation as equals of many countries regardless of their size or share of international trade. This is the basic of the rules and principles embodied in treaties such as the Marrakesh Agreement Establishing the World Trade Organization and its components.”¹⁰

“Regionalism” is defined in the dictionary of Trade Policy Terms as “actions by governments to liberalize or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions.”¹¹ Regionalism is not necessary geographically proximate, instead, it can be appeared also based on preferential economic arrangements which may or may not involve geographical proximate. Bilateral trade agreement as well as “Unilateral,”¹² and “Plurilateral”¹³ trade arrangements are different kinds of regional economic integration in a border definition in terms of “Regionalism.”

¹⁰ Goode, *supra* n. 1, at 237.

¹¹ *Id.* at 293. The book further explains the term “Regionalism” as following:

Many people see regionalism as complementary to multilateralism because it appears to offer a quicker way to achieve results for the participating economics than the full multilateral process. This is not necessarily the case. Often, the perceived faster pace of regional liberalization, where this actually occurs, is due only to the fact that multilateral outcomes may take a long time to negotiate. Moreover, the apparently faster pace of regional negotiations is often balanced by extended phase-in arrangements or *cave-outs* for sensitive products. The time difference in reaching the end-points may therefore be less than seems to be the case.

¹² “Unilateralism” is any doctrine or agenda that supports one-sided action. Such action may be in disregard for other parties, or as an expression of a commitment toward a direction which other parties may find agreeable. Unilateralism is a neologism; coined to be an antonym for multilateralism —the doctrine which asserts the benefits of participation from as many parties as possible. The two terms together can refer to differences in foreign policy approached to international problems. When agreement by multiple parties is absolutely required—for example in the context of international trade policies—bilateral agreements (involving two participants at a time) are usually preferred by proponents of unilateralism. See Bernard M. Hoekman & Michel M. Kostecky, *The Political Economy of the World Trading System: The WTO and Beyond* 75 (2d ed., Oxford U. Press 2001).

¹³ *Id.* at 83. “WTO Plurilateral Agreements” contrast with “Multilateral Agreements” in that plurilateral agreements are signed only by member countries that choose to do so, while all members are party to multilateral agreements.

Most of the countries in the world jointed the WTO as participating in the critical multilateral trading system, and at the same time, they also enjoy the negotiation of regional economic integration for the better conditions with other trading partner.

2. Development of Regionalism

The late 1950s and early 1960s were characterized by the formation of various regional arrangements, which sparked much theoretical work on their causes and effects.¹⁴ Unfortunately, most of these regional arrangements failed because of not matching the original purpose. These results contributed to the multilateral trade negotiation process of the post-World War II period. However, when the pace of the multilateral negotiation slowed down, the development of regional trade talks returns back.

Although the regional integration process in Europe provided the excellent model of economic development in the past decades, numerous of regional arrangements around the world are concerned in Asia, Africa, America, which are outside Europe. The “Old Regionalism” (first wave or early regional economic integration in 1950s and 1960s), besides Europe, was negotiated among developing countries. Most of these regional arrangements reveal of failure because the highly protectionist and inward-looking bias of the trade condition. In other words, although they did success in implementing their agenda, which generating the significant benefits in terms of intra-bloc trade expansion,

¹⁴ Edward D. Mansfield & Helen V. Milner, *The Political Economy of Regionalism: An Overview* in *The Political Economy of Regionalism: New Direction in World Politics* 1, 2-3 (John G. Ruggie ed., Colum. U. Press 1997).

regional specialization and faster growth, however, their gains from actual or potential trade creation were often small and outweighed by trade diversion.¹⁵ Because of this nightmare in the initiative, most of the developing countries move back to the multilateral trading system, and enjoy the several negotiation rounds under the GATT regime, of late, establishing the WTO in 1994 by Uruguay round. The “New Regionalism” (second wave of regional economic integration) tends to go far beyond traditional tariff-reducing deals, especially negotiate more and more new issues, such as investment, competition, intellectual property, environment and labor provisions.¹⁶ Developing countries continuingly play in an important role in this new development,¹⁷ and most of them success in this time. The main reason to describe this successful change is that those countries’ political commitment to an economic restructuring process linked to a broader scheme of regional integration.¹⁸

International scholars and world leaders always concern the impact of regionalism on the rate of multilateral negotiation. The main question is “Does the formation of regional agreements have the positive or negative effects on multilateral trading system?”

¹⁵ This is because in the old regionalism, the countries focused on the trade and economic cooperation or new financial projects rather than discussed the better conditions for mutual trade, so the trade diversion was low. See Peter Robson, *The Economics of International Integration* 274 (4th ed., Routledge 1998).

¹⁶ See Boonekamp Clemens, *Regional Trade Integration under Transformation* (Programme and Presentations for the Seminar on Regionalism and the WTO, Apr. 26, 2002), available at http://www.wto.org/english/tratop_e/region_e/sem_april02_e/clemens_boonekamp.doc (last visited July 29, 2006).

¹⁷ *Id.* Of the 243 RTAs estimated to be currently in force, between 30-40 per cent are arrangements concluded between developing countries. These various in form, ranging from customs unions, free-trade areas, partial scope arrangements in which parties recurrent among developing countries than developed ones.

¹⁸ *Id.* The best example is the case of Latin American countries under the negotiation of FTAA. FTAA is not just merely economic perspective. The U.S. and other Latin American countries concern more about the national security issues as well as the democratic domestic political system.

This is the “Building Block”¹⁹ or “Stumbling Block”²⁰ debate. The growth of regional economic integration may affect the rate of multilateral liberalization in many ways. It’s clear that regional economic integration is not always benefit to the multilateral trading system. However, it is not always positive for regionalism itself. Deeper economic integration could be better or worse than the domestic or multilateral conditions they replace or discipline. In other words, “Deeper” does not equal to “Better” or “More Efficient”²¹ in many circumstances.

3. Benefits and Critiques of Regionalism

The positive views of regionalism are at least considering the following main reasons. First, Regional talk is easier to negotiate the parties’ core concerns than multilateral round. The reason is because it’s sometimes difficult to evaluate net gains in a negotiation table of more than hundreds of countries with very different strategies to reach the deals. However, regional agreements somehow provide many advantages in this respect.²²

¹⁹ Goode, *supra* n. 1, at 51. “Building-block” approach means the element ultimately making up a free-trade agreement. Some easy elements, such as trade facilitation activities, might be tackled first as confidence-building measures. The more difficult economic provisions would come later. Second, free-trade areas are seen by some as the building blocks of the multilateral trading system. Individual areas could ultimately be combined to bring down trade barriers between ever larger areas.

²⁰ *Id.* at 330. “Stumbling blocks” is a term ascribed to Mr. Jagdish Bhagwati. It is used to describe free-trade areas that impede the development of multilateral trade liberalization.

²¹ Robert Z. Lawrence, *Regionalism, Multilateralism, and Deeper Integration* 33 (Brookings Instn. 1996).

²² See Antoni Estevadeordal, *Traditional Market Access Issues in RTAs: An Unfinished Agenda in The Americas’ Background Paper for the Seminar: Regionalism and the WTO*, (Programme and Presentations for the Seminar on Regionalism and the WTO, Apr. 26, 2002), available at http://www.wto.org/english/tratop_e/region_e/sem_april02_e/estevadeordal.pdf (last visited July 29, 2006).

Second, regional talk is easier to negotiate the complex policy issues than multilateral round. It's general feeling that the complex or sensitive issues, such like agriculture, competition policy, labor standard etc., can better be deal with a limit circle of "friends."²³

Third, regional blocs help to build, strengthen, and improve the multilateral trading system. Today, regional arrangements have so far coexisted with the world multilateral system on a reasonably satisfactory basis and are generally considered to be mutually positive.²⁴ Finally, regionalism may improve welfare of the member states,²⁵ especially for the developing countries.²⁶ Developing countries usually have less negotiation power among the multilateral table, thus regional negotiation is breaking down issues and is a new-approach laboratory for them to gain better economic conditions, which can be applied multilaterally.²⁷

The negative views of regionalism are referring to the following main concerns: First, the nature of regionalism is discriminatory. Regional economic integration betrayed the global-approved MFN principle, and there is no clear evidence shows that the effects on regional trade liberalization together with economic growth are usually positive, instead, the circumstance now is ambiguous.²⁸

²³ See Clemens, *supra* n. 16.

²⁴ Robson, *supra* n. 15, at 269.

²⁵ Mansfield & Milner, *supra* n. 14, at 4 -5.

²⁶ WTO Secretariat, *Doha Ministerial Brief Notes: Regional Trade Agreements, Regionalism and the Multilateral Trading System*, at http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief20_e.htm (last visited July 29, 2006).

²⁷ Vincent Cable & David Henderson eds., *Trade Blocs? The Future of Regional Integration* 12 (Royal Inst. of Intl. Affairs 1994).

²⁸ WTO Secretariat: Trade Policy Review Division: Regional Trade Agreements Section, *Scope of RTAs*, available at http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (last visited July 29, 2006).

Second, the dangers of inconsistencies with the multilateral regime have more risk on regionalism. No doubt, regional negotiation will explore many policy areas not regulated by multilateral trading system. This is likely to give all WTO members of regulatory confusion, distortion of implementation, and raise many uncertain problems that may not be solved neither by multilateral negotiation nor WTO dispute resolution mechanism.

Third, the dominant country would control the regional trade negotiation, and less powerful countries would lose their autonomy and sacrifice their interests.

Finally, regional talk is possible to reduce the motivation and commitment to multilateral negotiation.²⁹ The global leaders will not make effort to solve and negotiate their problem in the multilateral system, because they think the issues maybe better resolve in the regional level.

4. Regionalism, Multilateralism, or Both?

Although the debates between the two powers are still mess in the conclusion, they are keeping in different directions. On one hand, Doha declaration improved negotiation process of complex issues, and all members seem to seek intra renovating the WTO rather than seeking extra revolution. On the other hand, countries never reduce their desire to continue regional negotiation. The impacts of regionalism towards multilateralism could be either in positive or negative side, the more regional negotiation a country participate in, the greater the potential for complexity and conflict of intra and

²⁹ Cable & Henderson, *supra* n. 27, at 12-13.

extra trade policy.³⁰ To evaluate which power is better for the global trade is not the primary propose in this dissertation, however, the main objective focus on the question: To what extent that Regionalism is current corporate with or impact of Multilateralism and how the Multilateral trading system would response?

After Uruguay round establishing the WTO in 1994, regional economic integration continued to grow year by year. Table 3 shows that after establishing the WTO, regional trade agreements (RTAs) are speedy increasing in the multilateral trading system. Compare with last three and four decades, 125 new RTAs have been notified, with an average of 15 notifications per year to the WTO.³¹ The current development of this “New Regionalism” is led by three dominant regional super powers – U.S.A., EU, and Mainland China. After the Ministerial Conference in Cancun, their trade policy priority is now turning to the completion of regional economic integrations. Countries in Americas, Europe, as well as Asia are no doubt seeking RTAs with these super-hubs may now also adjust their directions.³²

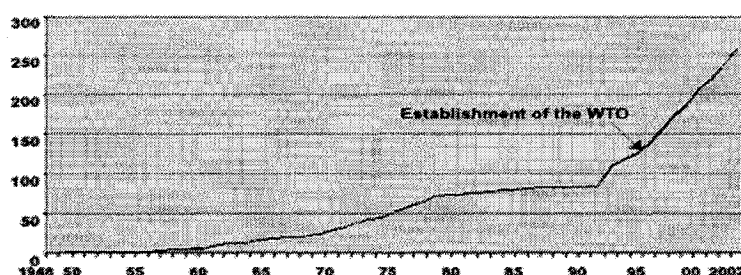


Table 3 Evolution of Regional Trade Agreements in the world,
1948 – 2002, Number of RTAs (Source: WTO Secretariat)

³⁰ Clemens, *supra* n. 16, at 11.

³¹ *Id.* at 3-4.

³² Peter J. Lloyed, & Donald MacLaren, *The Case for Free Trade and the Role of RTAs* (Seminar on Regional Trade Agreements and the WTO, Nov. 14, 2003), available at http://www.wto.org/English/tratop_e/region_e/sem_nov03_e/macLaren_paper_e.pdf (last visited July 29, 2006).

The multilateral trading system, now the WTO, allowed its member countries to negotiate the customs unions and free trade areas under GATT Article XXIV. This is the exception of the fundamental principle of non-discrimination set in GATT Article I as MFN clause.³³ The impacts of regionalism towards multilateralism could be either in positive or in negative side (discussed above in this chapter section II. A. 3.), the more regional negotiation a country participate in, the greater the potential for complexity and conflict of intra and extra trade policy.³⁴ Thus, the world leaders are always asking a paradoxical question: Where should my country go? Multilateralism? Regionalism? Or both?³⁵

B. Legal Analysis of GATT XXIV

Although the “Multilateralism and Regionalism” debate is still continuing effect the international economic order (discussed in the above section), the two powers together pull the global economy toward different ends, and the only connection between

³³ WTO Secretariat, *supra* n. 26.

³⁴ Clemens, *supra* n. 16, at 11. In this article, the author indicated:

The more RTAs a country participates in, the greater the potential for crises-crossing tariff concessions and rules of origin. In addition, the greater its participation in plurilateral RTAs (which have three or more members), or in RTAs in which one party is an RTA itself, the greater the potential for complexity, especially where each country maintains a distinct preferential regime with each partner. Harmonization in the granting of tariff concessions and in rules of origin can reduce significantly the administrative burden associated with membership in multiple RTAs covering trade in goods. This scenario becomes even more complex if a country is involved in multiple RTAs covering trade in services, given that the harmonization of regulations across a number of preferential agreements presents an even greater administrative challenge.

³⁵ Cable & Henderson, *supra* n. 27. In this book, the editor provided four evaluation criteria of the impacts of regionalism toward the world trading system, (1) Is intra-regional trade (or investment) is growing faster than trade in general? (2) Is regional integration schemes have successfully forested a redirection of trade flows on a regional basis? (3) Is welfare (or growth) stimulating effects of regional integration? (4) Is there any impact of regional integration on third parties?

them is GATT Article XXIV.³⁶ This bridge was born for the exception of Most-Favored-Nation (MFN) principle, which not only allowed regionalism coexist with multilateralism, but also provided fundamental guideline to every negotiating party regardless in multilateral or regional level. In practice, GATT XXIV gives three possible avenues for regional economic integration: customs unions, free-trade area, or an interim agreement. This section first addressed the original rule of MFN, how Article XXIV related to this important non-discrimination doctrine? Then this section explores the mechanism of GATT/WTO regime to consistent MFN and Article XXIV. Second, the legal analysis of Article XXIV will be examined in both theory and practice. In theory, it may focus on the legal terms and meanings. In practice, it may use the WTO appellate body report on “Turkey – Restrictions on Imports of Textile and Clothing Products”³⁷ as the case study in order to understand how WTO panel and Appellate Body interpreted GATT Article XXIV. Third, it will conclude and set up the guideline for country members, who seek their regional trade negotiation partners, to follow the criteria and requirements from multilateral trading system, which is GATT Article XXIV. Finally in this section, it will point out the critique and failure of this “Bridge,” and possible amendment in the future.

1. Most-Favor-Nation (MFN) and GATT Article XXIV

³⁶ See GATT art. XXIV.

³⁷ WTO Appellate Body Report: *Turkey-Restrictions on Imports of Textile and Clothing Products*, AB-1999-5, WT/DS34/AB/R (Oct. 22, 1999) (adopted Nov. 19, 1999)[Hereinafter *Turkey Restrictions on Imports Case*].

The relationship between regional economic integration and multilateral trading system is complex as discussed above. The strategy for connecting these two different politics based on the Most-Favored-Nation (MFN) clause, which is the basic principle set in GATT Article I.³⁸ MFN is sometimes considered as the “Central Policy” of GATT legal regime, because its main goal is assume that “if every country observes the principle, all countries will benefit in the long run through the resulting more efficient use of resources.” The importance of MFN principle is to provide a “free-trade” framework for each player who plans to join the multilateral game with non-discrimination basis, and equally share the benefit from multilateral system.³⁹ However, although all the WTO members (or former GATT signature parties) agreed to this policy goal, the MFN clause is now eroded by many preferential as well as the regional trade agreements depart from

³⁸ See GATT art. I, para. 1 indicated that

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

Professor Jackson in his book further analyzed “the basic idea that trade in the world should proceed with the least possible amount of discrimination among countries, so as to facilitate trade, reduce tensions, remains one of the central pillars of the multilateral system.” See Jackson, *supra* n. 4, at 99-101.

³⁹ Jackson et al., *supra* n. 2, at 416. The five significant benefits flowing from the principle (MFN): (1) from the economic view point, the MFN ensures that each country will satisfy its total import needs from the most efficient sources of supply, allowing the operation of comparative advantage; (2) from the trade policy viewpoint, the MFN commitment protects the value of bilateral concessions and ‘spreads security around’ by making them the basis for a multilateral system; (3) from the international-political viewpoint, the commitment to MFN clause mobilizes the power of the large countries behind the main interest and aspiration of the small ones which is to be treated equally; (4) from the domestic-political viewpoint, the MFN commitment makes for more straightforward and transparent policies and for greater simplicity of administration of protection; (5) ultimately, the unconditional MFN commitment is of a constitutional significance. It serves as the safe constraint on the delegated discretionary powers of the executive branch in trade matters).

the spirit of obligations set in GATT Article I.⁴⁰ To this end, here are two paradoxical questions: If the MFN clause is the perfect framework for the international economic relations, why does GATT/WTO open the gate for regional trade agreements as exception? What is the firewall preventing the crash of this pillar under GATT/WTO?

To answer the first question, it should go back to the legitimacy goal of regulating international economic order. The objective to allow regional trade agreements under the multilateral system based on the assumption that the countries constituted a strong attempt to develop a free trade within the bloc.⁴¹ Furthermore, these regional trade blocs improve more “Trade Creation”⁴² rather than “Trade Diversion.”⁴³

About the second question, the WTO General Council created the Regional Trade Agreements Committee (RTAC) in 1996 in order to examine economic integration and to evaluate whether they are consistent with WTO obligations. The committee is also examining how regional arrangements might affect the multilateral trading system, and

⁴⁰ “Particularly in a world where the multilateral system embraces MFN but includes more than 100 countries, there are number of problems engendered by MFN. These problems are characterized as ‘the free-rider’, or ‘lowest common denominator’ problems.” Jackson, *supra* n. 4, at 101; See also Jackson et al., *supra* n. 2, at 417; and John H. Jackson, *Equality and Discrimination in International Economic Law: The General Agreement on Tariffs and Trade in The British Yearbook of World Affairs* 1983 (London Inst. of World Affairs 1983); and John H. Jackson, *The World Trading System: Law and Policy of International Relations* (2d ed., MIT Press 1997).

⁴¹ Jackson, *supra* n. 4, at 101.

⁴² Goode, *supra* n. 1, at 353. Trade Creation: a criterion used for the assessment of the impact of free-trade areas and customs unions on others. Trade theory holds that the reduction or elimination of barriers to trade will lead to increased trade between members and non-members if external barriers are not raised at the same time. The experience of the GATT system and the exception of trade under it would indicate that this theory is underpinned by evidence. In practice, the validity of the argument is quite difficult to demonstrate for any given area because of the interplay of other factors, particularly secular changes such as technological advances, changing investment patterns, etc.

⁴³ *Id.* at 353. Trade diversion: also known as trade deflection. One of the criteria used for the assessment of the impact of free-trade areas and customs unions. The creation of such bodies normally leads to the expansion of trade between its members, but economic theory postulates that a share of the increased trade experienced by participants is merely due to redirection of their trade, and not increased trade due to the arrangement. This effect can be demonstrated convincingly in models. In practice, trade diversion has always been very difficult to isolate because of other factors. These include technological innovation, global reduction in tariffs, changes in investment policies, etc.

what the relationship between regional and multilateral arrangements might be.⁴⁴ The RATC combined with GATT Article XXIV are playing important roles as connection between regional agreements and multilateral system. Its policy goal is like a “firewall” to manage the complex and overlapped regional trade agreements.

2. Article XXIV – Theory and Practice

Considering the theory of policy goal in GATT Article XXIV, there are five elements in particular which should be mentioned. These are included the three substantial issues which are the “Type of Formation” standard; the “Substantial All” Criteria; the “Not on the whole higher than” requirement for customs unions; and two procedural issues which are “Plan and Schedule” for interim agreements, and “Notification” requirement to the WTO Committee of Regional Trade Agreements.

(a) Type of Formation

The “Type of Formation” requirements set up the exception for trade blocs applied to three types of regional economic integration, which are “Customs Unions,”⁴⁵

⁴⁴ WTO Secretariat, *Understanding the WTO: Cross-Cutting and New Issues - Regionalism: Friends or Rivals?*, see http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm (last visited July 29, 2006).

⁴⁵ Goode, *supra* n. 1, at 90. “Customs Unions” is defined as an area consisting of two or more individual economies or *customs territories* which remove all tariffs and sometimes broader trade impediments between them. The members making up the area than apply a common external tariff. In GATT art. XXIV, Paragraph 5(a) indicated that “with respect to a customs union ... the duties and other regulations of commerce imposed at the institution ... shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be.”

“Free-trade Area,”⁴⁶ and “Interim Agreements”⁴⁷ and excluded other scope of agreements.⁴⁸ The major difference between “Customs Unions” and “Free-trade Area” is that customs union not only required to eliminate of “all internal tariffs” and Non-tariff barriers to trade (NTBs) among its members, but also established a uniform “Common External Tariff” which applied by all its members to import from non-members as well as “Common External Commercial Policies.” Instead, in a “Free-trade Area,” members eliminate “most tariffs barriers” and NTBs to import from the members, but continue to apply their respective individual country tariffs and NTBs to the products of non-members as well as to pursue their own commercial policies. Finally, “Interim Agreements” have its wide range of trade policies among their members and flexible negotiating timetable, but limit to “necessary for the formation of a customs unions or a free-trade area” in a “reasonable time.”

⁴⁶ *Id.* at 146. “Free-trade Area” is defined as a group of two or more countries or economies, customs territories in technical language, that have eliminated tariff and all other non-tariffs measures affecting trade among themselves. Participating countries usually continue to apply their existing tariffs on external goods. Free-trade areas are called reciprocal when all partners eliminate their tariffs and other barriers towards each other. There are cases where developing country partners are exempt from making equivalent reduction, even though they get free access to developed-country markets. These are called non-reciprocal free-trade areas.

⁴⁷ *Id.* at 182. “Interim Agreement necessary for the formation of a customs unions or a free-trade area” is defined as an instrument mentioned in GATT Article XXIV which deals with customs unions and free-trade areas. Such agreements have to be notified to the WTO, together with a timetable for their implementation. Few interim agreements appear to have been notified to the GATT or the WTO. Nor have working parties, in examining notified agreements, always been able to agree whether it was an interim agreement or a final agreement. However, in a sense nearly all notified free-trade agreements have been interim agreements even though the parties may have regarded them as final agreements. This is because even phase-in provisions for the elimination of trade restrictions in sensitive products.

⁴⁸ The following types of agreements are excluded from the scope of GATT art. XXIV: (1) non-reciprocal agreements, i.e. those in which only one or more (but not all) parties to an agreement offer to make concessions; (2) agreements which are partial in scope and do not seek to become free-trade areas or customs unions; (3) trade, cooperation, and investment agreements, and any other agreements aiming at facilitation trade but falling short of providing for tariff preferences inherent in a customs union or free-trade area. See WTO Secretariat: Committee on Regional Trade Agreements (CRTA), *Mapping of Regional Trade Agreements*, WT/REG/W/41 (WTO, Oct. 11, 2000), available at http://www.wto.org/english/tratop_e/region_e/wtregw41_e.doc (last visited July 29, 2006).

(b) “Substantial all” Criteria

The “Substantial all” criteria refer to the scope of liberalization to be achieved by members of customs unions or free-trade areas. The central issue to be concerned will be discussed in two different approaches: one is “qualitative analysis,” and the other is “quantitative analysis.” The qualitative analysis is “no exclusion of major sectors,” which means that third country have questioned whether the agreement that explicitly excluded trade in major sector products.⁴⁹ And regarded to the quantitative analysis refers to the percentage of trade of the members covered.

The relevant provision set in GATT Article XXIV:8(b) indicated that “... a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”⁵⁰ However, some regional signatories argued that “the criterion of Article XXIV is that obstacles be eliminated on ‘Substantial all the trade between the parties’ and not on ‘Trade in substantially all products or members’.” they further argued that “This Article does not preclude the exclusion of a sector of economic activity provided that the overall trade coverage of the agreement meets the criterion laid down in GATT Article XXIV.”⁵¹

In Turkey – Restrictions on Imports of Textile and Clothing Products case, the panel interpreted indicated that “Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the internal trade between constituent members, and 8(a)(ii) set up the

⁴⁹ *Id.* For example Trade in Agriculture products is the most arguments to exanimate whether the qualitative approach met the requirement of “Substantial All the Trade.” Besides, many scholars believed that “Substantial All” means 80% - 85% of the total trade of the countries.

⁵⁰ GATT art. XXIV, sub-para. 8(b)

⁵¹ Raj Bhala, *International Trade Law: Theory and Practice* 625 (2d ed., Lexis Publisher 2001).

requirement for constituent members deal with third countries in order to satisfy the definition of a “customs union.” The appealed body further explained that “substantially all the trade” duties between internal members and “substantially the same” duties toward external third parties all offer a certain “limited” degree of “flexibility” to the constituent members to “create a common commercial policy.” However, the panel interpreted in 8(a)(i) that “substantially all the trade” is not the same as “all the trade,” and also is something considerably more than merely “some of the trade.”⁵² The word “substantially” qualifies the word “same.” Therefore, something closely approximating “sameness” is required by Article XXIV:8(a)(ii).⁵³

In sum, the theory and practice for this criteria is based on believing that the advantages of a preferential agreement that went so far as to eliminate substantially all the barriers, would be deemed to outweigh the disadvantages of departure from the general

⁵² GATT art. XXIV sub-para. 8(a)(i) establishes the standard for the internal trade between constituent members in order to satisfy the definition of a “customs union.” It requires the constituent members of a customs union to eliminate “duties and other restrictive regulations of commerce” with respect to “substantially all the trade” between them. It is clear, though, that “substantially all the trade” is not the same as *all* the trade, and also that “substantially all the trade” is something considerably more than merely *some* of the trade. The terms of sub-para. 8(a)(i) offer “some flexibility” to the constituent members of a customs union when liberalizing their internal trade ... the degree of “flexibility” that sub-paragraph 8(a)(i) allows is limited by the requirement that “duties and other restrictive regulations of commerce” be “eliminated with respect to substantially all” internal trade.

⁵³ GATT art. XXIV sub-para. 8(a)(ii) establishes the standard for the trade of constituent members with third countries in order to satisfy the definition of a “customs union.” It requires the constituent members of a customs union to apply “substantially the same” duties and other regulations of commerce to external trade with third countries. However, sub-para. 8(a)(ii) does not require each constituent member of a customs union to apply the same duties and other regulations of commerce as other constituent members with respect to trade with third countries; instead, it requires that substantially the same duties and other regulations of commerce shall be applied. The terms of sub-para. 8(a)(ii), and, in particular, the phrase “substantially the same” offer a certain degree of “flexibility” to the constituent members of a customs union in “the creation of a common commercial policy.” Here too we would caution that this “flexibility” is limited. It must not be forgotten that the word “substantially” qualifies the words “the same.” Therefore, in our view, something closely approximating “sameness” is required by Article XXIV, sub-para. 8(a)(ii). Sub-para. 8(a)(ii) requires the constituent members of a customs union to adopt “substantially the same” trade regulations. “Comparable trade regulations having similar effects” do not meet this standard. A higher degree of “sameness” is required by the terms of sub-paragraph 8(a)(ii). *See Turkey Restrictions on Imports Case, supra* n. 37.

MFN principle both in quality and quantity. The absent of the interpretation of the working parties make this “Substantial all the trade” criteria troublesomely ambiguous.⁵⁴

(c) “Not on the Whole Higher Than” Requirement

For customs unions, there is not only eliminate the barriers between the constitute members, but also form a common external trade policy regarding imports from third countries. In Article XXIV (5)(a), “with respect to a customs union... the duties and other regulations of commerce imposed at the institution of any such union ... shall not on the whole be higher or more restrictive than the general incidence of the duties ... applicable in the constituent territories prior to the formation of such union.” In other words, there should be an additional requirement for customs unions that the duties of the common external system shall “not on the whole be higher or more restrictive than the general incidence of the duties and regulations” applicable prior to the formation of the union.⁵⁵

In Turkey – Restrictions on Imports of Textile and Clothing Products case the appellate body indicated that “With respect to ‘duties’, Article XXIV:5(a) requires that the duties applied by the constituent members of the customs union after the formation of the customs union “shall not on the whole be higher ... than the general incidence” of the duties before the union.... paragraph 2 of the Understanding on Article XXIV requires that the evaluation under Article XXIV:5(a) of the general incidence of the duties applied

⁵⁴ Jackson, *supra* n. 4, at 103.

⁵⁵ *Id.*

before and after the formation of a customs union “shall ... be based upon an overall assessment of weighted average tariff rates and of customs duties collected.”⁵⁶

To this end, the controversy issue regarding that whether it is necessary, for the propose of making comparison between *ex ante* or *ex post* market access opportunities, that a country-by-country and product-by-product examination of the effect of increases in tariffs be undertaken. Simply learned from the *Turkey* case, the appellate body concluded that “the terms of paragraph 5(a) do not address the GATT/WTO compatibility of specific measures that may be adopted on the occasion of the formation of a new custom union.” Further more the Committee of Regional Trade Agreements (CRTA) does not require the determination of the compatibility of specific measures with GATT rules. The CRTA in its overall assessment, shall not determinate the WTO compatibility of specific measure.⁵⁷

(d) Procedures: Plan, Schedule, and Notification

For interim agreement, GATT XXIV:5(c) indicated that “any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.”⁵⁸ However, the question here is no definitions of the terms “interim agreement”

⁵⁶*Id.* The author further indicated in the book that the assessment of weighted average tariff rates and of customs duties shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin.

⁵⁷ James H. Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the International Trade Requirement* 203 (T.M.C. Asser Press 2002).

⁵⁸ See GATT art. XXIV, sub-para. 5(c)

and “plan and schedule” are provided.⁵⁹ This absent of agreed definitions has made more controversy and confuse for the practicing of this requirement.

The WTO Negotiating Group on Rules, at its meeting of 8 May 2002, requested the Secretariat to prepare a background note which could assist delegations in the preparation of submissions and proposals in the context of paragraph 29 of the Doha Ministerial Declaration.⁶⁰ It provided “Compendium of Issues Related to regional trade agreements” which contents “Checklist of Issues Related to RTAs.”⁶¹ This legal document provided clearly in its preamble that “Most of the issues summarized below refer specifically to the application or interpretation of existing WTO provisions applying to RTAs. Other issues are of a conceptual nature, interrogating the relationship between the multilateral and RTA approaches, or are associated to RTA characteristics highlighted by recent developments and not explicitly or fully covered by existing WTO provisions.” After the improvement of the WTO, this procedure troublesome has been reduced in these years. However, the enforcement issue is remaining the biggest difficult, because most of the countries don’t agree to adopt certain agreement that criticizing or limiting their negotiation of regional trade agreements.

⁵⁹ Bhala, *supra* n. 51, at 624.

⁶⁰ See World Trade Organization, *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [Hereinafter Doha Ministerial Declaration], available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited July 29, 2006). In this Declaration, the members indicated that “We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.”

⁶¹ See WTO Secretariat, *Negotiating Group on Rules*, TN/RL/W/8/Rev.1 (WTO, Aug. 1, 2002), available at <http://docsonline.wto.org/DDFDocuments/t/tn/rl/W8R1.doc> (last visited July 29, 2006). Summarizing the checklist, it divided in seven parts: (1) WTO Basic Transparency Requirements on RTAs; (2) Multilateral Surveillance Mechanisms for RTAs; (3) Relationship Between RTA-Specific WTO Disciplines and Other WTO Rules; (4) Interdependence of RTA-Specific WTO Disciplines; (5) Interpretation of Particular Wording Contained in GATT Article XXIV; (6) Interpretation of Particular Wording Contained in GATS Article V; (7) Interaction Between Regional Trade Agreements and the Multilateral Trading System.

C. Future Improvement for Regional Negotiation under Multilateral Trading Regime

The rule on regional arrangements in GATT Article XXIV has been considered by many scholars to be ineffective.⁶² GATT and its Article XXIV are “woefully inadequate for the tasks required of a multilateral system to provide some sort of adequate supervision and discipline on certain of the more dangerous tendencies of trading blocs.”⁶³ To let the multilateral framework better serve for the regional economic integration, and not leave it behind, there are more challenges in the future. In order to “merger” or at least “consisted” the two main powers (Multilateralism and Regionalism), the following subjects may be considerate in future multilateral negotiation round:

First, GATT Article is out of dated, and need to be given the new life to face rapidly changing landscape of regional economic integration. For this reason, merely one article under the GATT regime is far beyond it objectives and policy goals. In Doha or later negotiation round, the WTO members should consider further negotiating “*Agreement on Regional Economic Integration*” to facilitate various regional trade agreements and strengthen the connection with the two powers. All substantial and procedure issues should be included in this agreement. This agreement not only provides a guideline for the constitute parties fellow the basic requirements from multilateral legal framework during their negotiation of regional economic integration, but also provide the

⁶² Yoshi Kodama, *Asia Pacific Economic Integration and the GATT/WTO Regime* 1 (Kluwer L. Int'l 2000).

⁶³ Jackson, *supra* n. 4, at 108.

WTO Committee of Regional Trade Agreements (CRTA) a clear standard to review of new notified regional agreements.

Second, the dispute settlement system should be ensured strong and clear provision for the third party to challenge “nullification or impairment” which doesn’t qualified the regional agreements under the GATT Art. XXIV.⁶⁴

Third, the WTO members should take the advantages form the experiences of regional trade negotiation. Many complex issues, such as agriculture, competition policy, labor standard, and environmental issues, that cannot be done at the multilateral level should learn from any successful regional trade agreement. This is not zero-sum game for multilateral and regional trade negotiations. Instead, the Win-Win solution needs to keep in track.

III. CURRENT DEVELOPMENT OF REGIONAL EECONOMIC INTEGRATION AROUND THE WORLD

A. Current Development of Economic Integration in the New World Order

Most of the WTO members are now also participate in regional economic integration. The regional blocs have expanded various in number, scope, and coverage and this number of regional negotiations is still increasing year by year.⁶⁵ It is estimated that more than 50% of world trade is now conducted under preferential trade

⁶⁴ *Id.* at 109.

⁶⁵ Peter Sutherland, Jagdish Bhagwati, Kwesi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer & Therry de Montbrial, *The Future of the WTO: Addressing Institutional Challenge in the New Millennium* (WTO 2004), at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf (last visited July 29, 2006).

agreements,⁶⁶ in other words, regional trade agreements becomes as important as multilateral trading system. Although preferential trade agreements are found in different region in the world, they are more and more globalize. The best known regional economic integration models are the European Union (EU), the European Free Trade Association (EFTA), the North American Free Trade Agreement (NAFTA), the Southern Common Market (MERCOSUR), the Association of Southeast Asian Nations (ASEAN), and the Common Market of Eastern and Southern Africa (COMESA).”⁶⁷

According to the statistics provided by the WTO, “out of a total 300 RTAs notified to the WTO committee of Regional Trade Agreements (CRTA) up to Oct. 2004, 176 were notified after January, 1995 (This figures correspond to PTAs notified to the GATT/WTO under GATT Article XXIV, GATS Article V and the Enabling clause, including accessions to existing agreements).” Up to now, “150 PTAs are currently in force, and an additional 70 are estimated to be operational, although not yet notified. By the end of 2007, if PTAs reportedly planned or already under negotiation are concluded, the total number of PTAs enforced might well approach to 300.”⁶⁸

B. Europe – European Union (EU)

For many centuries Europe was the world’s most powerful, prosperous and technologically advanced continent. That period of European cultural and political dominance came to a definitive end with the Second World War. In 1945 Germany was

⁶⁶ *Id.* at 22.

⁶⁷ WTO Secretariat, *supra* n. 26.

⁶⁸ Sutherland et al., *supra* n. 65, at 21.

defeated and in ruins; France was half-starved and humiliated; Britain was bankrupt and on the point of losing its empire; Spain was a backward, isolated dictatorship; and the countries of Central and Eastern Europe had been absorbed into a Soviet empire. Nobody would have guessed that Europe was at the beginning of a new golden age. Besides, the European Integration Process combined the “Economic Integration” and “Peace Process,” and this was the successful case that explained the high economic interdependence would promote the peace. The following section will provide the most successful case study of regional economic integration – The European Union. The process of European integration is unique not only because the member countries are the largest in the world, but also the European Integration was the first and only case that from economic integration “Spilled-over” to the political aspects.

1. Regional Background Analysis

(a) History and Development

After the end of World War II in 1945, European countries were faced the post-war economic reconstructions. In this background, the European countries had strong motivation to maintain peace and prevent any intra conflict. Western Europe’s economic weakness and raising power of the Soviet Russia drew the United States deeper into the continent’s affairs by famous Marshall Plan – or the European Recovery Program.⁶⁹ The

⁶⁹ For resources of the Marshall Plan and its relationship to European integration, see Michael Hogan, *The Marshall Plan: America, Britain and the Reconstruction of Western Europe, 1947-1952* (Cambridge U. Press 1987); Alan Milward, *The Reconstruction of the Western Europe: 1945-51* (Routledge 1984); and

emergence of the Cold War and its domestic political repercussions contributed to the growth of the European movement, and the idea of European integration first came by two French men, Jean Monnet⁷⁰ and Robert Schuman.⁷¹ In 1952, their first achievement – The European Coal and Steel Community (ECSC) began operating by six states.⁷² In this perspective, “Coal and Steel,” the two key sectors of industrial production and war-making potential, would be removed from national control and placed under a single, Super-national authority.⁷³

In 1957, the intergovernmental conference (IGC) came to and end in a series of high-level meetings to sign two important treaties, one is for European Atomic Energy Community (Euratom) and the other is for European Community (EC), which officially called “Treaties of Rome.”⁷⁴ But right after the treaties of Rome, the decade from 1958

Imanuel Wexler, *The Marshall Plan Revisited: The European Recovery Program in Economic Perspective* (Greenwood Press 1983).

⁷⁰ Jean Monnet, *Memoirs*, 222 (Doubleday 1978). Monnet came to the conclusion early in World War II that economic integration was the only means by which conflict in Europe could be avoided. Monnet further claimed that there would be no peace in Europe “if States reestablished themselves on the basis of national sovereignty with all that this implies by way of prestige politics and economic protectionism.” He also argued, “The States of Europe must form a federation or a ‘European Entity’, which will make them a single entity.”

⁷¹ See Richard McAllister, *From EC to EU: An Historical and Political Survey* 47 (Routledge 1997). Robert Schuman (June 29, 1886 – September 4, 1963) was a noted Luxembourg-born French politician, a Christian Democrat (M.R.P.) who is regarded as one of the founders of the European Union.

⁷² *Id.* The six original states operated the European Coal and Steel Community (ECSC) included: France, Germany, Italy, Belgium, the Netherlands, and Luxembourg.

⁷³ See John Gillingham, *Coal, Steel and the Rebirth of Europe, 1945-1955: The Germans and French from Ruhr Conflict to Economic Community* 297-298 (Cambridge U. Press 1991). The ECSC disappointed European federalists both in its conceptual framework and in its actual operation. It was an unglamorous organization that inadequately symbolized the high hopes of supernationalism in Europe. The agreement to create a heavy industry pool changed no borders, created no new alliances, and reduced only a few commercial and financial barriers. It did not even end the occupation of the Federal Republic.... By resolving the coal and steel conflicts that had stood between France and Germany since World War II, it did, however, remove the main obstacle to an economic partnership between the two nations. There were by no means inconsiderable achievements.

⁷⁴ *Id.* Although officially both are called the Treaties of Rome, in practice only the treaty establishing the EC – as the EEC came to be called – is known as the Treaty of Rome.

to 1969 was known that De Gaulle, French President, destroyed the EC's development.⁷⁵ President De Gaulle's stand against commission in 1965 epitomized his hostility to Super-nationalism. Yet Inter-governmentalism, which de Gaulle so bluntly asserted during the empty chair crisis, laid the basis for the EC's survival in the 1970s and invigoration in the 1980s as well as the EU of the 1990s as "improbable blend of de Gaulle and Monnet."⁷⁶

Besides the debate between Super-nationalism and Inter-Governmentalism, the "Enlargement of Members" is another issue for the EC during 1960s, with de Gaulle seemingly the sole obstacle to British's entry. That obstacle suddenly disappeared in April 1969 when de Gaulle's resigned, having staked his presidency on the outcome of two referendums on minor administrative issues.⁷⁷ However, although the speed of European Integration process was decreasing by President De Gaulle's foreign policy gave Europe a greater sense of identity and purpose at a time of subordination to the superpowers.⁷⁸

In 1970s, the history of the EC is a Community in Flux, attempting to cope with fundamental changes in the international system and fighting for survival in a radically altered political and economic environment. The first enlargement of the EC was in 1973, which allowed three new member states joined in the community.⁷⁹ Five years later, the European Council approved the plan for European Monetary System (EMS), and member

⁷⁵ See Desmond Dinan, *Ever Closer Union: An Introduction to European Integration* 37 (Lynne Rienner Publishers 1999). "For in the popular opinion of European integrationists, de Gaulle's anachronistic championing of the nation-state destroyed EC's development in 1960s and stunted its institutional growth until the Single European Act of 1986 and the Treaty on European Union in 1992."

⁷⁶ See Wolfgang H. Reinicke, *Building a New Europe: The Challenge of System Transformation and Systemic Reform* 3-11 (Brookings Instn. 1992).

⁷⁷ *Id.* at 54.

⁷⁸ Dinan, *supra* n. 75, at 35.

⁷⁹ *Id.* These three countries included: Britain (United Kingdom), Denmark, and Ireland.

states decided to launch the EMS in January 1978. Eight of them decided to participate in the system's exchange rate mechanism (ERM). As a result, the years between 1969 and 1979 represent not only a transition in the post-war international system that tested the EC's resilience but also a critical bridge between the Community's early attainments and later triumphs.⁸⁰ Yet a busy 1978 - 1979 brought an accession treaty with Greece, accession negotiation with Portugal and Spain, the first election to the EP, and the launched of EMS.⁸¹

In 1983, leaders of Europe discussed the "Draft Treaty Establishing the European Union." This draft treaty sought to substitute the existing treaties establishing the European Communities with a single treaty establishing a European Union. The EU would maintain the basic institutional structural and legal competence of the three communities (the ECSC, EC, and Euratom⁸²) but revise their decision-making procedures and add to them new or expanded authority over certain aspects of economic, social, and political affairs. Thus, the 1980s is the decade of EC's transformation of sluggish growth and institutional immobility. After these changes, member states concluded the SEA, a major revision of the Treaty of Rome that underpinned the single market program.

The "miracle year" that ushered in the "New Europe" of the post-Cold War era was in 1989. It was a year of "peaceful revolution" that hastened the collapse of communism and led directly to the unification of Germany in 1990 and the disappearance of the Soviet Union in 1991. Also in this year, the Western European countries fully

⁸⁰ *Id.*, at 59.

⁸¹ These three events would cure the EC by promoting institutional reform, deeper integration and renewed interests in Economic and Monetary Union (EMU) proved justified, but not right away. See Michael Keating, *The New Regionalism in Western Europe* 66 (Edward Elgar Publg. 1998).

⁸² *Id.* These refer to: European Coal and Steel Community, European Community, and European Atomic Energy Community.

immersed in the single market program and about to embark on the road to Economic and Monetary Union (EMU).⁸³ By 1992, when the single market was to have been completed and the Treaty of European Union (TEU) was to have been implemented, economic recession had spread throughout Western Europe while the former Soviet bloc countries struggled to implement market reforms and considerate newly established democratic institutions.⁸⁴

Based on extensive bilateral meetings and on shrewd observations made during negotiating sessions, in mid-April 1991, Luxembourg produced a lengthy draft TEU. Its most striking feature was architectural; the putative EU would consist of three pillars capped with the European Council. By keeping the Common Foreign and Security Policy and cooperation on Justice and Home Affairs on an intergovernmental basis outside the Rome Treaty, Luxembourg hoped to reconcile the two extremes of federalism⁸⁵ and anti-federalism.⁸⁶ Indeed, with the exception of Denmark, Britain, and Germany, where a challenge to the treaty's constitutionality held up proceedings, every member state ratified the treaty by the target date of December 1992.

Despite the long-term implication for Germany's role in the EU, the Constitutional Court's judgment removed the last obstacle to ratification of the TEU, allowing it finally to come into effect on November 1, 1993.⁸⁷

⁸³ Dinan, *supra* n. 75, at 127. More than any other event, the unexpected breach of the Berlin Wall on the night of November 9, 1989, symbolized a renunciation of the Cold War division and an affirmation of Europe's common destiny.

⁸⁴ Elizabeth Pond, *The Rebirth of Europe* 101-107 (Brookings Instn. Press 1999).

⁸⁵ *Id.* at 109. Europe federalism was supported mainly by Germany, Italy, and the Netherlands.

⁸⁶ *Id.* Europe anti-federalism was mainly epitomized by Britain and Denmark.

⁸⁷ Dinan, *supra* n. 75, at 127, 143, and 156. Also see Brent F. Nelsen & Alexander C-G. Stubb eds., *The European Union: Readings on the Theories and Practice of European Integration* (2d ed., Lynne Rienner Publishers 1998).

In 1995, the new European Union enlarged again when Austria, Finland, and Sweden joined. Called the “Eftan enlargement” because the three new entrants had been members of the European Free Trade Association (EFTA), the 1995 enlargement promised to change the EU in a variety of ways. Accession negotiations with the “5+1” (the Czech Republic, Estonia, Hungary, Poland, and Slovenia, plus Cyprus) began ceremoniously in Brussels in 1998, when the foreign ministers of the applicant states held separate opening talks with their EU counterparts. Although the applicant states appear to have much weaker hands than their EU interlocutors, they have an ace up their sleeve: The EU cannot afford to let the accession negotiations languish or fail. As the EU often points out, “promoting democracy and prosperity” in Central and Eastern Europe is the EU’s primary foreign policy goal, and enlargement is the primary means of achieving that goal. If enlargement is unduly delayed by an impasse in the negotiations or by the EU’s failure to make internal policy and institutional reform, the damage to the EU’s already fragile political image and international credibility would be incalculable.⁸⁸ Of course, the new members of Central and Eastern European countries were successfully joined in the European Union in recent years.

(b) Political Economy

Following the analysis above, the ECSC was the first step of European integration, and the main purpose of this agreement is to prevent the war and maintain peace by controlling the Coal and Steel between member countries, especially France and

⁸⁸ See J.H.H. Weiler, Iain Begg & John Peterson eds., *Integration in an Expanding European Union: Repassessing the Fundamentals* (Blackwell Publ. Ltd. 2003).

Germany. Further, the six ECSC member states negotiated to abolish quotas and tariffs on trade among themselves, establish a joint external tariff, unify trade policy toward the rest of the world, devise common policies for a range of socioeconomic sectors, and organize a single internal market. Thus, the preamble of the EEC treaty was far less flamboyant than its ECSC counterpart, referring only to the signatories' determination "to lay the foundations of an ever closer union among the peoples of Europe."

Besides, European Monetary System (EMS) "enabled the unify of the Common Market to be preserved, reasonable exchange rates to be maintained, and the foundations of the Community's monetary identity to be laid." Regardless of its subsequent development, the fact of its existence and the relative speed with which it came into being marked an important milestone in the EC's history.⁸⁹

Another issue was public alienation from an increasingly complex and intrusive policy-making process, poor democratic accountability in Brussels, and doubts about the EU's ability to cope with profound change in the international political system. Worries about the long-term impact of German unification and eventual EU enlargement to the East contributed to a climate of uncertainty in which the ratification drama unfolded.⁹⁰

⁸⁹ Dinan, *supra* n. 75, at 88.

⁹⁰ See Lars Magnusson & Bo Strath eds., *From the Warner Plan to the EMU: In Search of a Political Economy for Europe* (P.I.E. –Peter Lang 2001). Apart from EMU, enlargement was biggest item on the EU's agenda for most of the 1990s. The collapse of the Soviet empire in the late 1980s, and of the Soviet Union in 1991, gave the rise to a hitherto unimaginable enlargement scenario. First the European neutrals, no longer constrained by the Cold War, applied for EU membership. Later the newly independent countries of Central and Eastern Europe, plus Cyprus and Malta, followed suit. Austria, Finland, and Sweden joined the EU in 1995; three years later, the EU opened accession negotiations with five Central and Eastern European states plus Cyprus. The eventual accession of ten or more mostly small and poor Central and Eastern European states was bound to change the EU profoundly. Although 1996 – 1997 intergovernmental conference provided an opportunity to reform the EU's founding treaties in anticipation of enlargement, member states ducked the most difficult institutional issues. Nevertheless, the unrelenting pressure of imminent enlargement presaged both a major institutional overhaul and a wide-ranging reform of key politics and programs.

Implementation of the TEU in 1993 did not end popular dissatisfaction with the EU but at least paved the way for European integration to progress beyond the single market program toward monetary union and the single currency.⁹¹

1. Negotiation Strategy Analysis

(a) Key Negotiation Interests

Under the terms of the Treaty of European Union (TEU), the negotiation involved the introduction of a common currency, which took place in 1999. On the commission of European Community (EC, the First Pillar), member states approved new cooperative arrangements for foreign and security policy (CFSP, Second Pillar) and for judicial and home affairs (JHA, Third Pillar). The European Parliaments acquired greater political and institutional oversight – including a right of inquiry, a more formal right of petition, and the appointment of an ombudsman – and greater legislative power through the co-decision procedure. The TEU redefined or extended the community concerns in a number of key negotiation areas, such like: education, training, cohesion, research and development, environment, infrastructure, industry, healthy, culture, consumer protection, and development cooperation, although with only a limited extension of qualified majority voting. As well as being intensive bargaining session, the Maastricht summit was an opportunity to permit each participant, including the Commission, to claim victory on a variety of issues. Clearly, there was something in the final agreement for everyone.

⁹¹ Dinan, *supra* n. 75, at 127-128.

(b) Negotiation Barriers

The barriers of European integration could be divided into three important issues:

(1) Transformation Enlargement struggle; (2) German Unification; and (3) The Ratification Crisis.

First, enlargement issue is one of the most remarkable barriers of the EC's transformation that it coincided with the potentially disruptive enlargement. In the history, every enlargement process would bring serious intra debates amongst the existed members of European Community, for example, the prior British accession issue, the Central and Eastern Europe countries' accession, and now the Turkey accession. Without compensating mechanisms, completion of the internal market could have immensely aggravated the social and economic divide between the EC's rich and poor member states. Thus the Single European Act was more than a device to launch the single market program. It was a complex bargain to improve decision-making, increase efficiency, achieve market liberalization, and at the same time promote cohesion.⁹²

Second, the German's unification issue throughout the EC's existence had remained a remote aspiration. It is impossible to exaggerate the shock that probable unification caused the EC and its member states (including Germany). The challenge for the EC was both procedure (how to absorb the underdeveloped German Democratic Republic "GDR") and political (how to prevent a resurgent, united Germany from tipping

⁹² See Stanley Hoffmann, *The European Community and 1992*, 68 For. Affairs 32, 32-33 (No.4, 1989); also see Helen Wallace, *Widening and Deepening: The European Community and the New European Agenda* 6 (Royal Inst. of Intl. Affairs Discussion Paper No. 23, 1989).

the institutional balance and subverting the EC system). The challenge for Germany was to reassure EC partners of its commitment to European integration; the challenge for other member states was to overcome latent fear of Germany's size in the EC (a united Germany would account for 27 percent of the EC's GDP and, with 77 million people, 25 percent of its population). The solution to these problems seemed to lie in deeper European integration.⁹³

Finally, the Ratification Crisis is the most difficult part for all the member countries fully implement the consensus of EU. In 1986 a majority of Danes endorsed the SEA after the Danish parliament's rejection of it. At the end of 1986 the Irish Supreme Court held the SEA unconstitutional, thereby obliging the government to hold a referendum. The Supreme Court's ruling and the subsequent referendum delayed implementation of SEA until 1987. Yet at no time after the Danish parliament's rejection of the SEA or the Irish Supreme Court's ruling on it did anyone talk about a crisis in the community. In June 1997, by contrast, the Danish electorate's narrow rejection of the TEU jeopardized the future of European integration and shook the EC to its core. The impact of the Danish result was all the more striking because ratification was proceeding smoothly in every other member state.⁹⁴ Recently, the referendum in France and the Netherlands rejected the new EU constitution, and made the integration process slow down.

The barriers of negotiating further European Integration now are not easy to solve, because the members of European Union have different concerns and national

⁹³ Dinan, *supra* n. 75, at 130.

⁹⁴ *Id.* at 148-149.

interests. Although the objections of European Constitution are still remaining, the European Union would not collapse because of the strong legal structure.

3. Institutional Framework Analysis

(a) Strengthen and Opportunity

The EU's main innovation is that it includes "the first institutionalization of the concept of flexibility as a basic principle in the treaties."⁹⁵ The Treaty will be known for its flexibility clause and also for its establishment of an area of freedom, security, and justice. External border control and visas, asylum and immigration policy and judicial cooperation are close to the core of national sovereignty but are also issues on which most Europeans want to see more effective transnational cooperation. In the meantime, other provisions of the Treaty promise more immediate benefits for the EU citizens.⁹⁶ As soon as people move freely throughout the EU, and once the EU has greater external border protection, the Treaty will be seen in favorable light.⁹⁷

(b) Weakness and Threaten

⁹⁵ Alexander C-G Stubb, *The Amsterdam Treaty and Flexible Integration*, 11 E.C.S.A. Rev. 1, 1-5 (Spring 1998).

⁹⁶ *Id.* For instance, the Treaty extends EU competence in areas of obvious popular concern, such as public health and consumer protection. More controversially, the Treaty includes a chapter on employment allowing the Council to draw up guidelines for member states, encouraged new initiatives and pilot projects, and establish an advisory employment committee to promote coordination among member states.

⁹⁷ Dinan, *supra* n. 75, at 182-183.

The EU has often struggled to persuade governments to look beyond narrow national interests, as it inches toward its goal of becoming a vast free market. But now an unabashedly populist ideal is taking root among governments: “economic patriotism.” A series of government moves to block foreign takeovers is fueling concern that a surge in protectionism could threaten the EU’s economic progress, just when competition from Asia is making liberalization more urgent than ever. Several countries have intervened recently to protect their corporate “champions” from rivals in other EU states. Coming less than a year after voters in France and the Netherlands rejected a draft EU Constitution, the trend has raised alarm about the future of Europe’s single market and the enforcement of rules underpinning it. The unraveling of Europe, even as an economic actor, is unfortunately a possible scenario.

Over the past decade Europe, a continent often accused of sclerotic caution, has displayed a daring political imagination that has produced a run of successes. The trouble with that kind of philosophy is that it can eventually lead to a nasty accident, and indeed the European project looks increasingly troubled. Economically, the EU is falling further behind the United States, and can only envy the dynamism of China or India. Politically, its members have been at each other’s throats over Iraq, the management of the Euro and the constitution. Perhaps most dangerously of all, the EU is plagued by a lack of popular understanding and enthusiasm.

Finally, the EU may indeed split. But a split need not be a disaster. It could lead to a multi-layered EU in which different countries adopt different levels of political integration and experiment with different economic models. If the EU were preserved as an over-arching framework, it could actually benefit from such diversity. But there is also

a darker, if less likely possibility. A split in the EU could cause Europe once again to divide into rival power blocks. That could threaten what most agree is the Union's central achievement: peace in Europe.

4. Future European Integration

Taking the various members countries' circumstances of history and development into account, it is clearly that much of the political energy directed towards the promotion and justification of a "Constitution" for the EU at the present time is focused on its relation to the external world, and in strengthening its perceived internal unity.⁹⁸ Not only is the political rhetoric increasingly concerned with Europe's international role, but many of the most notable new provisions of the draft constitution are clearly intended to strengthen the EU's external representation and identity, to concentrate the power of government in the body responsible for foreign policy, and to strengthen the EU as a global actor as a counterbalance to the power of the U.S. Whether the proposed enactment of a constitution proves instead to be a "moment of madness," an attempt to force on Europe's national populations a settlement which presupposes an as yet nonexistent European demos and a strong degree of citizen identification and political allegiance to the EU, cannot easily be predicted at least until some of the national ratification processes (which in some cases will include a popular referendum) on the new constitutional text take place.⁹⁹ The optimistic scenario is that the aim of constructing a degree of constitutional commitment and community precisely through the

⁹⁸ Grainne de Burca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61 Wash. & Lee L. Rev. 555, 582-583 (2004).

⁹⁹ *Id.*, at 583.

process of deliberating, debating, and enacting a constitution, will be borne out over time, even if that prospect remains for now at quite a distance. Given all these factors, the speed of EU integration is slow at this moment, but would keep in the right direction.

C. America – Free Trade Area of America (FTAA)

The economic integration in Americas is not the same like the European Union.¹⁰⁰

The following sections explain the economic integration in America, and it divides into three geographical parts: North, Central, and Southern America. In the end, this section would discuss a little about the current situation of negotiating Free Trade Agreement of America (FTAA).

1. Regional Background Analysis

(a) History and Development

The America is the second largest economy entity, fellow by the Europe, in the world. The development history of economic integration in North America is deeply affected by the Europe, especially the “Single European Act” in 1992.¹⁰¹ The primary

¹⁰⁰ *Id.* The economic integration in European Union continued successfully for more than five decades. However, the integration process of enlarging North, Central, and Southern American countries is still difficult to get the mutual consensus.

¹⁰¹ Khosrow Fatemi, *New Realities in the Global Trading System in The North America Free Trade Agreement* 4-5 (Khosrow Fatemi & Dominick Salvatore eds., Pergamon 1994). The culmination of such fears came in the fall of 1985, when the Council of Ministers of the European Community adopted the Single European Act, commonly known as ‘Europe-1992’. ‘Europe-1992’ became synonymous with ‘Fortress Europe’ in which rapid expansion of intra-community trade would come primarily at the expense of the rest of the world.

concern of Canada and the United States was the potential loss of the vast markets of the EC both countries had traditionally relied on the EC as one of their major partners and any significant inward – intra-community – moves in the European trade picture could create serious problems for either country. For this reason, the political leaders in the North America had strong desire to promote further integration in this region, and even expand their free trade bloc to the whole West Hemisphere.¹⁰²

(1) North America

In North America, the United States first signed its free trade agreement with Canada in the Canada-U.S. Free Trade agreement (CUSFTA) in 1989, and its participation in the famous trade agreement in North America Free Trade Area (NAFTA), which goal is economic growth for each country. This goal depends on the quality, quantity, and allocation of resources and the use of technology in an economy. The three members of NAFTA are United States, Canada, and Mexico. Under the free trade agreement, the Human, natural and capital resource development and technological advance in each country contributed to their economic situation prior to NAFTA.¹⁰³

United States plays an important role not only in the NAFTA process, but also in the whole integration of whole America. In the early part of 20th century, the United States continued industrialization and economic expansion until the Great Depression of

¹⁰² *Id.* Central American countries are not the only potential candidates for membership in the expanded NAFTA. Others included Chile, Venezuela, and even Argentina. In the long run, there may even be a true “Western Hemispheric Free Trade Area.”

¹⁰³ Ralph H. Folsom & W. Davis Folsom, *Understanding NAFTA and Its International Business Implications* 4 (Matthew Bender 1997).

the 1930s. In order to solve the economic crisis in the 1930s, many public sector projects, established by the President Franklin Roosevelt, expand government involvement in the economy. Further more, the World War II increased the government spending in the war period, but after that, the U.S. industrial system dominated the world economy.¹⁰⁴ U.S. is the most important driver of establishing NAFTA in 1990s, and after the 911 incident in 2001, the U.S. is pushing forward the free trade negotiation with central and southern American countries for not only economic perspectives, but also desired in common political and security perspectives.

Canada is the third largest country in the world. It is extremely rich in natural resources, has one of the highest per capita incomes, and has only 27 million people. The economic development of Canada is a story about nature resource, trade, politics and geography. In the period since World War II, Canada remains largely dependent on export of natural resource products, foreign capital and technology, and is tied generally to the U.S.¹⁰⁵ At the Shamrock Summit (1985), President Reagan and Conservative Prime Minister Mulroney agreed to give highest priority to finding ways to reduce trade barriers between the two countries. Four years later, the Canada-United States Free Trade Agreement (CFTA) went into force.¹⁰⁶ This FTA brought Canada free movement of goods and services to the U.S. market, and deeply influenced the political and economic interdependence between the two countries.

¹⁰⁴ Jonathan Hughes & Louis P. Cain, *American Economic History* 535 (4th ed., Addison-Wesley Pub. Co. 1993).

¹⁰⁵ Kenneth Norrie & Douglas Owsam, *A History of the Canadian Economy* 282 (Harcourt Brace 1990).

¹⁰⁶ Folsom & Folsom, *supra* n. 103, at 20.

The development history of Mexico is a history of exploration, exploitation and foreign control.¹⁰⁷ In other words, Mexico has long been “the struggle between old and new and the contradictions between rich and poor, rural and urban, believer and nonbeliever.” The decision to join NAFTA is another in a series of determinations made by the few but affecting all Mexicans.”¹⁰⁸ Without doubt, NAFTA will change the course of Mexican economic history. Questions remain whether this change will be peaceful and whether it will benefit all or even most of Mexican Society.¹⁰⁹ However, Mexico is very smart by negotiating with other countries outside the NAFTA region. The various successful FTA made Mexico became the “Bridge” to the U.S. domestic market as well as the North America. Mexico’s trading partners included most Central and Southern American countries, the EU, and even Asia countries.

(2) Central America

In a region that has a long history of regional integration endeavors, the Association of Caribbean States (ACS) was a relatively novel endeavor. Building upon their geographical proximities and historical linkages, 25 countries of the Caribbean sub-region tried to join together in an economic, cultural and socially cohesive group in 1992. The first and immediate aim was to strengthen sub-regional cooperation and integration so that an “enhanced economic space” could be created, which in turn could contribute to

¹⁰⁷ Michael C. Meyer, William L. Sherman & Susan M. Deeds, *The Course of Mexican History*, 211 (7th ed., Oxford U. Press 2003). The power to determinate Mexico’s economic future has often been centralized. Dominant tribes, the Spanish military, the Catholic church and economic elites (both foreign and domestic) have all extend control over the Mexican economy.

¹⁰⁸ See Tim L. Merrill & Ramon Miro, *Mexico, A Country Study* (Gov. Printing off. 1998).

¹⁰⁹ Folsom & Folsom, *supra* n. 103, at 21.

more competitive participation of the Caribbean region in the regional and multilateral marketplaces. The second major objective was to facilitate active and coordinated participation of the Caribbean region in various multilateral legal frameworks. As individually these Caribbean states are small, it was hoped that together they could make their presence felt on the global stage¹¹⁰ and the trade bloc among the Caribbean states would bring more economic and political power in international order.

The small ACS economies have a great deal of intra-trade potential. The population of ACS is 242 million, which is almost half of the total population of the Latin American and Caribbean (LAC) region. The size of the combined GDP of ACS is \$938 billion, which is again almost half of the total GDP of the LAC region. Therefore, the principle focus of the ACE action plan is cooperation in the area of trade, transport and sustainable tourism. The member states see the three activities as inextricably linked in the sub-region.¹¹¹

As opposed to the ACS, the Caribbean Community and Common Market (CARICOM)¹¹² had a long history and was the result of a long drawn-out effort towards regional integration. In 1965, the heads of government of Antigua, Barbados and British Guiana (now Guyana) signed an Agreement at Dickenson Bay, Antigua, to set up the

¹¹⁰ *Id.* The ACS has 25 Member States and three Associate Members. Eight other non-independent Caribbean countries are eligible for associate membership. The member states are: Antigua and Barbuda, Bahamas, Barbados, Belize, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Venezuela. The associate Members are: Aruba, France (on behalf of French Guiana, Guadeloupe and Martinique) and the Netherlands Antilles.

¹¹¹ Dilip K. Das, *Regionalism in Global Trade 190-191* (Edward Elgar Publ. Ltd. 2004).

¹¹² The heads of the government conference in CARICOM is something akin to the meeting of heads of government in EU, which is known as the European Council, or simply the Council. Most major decisions are taken in the Council, which holds regular bi-annual meetings. See Karlheinz Neunreither & Antje Wieber eds., *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* 22 (Oxford U. Press 2000).

Caribbean Free Trade Association (CARIFTA). As the ultimate objective was cooperation among all the Commonwealth Caribbean territories, the actual launch of the CARIFTA was delayed on purpose in order to allow the rest of the region, Trinidad and Tobago and Jamaica and all the Windward and Leeward Islands, to become members of the newly formed free trade area. CARICOM has concentrated on promoting the integration of the member economies as well as giving impetus to intra-trade. Coordination of foreign policy was also added to its list of priorities. CARICOM was trying to strengthen relations with the LAC region through the establishment of trade and economic agreements with Venezuela, Colombia, the other Caribbean states, and the ACS and deepening the integration process in the Community through the formation of a single market and economy. The next natural move, in the foreseeable future, for the CARICOM economies would be harmonization of standards and economic policies.¹¹³

Recently, the U.S. is pushing the U.S.-CAFTA negotiation and trying to build the free trade area with Caribbean countries. This proposal was both supported and rejected by some countries. The debates of whether to sign the CAFTA are also among the intra-U.S. political parties.

(3) South America

Latin American economies have a history of regional integration initiatives than any other developing region. Regional integration agreements flourished in the early post-war era, but then lost momentum. During the mid-1980s, this group of economies

¹¹³ Das, *supra* n. 111, at 192.

began liberalizing unilaterally and a resurgence of regionalism followed. It coincided with the global phenomenon of “New Regionalism.” The original objective behind making regional or sub-regional trading blocs was political.¹¹⁴

The first group of regional economic integration in the region is formed in the 1960s as Latin America Free Trade Area (LAFTA)¹¹⁵ when the Latin American economies had adhered to the “import-substituted industries strategy” for growth. It was expected that regional integration agreements would enable the constituent members to plan for the entire regional or sub-regional markets, which would cover all the member economies. The hope was that this strategy would step up the pace of regional industrialization and lead to rapid real GDP growth.¹¹⁶

The 1982 debt crisis was a serious blow to the economies in Latin America with even the larger regional economies being affected in an adverse manner. The new growth strategy turned out to be an antithesis of the popular import-substituting industrialization strategy of the past. It was based on liberalization, deregulation, privatization, outward-orientation, correct relative prices, a market-friendly policy ambience, relinquishment of “statist” strategy,¹¹⁷ and acceptance of the “Washington consensus.”¹¹⁸

¹¹⁴ *Id.* at 172-173.

¹¹⁵ *Id.* at 193. The Latin America Free Trade Area was launched in 1960 under GATT art. XXIV. In 1980 it was revived as Latin America Integration Association under the Enabling Clause. Its membership includes Mexico, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Uruguay, and Venezuela.

¹¹⁶ *Id.* The Andean Pact or Group was launched in 1969 under the Enabling Clause as a customs union. Its membership was Bolivia, Colombia, Ecuador, Peru, and Venezuela.

¹¹⁷ The “Statist” strategy implies intervention of the state in a country’s economic activity. This strategy held sway during 1950s and the 1960s. Subsequently, its failure to achieve any of its objectives made it unpopular. Its popularity began wilting away in the 1970s. See James M. Cypher & James L. Dietz, *The Process of Economic Development* 54 (Routledge 1997).

¹¹⁸ For a recent discussion of the Washington consensus refer to John Williamson, *Did the Washington Consensus Fail? Outline of Remarks at CSIS* (Inst. for Intl. Econ., Nov. 6, 2002), available at <http://www.iie.com/publications/papers/paper.cfm?researchid=488> (last visited July 29, 2006). The phrase “Washington Consensus” is today a very popular and often pilloried term in debates about trade and

In conjunction with macroeconomic and political reforms that were undertaken after this crisis, there was serious trade liberalization in a majority of the Latin America Economies. New initiatives on launching regional trading blocs began to appear in the latter half of the 1980s. The principle driving force behind the resurgence included the search for additional policy tools to manage insertion into an increasingly globalized competitive world economy. Various economies and sub-regions in Latin America experienced a quickening of the pace of integration among themselves as well as with the global economy. The Latin America treated regional economic integration formation as one of the tools for trade policy liberalization. The regional trade agreements represented a third tier of trade policy reform, which aims to complement and reinforce the unilateral (the first tier) and multilateral (the second tier) liberalization undertaken as part of the structural reform programs that had been underway since 1980s.¹¹⁹ Adoption of neoliberal strategy, ongoing regionalism and globalization has resulted in markedly

development. It is often seen as synonymous with “neoliberalism” and “globalization.” As the phrase’s originator, John Williamson, says:

Audiences the world over seem to believe that this signifies a set of neoliberal policies that have been imposed on hapless countries by the Washington-based international financial institutions and have led them to crisis and misery. There are people who cannot utter the term without foaming at the mouth.

Besides, Williamson originally coined the phrase in 1990 to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989. These policies were: (1) Fiscal discipline; (2) A redirection of public expenditure priorities toward fields offering both high economic returns and the potential to improve income distribution, such as primary health care, primary education, and infrastructure; (3) Tax reform (to lower marginal rates and broaden the tax base); (4) Interest rate liberalization; (5) A competitive exchange rate; (6) Trade liberalization; (7) Liberalization of inflows of foreign direct investment; (8) Privatization; (9) Deregulation (to abolish barriers to entry and exit); (10) Secure property rights. Since then, the phrase “Washington Consensus” has become a lightning rod for dissatisfaction amongst anti-globalization protestors, developing country politicians and officials, trade negotiators, and numerous others. It is often used interchangeably with the phrase “neoliberal policies.” Clearly, the debate continues about the Washington Consensus, its definition, its successes and failures, and whether it even exists. As many of the Washington Consensus’ policy components – however it is defined – relate directly to trade policy, it is a debate worth following.

¹¹⁹ Das, *supra* n. 111, at 174.

intensified competition among the Latin American economies and sub-regions over the last two decades. The regional economic integration became an integral part of it and was instrumental in promoting and anchoring liberalization and reform endeavors.¹²⁰ The impact of the neo-liberal strategies was visible in the regional trade, which has expanded substantially over the last two decades. Exports soared from \$92 billion to \$406 billion over the 1980-2000 period, while imports rose from \$93 billion to \$418 billion.¹²¹

In the early years of the 21st century, the regional dimension of trade became a more important part of the domestic policy than ever in the past. A watered-down Economic Complementary Agreement (ECA or ACE in Spanish) in the four Southern Cone economies resulted in the signing of the Treaty of Asuncion in 1991 to launch MERCOSUR in 1995.¹²² Negotiations continued for the next five years and MERCOSUR did indeed come into force in 1995. It was formed by a contiguous sub-regional group of economies and was planned as a custom union, which ambitions for a higher level of integration. Future plans are to evolve as a common market. Subsequently, it incorporated Bolivia and Chile as associate free trade area members.¹²³ The Andean Pact (AP) was born with an ambition to be a customs union. The 1988 Protocol of Quito called for amendments to the Andean Group's (AG's) founding treaty. Its institutional structure was also revised in 1988. During the early 1990s, a free trade area (FTA) was

¹²⁰ See Joseph E. Stiglitz, *Globalization and Its Discontents* (W.W. Norton 2002).

¹²¹ A. Markusen & C.C. Diniz, *The Differential Competitiveness of Latin American Regions: Opportunities and Constraints* (Inter-Am. Development Bank, Governor's Meeting at Milan, Italy, Mar. 22, 2003), available at <http://www.hhh.umn.edu/img/assets/6158/latinamericanregions.pdf> (last visited July 29, 2006).

¹²² *Id.* MERCOSUR stands for Mercado Comun del Sur or Southern Cone Common Market Agreement. The Southern Cone countries of Argentina, Brazil, Paraguay, and Uruguay are members of MERCOSUR.

¹²³ Das, *supra* n. 111, at 177.

formed between AG countries.¹²⁴ In 1996, they changed their name to the Andean Community (AC or CAN in Spanish). This new regionalism-related strategies, coupled with the adoption of market-friendly outward-oriented strategies, enabled Latin America to be better integrated with the global economy and a more active participant in the global era. Enhanced regional integration has allowed these economies to cooperate and become more effective global players. During the ongoing negotiations for the FTAA and MERCOSUR, the AC and CARICOM all participated as sub-regional blocs, which gave them more clout than if each country had participated individually.¹²⁵

(b) Political Economy

(1) North America

Economic and Political relations with the U.S. continued to act as a major issue for Canada.¹²⁶ A 1978 study by international relations scholars predicted: "Canada will probably be more, not less, integrated with the United States, and the two governments will probably have more, not fewer, conflicts." The original objectives of NAFTA are as easy as trade and investment issues. However, in recent years, some non-economic core concerns raised in the negotiation table. The central focus of these three governments is the "security" issue of post-911 anti-terrorism missions;¹²⁷ in other words, the integration

¹²⁴ *Id.* Subsequently, an imperfect customs union was formed among three of them, namely, Colombia, Ecuador and Venezuela.

¹²⁵ *Id.* at 184.

¹²⁶ Folsom & Folsom, *supra* n. 103, at 20. Canadian Nationalism was sometimes difficult to distinguish from anti-Americanism.

¹²⁷ Peter Hakim & Robert E. Litan eds., *The Future of North American Integration: Beyond NAFTA* 8 (Brookings Instn. 2002).

process in the North America will go beyond the trade and investment in the future.¹²⁸

There is no special treatment for Mexico as a developing country; so Mexican participation in NAFTA is another major step in the dramatic liberalization of the Mexican economy since the mid-1980s.¹²⁹

(2) Central America

Caribbean Basin Economic Recovery Act (CBERA) became operative in 1984, and this act provides eligible products exported from the Caribbean Basin countries duty-free entry to the United States.¹³⁰ APTA and NAFTA impact Caribbean nations, because these two trade agreements will undermine the U.S. trade objective of promoting economic development in the Caribbean.¹³¹ “Those increased in the development of the Caribbean should be concerned about the potential impact of NAFTA. Since NAFTA has

¹²⁸ *Id.* at 14. (The direction of deeper integration in NAFTA would be to develop more formal cooperative arrangements in other critical areas out-side trade and investment, such like security, migration, and labor and environment).

¹²⁹ Murry Smith, *The North America Free Trade Agreement: Global Impacts in Regional Integration and the Global Trading System* 83, 85 (Kym Anderson & Richard Blackhurst eds., Harvester Wheatsheaf 1993).

¹³⁰ Robert C. Shelburne, *The Effect of NAFTA and APTA on the Caribbean Basin Countries in The North America Free Trade Agreement* 30, 32 (Khosrow Fatemi & Dominick Salvatore eds., Pergamon 1994). Caribbean Basin Economic Recovery Act became operative on January 1, 1984; this act provides eligible products exported from the Caribbean Basin countries duty-free entry to the United States. Of the approximately 9250 eight-digit tariff entry categories listed in the U.S. Harmonized Tariff Schedule (HTS), 6450 are eligible for CBERA duty-free benefits cover all products except most textiles and apparel, canned tuna, petroleum and petroleum products, certain footwear and leather goods, and watches and watch parts with components from Communist countries. The beneficiary nations also have the right to negotiate liberal bilateral textile quotas; these Guaranteed Access Levels (GALs) assure access to the U.S. market for apparel products assembled from fabric formed and cut in the United States.

¹³¹ *Id.* at 31-32. In 1991, the United States legislated a set of trade benefits in the Andean Trade Preference Act (ATPA) for Colombia, Peru, Bolivia, and Ecuador similar to those in Caribbean Basin Economic Recovery Act (CBERA) nations. In addition, the creation of the North America Free Trade Agreement (NAFTA) which was implemented in January 1994, has significantly improved Mexico's access to the U.S. Market. Since NAFTA and ATPA diminish the relative trade preferences given to CBERA beneficiaries, concerns have been raised that these two new trade agreements will undermine the U.S. trade objective of promoting economic development in the Caribbean.

already been implemented, the only viable alternative for the Caribbean nations are to attempt to obtain more trade preferences for them. These could include more limited proposals providing improved access for apparel, or more extensive possibilities such as accession into NAFTA; however, in order to obtain these, the United States will require the Caribbean nations to further liberalize their own economics.¹³² The Caribbean nations may lose much of the benefit of their preferred access to the U.S. market as a result of ATPA and NAFTA. Since these two programs give these nations at least the same tariff-free benefits, the increased competition may reduce the volume and price of Caribbean countries exports to the United States.¹³³

(3) South America

New regionalism failed to resolve some of the age-old problems related to regional integration in Latin America. The case in point is the four sub-regional groups (AC, CARICOM, CACM, and MERCOSUR), which had formally declared their objective of creating common markets or economic unions. Formation of a customs union is a necessary first step in this direction, but to the present time none of the four sub-regional groups has come close to being a customs union. They have all agreed to the concept of common external tariffs but either they are being developed (CACM and CARICOM), or reformulated (AC), or in the case where they have been developed, common external tariffs have serious unilateral gaps and loopholes (MERCOSUR). Historically, economies in Latin America had a lot of problems with common external

¹³² *Id.* at 53.

¹³³ *Id.* at 37.

tariffs. The new regionalism has not succeeded in bringing about much improvement in the old malaise. One noteworthy common characteristic regarding the scope and depth of regional integration in Latin America is that so far it has not succeed in liberalization in areas beyond trade in goods. In their articles of agreements, most regional economic integration was traditionally confined to goods-only trade liberalization.¹³⁴

2. Negotiation Strategy Analysis

(a) Key Negotiation Interests

From a United States perspective, NAFTA was in many ways a better agreement than the multilateral negotiation. The US got more of what it wanted in areas of important to it (especially services and investment) and for major trading partners, with out having to accept a supranational regional trade authority. It was able to deal simultaneously with troublesome side issues through the device of separate environmental and labor agreements.¹³⁵

From a Canada perspective is fairly simple. Canada can't affect Mexican growth by ignoring Mexico. Since the rise of Mexico as a competitive player, like the rise of Taiwan or Korea, is outside Canadian influence, the key to Canadian success is to concentrate on internal matters – job training, the extent of intra-provincial barriers,

¹³⁴ Das, *supra* n. 111, at 185.

¹³⁵ Julius Sen, *The North American Free Trade Agreement in Regionalism, Multilateralism, and Economic Integration - The Recent Experience* 135, 140 (Gray P. Sampson & Stephen Woolcock eds., UN U. Press 2003). NAFTA agreement gave the United States, Canada, and Mexico the chance to push further and faster in a number of areas than was possible at the multilateral level, even if the agenda was largely driven by the United States.

venture capital, the building of the “Canadian diamond,” the set of interrelated goods and services production which leads to enhanced productivity, exports and higher incomes.¹³⁶

From a Mexico perspective, the main benefit lies in the fact that the NAFTA begins to scrap old industrial regulations and investment restrictions, which should help modernize the economy and give it an advantage over its Latin American partners. The most steps ahead are for Mexico to make NAFTA meaningful and fully internationalize its economy by allowing foreigners to take a more important role in equity finance. In the absence of this participation, the high growth and capital formation expected from NAFTA will not have enough financial backing from capital market.¹³⁷ Four Steps of Mexican economy reform lead the country into NAFTA agreement. The first step was to liberalize trade in manufactures. The government undertook this action not as soon as it realized its necessary, but only when the unanimity of the powerful groups within the manufacturing sector broke down in the 1980s. The second step was to consolidate the power of emerging elites with an interest in export promotion, an objective that the government achieved through privatization and deregulation. The third step in the

¹³⁶ Leonard Waverman, *The NAFTA Agreement: A Canadian Perspective* in *Assessing NAFTA: A Trinational Analysis* 32, 56-57 (Steven Globerman & Michael Walker eds., The Fraser Inst. 1993). Canada is facing a new challenge, and the Canadian government treated NAFTA as the way to promote the economy. Canadians already hurt by increased global competition, so the innovation transaction and retraining programs are needed to improve.

¹³⁷ Rogelio De La O Ramirez, *The NAFTA Agreement from a Mexican Perspective* in *Assessing NAFTA: A Trinational Analysis* 60, 86 (Steven Globerman & Michael Walker eds., The Fraser Inst. 1993). The Mexican government was on early alert to refuse any negotiation of foreign investment in the oil industry, including exploration and production, refining, basic petrochemicals, and distribution of oil, gas, and gasoline. It also refused to guarantee a given level of oil supplies to North America or to reduce exports and domestic sales of crude in equal proportions in case of an emergency.

sequence was the signing of NAFTA, and the fourth step will be actually to dismantle protection in the agricultural and service sector.¹³⁸

NAFTA was a unique achievement because it implements virtually complete free trade between two highly developed economics and a developing country within fifteen years. Remarkably for trade between countries at very different development levels, NAFTA will remove all border barriers to trade, including those in previously highly protected trade in agriculture and in textiles and automobiles that meet North American content requirements. The agreement is also remarkable in allowing no special and differential treatment for Mexico as a developing country.¹³⁹

For Central America, the time is right to set itself an ambitious goal for further integration: More than a decade after the end of conflicts in the region, a new spirit of cooperation, democracy, and market-oriented economic reforms has firmly taken root, setting the region on a clear path toward its rightful position at the cross-roads of the Americas (a region firmly committed to outward-oriented growth, making the best of its location, natural beauty, and human resources). Central America has just completed the negotiations for a free trade agreement with the United States, which will help entrench this process further and align the region even more closely with its largest trading partner. What needs to be done to capitalize on these achievement and to prepare the region for

¹³⁸ Aaron Tornell & Gerardo Esquivel, *The Political Economy of Mexico's Entry into NAFTA in Regionalism versus Multilateral Trade Arrangements* 25, 53-54 (Takatoshi Ito & Anne O. Krueger eds., U. of Chi. Press 1997).

¹³⁹ Lawrence, *supra* n. 21, at 68-69.

further integration, thereby making it more resilient to shocks and able to compete more effectively in the global market for goods, jobs, and capital.¹⁴⁰

The 1980s marked a radical shift in Latin American economic development strategy. Inward oriented policies of import substitution were transformed into outward oriented open-market-based development strategies. Amid debt crises the countries of the region were forced to implement stabilization and structural adjustment packages, which brought restrictive macroeconomic policies, market deregulation and the adoption of unilateral policies aimed toward opening up their economies to neighboring countries and the rest of the world. Although regional integration was not new within South America, the 1990s marked a period of renewed interest, reinvigorating the promotion of earlier integrationist processes. Since then, these countries have also exerted an interest in adopting policies to open their economies toward global trade. This openness has been seen as an essential mechanism for Latin American governments to gain markets and to advance their region on the global map.

(b) Negotiation Barriers

Mexico have expressed concern about U.S. compliance with NAFTA on issues as varied as sugar and trucking. For their part, Canadians were irritated about the recent imposition of U.S. tariffs on its lumber exports and concerned about possible new barriers raised against the import of Canadian wheat and steel. While all of these matters

¹⁴⁰ Markus Rodlauer, Speech, *Perspectives for Economic Integration in Central America* (Tegucigalpa Hond., Feb. 27, 2004), available at <http://www.imf.org/external/np/speeches/2004/022704a.htm> (last visited July 29, 2006).

may not be specifically covered by NAFTA, many in Canada feel that the United States is not showing good faith by restricting free trade in key commodities. As for the United States, many policymakers and citizens remain concerned about Mexico's adherence to NAFTA's rules of origin provisions and its labor and environment side agreements.¹⁴¹ Many Mexicans perceive NAFTA process to be a "make-or-break" national strategy for their nation. Mexico's negotiation strategy is to maintain a unique combination in the balance of global trade and investment, and it has the possibility of emerging into the global economy as a strong trading partner with the United States and the rest of the world.¹⁴² The culture, economic and geographic characteristics of Mexico make it critical link to all three of the triadic regions as well as in north-south relations.¹⁴³ Mexicans are generally a bit more positive about NAFTA and its effects than the U.S. respondents. It can be inferred from the data that Mexican respondents expect increased product quality, higher levels of sales, and stronger positive effects for both economics than do their counterparts from the United States.

Canada's objective in joining the NAFTA negotiations was not to secure or maintain access to the Mexican market but to protect its trading interest with the United

¹⁴¹ Hakim & Litan eds., *supra* n. 127, at 9-10.

¹⁴² Stephen B. Preece & Claudio D. Milman, *Pluralistic Participation in an Era of Economic Blocs: The Case of Mexico in The North America Free Trade Agreement* 50, 56-57 (Khosrow Fatemi & Dominick Salvatore eds., Pergamon 1994). Mexico can attract trade and investment partners because it maintains a unique combination of country-specific advantages which makes it a strategic consideration in the balance of global trade and investment. These advantages include an important historical and cultural heritage, a critical geographic positioning, and specific economic advantages such as low labor cost and rich natural resources (including oil). These advantages also impact the 'goodness of fit' which naturally emerges between specific partners in the global community. With the proper economic relationships, which strategically incorporate these elements among a plurality of countries, Mexico has the possibility of emerging into the global economy as a strong trading partner with the United States and the rest of the world – as opposed to becoming a dependent satellite to its dominant neighbor to the north.

¹⁴³ *Id.* at 63. It can reasonably be stated that the advancement of Mexico will prove to be one of the most important developments in the global economic balance during this decade to the 21st century. Pluralistic participation will ultimately enable Mexico to achieve its potential while meeting the needs of its global partners.

States. Under a free trade agreement, trade partners may change; but currently, trade between Mexico and Canada is minuscule.¹⁴⁴ The process of NAFTA is an emerging economic reality. Mexico has made the long-term decision to move from economic isolationism and autarky towards free trade with its neighbors to the north. The final signing of NAFTA will be a symbolic gesture of trilateral commitment to an ongoing process, which has already begun to transform the economic landscape of North America.¹⁴⁵ However, the further integration is too difficult for the three parties to negotiate deeper customs union or common market in North America.

The barriers of integration for Central and Latin America countries are generally based on the different national interests, especially how deep the cooperation with the U.S. For various economic and security concerns, the intra-state integration among Central and Southern American countries are fine, but the situation is worse if the negotiation involved in the U.S. power, especially the FTAA (U.S. proposal for integrate the North, Central, and Southern Americas).

One of the main critics of the FTAA is Venezuelan president Hugo Chávez, who has described it as an “annexation plan” and a “tool of imperialism” for the exploitation of Latin America. As a counterproposal to this initiative, Chávez has promoted the Bolivarian Alternative for the Americas (*Alternativa Bolivariana para la América*, ALBA), based on the model of the European Union, which makes emphasis on energy

¹⁴⁴ Irene M. Herremans, John K. Ryans & Pradeep Rau, *A Canadian Business Perspective on NAFTA in The North America Free Trade Agreement* 118, 120 (Khosrow Fatemi & Dominick Salvatore eds., Pergamon 1994).

¹⁴⁵ Joel D. Nicholson, John Lust, Alejandro Ardila Manzanera & Javier Arroyo Rico, *Mexican and U.S. Attitudes Toward NAFTA in The North America Free Trade Agreement* 68, 68 (Khosrow Fatemi & Dominick Salvatore eds., Pergamon 1994).

and infrastructure agreements that are gradually extended to other areas to finally include the total economic, political and military integration of the member states.

Some Central and Latin Americas has referred to the US-backed Free Trade Area of the Americas, as “an agreement to legalize the colonization of the Americas.” On the other hand, the presidents of Brazil, Luiz Ignacio Lula da Silva, and Argentina, Néstor Kirchner, have stated that they do not oppose the FTAA but they do demand that the agreement provide for the elimination of US agriculture subsidies, the provision of effective access to foreign markets and further consideration towards the needs and sensibilities of its members.¹⁴⁶

3. Institutional Framework Analysis

(a) Strengthen and Opportunity

NAFTA has created a market with total production (GNP) of over \$6.0 trillion, total population of 380 million and total trade of 1.4 trillion. In all areas, these numbers are substantially higher than their nearest competitor, the European Community, now renamed, the European Union (EU).¹⁴⁷ The resulting internal market will be larger than the European Community by 15 million (365 million total customers). In addition to engendering significantly new supply and demand economics, NAFTA will provide for

¹⁴⁶ One of the most contentious issues of the treaty proposed by the United States is with concerns to patents and copyrights. Critics claim that if the measures proposed by the U.S. were implemented and applied this would prevent scientific research in Latin America, causing as a consequence more inequalities and technological dependence from the developed countries. See Till Geiger & Dennis Kennedy eds., *Regional Trade Blocs, Multilateralism, and the GATT: Complementary Paths to Free Trade?* 44 (Pinter Press 1996).

¹⁴⁷ Fatemi, *supra* n. 101, at 3.

extensive rationalization of production and services across a broad spectrum of industries. U.S. capital, technical know-how, systems organization and entrepreneurship will combine with low-cost Mexican labor and resources, creating an array of new ventures which will launch globally competitive products internally, as well as in international markets.¹⁴⁸

Many of the scholars believed the NAFTA creates an opportunity for firms operating in the free trade blocs, and have a positive impact on the Canadian and U.S. economics.¹⁴⁹ While the assumption of beneficial effects may be valid at the aggregate, country-level; at the firm-level the assumption of opportunity depends upon the conditions under which a firm operated prior to the NAFTA. For firms in industries, which may be rationalized as a result of this agreement, the implementation may be perceived as a significant treat.¹⁵⁰

Considering of the future integration of North America would go into two different directions: widening or deepening. For the widening propose, NAFTA could incorporate other neighboring countries such as those of Central America and the Caribbean. Some argue, however, that widening NAFTA to include these additional countries may weaken the original agreement and detract from the potentially larger benefits of achieving deeper integration among just the three NAFTA partners.¹⁵¹ This project provided by the U.S. government as establishing "Free Trade Area of America

¹⁴⁸ Nicholson et al., *supra* n. 145, at 68.

¹⁴⁹ Alan M. Rugman, *The Free Trade Agreement and the Global Economy*, 53 Bus. Q. 13, 13-20 (1988); Peter Morici, *Lessons from the Canada-U.S. Free Trade Agreement: Mexico, Other Regional Agreements and the GATT System*, 14 Cato Rev. of Bus. & Gov. Reg. 57, 57-63 (1991); Alan M. Rugman & Alain Verbeke, *Strategic Management and Trade Policy*, 1989 J. Intl. Econ. Stud. 139, 139-152.

¹⁵⁰ Alice C. Stewart & Reginald A. Litz, *The U.S.-Canada Free Trade Agreement: International, Political and Strategic Responses of U.S. and Canadian Firms in The North America Free Trade Agreement* 68, 88 (Khosrow Fatemi & Dominick Salvatore eds., Pergamon 1994).

¹⁵¹ Hakim & Litan eds., *supra* n. 127, at 14.

(FTAA)” in these years, but seems rejected by some Latin American countries, especially Brazil and Venezuela.

(b) Weakness and Threaten

Americans are significantly less positive for NAFTA, fearing the downward forces on U.S. wages the pact would unleash. They expressed specific concern that there will be a significant loss of blue-collar jobs in their country, and a general decrease in overall U.S. employment levels. This perhaps the greatest fear concerning NAFTA for Americans.¹⁵² Strong protests were voiced in the Canadian and U.S. press by labor leaders, farmers, and others who saw the agreement as eliminating jobs, redirecting investment, and eroding social benefits. While the media were not silent on the NAFTA negotiations, the Canadian business executives’ views, especially those of the smaller firms, were rarely reported.¹⁵³

Compare to the issues addressed above about North America, the CAFTA is worse. Although the most part the five Central American governments¹⁵⁴ involved in the negotiations have supported CAFTA (often in the face of great opposition from parliaments and civil society groups in their countries), several contentious areas have emerged in the negotiations, including the impact of CAFTA on labor standards in Central America, and the impact of trade liberalization on agriculture. In particular, some

¹⁵² Nicholson et al., *supra* n. 145, at 81.

¹⁵³ Herremans et al., *supra* n. 144, at 135.

¹⁵⁴ *Id.* The U.S.-Central America Free Trade Agreement (CAFTA) is a trade agreement that is being negotiated between the United States and five Central American countries: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Negotiations to include the Dominican Republic are also under way.

Central American governments have taken hard negotiating positions on the terms of liberalization of sensitive agricultural products such as corn, rice, beans and dairy. The U.S. sugar industry is similarly concerned by CAFTA, and has lobbied the U.S. Congress against the agreement. U.S. textile states, such as North Carolina, have also come out against the agreement, fearing loss of jobs to the booming Central American maquila sector. Other states that lost jobs or suffered under NAFTA have expressed skepticism over whether CAFTA will be good for the U.S. or Central America.

4. Future Economic Integration of America – Free Trade Area of Americas

The notion of Free Trade Area of Americas (FTAA) was partly inspired by the success of European integration. The Americas may well suffer greater economic divergence as a result of integration than did Europe. The reason is that the initial asymmetries in size and income levels in the Americas are much larger than they were in Europe at the time of the signing of the Treaty of Rome.

The concept to unite the economies North and South Americas into a single FTA was announced at the Summit of the Americas, which was held in December 1994, in Miami. The heads of state and government of the 34 democracies in the region agreed to collaborate to form an FTAA (Free Trade Area of Americas), in which barriers to trade and investment would be progressively eliminated, and to complete negotiations for the

agreement by 2005.¹⁵⁵ When launched, it would be the largest FTA in the world, with a population of 800 million and GDP of \$11 trillion.

Although the objectives are to form an FTA, this is not essentially an exercise in shallow regionalism. It is intended to be a broad FTA, reflecting a consensus to negotiate a wide and diverse range of issues. Reciprocal commitments in areas like trade in service, intellectual property, rights, environmental protection, trade facilitation as well as investment and competition policies. Furthermore, the FTAA also aims at improving the WTO rules and discipline “whenever possible and appropriate.”¹⁵⁶

A unique feature of the FTAA negotiation is the involvement of civil society in the planning process. During the first phase of negotiations, the FTAA Committee of Government Representatives on the Participation of Civil Society issued its initial “Open Invitation to Civil Society.” This called on the interested parties to share their views on the FTAA formulation process in a constructive manner. Another unique feature of the FTAA formulation process is the Joint Government-Private Sector Committee of Experts on Electronic Commerce, established to study how to broaden the benefits to be derived from the electronic marketplace in the hemisphere, and how to deal with this cross-cutting issue within the negotiations.

¹⁵⁵ *Id.* These 34 countries are: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Montserrat, Nicaragua, Panama, Paraguay, Peru, St. Lucia, St. Kitts and Nevis, St. Vincent and Grenadines, Suriname, Trinidad and Tobago, Uruguay, the United States of America, and Venezuela.

¹⁵⁶ Das, *supra* n. 111, at 193.

D. East Asia - ASEAN plus Three and East Asia Summit

1. Regional Background Analysis

(a) History and Development

Considering cooperation among East Asian countries, difficulties always arise in defining the geographical scope of the region. This issue has cast a shadow over arguments on the membership of or eligibility for planned arrangements covering the region.¹⁵⁷ Geographically, countries or regions facing the Pacific Ocean are included in the region¹⁵⁸ as qualified Asia Pacific Economic Cooperation (APEC) members, but this rule cannot apply to current East Asia Summit, because India is also invited.¹⁵⁹ Functionally, a certain level of economic development may be necessary. However, the East Asian region is one of the most culturally diverse regions in the world, not only in economic perspective, but also in the religion and cultural aspects. It is divided as a result of its historical background.¹⁶⁰ There are areas that were once directly dominated by Chinese, or, to a lesser extent, Indian culture. Such areas have a background of Buddhist, Christian, and Confucianism influences.

According to this historical impact, the integration process is more difficult than other place around the world. In the past decades, the integration progress of the APEC

¹⁵⁷ Hadi Soesastro & Sung-joo Hang eds., *Pacific Economic Co-operation - the Next Phase* 53 (Yayasan Proklamasi 1983).

¹⁵⁸ *Id.* This definition has the effort of limiting the scope of potential membership. There is an issue whether countries in the Asian or American countries can be included in the Asia Pacific Region. For instance, Argentina and Brazil will claim that they should not be discriminated against relative to Chile; India and Pakistan, a possible next generation of developmental take-offs, will argue against their own exclusion.

¹⁵⁹ Das, *supra* n. 111, at 122. The countries participated in the First East Asia Summit included: ASEAN ten countries, China, Japan, South Korea, India, Australia, New Zealand.

¹⁶⁰ Soesastro & Hang eds., *supra* n. 157, at 53.

had been the well-known regional arrangements, despite increasing economic interdependence in the region, transforming its traditional vertical “hub and spoke” type relations into more mutually interdependent relations.¹⁶¹ The reasons for such phenomena can be addressed as followings: first, the countries in this region are diverse in many aspects, economically and culturally, and in a geographically wide territory. Such diversity can be the barriers to establish a strong institutional framework, even though their mutual trade and economic interdependence has increased year by year. Second, recent rapidly developing countries have adopted a market-oriented growth strategy, encouraging exports, aimed at promoting international competitiveness.¹⁶² This may be incompatible with an authoritative institutional arrangement, which could act as a protectionist body, negatively affecting free-market mechanisms both inside and outside the region. Third, several political conflicts may be elucidated. The existences of ideological confrontations, such as that between Mainland China and Taiwan, the North Korea issue, and the ideological tensions around Indochina and the island area, have been a major obstacle.¹⁶³

(b) Political Economy

The political economy of East Asia economic integration can be summarized as follows. First, the increasing economic interdependence among countries in the region

¹⁶¹ See C. Fred Bergsten & Marcus Noland eds., *Pacific Dynamism and the International Economic System* (Inst. for Intl. Econ. 1993).

¹⁶² See World Bank Policy Research Report, *The East Asia Miracle: Economic Growth and Public Policy* (Oxford U. Press 1993).

¹⁶³ Kodama, *supra* n. 62, at 54.

encouraged dialogue and cooperation. Second, the successful economic development of some medium-sized or small economies in the region, including ASEAN members, has made them self-confident enough to participate in a regional framework, not fearing domination by major economic and political powers in this region. Third, with regard to political background, the diminishing cold war element in the region has also provided indirect momentum for progress toward a regional arrangement.

However, regional economic integration is the main trend together with globalization. After establishing the North America Free Trade Area (NAFTA) and European Community (EU), the political leaders of East Asian countries realized the importance of promoting deeper economic integration in this region. In November 1989, the fully-fledged effort for regional cooperation, including all major economic factors in the region, started with the establishment of the Asia Pacific Economic Cooperation (APEC), on the basis of Australia's proposal.¹⁶⁴ The present direction of APEC was set out at their third ministerial meeting in Seoul in 1991 when APEC ministers adopted the Seoul APEC Declaration.¹⁶⁵

Besides, the goal and function of APEC is too wide to obtain deeper integration, it is merely the "Annually Economic Forum" for the countries leaders and businessman. Besides, the U.S. is promoting APEC as its platform to extent the economic and political powers in this region. In 1995, the ASEAN Heads of States and Government re-affirmed that "Cooperative peace and shared prosperity shall be the fundamental goals of

¹⁶⁴ Anderson Kym, *Is an Asia Pacific Trade Bloc Next?*, 28 *J. World Trade* 27, 27 (1994).

¹⁶⁵ See APEC Economic Leaders Declaration of Common Resolve (Nov. 15, 1994), 34 I.L.M. 758, available at http://www.apec.org/apec/leaders_declarations/1994.html (last visited Aug. 3, 2006). This declaration included the following principles: (1) regional growth and the achievement of common interests for the region's inhabitants; (2) strengthening of a multilateral free-trade framework in a global sense; and (3) internal liberalization of trade and investment which is compatible with the GATT/WTO principles.

ASEAN.” The Association further represents the collective will of the nations of to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom, and prosperity.¹⁶⁶

In recent years, majority of ASEAN leaders plan to establish “Close Regionalism” in this region, in other words, exclusive the U.S. power into East Asia. For this propose, “ASEAN-plus-one” is the first step to negotiate Free Trade Agreement (FTA) with China. Beyond the achievement, “ASEAN-plus-three” is right on the direction to put Japan and South Korea in the negotiation table. In 2005, the first “East Asia Summit” was held in Malaysia, and many political observers in the region proclaimed the birth of a “New Hope” - brand new ground in Asian integration and community building.

2. Negotiation Strategy Analysis

(a) Core Concern Interests

(1) Trade and Investment Liberalization

One of the most important objectives in East Asia economic integration is trade and investment liberalization at regional level.¹⁶⁷ At the same time, consistency with the GATT/WTO rules continues to be a main principle, along with a flexible approach. The

¹⁶⁶ See Declaration Constituting an Agreement Establishing the Association of South-East Asian Nations (Bangkok Declaration), Aug. 8, 1967, 1331 U.N.T.S. 3, 6 I.L.M. 1233. <http://www.aseansec.org/1212.htm> (last visited Aug. 3, 2006).

¹⁶⁷ Mordechai E. Kreinin & Michael G. Plummer eds., *Economic Integration and Asia: The Dynamics of Regionalism in Europe, North America, and Asia-Pacific* 9-18 (Edward Elgar 2000).

wide range of economic structural of East Asian countries makes the negotiation more difficult than other regions. From developing to developed countries, East Asian countries include the agriculture supply chains, natural resources industries, and also high-technology industries. So far, the regional liberalization program has partially started. The issue is how to strike a balance between regional liberalization and WTO-consistency. Under the WTO regime, East Asian countries need to form the creation of a “free-trade area (FTA)” or “custom union” in a manner compatible with GATT Article XXIV.

Throughout this idea, East Asian countries would process “Close Regionalism” in this area, and this is the main reason of ASEAN negotiate FTA with China, Japan, and South Korea. “The Framework Agreement on Enhancing Economic Cooperation”¹⁶⁸ was adopted at the Fourth ASEAN Summit in Singapore in 1992, which included the launching of a scheme toward an ASEAN Free Trade Area (AFTA).¹⁶⁹ The strategic objective of AFTA is to increase the ASEAN region’s competitive advantage as a single market, like prior European Community (EC).¹⁷⁰ The elimination of tariff and non-tariff

¹⁶⁸ See Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan. 28, 1992, 31 I.L.M. 506, available at <http://www.aseansec.org/12374.htm> (last visited Aug. 3, 2006).

¹⁶⁹ *Id.* At the Fourth ASEAN Summit in Singapore in January 1992, ASEAN initiated the ASEAN Free Trade Area, or AFTA, which laid out a comprehensive program of regional tariff reduction, to be carried out in phases through the year 2008. This deadline was subsequently moved forward to 2003. Over the course of the next several years, the program of tariff reductions was broadened and accelerated, and a host of “AFTA Plus” activities were initiated, including efforts to eliminate non-tariff barriers and quantitative restrictions, and harmonize customs nomenclature, valuation, and procedures, and develop common product certification standards. In addition, ASEAN later signed framework agreements for the intra-regional liberalization of trade in services, and for regional IPR cooperation. An industrial complementation scheme designed to encourage intra-regional investment was approved, and discussions were held on creating a free investment area within the region. During the financial crisis of 1997-98, ASEAN reaffirmed its commitment to AFTA, and as part of a series of “bold measures,” agreed that the original six AFTA signatories would accelerate many planned tariff cuts by one year, to 2002 from 2003.

¹⁷⁰ B.N. Ghosh ed., *Privatization: The ASEAN Connection* 253-263 (Nova Sci. Publishers 2000).

barriers among the member countries is expected to promote greater economic efficiency, productivity, and competitiveness.

The Fifth ASEAN Summit held in Bangkok in 1995 adopted the Agenda for “Greater Economic Integration,” which included the acceleration of the timetable for the realization of AFTA from the original 15-year timeframe to 10 years.¹⁷¹ However, compares to ASEAN, APEC still used the principle of voluntary liberalization as an excuse for the possible integration and cooperation. APEC members may claim that any liberalization is made on an individual basis, so it has nothing to do with APEC itself. Accordingly, APEC can’t promote trade and investment in a strong power, and there is no enforcement mechanism to guaranty deeper economic integration. Thus, the future East Asian economic integration process would be focus on “ASEAN-plus-three,” but not APEC.

(2) Harmonization

With intensified economic transaction in the region, non-tariff measures become a focus of attention, along with tariff measures. Non-tariff barriers (NTBs) include administrative procedures and regulations. In APEC, to reduce non-tariff barriers in major industrial sectors are already on the agenda. Harmonization will be possible amongst countries with similar development levels and economic structures, but it’s criticized as slowly and voluntarily. APEC members, with their diversity, will have difficulty in setting out acceptable standards and harmonizing each member’s regulations.

¹⁷¹ Ito Takatoshi, *Growth, Crisis, and the Future of Economic Recovery in East Asia* in *Rethinking the East Asia Miracle* 55, 71-72 (Joseph E. Stiglitz & Shahid Yusuf eds., Oxford U. Press 2001).

Consequently, in the current APEC programs, mutual recognition of other members' standards and policies is favored as an alternative solution to regional standard setting.¹⁷²

However, in ASEAN agenda, the harmonization is more successful than APEC.¹⁷³ Desiring to build a community of caring societies, the ASEAN leaders resolved in 1995 to elevate functional cooperation to a higher plane of bring shared prosperity to all its members.¹⁷⁴ The Framework for "Developments in Functional Cooperation" was adopted in 1996 with a theme: "Shared prosperity through human development, technological competitiveness, and social cohesiveness."¹⁷⁵ Functional cooperation is guided by the following plan of Actions: Social Development, Culture and Information; Science and Technology; Environment; Drug Abuse Control; and Combating Transnational Crime. As recent negotiation progress, there would be more harmonization of different standards and regulations in the intra-market of the "ASEAN-plus-three."

(3) Dispute Settlement

The East Asia is examining a possible dispute settlement mechanism at regional level, which would supplement the WTO dispute settlement mechanism. This idea is

¹⁷² Kreinin & Plummer eds., *supra* n. 167, at 10-12.

¹⁷³ *Id.* The harmonization within ASEAN economic integration covers the following areas: trade, investment, industry, services, finance, agriculture, forestry, energy, transportation and communication, intellectual property, small and medium enterprises, and tourism.

¹⁷⁴ Edward J. Lincoln, *East Asia Economic Regionalism* 150-153 (Brookings Instn. 2004).

¹⁷⁵ *Id.* at 161. Cooperation in science and technology, environment, culture and information, social development and drugs and narcotics control sharpened and accelerated with the adoption of the Framework for Elevating Functional Cooperation to a Higher Plane by the 29th ASEAN Ministerial Meeting in July 1996. Focusing on the theme of shared prosperity through human development, technological competitiveness and social cohesiveness, functional cooperation programmes and activities were prioritized in line with the Bangkok Summit Declaration's 15-point consensus on functional cooperation: high profile or flagship projects were developed; greater publicity was given to functional activities; various ASEAN awards were established; cost-sharing schemes for projects were formulated; and the Functional Cooperation Bureau of the ASEAN Secretariat was strengthened.

motivated by concerns about recent economic disputes in this region, but mostly between the USA and East Asian economies, not the intra-Asian countries itself. An efficient dispute settlement mechanism by a regional body may be one possible solution to disputes with regional implications. A separate regional dispute settlement design is necessary because the FTAs always contented broader subject matters than the WTO process, and can become more efficient or useful as a regime for dispute resolution.¹⁷⁶ In November 2004, ASEAN passed “Protocol on Enhanced Dispute Settlement Mechanism” in Vientiane, includes twenty one articles. Besides, China and ASEAN signed “ASEAN-China Free Trade Area (ACFTA),” and in order to facilitate the business environment in relation to the ACFTA, the “Agreement on Dispute Settlement Mechanism between ASEAN and China” was signed in 2004 at the ASEAN -China Summit in Vientiane. The Agreement provides a mechanism by establishing a tribunal and dispute settlement procedure in relation to the trade and investment disputes arising under the scope of the ACFTA. Important provisions in the Agreement include consultations, appointments, compositions and functions of the arbitral tribunals, proceedings, third parties and compensation and suspension of concessions or benefits.¹⁷⁷

(b) Negotiation Barriers

¹⁷⁶ See Akira Kohsaka, *Asia Pacific Development Experience and Its Implications for Regional Co-operation in Regional Co-operation and Integration in Asia* 49, 51-52 (Kiichiro Fukasaku ed., OECD 1995).

¹⁷⁷ Yingyi Qian, *Government Control in Corporate Governance as a Transitional Institution: Lessons from China in Rethinking the East Asia Miracle* 295, 295-299 (Joseph E. Stiglitz & Shahid Yusuf eds., Oxford U. Press 2001).

Sovereignty and nationalism are still sensitive issues in East Asia countries. Most economic issues are seen in the political context. The original idea of APEC process has been concentrated on economic fields, in order to avoid raising politically sensitive issues. However, difficulties already exist in containing existing political elements. The East Asian countries have progressed their economic development and interdependence, but remain politically unstable in this area, especially in some countries.¹⁷⁸ These potential political conflicts make it more difficult to negotiate a strong “Super-State Power” or “Share Sovereignty” to establish certain institution toward deeper integration. Some of the East Asian countries, such as Japan, Australia, and Singapore, traditionally have extra-regional economic relations with the U.S. in economic and political cooperation. This tern makes it difficult to create an exclusive regional arrangement, and raise the question, what type of arrangement is most appropriate for the region? This is another fundamental issue in the East Asia economic integration process. APEC is “open regionalism,” and its member includes lots of American countries, such as Chile, Mexico, and Canada. However, the “East Asia Summit” is designed as “close regionalism,” which excludes the U.S. and any other countries outside the region. In fact, many ASEAN leaders agree that geographical closeness brings about close economic transactions amongst states, especially with the rapid growth of China. They also suppose that economic integration may also create psychological closeness, which can give rise to common political or security preoccupations and concerns.¹⁷⁹

¹⁷⁸ Lincoln, *supra* n. 174, at 236-239.

¹⁷⁹ Kodama, *supra* n. 62, at 68-69.

The obstacles to the creation of a regional arrangement in the East Asia may be summarized as follows. First, diversity amongst constituents in the region will be the single most significant obstacle to such an attempt. In addition to their economic and population sizes, religions, cultures, different diplomatic policy goals among countries also present an obstacle. Second, the U.S. attempts to use APEC as the platform for liberalizing its preferred sectors in East Asian countries, and raise the competition with China in this area.¹⁸⁰ In different viewpoints of this policy approach, countries like Malaysia prefer an Asia-based nationalistic arrangement, based upon political motivation; but countries like Japan and Australia prefer an arrangement includes the U.S. accession. Thus, the more consensus establish amongst the countries, the better possibility for creation of an East Asia arrangement. Third, external common security conditions cannot become a unifier for the East Asian region. Rather, countries in this region have different national security concerns, which depend upon their geographical position and circumstances. This shows a contrast with post-war Western Europe, which had a unifying core group (Germany and France), as well as external pressures (Strategically, the Soviet Union, and later, economically, the USA).¹⁸¹ Based on the analysis above, how to remove the barriers among the East Asia countries is the key negotiation process for further economic integration.

(c) Negotiation Process

¹⁸⁰ Yongtu Long, *China and Asian Regional Co-operation in Regional Co-operation and Integration in Asia* 53, 54-57 (Kiichiro Fukasaku ed., OECD 1995).

¹⁸¹ See Robert O. Keohane & Joseph S. Nye, *Power and Interdependence* (Longman 1989).

APEC negotiation process is gaining the characteristic of being a more policy-based tool, along with its original attempt at practical economic cooperation for mutual convenience. With this approach, APEC becomes a unique model of regional arrangements, in other words, APEC is one of the most successful “open regionalism” in the world. It is a regional arrangement, but has a universal aspect, reflecting economic, culture and political diversity. For example, “Anti-terrorism” is the hot topic for APEC in recent years, and “Promoting Doha round Multilateral Negotiation” is another big issue in 2005.

If the future plans for APEC require the same considerations as those for multilateral international negotiation, such as the WTO, APEC would be more like multilateral institution and far beyond the regional perspective. For this wide range of concentration, many arguments on the future of APEC will continue.¹⁸² In particular, the biggest issue is whether APEC should maintain the “soft and open” structure or introduce a more “rigid and closed” style. After a long debate and negotiation, APEC seems likely to preserve its basic principles as “open regionalism.” Such principles include a soft and flexible modest institutional structure, voluntary approach to liberalization, WTO-consistency, including non-discrimination, and flexibility based upon economic diversity. Like other institutions, APEC may well progressively expand the scope of its activities as a result of accumulated routine practice. In these years, the leaders’ meetings transformed into a more comprehensive discussion body; which covers both economic and non-economic matters. APEC may also try to broaden its coverage to concern regional issues

¹⁸² Yung Chul Park, *The East Asia Dilemma: Restructuring Out or Growing Out?* 60-63 (Intl. Econ. Sec., Princeton U. Press 2001).

as for balance. These may include social policy, security and human rights, though at the past these areas are excluded from the APEC negotiation round table. APEC will then become another example of an evolutionary development of regional arrangements.

However, the recent development of the APEC seems not satisfied ASEAN countries. Compare to the success of NAFTA and EU, the economic integration of APEC is too slow and voluntary. The rapid desire for AFTA amongst the countries in this region makes Asian leaders seek another solution outside the APEC. Although ASEAN members were worried about the growth power of China, this concerns fundamentally changed after the Asia Financial crisis. China as the super power in this region could be the positive or negative options for ASEAN.¹⁸³ In recent years, China also promotes preference environment for FDI toward ASEAN. Finally, ASEAN and China, “ASEAN-plus-one,” find the common interests of establish “East Asia Free Trade Area” as a goal to remove tariff and non-tariff barriers for the internal single market, and improve competitive advantages for the external trade relations with the universes. Although there are still a lot of arguments for “close regionalism” in this area, this becomes the recent tern of East Asia economic integration.¹⁸⁴

3. Institutional Framework Analysis

(a) Strengthen and Opportunity

¹⁸³ See Alyssa Greenwald, *The ASEAN-China Free Trade Area (ACFTA): A Legal Response to China's Economic Rise?*, 16 Duke J. Comp. & Intl. L. 193, 212-213 (2006).

¹⁸⁴ Joseph E. Stiglitz, *From Miracle to Crisis to Recovery: Lessons from Four Decades of East Asian Experience in Rethinking the East Asia Miracle* 509, 524-525 (Joseph E. Stiglitz & Shahid Yusuf eds., Oxford U. Press 2001).

Comparing various regional and non-governmental arrangements in the East Asia, ASEAN is the most highly valued organization.¹⁸⁵ It consists of, in principle, relatively free democratic South East Asian countries, and promotes future East Asia economic integration with China, Japan, and Korea. The Bangkok Declaration founded ASEAN in 1967, which is originally a sub-regional, inter-governmental organization with a wide scope. Although it has been generally exaggerated, ASEAN's reputation is high in this region. First, ASEAN's coordination and cooperation have been exceptional in the East Asia, where rigid institutional arrangements are relatively rare and unsuccessful. Second, ASEAN's members are exclusively Asian countries, and it is the first and only successful "close regionalism" in this area. Third, ASEAN's success in the political fields has created a positive image as a cooperative body, and ASEAN can enjoy this positive political attitude toward the success in the economic area. Four, ASEAN is still the major power in the economic integration process, and the possible balance power between other two super entities: China and Japan.

The declaration set out ASEAN's main objectives as followings: first, "to accelerate the economic growth, social progress and culture development," and second, "to promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields." Thus, ASEAN aims to achieve economic cooperation for development as well as other general cooperation. They held first heads of governments' meeting at Bali in 1976. At this meeting, they signed the Declaration of ASEAN Concord as well as the Treaty of Amity

¹⁸⁵ Min Tang, *Asian Economic Co-operation: Opportunities and Challenges in Regional Co-operation and Integration in Asia* 195, 209-213 (Kiichiro Fukasaku ed., OECD 1995).

and Cooperation in South East Asia. In the following year they signed the ASEAN preferential trading arrangements for trade liberalization. ASEAN's achievements were first seen in their political cooperation on a joint position during the unstable period after the Vietnam War. ASEAN's cooperation on the political aspect has been advanced by the regular consultation schedule of their heads of governments' or ministerial meetings. ASEAN is generally highlighted by its political success and relatively inactive economic co-operation.

The 1992 agreements aimed at overcoming the stagnation by establishing an ASEAN Free-trade Area (AFTA), which consists of the arrangement on the ambitious and stronger than ever before. First, unlike the preceding preferential agreement, ASEAN members' economic performance improved with the deepening of their economic interdependence. Second, with the progress of economic development, ASEAN countries shifted their policy to a more liberal and export-oriented approach towards trade. Third, ASEAN's recent mutual cooperation and its relative success have further contributed to its cooperative trend. Fourth, external aspects are also important AFTA's core concern is its plan for regional liberalization by common effective preferential tariffs. The liberalization plan is multi-layered, and thus flexible, reflecting ASEAN members' diversity in their economic development stages.¹⁸⁶

Following by these achievements, ASEAN negotiate further integration with other major markets in this region as their next step. The goal for the creation of AFTA, ASEAN invited three important powers in East Asia: China, Japan, and Korea. Timing of

¹⁸⁶ Jose Edgardo Campos & Hilton L. Root, *The Key to the Asian Miracle: Making Shared Growth Credible*, 174-178 (Brookings Instn. 1996).

the Creation of AFTA and an Integrated Road-map to achieving it regarding the route toward achieving the AFTA, negotiations are underway in the “ASEAN-plus-one” process (with Japan setting the target year at 2012, China at 2010, and Korea at 2009), while bilateral FTA negotiations, such as those between Japan and Korea, are also in progress.¹⁸⁷ The ASEAN Plus Three cooperation began in December 1997 with the convening of an informal Summit among the Leaders of ASEAN and their counterparts from East Asia, namely China, Japan and the Korea at the sidelines of the Second ASEAN Informal Summit in Malaysia. The “ASEAN-plus-three” Leaders expressed greater resolve and confidence in further strengthening and deepening East Asia cooperation at various levels and in various areas, particularly in economic and social, political, and other fields. They signed in 1999 “Joint Statement” on East Asia Cooperation at their 3rd “ASEAN-plus-three Summit” in Manila. Furthermore, the long-awaited “East Asia Summit (EAS)” held in mid-December 2005 brought together China and India with Japan, South Korea, Australia and New Zealand, and the Association of Southeast Asian Nations (ASEAN). ASEAN also decided that the Summit will be held annually with the ASEAN Summit in Southeast Asian countries only. Thus, ASEAN will be the hub of the EAS and the key driver within the “AEAN-plus-three.”

(b) Weakness and Threaten

The East Asia region contains a number of obstacles to obtain a regional arrangement, but even all Asian leaders realized that a regional arrangement may bring

¹⁸⁷ Tang, *supra* n. 185, at 210-215.

about certain advantages. Increasing economic interdependence and the consequential emergence of common interests necessitate regional economic integration. It is reasonable to deal with some problems at regional level, if the problems are regionally rooted.¹⁸⁸ However, the weakness for East Asia economic integration could summarize as followings: First, East Asia region contains almost the full spectrum of economies that multilateral regimes already encompass. Therefore, there is a little room for a regional arrangement to contribute to strengthening multilateral frameworks. Creation of a regional arrangement in the Asia Pacific is a policy choice, and Asian leaders should take into account the possible costs and benefits of creating a regional arrangement. Second, in the East Asia region, regional security networks need to be re-constructed after the cold war era. The politically sensitive issues still remain in this area, and it seems to continue in the future decades; for example, the Cross-Strait conflict (Between Mainland China and Taiwan), Sino-Japan tension, and Japan-Korea tension. Third, optimists see the EAS as the first step toward establishing an East Asian Community (EAC) along the lines of the European Community (EC). However, competing geopolitical interests and historic suspicion make the goal unrealistic for the foreseeable future. Instead of creating a common bond, the EAS may have intensified old strategic rivalries and forced smaller Asian nations to choose sides. Four, whether the U.S. power should be include or exclude remain the key issue among the East Asian countries. Former Malaysian Prime Minister Mahathir Mohamad first proposed the summit as the East Asian Economic Caucus in 1991. But the original proposal, with its narrow membership definitions, floundered

¹⁸⁸ Kodama, *supra* n. 62, at 71.

mainly due to opposition from the US, and the first EAS follows the original ideas of Mahathir.¹⁸⁹

For the future consideration, “East Asia Summit” along with the “ASEAN-plus-three” would be the most important regional meeting to improve economic integration. However, there are still many threaten to increased the difficulty of deeper integration. The most one is membership accession and negative competition inside the East Asia Summit. In 2005, ASEAN supported India’s participation in the East Asia Summit, seeing it as a useful counterweight to China’s growing power and backed Australia’s participation provided that Canberra acceded to the ASEAN Treaty of Amity and Cooperation, which it did. However, at the same time, China proposed to divide members into core and secondary categories, and Chinese and Korean leaders refused to hold bilateral or trilateral talks with Japan. China’s proposal is that the existing “ASEAN-plus-three,” and not the new sixteen members of East Asia Summit, control the formation of any Asian community-building exercise. In other words, China insisted that East Asia Community (EAC) formation remain the responsibility of the core group, or “ASEAN-plus-three.” This statement is propose to divide East Asia Summit into two blocs - the core states with China as the dominant “ASEAN-plus-three” player, and the peripheral states with India, Australia and New Zealand, “outsiders.”¹⁹⁰

Furthermore, in the absence of a thaw in Sino-Japanese, Korean-Japanese, and Sino-Indian relations or great power cooperation, the East Asia economic integration is unlikely to take off because multilateral negotiation is a multi-player game. If such

¹⁸⁹ Lincoln, *supra* n. 174, at 238-239.

¹⁹⁰ Sungjoon Cho, *Rethinking APEC: A New Experiment for a Post-Modern Institutional Arrangement in WTO and East Asia: New Perspective* 381, 419-422 (Mitsuo Matsushita & Dukgeun Ahn eds., Cameron 2004).

rivalry continues, there is every risk that economic integration process would be fatally compromised. At the worse, the East Asia Summit will be just another “talk shop” or “Annual Party” like the APEC, in other words, the declaration is made year by year, but little economic integration is achieved.

4. The Future of East Asia Economic Integration

Although The East Asian economies have achieved substantial liberalization of trade and FDI under the frameworks of WTO and APEC, the most significant development is the movement toward regional economic integration supported by ten ASEAN countries. Negotiations that would integrate the Chinese economy with those of the ten Southeast Asian States “ASEAN-plus-one” —are already at the substantive stage. And the negotiations that would bring together “ASEAN-plus-one” with the economies of Japan and Korea —to make “ASEAN-plus-three” —are being actively pursued at various levels. Further in today’s development, East Asia Summit will be hold annually by ASEAN’s member countries starting from 2005. Market openness and financial reform contributed to rapid economic growth by attracting FDI and, together with trade openness, deepened economic integration in East Asia region.¹⁹¹

The process of economic integration in East Asia is one of the most difficult negotiation tasks in the world. The more opportunities and strengthen the East Asian market has, the more challenges and threatens the negotiation process would be experienced. By analysis above in this Chapter, the followings are the closing thoughts

¹⁹¹ Hans G. Danielmeyer, *A Business Scenario for the Future in Asia* in *Regional Co-operation and Integration in Asia* 63, 63-67 (Kiichiro Fukasaku ed., OECD 1995).

together with some suggestions of the future improvement toward East Asia economic integration:

First, "Diversity issue" is the fundamental differences amongst East Asian countries in economic size, culture, religion, and language. It could be the advantage for integrate all kinds of different resources to promote deeper interdependent in one hand, and could be the disadvantage for the potential barriers to obstacle the negotiation. To respect the various concerns among individual country as well as consistent the overall integration process would be the most important element in the future negotiation process.

Second, "Membership Enlargement" is difficult to resolve amongst various countries' perspectives. This issue originally comes from the basic question: whether the East Asia economic integration is "open regionalism" or "close regionalism"? If the answer is the first one, the inefficiency of APEC will be shown in the future. If the answer is the second one, the membership enlarge standard or criteria should be set up immediately. The establishing the standards and criteria are to insure the common schedule and enforcement by all members, but not merely a declaration for voluntary action.

Third, "the U.S. Impact" is the political issue within the economic integration process. The major influence is whether to exclude the U.S. power in this region.¹⁹² Majority Asian leaders seem to exclude the U.S. power into this region. The first East Asia Summit limited the countries in East Asia region only, and the goal of economic integration is to build East Asia Community.

¹⁹² Lincoln, *supra* n. 174, at 250-267.

Finally, “the China Impact” raised its importance in recent years. The tension of Sino-Japan relations (also Korea-Japan relations) as well as Cross-Strait relations would be potential intra-conflict to obstacle the deeper integration. Although the East Asia economic integration is right on the track now, there is still a long way to go.

IV. POSSIBLE ECONOMIC INTEGRATION NEGOTIATION BETWEEN TAIWAN AND MAINLAND CHINA IN THE WORLD ORDER

A. Multilateral Negotiation

1. China's Accession in to the WTO

(a) Negotiation History and Process

The Economy of the People's Republic of China is the second largest in the world when measured by purchasing power parity, with a GDP (PPP) of US \$7.124 trillion in 2004. When measured in USD-exchange rate terms, it was the 6th largest in the world in 2004 with a GDP of US\$1,929.21 billion, leapfrogging to the 4th largest in 2005 with approximately US\$2.18 trillion. It is the world's largest developing economy, and its continued growth is critical to the overall health of the world economy and to the welfare of its population of 1.3 billion. PRC's per capita GDP was approximately US\$1,665 in 2005. Since 1978 the PRC government has been reforming its economy from a Soviet-style centrally planned economy to a more market-oriented economy but still within the rigid political framework imposed by the Communist Party of China. This system has

been called “Socialism with Chinese characteristics” and is one type of mixed economy. PRC’s global trade exceeded \$1 trillion (\$1.15 trillion) in 2004, more than doubling from 2001. The trade surplus however was stable at \$30 billion. PRC’s primary trading partners include Japan, U.S., South Korea, Germany, Singapore, Malaysia, Russia, and the Netherlands. According to U.S. statistics, PRC had a trade surplus with the U.S. of \$170 billion in 2004, more than doubling from 1999.¹⁹³

The PRC has experimented with decentralizing its foreign trading system and has sought to integrate itself into the world trading system. In November 1991, PRC joined the Asia-Pacific Economic Cooperation (APEC) group, which promotes free trade and cooperation in economic, trade, investment, and technology issues. In 2001, PRC served as APEC chair, and Shanghai hosted the annual APEC leaders meeting. In November 1999, the United States and PRC reached a historic bilateral market-access agreement to pave the way for the PRC’s accession to the WTO. As part of the far-reaching trade liberalization agreement, the PRC agreed to lower tariffs and abolish market impediments after it joins the world trading body. Chinese and foreign businessmen, for example, will gain the right to import and export on their own - and to sell their products without going through a government middleman. Average tariff rates on key U.S. agricultural exports will drop from 31% to 14% in 2004 and on industrial products from 25% to 9% by 2005. The agreement also opens new opportunities for U.S. providers of services like banking, insurance, and telecommunications. After reaching a bilateral WTO agreement with the EU and other trading partners in summer 2000, the PRC worked on a multilateral WTO

¹⁹³ Peter Drysdale & Ligang Song, *China’s Entry to the WTO: Strategic Issues and Quantitative Assessments* 53-65 (Routledge 2000).

accession package. The PRC joined the WTO on December 11, 2001, after 15 years of negotiations, the longest in GATT history.¹⁹⁴ The U.S. is one of China's primary suppliers of power-generating equipment, aircraft and parts, computers and industrial machinery, raw materials, and chemical and agricultural products. However, U.S. exporters continue to have concerns about fair market access due to China's restrictive trade policies and U.S. export restrictions. Intellectual property theft makes many Western companies worry of doing business in mainland China.

(b) Internal Effects

A new era of open trade and economic development comes after China accessing into the WTO in 2001. Although China is still a developing country, all the WTO members agreed that China has to adjust its trade protection policy and open the domestic market following by the recognized schedule. In other words, the external pressures for China's economies will increase as well as the internal market competition in various industries. In these years, PRC government reduced the import tariff, non-tariff barriers, adjusted its communist economic in one hand, and put the MFN, national treatment, transparency principle into domestic regulations in the other hand.

During 2001-2005, China adjusted more than 2,500 laws and regulations of about Foreign Direct Investment (FDI) and Import-Export Trade. At the same time, the local governments also adjusted more than 190,000 regulations and trade and investment

¹⁹⁴ See Wook Chae & Hongyul Han, *Impact of China's Accession into the WTO and Policy Implications for Asia-Pacific Developing Economies* (S. Kor. Inst. for Intl. Econ. Pol., 2001); and see Eswar Prasad ed., *China's Growth and Integration into the World Economy: Prospects and Challenges* (IMF, 2004).

policy mechanism in order to improve the efficacy of the law enforcement. Although the results are not fully satisfied by the international society, the efforts made by the Chinese Communist Authority already changed the fundamental framework of Chinese market from communism to capitalism in economic aspects.

According to WTO tariff schedule, PRC recognized to reduce agriculture and industry products to 10%, and take off all non-tariff barriers, includes the import quota and license of automobile industry in 2006.¹⁹⁵ Besides, Mainland China also needs to improve more open market access in trade in services, such like banking, security, insurance, media, and communication industry. This is a brand new era for Chinese people and a big challenge as well. As for the local company in China, it means more competition would increase, and the business structural would be changed for more globalization. As for the government, continuing to open the domestic market would not only enlarge the import activities, but also increase the pressure of international balance of payment problem.¹⁹⁶

(c) External Affairs

After China accessing to the WTO, the U.S. government signed the PNTR¹⁹⁷ with PRC and establish the bilateral trade relationship. Besides, other major economic entities in the world, such like European Union, Japan, and India, are also negotiating closer trade

¹⁹⁵ See Xianyu Yu, *Shi Mao Zu Zhi Fa Lü Gui Ze Yu Zhongguo* 世貿組織法律規則與中國 (Zhongguo Cai Zheng Jing Ji Chu Ban She, 2001); and Cheong Ching & Hung Yee Ching, *Handbook on China's WTO Accession and Its Impacts* 20-45 (River Edge 2003).

¹⁹⁶ Jiao Xue Yuan, *Guo Ji Fa Lun Cong* 國際法論叢 (Fa Lü Chu Ban 1989).

¹⁹⁷ For more discussion about U.S. foreign policy toward Mainland China, see *supra* Ch. 2.

relationship with PRC. Based on the WTO rules, PRC's domestic market became more open and the commercial activities as well as foreign direct investment increased year by year.¹⁹⁸ PRC is the biggest FDI market in the world, and many scholars called it as the "World Factory." The reason for the rapid change of Chinese market and economic environment is because Beijing adjusted several laws and regulations after entering into the WTO. The more transparent in the legal process, the more foreign companies jumped into the market.

In sum, PRC's ranking of foreign trade raised from the top 6 to the top 3 around the world, and the enlarged economic competitive advantage made PRC's economic power stronger in the international politics and diplomacy. After PRC entering into the WTO, the domestic market will open following the tariff schedule, and PRC government adopted hundreds of regulations and laws for satisfies the GATT/WTO requirement. Although there are still corruptions and trade barriers in many transactions or service sectors, no country in the world could ignore the impacts of PRC in the 21st century.

2. Taiwan's Accession in to the WTO

(a) Negotiation History and Process

Foreign trade has been the engine of Taiwan's rapid growth during the past 40 years. Taiwan's economy remains export-oriented, so it depends on an open world trade

¹⁹⁸ In 2002, the total trade amount was 5,100 hundred million U.S. dollars, and it became 1.1 trillion in 2005. In the past three years (2002-2005), FDI in China were over 500 hundred million U.S. dollars, and it would be up to 600 hundred million U.S. dollars in 2006. *See* Yu, *supra* n. 195, at 62.

regime and remains vulnerable to downturns in the world economy. Export composition changed from predominantly agricultural commodities to industrial goods. The electronics and high-technology sector are Taiwan's most important industrial export sector and is the largest recipient of U.S. investment.¹⁹⁹ Taiwan became a member of the WTO as "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" in January 2002.

(b) Internal Effects

Through nearly five decades of hard work and sound economic management, Taiwan has transformed itself from an underdeveloped, agricultural island to an economic power that is a leading producer of high-technology goods. Taiwan is now a creditor economy, holding one of the world's largest foreign exchange reserves of more than \$257 billion in 2006.²⁰⁰ Despite the Asian financial crisis, the economy continues to expand at about 5% per year, with virtually full employment and low inflation. In the 1960s, foreign investment in Taiwan helped introduce modern, labor-intensive technology to the island, and Taiwan became a major exporter of labor-intensive products.

In the 1980s, focus shifted toward increasingly sophisticated, capital-intensive and technology-intensive products for export and toward developing the service sector.

¹⁹⁹ See Suzanne Berger & Richard K. Lester eds., *Global Taiwan: Building Competitive Strengths in a New International Economy* 3-32 (An E. Gate Bk. 2005).

²⁰⁰ See Source from Central Bank of Republic of China, *Statistics of Major Trading Partners' Foreign Exchange Reserve*, <http://win.dgbas.gov.tw/dgbas03/bs8/world/fer.htm> (updated Mar. 3, 2006)(last visited July 29, 2006).

At the same time, the appreciation of the New Taiwan dollar, rising labor costs, and increasing environmental consciousness in Taiwan caused many labor-intensive industries, such as shoe manufacturing, to move to the Chinese mainland and Southeast Asia. Taiwan has transformed itself from a recipient of U.S. aid in the 1950s and early 1960s to an aid donor and major foreign investor, especially in Asia. Private Taiwan investment in the Mainland China is estimated to total more than \$30 billion, and Taiwan has invested a comparable amount in Southeast Asia.²⁰¹

(c) External Effects

Taiwan is the world's largest supplier of computer monitors and is a leading PC manufacturer. Textile production, though of declining importance as Taiwan loses its competitive advantage in labor-intensive markets, is another major industrial export sector. Imports are dominated by raw materials and capital goods, which account for more than 90% of the total.²⁰² Taiwan imports most of its energy needs. The United States is Taiwan's second largest trading partner, taking 20% of Taiwan's exports and supplying 16% of its imports. Taiwan is the United States' eighth-largest trading partner; Taiwan's two-way trade with the United States amounted to about \$45 billion in 2002. Imports from the United States consist mostly of agricultural and industrial raw materials. Exports to the United States are mainly electronics and consumer goods. The United States, Hong Kong (including indirect trade with Mainland China), and Japan account for

²⁰¹ Xue-Yi Cai, *Liang An Jing Mao Zhi Zheng Zhi Jing Ji Fen Xi* 兩岸經貿之政治經濟分析 265-296 (New Wun Ching Developmental Publg. Co. Ltd. 2003).

²⁰² Berger, *supra* n. 199, at 40-45.

nearly 56% of Taiwan's exports, and the United States and Japan provide over 40% of Taiwan's imports. As Taiwan's per capita income level has risen, demand for imported, high-quality consumer goods has increased. The lack of formal diplomatic relations with all but 26 of its trading partners appears not to have seriously hindered Taiwan's rapidly expanding commerce. Taiwan maintains trade offices in more than 60 countries with which it does not have official relations. In addition to the WTO, Taiwan is a member of the Asian Development Bank as "Taipei, China" and the Asia-Pacific Economic Cooperation (APEC) forum as "Chinese Taipei." These developments reflect Taiwan's economic importance and its desire to become further integrated into the global economy.²⁰³

B. Regional Negotiation

1. China's Impact toward Asia Economic Integration

ASEAN held the most positive approach to communicate with China, Japan, India, and South Korea, and the purpose for the "East Asia Single Market" is to exclude the impact from the U.S., and further to build it as "Closed Regional Organization."²⁰⁴ If this regional framework successfully establishes in the coming future, the economic and market power would be equal to the EU as well as the NAFTA. This regional agreement contains the largest population in the world, and all these Asian leaders planned to

²⁰³ Zhen-Yuan Tong, *Cross-Strait Economic Relations in the Era of Globalization* 全球化下之兩岸經貿關係 19-71 (Shengchih 2003).

²⁰⁴ See Campos & Root, *supra* n. 186; also see Kreinin & Plummer, *supra* n. 167.

improve and establish the “East Asia Summit” in December 2005. In the future, not only the economic integration process would be discussed in this framework, but also the common security policy would be debt among the members.²⁰⁵

Of course, PRC plays an important role in the process of East Asia integration. In the FTA negotiation, both China and ASEAN agreed to remove all tariffs of insider trade in 2010, and also seek the closer cooperation in politics, security, military, transportation, and tourism. In other words, ASEAN and PRC would go through deeper and wider economic integration in these years. Reviewing the negotiation history, the original idea of “China-ASEAN FTA” came up in 2000, declared by Mahathir Mohamad, former Prime Minister of Malaysia. Few years later, ASEAN and China signed “Comprehensive Economic Co-operation between ASEAN and the People Republic of China” in 2002, establish “Strategic Partnership Relations” with each other in 2003, and declared “Plan of Action to Implement the Joint Declaration of the Heads of State/Government of ASEAN and China on Strategic Partnership for Peace and Prosperity” in 2004. In 2005, PRC and ASEAN signed free trade agreements, includes “Agreement on Dispute Settlement Mechanism between ASEAN and People’s republic of China,” and “Agreement of economic cooperation framework on trade in goods between ASEAN and PRC.” In the first agreement, it is based on “WTO Agreement on Dispute Settlement,” includes the scope of dispute, the process of Consultation, Mediation, Arbitration, the enforcement and implement. In the second agreement, includes the “Normal Track” and “Sensitive

²⁰⁵ About the detail discussion of East Asia Economic Integration, see *supra* pt. III (D), at 180-198.

Track,” both parties agreed to reduce import tariff of more than 7,000 products into 0% ~ 5% no later than 2010.²⁰⁶

2. Taiwan's role in Asia Economic Integration

Although Taiwan had entered into the WTO for almost 4 years, the internal and external challenges increased year by year. Most of WTO members seek to sign FTA with others or improve regional economic integration in these years, especially due to the failure and delay of multilateral negotiation process. The desire for Asia countries to negotiate deeper economic integration becomes the major task in these years. Not only ASEAN established the FTA itself, PRC, Japan, South Korea also negotiated “ASEAN plus three” agreement. In 2005, the first East Asia Summit was held in Malaysia, the participants includes 16 Asia countries, such as ASEAN, PRC, Japan, South Korea, Australia, New Zealand, and Russia. Almost all East Asia countries join this regional meeting except Taiwan. The major reason is the political conflict between PRC and ROC. Most of the countries follow Beijing's instruction and exclude Taiwan to participate this regional economic integration regime. In fact, the only regional institution that Taiwan participates is APEC, which is so called “Open Regionalism.”²⁰⁷ APEC became less important for Asia Countries since the East Asia Summit was established. If the East Asia FTA was signed and excluded Taiwan's participating, Taiwan would face the biggest challenge in economic development.

²⁰⁶ Paul Monk, *Thunder from the Silent Zone: Rethinking China* 96-124 (Scribe 2005).

²⁰⁷ See Kiichiro Fukasaku ed., *Regional Co-operation and Integration in Asia* (OECD Pub. 1995).

The influence of Asia Economic Integration toward Taiwan is in two respects: First, the trade substitute of Taiwan's products export to the market in Mainland China, Japan, Korea, and South Eastern Asia. Second, the impact of FDI import from the U.S., Japan, and EU toward Taiwan. As for the industry, Taiwan's traditional manufactories such like textile, cotton, iron, and petrochemical etc... would become less competitive in East Asia Single Market and would face serious market injury. If Taiwan's products can't enjoy the benefit of internal preferential tariff among Asia countries, Taiwan will lose its capacity to compete with others.

V. BILATERAL NEGOTIATION AS THE WIN-WIN STRATEGY

Because the productive activities between Taiwan and Mainland China are basically complementary, or vertically in line with each other, the trade creation effect is expected to be large after forming deeper economic integration. Indirect trade between Mainland China and Taiwan has risen sharply in recent years; nevertheless, the volume of this entrepot trade represents only a relatively small share of world trade.²⁰⁸

Before the purchasing power of China increases significantly, these two economies will have to continue to rely heavily on trade with countries outside the region. Even though negative factors such as deficient transportation infrastructure, overvalued currency and lack of purchasing power that constrain intra-regional trade will be improved in the future, and bilateral trade within this region may grow considerably,

²⁰⁸ Hui-Wan Cho, *Taiwan's Application to GATT/WTO: Significance of Multilateralism for an Unrecognized State* 183-197 (Praeger 2002); also see Wen-Cheng Liu, *Liang An Jing Mao Da Wei Lai 兩岸經貿大未來* 201-238 (Shengzhi 2001).

political disputes and differences both in stages of development and the political-economic system cannot be easily solved in a short period of time.

On the other hand, if the degree of trade dependence increases because of the surge of intra-regional trade, this might hurt the Taiwanese government's bargaining power on matters relating to relations between the two sides of the Taiwan Strait. Moreover, until direct flights between Taiwan and Mainland China begin, the transportation costs of enter port trade via Hong Kong will remain high. Based on these factors, it is too optimistic to think that huge gain will be won by forming economic integration for the time being.²⁰⁹

While the formation of formal trade agreements sometimes gives rise to suspicions of increasing protectionism and fears of trade diversion, this is not the case for Taiwan and China. Hong Kong remains the closest equivalent to an open economy. Mainland China is reducing barriers and Taiwan has liberalized trade significantly. The only policy favoring trade diversion over creation is Beijing's preferential treatment of Taiwanese imports. These preferences are counterbalanced, however, by Taiwanese restrictions on exports and appear to be small in any case.²¹⁰

The economic integration between Taiwan and Mainland China differs drastically, even from the more beneficial trade arrangements such as European Union and ASEAN, as it has raised openness and trade creation far in excess of trade diversion. However, special relationships with Hong Kong and Taiwan based on geographical and cultural

²⁰⁹ Jiann-Chyuan Wang, *The Prospects for Economic Integration among Three Chinese Economies* 兩岸三地經貿整合趨勢 7-8 (Chun-Hua Instn. for Econ. Res., 1994).

²¹⁰ Wei-Fong Kao, *WTO Membership: Win-Win for Both the Mainland China and Taiwan* 兩岸入世求雙贏 (Zhong Guo Ping Lun 2002).

proximity will be less important for other provinces of China. Future liberalization, therefore, may see more rapid integration of PRC with the rest of the world than in the past, relative to the expansion of intra-regional trade between the three Chinese economies.

In Sum, Trade between Mainland China, Hong Kong, and Taiwan as a proportion of their total trade was higher interdependence, not only because the trade diversion, but also because Hong Kong is still the bridge between the two parties. Meanwhile, however, the integration of Southern China is playing a key role in easing the transition of Mainland China from a centrally-planned economy to one that is more market-based.²¹¹ This may lead in the long run to the emergence of PRC as one of the key world economic powers. The Cross-Strait economic integration is now on the way to becoming the fourth largest entity in the world.²¹²

VI. CONCLUSION

Summary of this Chapter are as followings:

1. Although the debates between the "Multilateralism" and "Regionalism" are still messy under recent world order, they are keeping in different directions. On one hand, Doha declaration improved negotiation process of complex issues, and all members seem to seek intra renovating the WTO instead of extra revolution. On the other hand, countries never reduce their desire to continue regional negotiation. The impacts of

²¹¹ See Fei Li, *Hai Xia Liang An Jing Ji Yi Ti Lun* 海峽兩岸經濟議題論 (Boyan Wen Hwa 2003).

²¹² Zhu-Yuan Zheng, *Hai Xia Liang An Jing Ji Fa Zhan Yu Hu Dong* 海峽兩岸經濟發展與互動 (Lianjing 1994).

regionalism towards multilateralism could be either in positive or negative side, the more regional negotiation a country participate in, the greater the potential for complexity and conflict of intra and extra trade policy.

2. The multilateral trading system, now the WTO, allowed its member countries to negotiate the customs unions and free trade areas under GATT Article XXIV. This is the exception of the fundamental principle of non-discrimination set in GATT Article I as MFN clause. The impacts of regionalism towards multilateralism could be either in positive or in negative side, the more regional negotiation a country participate in, the greater the potential for complexity and conflict of intra and extra trade policy.
3. The first case is economic integration in Europe. The process of European integration is unique not only because the member countries are the largest in the world, but also the European Integration was the first and only case that from economic integration “Spill-over” to the political aspects. Although the European integration process was the unique successful case in human history, the future of European constitution would still indistinct. However, the “desire for peace, prosperity, and justice” is the fundamental spirit of the process. It is a good lesson for the Cross-Strait economic integration. To prevent the possible future war, the European countries have strong motivations to seek deeper integration. The important achievement of the European integration is the solution of potential sovereignty conflict, and this is the useful lesson for the Cross-Strait peace negotiation process.
4. The second case is economic integration in America. The very successful negotiation was NAFTA in 1994 to integrate the North American Market. However, the process for negotiating the single market of America (including Central and Latin America)

was not positive. Many Central and Latin American countries already enjoyed the sub-regional economic integration, and it's hard to evaluate how the influences that the U.S. power integrated into the sub-region. Economically, it's better for Central and Latin American countries export their goods to the U.S. market in one hand, but it's difficult for the traditional industries in these countries to compete with U.S. enterprises. Politically, the U.S. government was pushing the FTA with many political and diplomatic concerns, such as anti-terrorism and regional security. However, giving the diversity national interests among the Central and Latin American countries, the U.S. negotiator was difficulty establishing the "common security policy" or "common trade and tariff policy" among the majority of American countries. Although the process of American integration was not so easy in current circumstances, the model of the America is similar to the Cross-Strait relations than Europe, because Mainland China became the super power in this region, like the U.S. power in the America. Besides, the different national security perspective could be the barrier to negotiate economic integration both in America and the Taiwan Strait.

5. The third case is economic integration in East Asia. According to the analysis in this chapter, the future barriers for East Asia economic integration including "Diversity issue," "Membership Enlargement," "the U.S. Impact," and "the China Impact." Mainland China was pushing "ASEAN plus Three" and "East Asia Summit" in 2005. The aim of this process was to establish the Free Trade Agreement of East Asia. However, Taiwan was excluded by all these regional economic integration. The likelihood of success of East Asia integration is still controversial, but the motivation of Asian countries is stronger and stronger in recent years. East Asia economic

integration could be another “opportunity” or “challenge” for the Cross-Strait peace negotiation, and it is deeply depending on the trade expectation of Beijing and Taipei.

Although Taiwan and Mainland China entered into the WTO for almost five years, the mutual interaction was few and the barriers to trade were still high. The multilateral negotiation could do very less for the peace negotiation of Cross-Strait economic integration. Similarly, the regional economic integration in East Asia couldn't be the “guarantor” for peace process. Thus, it is the best strategy for Taiwan and Mainland China negotiating certain bilateral agreement to establish FTA or customs union under the GATT XXIV. The following two chapters would discuss what are the critical substantial negotiation issues for the two parties (in Chapter IV)? what are the procedure, institutions, and the timetable as the action plan (in Chapter V)?

CHAPTER FOUR

NEGOTIATING SUBSTANTIAL ISSUES OF CROSS-STRAIT ECONOMIC INTEGRATION

I. INTRODUCTION

The beginning question of this chapter is: what are the substantial issues of negotiating Cross-Strait economic integration? What is the content of the proposed agreement of economic integration between Taiwan and Mainland China? In this Chapter, this dissertation developed a new approach to examine the different level (from lower to higher) of substantial negotiation issues that appear in the economic integration. The criteria of the selected issues based on two criteria, which are “Multilateralism” test, and “Sovereignty” test.

First, the “Multilateralism” test is based on “how deep the issue is involved in the multilateral negotiation?” Taiwan and Mainland China are both WTO members, some issues are already regulated under the WTO multilateral legal framework, but some issues are not yet have the consensus under the WTO regime. The lower level issues are more multilateral regulatory, and the higher level issues are less multilateralism.

Second, the “Sovereignty” test is based on “how deep the issue is involved in the national sovereignty?” The unique situation between Taiwan and Mainland China is

that any single issue would be considered as the national sovereignty, even the negotiation process itself. The lower level issues are involved less sovereignty (more commercial and economic aspects), and higher level issues are involved more sovereignty (more governmental and public interests).

Based on the two criteria above, the lower level issues are regarding to less sovereignty conflict, and more multilateral negotiation regulatory. Taiwan and Mainland China would be necessary and easier to negotiate the lower level issues as the beginning of economic integration. This chapter analyzed the current regulatory and import-export limitations, trade barriers, market access, and the degree of interdependence in each negotiation topic from Taiwan and Mainland China.

Part II begins with the examination of "Trade in Goods," "Trade in Service," and "Dispute Settlement Mechanism" as the lower level of economic integration. "Trade in Goods" is the fundamental trade negotiation issues of the accession into the WTO. Although there are lots of tariffs and non-tariff market access issues need to negotiate, the WTO already set up a standard for all the members under Uruguay Round. Based on these multilateral agreements, the following sections will respect to the existing rules and regulations, such as (1) market access, (2) trade remedy laws (anti-dumping, safeguard, and Subsidies/Counter valuing duty), and (3) agriculture. The second issue explores in this level is Trade in Service. This section divides into two sub-topics: (1) Trade in Service and (2) Telecommunications. Finally, the dispute settlement is also the basic framework of every regional or multilateral trade agreement. To set up the Dispute Settlement mechanism is help both parties prevent the trade discrimination and move out the trade barriers.

Part III examines the intermediate level of the negotiation issues, including “Investment,” “Intellectual Property Rights,” and “Environmental and Public Health issues.” The first section examines the bilateral investment issues between two parties, especially the by reviewing the major multilateral agreements, which is Trade Related Investment Measures (TRIMs). The second section concentrates on the “Intellectual Property Rights.” Although Intellectual Property issues are well developed in the WTO regime by the Trade Related Intellectual Property Rights (TRIPs), it is still a long way to negotiate the cooperation of protection IP rights in Taiwan and Mainland China. Finally, the last section discusses “the Environmental and Public Health issues” in East Asian region, and besides, Sanitary and Phytosanitary Measures (SPS) is also addressed in this section.

Part IV focuses on the higher level of the negotiation issues of economic integration. These issues are more involved national sovereignty, full of public interests, and most of these issues are not well-developed in the WTO regime. The first section is “Non-Economic Factors.” These issues are not pure-economic factors, but they affect and involved deeply in the economic integration process, such as “Labor Standard” and National Security concern. The second section is “Public Sector” issues, including “Government Procurement” and “Competition Policy,” these issues are also current to topics under WTO multilateral negotiation. The potential conflict between two parties regarding the transparency and government related issues is because Taiwan is a developed country with the democratic government, but Mainland China is a developing country with the communist government. The different procedures of the legislation and exclusion make these issues more complicated and difficult. Thus, this

Chapter discusses not only on many different legal problems about each economic and trade-related negotiation issues, but also draw on much of the work that non-economic factors with government involved. The last section focuses on “Momentary Integration” as the negotiation topics. Europe experienced the biggest economic integration in the world, and they have rich agreements and institutions deals with the integration process. Financial and momentary integration process includes the common momentary policy, central banking system, common tariff policy and integrated banking and securities regulations. This is the factor to identify the differences between Free Trade Area (FTA) and the Common Market. Thus, the “Momentary Integration” issue is the last negotiation topic discussed in this chapter as Cross-Strait economic integration.

II. NEGOTIATING LOWER LEVEL ISSUES

A. Trade in Goods

1. Market Access

(a) Market Access under the WTO regime

The purpose of a Free Trade Agreement (FTA) is to confer tariff preference in a given country's domestic market on the goods of another member country markets for the goods of that given country. The key to the arrangement is the “give and get” concept of “reciprocity,” so that the overall economic “value” of the tariff reductions and other concessions made by one member country to the goods of another member

countries is roughly equal to the value they realize out of the arrangement. So, the central issue of any FTA is that of the extent and quality of "Market Access" to be realized by the signatory countries. "Market Access" has been defined as "The availability to permit imports to compete relatively unimpeded with similar domestically-produced goods."

The giving of "Market Access" means the immediate, or often phased, removal or reduction of a nation's tariffs on defined exports of an FTA partner nation. The removal or reduction is usually implemented through agreement among the member nations on commitment to tariff removal on "schedules" of goods identified on an item-by-item basis with reference to the tariff schedule of member countries. It is the number of member countries that define the scope and significance of an FTA.

Besides, nearly equal in importance to tariff removal and/or reduction is the removal of so called non-tariff barriers (NTBs) or non-tariff measures (NTMs). These have proliferated in the last 25 years as a direct result of the success of the goal trading community in various GATT-sponsored multilateral trade negotiations in achieving broad multilateral reductions "across-the-board" in import tariffs. Having given commitments to tariff reductions, many countries then innovated new, non-tariff, impediments to imports or utilized existing regulatory systems for the purpose of avoiding the results of their tariff liberalization commitments. These impediments are referred to collectively as NTBs or NTMs. NTBs can take nearly any regulatory form other than a tariff, e.g., they include: import quotas; import licenses; import "exclusions"; custom surcharges or other additional import taxes or fees; unnecessary or drastic import labeling requirements; tariff rate discrimination based on ultimate use

(e.g., as inputs in assembly/processing operations for export); implementation of certain so-called “voluntary restraint agreements”; market price controls or discrimination on imports; unnecessary or extraordinary technical standards or quality controls; and local content requirements. The removal of NTBs cited by member countries is often one of the most contentious and prolonged area of FTA negotiation and usually results in the most explicit substantive requirements for their removal or remediation (“tariffication”) in an FTA. “Tariffication” is an effort to compute “tariff equivalents” (in terms of their overall impact on export costs) of NTBs, with the goal of eventually removing or reducing such constructed tariffs.

The most import aspect of an FTA, after the tariff commitments granted, is the “quality of treatment” guaranteed to member countries of an FTA for their goods in the markets of other member countries’ customs and the subsequent treatment such goods receive once they have arrived in the other member countries. The GATT incorporate two specific rules that govern international trade relating directly to the quality of treatment of the goods of WTO signatory contracting parties, which are often adopted for use in FTA as guarantees relating to the quality of treatment of their goods in other member markets. They are “Most-Favoured-Nation (MFN)” treatment¹ and “National Treatment.” Normally, a country is under no obligation to extent MFN treatment to another country unless both are contracting parties of the WTO or of an FTA or other economic integration arrangement that incorporates and applies this principle among its

¹ Most-Favored-Nation principle (MFN) describes a commitment that a country will extent to another country the lowest tariff rates it applies to any third country. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited July 29, 2006). In GATT art. I: “all WTO contracting parties undertake to apply such treatment to one another”. *See* John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 157-174 (2d ed., MIT Press 1997).

members. The MFN principle has been incorporated directly or by reference in most recent trade agreements. The second major quality of treatment is that of “National Treatment.” Taken from GATT Article III,² as more positively formulated, it means that a party must give goods from another country the same treatment it gives goods originating in its own market – but not necessarily better treatment. Most recent economic integration agreements now incorporate both of these treatment principles and will often guarantee FTA member countries the better of the two treatments if both are at issue in a given country. It is these two measures of the quality of treatment of member country goods in the markets of other member countries that – together with the extent of the tariff preferences provided – determine the real economic “value” of FTA to their members.

(b) Legal Regime of Market Access in Taiwan

Recently, Taiwan, despite its huge foreign exchange reserves and booming economy, claimed that its economy would collapse unless it maintain high and reinforced protectionist barriers, tariff preferences and other benefits to which it might be entitled as a “developing country.”³ Like other newly industrialized countries, Taiwan determined to preserve the preferential treatment it had enjoyed for many years and to resist being treated for international trade and tariff purposes as a developed

² National Treatment principle requires the treatment of import goods, once they have cleared customs and border procedures, to be no worse than that extended to domestically-produced goods in the importing country’s markets. *See id.*, at 213-228.

³ Hartland Thunberg, *China’s Modernization: A Challenge for the GATT*, 10 Wash. Q. 80, 80 (Spring 1987).

country. Many WTO members are now unwilling to continue treating Taiwan and other newly industrial countries as developing countries “graduating” them from such schemes as the United States Generalized System of preferences (GSP), which granted certain preferential treatment to imports from those countries. Faced with the loss of this sort of favorite tariff treatment, Taiwan was only acting prudently to protect itself by seeking admission to the WTO, where it might enjoy other tariff concessions and special treatment. Moreover, the rising expectations of Taiwan’s growing market exerted internal pressure on Taiwan authorities to liberalize quotas and other controls upon imports.

Among the complaints of foreigner seeking to enter Taiwan’s market, such issues as artificially low exchange rates, unrealistic commodity prices and interest rates pegged to favor local producers have loomed large over the past decade. The steps taken by Taiwanese government to minimize or to eliminate these irritants not only have improved Taiwan’s image of its major trading partners, but have also demonstrated a significant commitment to the free-trade principles, which have informed all the WTO members. Recently, Taiwan made the transition from a low-cost producer of cheap textiles and household products to high technology industries, and capital-intensive manufacturing. Besides, financial liberalization, including the removal of currency and investment restrictions, which had long closed to the Taiwan market to foreign investors, has also proceeded apace. However, those restrictions for Taiwanese companies investing in Mainland China still existed for national security reasons. Banking outflows represent money from Taiwan has made available for productive investments in foreign countries, particularly for transportation, electricity generation

and environmental protection, promised not only to improve the quality of life for Taiwan's residents but also to recycle some of the trade surpluses in a manner which might benefit foreign industrial enterprises, which hoped to provide much of the necessary equipment.⁴

(c) Legal Regime of Market Access in Mainland China

The conclusion of the negotiation of WTO accession for market access on goods represents a commitment undertaken by Mainland China (PRC) to gradually eliminate trade barriers and expand market access to goods from foreign countries. PRC has bound all tariffs for import goods. After implementing all the commitment made, PRC's average bound tariff level will decrease to 15% for agricultural products. The range is from 0% to 65%, with the higher rates applied to cereals. For industrial goods the average bound tariff level will go down to 8.9% with a range from 0% to 47%, with the highest rates applied to photographic film and automobiles and related products. Some tariffs will eliminate and others reduced mostly by 2004 but no later than 2010.⁵

The scope of PRC's market access commitments compare favorably with those of other WTO members. For example, PRC has committed to reduce its average statutory tariff on industrial products to 8.9 percent by 2005, and as already noted PRC agreed to much lower tariff levels on its most sensitive agricultural products than has Japan. And China agreed to bind all tariff at the new low statutory rates as they are

⁴ James V. Fiesler Damrosch, *Taiwan and the GATT*, 1992 Colum. Bus. L. Rev. 49, 49-52 (1992).

⁵ Terence P. Stewart & Patrick J. McDonough, *Accession of the People's Republic of China to the World Trade Organization: A Report and Selected Annexes, Prepared for the U.S.-China Security Review Commission* 16 (Transnatl. Publishers 2002).

phased in. As the U.S. Trade Representative pointed out, “Very few countries have done this.”⁶ India, for example, has bound only about two-third of its tariffs.⁷

The depth of the market access commitments that were required from PRC as a condition for membership in the WTO reflects the general raising of the bar for new members. For example, all seven of the countries that acceded to the WTO between its establishment in 1995 and late 1999 agreed to bind all items in tariff schedules.⁸ Thus PRC’s agreement to bind all rates at its new lower tariff levels is similar to the commitment made by other entrants. Although PRC’s import tariffs on industrial products are low relative to comparable countries that are long-standing WTO members, they are only somewhat below those of most recent entrants.⁹ For rules-based issues, however, PRC has accepted WTO-plus terms that go far beyond those agreed to even by other countries that have become members of the WTO since founding in 1995.¹⁰

(d) Core Concerns in the Negotiation of Market Access

Although Taiwan and mainland China both entered into the WTO in 2000 and 2001, the bilateral trade barriers and restrictions are more than the multilateral commitment. Because the political conflict still exists between the two parties, the trade

⁶ Nicholas R. Lardy, *Integrating China into Global Economy* 79 (Brookings Instn. 2002).

⁷ Gary Clyde Hufbauer & Daniel H. Rosen, *American Access to China’s Market: The Congressional Vote on PNTR*, Intl. Econ. Pol. Briefs No. 00-3 21, 21-23 (Inst. for Intl. Econ, April 2000), at <http://www.iie.com/publications/pb/pb00-3.pdf> (last visited July 29, 2006).

⁸ The countries are Ecuador, Mongolia, Bulgaria, Panama, Kyrgyz Republic, Latvia, and Estonia. See Kyung Tae Lee, Justin Yifu Lin & Si Joong Kim, *China’s Integration with the World Economy: Repercussions of China’s Accession to the WTO* 4-6 (S. Kor. Inst. for Intl. Econ. Policy 2001).

⁹ *Id.* at 7. The average for the seven is 12.4 percent versus 8.9 percent for China. However, Estonia at 6.6 percent and Kyrgyz Republic at 6.7 percent had lower tariff bindings than China.

¹⁰ Lardy, *supra* n. 6, at 80.

and economic relationship of private economic activities are increasing year by year. However, Taiwan's authorities believes that trade and economic interdependence between Taiwan and Mainland China will hurt Taiwan's industries. Thus, the restrictions preventing the trade flow from Mainland China to Taiwan are still high in order to protect the national security.¹¹

The first issue for Taiwan and Mainland China to negotiate economic integration, the "market access" would be the fundamental concern for the two parties. From the practical experiences of other FTAs in the world, the model language and structure of "market access" is as following:

Model Structure

The model legal structure for the negotiation of market access is as following.¹²

(1) Section A - Definitions and Scope and Coverage

- | | |
|-------------|--------------------|
| Article 3.1 | Definitions |
| Article 3.2 | Scope and Coverage |

(2) Section B - National Treatment

- | | |
|-------------|--------------------|
| Article 3.3 | National Treatment |
|-------------|--------------------|

(3) Section C - Tariffs

- | | |
|-------------|---|
| Article 3.4 | Tariff Elimination |
| Article 3.5 | Temporary Admission of Goods |
| Article 3.6 | Duty-Free Entry of Certain Commercial Samples of Negligible Value and Printed Advertising Materials |
| Article 3.7 | Goods Re-Entered After Repair or Alteration |

¹¹ See Wenhua Liu ed., *WTO Yu Zhongguo Mo Ye Fa Lü Zhi Du De Chong Tu Yu Gui Bi WTO 與中國貿易法律制度的衝突與規避* (Zhongguo Cheng Shi Chu Ban She 2001).

¹² Free Trade Agreement between Republic Korea and Chile, S. Kor.-Chile, Apr.30, 2004, at Ch. 3, WT/REG169/1 (WTO 2004), available at <http://docsonline.wto.org/DDFDocuments/t/WT/REG/169-1.doc> (last visited July 29, 2006).[hereinafter KCFTA].

Article 3.8 Customs Valuation

(4) Section D - Non-Tariff Measures

Article 3.9	Import and Export Restrictions
Article 3.10	Customs User Fees
Article 3.11	Export Taxes
Article 3.12	Emergency Clause for Agricultural Goods
Article 3.13	Committee on Trade in Goods

2. Trade Remedy Laws

(a) Trade Remedy Laws under the WTO regime

Trade remedies relate to a nation's right to response to and remedy of disputes created for its domestic economy as a result of their "fair" and "unfair" trade practices. The three most common trade remedies are: "safeguards" for so-called "fair trade" practice, and "Antidumping" and "Countervailing duties" for "unfair" trade practice. WTO members under very detailed preconditions authorize all these trade remedies. By certain constituent agreements of the GATT rules and purpose of their inclusion in FTA is to apply them more directly and among the member countries of an FTA arrangement.

First, "Safeguards." Once an FTA has been negotiated, signed, and entered into effect, member countries sometimes may confront the reality of unintended consequences thereof relating to overall balance of payments considerations or unforeseen specific impacts that must be resolved for their economies, either within the framework of the FTA, GATT/WTO rules, or otherwise. Since remedy action outside the provisions of the FTA would expose such countries to assertions of nullification or impairment of their commitments for tariff removal/reduction or MFN/National Treatment against exports of FTA member countries and, thus, to retaliation against

their own exports, efforts are usually made in the negotiation of FTAs to develop an acceptable but limited form of broader tariff reductions or expansion of market access in less negatively-impacted sectors. Indeed, safeguard provisions are sometimes used as a way to gain political support for entry into an FTA arrangement. A typical FTA safeguards provision would allow a member country to initiate safeguard measures only if the imports from the contracting party occur in such increased quantities or under such conditions as to cause or threaten to cause disruption to the domestic market or to the production of the importing country (sometimes referred to as “injury” to the involved sectors). Nearly, all FTA safeguard provisions, however, also require extensive prior consultation among member countries before imposition of safeguards by any member country, and usually provide for some form of compensation in the form of increased or other tariff reductions or market access concessions in other sectors.¹³

Second, “Dumping.” Dumping is considered to be the sale of a commodity in a foreign market at “less than normal value,” with “normal value” usually defined to be the price at which the same product is sold in the exporting country or by the exporting country to the third countries. Dumping may also include sale of the commodity in a foreign market at less than the cost of production in its exporting country. Dumping can be predatory in nature as, for example, when it is intended to drive a given domestic producer in the importing market out of business. Dumping has been used as a form of market offence – to create or increase market share in the importing country. Sometimes

¹³ Leonard E. Santos, Stephen J. Powell & Mark T. Wasden eds., *The Compendium of Foreign Trade Remedy Laws* (ABA 1998).

dumping is resorted to eliminate overhanging inventory of goods in the exporting country and injure domestic dumping are nearly universally viewed as “unfair” trade practices. Moreover, dumping has often been alleged by domestic producers in an importing country solely as a tactic for protection of their sector. GATT Article VI, as supplemented by the Uruguay Round’s International Antidumping Code, authorizes the imposition of special “antidumping duties” equal to the difference (“margin”) between the export sales price of a product in the importing country and the “fair” value thereof (as determined by that country’s Antidumping authorities), provided that, it can be demonstrated that such dumping is causing or threatens to cause “material injury” to competing domestic producers. Under the Antidumping Code, the imposition of antidumping duties is also subject to detailed rules as to (1) the facts needed to substantiate “dumping” and the calculation of “fair value”; (2) the process for determination of injury or threat of injury; and (3) the procedures under which these determinations may be made and duties imposed, review of such determinations and the period during which such duties may be imposed. As with unnecessary quality standards, dumping is an activity that is inconsistent with the goals of an FTA arrangement, as is the remedy that may be used to sanction it if actual dumping or injury has not been proven or it is being used simply as a protectionist device to scare foreign producers away from attempting to sell in a member country’s markets. Prior to the conclusion and entry into the effect of the GATT/WTO agreements on dumping, negotiators of FTA agreements concentrated on strengthening antidumping disciplines and procedures among their member countries.¹⁴

¹⁴ For Example, the NAFTA included eleven articles and six different annexes dealing with “Review and

Third, "Countervailing Duties." Countervailing duties are additional tariffs levied on imports by an importing country to offset government export subsidies to producers in an exporting country. Export subsidies are direct government payments or other benefits given by the government of an exporting country to producers therein of goods destined for export. The purpose of direct export subsidies is to give the exporting country's producers a competitive edge over the sales of products of domestic producers in an importing country and, as such, is considered an "unfair" trade practice. GATT Article XVI provides that "... contracting parties shall cease to grant either directly or indirectly any form of subsidy in the export of a product other than a primary product which results in the sale of such product to buyers in the domestic market," and that "... contracting parties should seek to avoid the use of subsidies in the export of primary products." GATT Article XVI, however, does not define the term "subsidy." Thus, "violations" of Article XXVI are a matter of GATT/WTO member-to-member consultations and, under certain circumstances, retaliation. The basic remedy for direct export subsidies as an unfair trade practice is found in the Uruguay Round Subsidies/Countervailing Duties Agreement. That agreement also prohibits subsidies based on export performance (except Agriculture, which is subject to a specific agreement). Moreover, upon a finding of the fact of such subsidies and a determination of the "bounty" thereof and injury to a domestic industry resulting there from, it authorized the imposition of Countervailing Duties. The CVD agreement itself also does not define "subsidies" but does include as an annex an "Illustrative List of Export

Dispute Settlement in Antidumping and Countervailing Duty Matters." Subsequent to the new GATT/WTO Antidumping Code, it is more likely that such agreements will in most cases incorporate the provisions of the Code by reference. See Hamilton Loeb & Michael Owen eds., *North American Free Trade Agreement: Summary and Analysis* 37 (Matthew Bender 1993).

Subsidies” that enumerates 12 categories thereof. The procedures of a Subsidies/CVD case are essentially similar to those for the imposition likely that provisions for CVD are less likely to be included in FTA agreements since such agreements can now invoke the provisions and remedies of that Code.

(b) Legal regime of Trade Remedy Laws in Taiwan

Taiwan’s Antidumping and countervailing systems grew out of the Implement Regulation adopted in 1984 and revised in 1994 remain incomplete and immature. In large part, the shortcomings are attributable the small number of cases that Taiwan has tackled and their relative simplicity. Also, the government’s resolve to use the existing system to counter unfair trade practice has offered little incentive for change. The Implement Regulation contains only thirty-two articles to deal with the subjects of both antidumping and countervailing duties, so lacunas and loopholes abound. As a result, administrative discretion has been called upon to fill the gap, adding to the difficulty of introducing judicial review into the antidumping and countervailing systems and diminishing the impetus to upgrade them. These factors have combined to sideline new antidumping and countervailing measures and keep the field dormant for the past decade. To date, there has been no countervailing duty case in Taiwan. On a handful of occasions where antidumping investigations have actually been pursued, the agency appeared to have conducted the investigations solely with a view to solve the disputes

between the conflicting private interests, as opposed to enforcing a trade policy.¹⁵ Reference to actual disposition of the procedural and substantive issues commonly seen in the investigation process is necessary to round out the picture. But even with such additions, areas of uncertainty remain.¹⁶

(c) Legal regime of Trade Remedy Laws in Mainland China

The Mainland China's antidumping regime is prospective. The legal basis for antidumping actions is the Antidumping Regulation of the PRC, issued by the State Council of the PRC as Order No.328 of January 1, 2002. The Ministry of Commerce (MOFCOM) investigates dumping but has delegated most of its investigative functions to its Fair Import and Export Bureau. The State Economy and Trade Commission (SETC), with whom MOFCOM must consult at various points of an investigation, make injury determinations. In the case of agricultural products, the Ministry of Agricultural investigates injury "jointly" with the SETC. Another body, the Customs Tariff Policy Commission of the General Council, although not an investigating authority, makes refunds, and continues or terminates measures for five years. Thus, important actions are contingent on approval by a political body. MOFCOM released several interim "rules" (regulations) in February and March 2002. These rules are effective April 15,

¹⁵ In 1989, the MOF found that nitrocellulose from Brazil had not been dumped in the R.O.C. It nevertheless accepted the price undertakings offered by the importer of Brazilian nitrocellulose, which appeared to have resulted from a settlement deal between the complainant and the said importer made prior to the offer. See the sources from Bureau of Foreign Trade, Republic of China, available at <http://cweb.trade.gov.tw> (For General Reference Regarding to Trade Policy of R.O.C.)(last visited July 29, 2006).

¹⁶ Santos, *supra* n. 13, at 294.

2002, expect for the interim rule on initiation, which was effective March 13, 2002.¹⁷ Overall, the system established by the Regulation and Interim Rules is difficult, uncertain, and burdensome for exporters, beyond the inescapable burden inherent in any antidumping investigation. In addition, the practice of deducting duty from resale prices in an interim reexamination should discourage related importers and exporters from requesting a review. Many terms denoting crucial concepts of antidumping are not defined, such as relationship between firms, normal commercial quantities and sales in the ordinary course of trade. There are no rules for constructed value or cost of production. How MOFCOM might implement these concepts in an investigation is a matter of conjecture. Exporters cannot rely on MOTEC following the clear and complete instruction by a Regulation or Rule.¹⁸

The legal basis of Countervailing Duty Investigation is the Anti-Subsidies Regulations of the PRC. The regulations were issued as Decree No.329 of the General Council on November 26, 2001. In addition, Interim Rules for Initiation, Hearings, Verification, and Investigation were issued as MOFCOM Orders 12, 10, and 17, respectively. MOFCOM investigation subsidization, as with Antidumping and Safeguards, the Fair Import and Export Trade Bureau of MOFCOM does the actual work of investigation. SETC determines if substantial damage has occurred. The General Council's Customs Tariff Policy Committee officially decides whether to impose provisional and definitive measures. Its decisions are made on the basis of

¹⁷ Stewart & McDonough, *supra* n. 5, at 16.

¹⁸ *Id.* at 555-556.

MOFCOM's proposals, and are taken after the preliminary and final rulings on subsidization and injury by MOFCOM and SETC.

Besides, the legal basis of China's Safeguard regime is the Regulations of the PRC on Safeguards. Rules have been released only for hearings and initiation. MOFCOM is responsible for "investigating and determining the increase of import products in quantity." The SETC investigates and determines serious injury. MOFCOM, as for antidumping and anti-subsidies investigations, has delegated the investigative work to its Fair Import and Export Trade Bureau. The regulation tracks the Safeguards Agreement with some specific differences. Being consistent with the Safeguards Agreement now is not sufficient to make safeguard measures WTO consistent. The Safeguard Agreement allows safeguard measures when an increase in imports causes serious injury to domestic industry. However, two WTO Appellate Body Panels¹⁹ have ruled that the provisions of GATT 1994 Article XIX must also be satisfied.

There is a major difference between the Safeguard Agreement and GATT Article XIX. GATT Article XIX²⁰ requires that a necessary circumstance to be established in a safeguards investigation is that the increase in imports must result from unforeseen developments and of the effect of the obligations incurred by a Member of the WTO Agreement, including tariff concessions. Imposition of Safeguards under the Safeguard Regulation would be inconsistent with WTO obligations if the circumstances set forth in GATT 1994 Article XIX were not found to exist. As currently situation, there is actually very little "investigation" for MOFCOM to perform in establishing an

¹⁹ See WTO Appellate Body Report, *Argentina- Safeguard Measures on Import of Footware*, WT/DS121/AB/R (Dec. 14, 1999); Also see WTO Appellate Body Report, *Korea-Definitive Safeguard on Imports of Certain Dairy Products*, WT/DS98/AB/R (Jun. 21, 1999).

²⁰ GATT art. XIX, sub-para. 1(a).

increase in imports. The applicant must provide import statistics and trends for the five years prior to application. What needs to be done is establish the cause of the increased imports and the circumstance existing when the increase occurred. Although this is the new system for PRC regarding the investigation about trade remedy law data information, it's very important for the future data basis of trade dispute litigation and negotiation.

(d) Core Concerns in the Negotiation of Trade Remedy Laws

There are more and more trade disputes between Taiwan and Mainland China in these years. Although the two parties could negotiate the dispute resolution under the WTO regime, the more positive way is to include trade remedy mechanism in the FTA. Many FTAs provided the same words regarding trade remedy regime in their agreements. The following is the model language.²¹

Model language

Dumping

If Taiwan finds that dumping within the meaning of Article VI of the General Agreement on Tariffs and Trade 1994 is taking place in trade with the Mainland China, or if the Mainland China finds that dumping within this meaning is taking place in trade with Taiwan, the Party concerned may take appropriate measures against this practice in accordance with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and with the procedure laid down in *(Here provides the*

²¹ Interim Agreement between the EFTA States and the Palestine Liberation Organization for the Benefit of the Palestinian Authority, EFTA- P.L.O., Sept. 24, 1999, WT/REG79/1 (WTO 1999), art.18 & 23, available at <http://docsonline.wto.org/DDFDocuments/t/WT/REG/79-1.doc> (last visited July 29, 2006). [hereinafter IAEFTAPLO].

Article No. in this agreement regarding the Procedure for the application of safeguard measures).

Procedure for the application of safeguard measures

1. Before initiating the procedure for the application of safeguard measures set out in the following paragraphs of the present Article, the Parties to this Agreement shall endeavour to solve any differences between them through direct consultations, and inform the other Parties to this Agreement thereof.
2. Without prejudice to paragraph 6 of the present Article, a Party which considers resorting to safeguard measures shall promptly notify the other Parties and the Joint Committee thereof and supply all relevant information. Consultations between the Parties to this Agreement shall take place without delay in the Joint Committee with a view to finding a commonly acceptable solution.
3. (a) The Parties concerned shall give to the Joint Committee all the assistance required in order to examine the case and, where appropriate, eliminate the practice objected to. If the Party in question fails to put an end to the practice objected to within the period fixed by the Joint Committee or if the Joint Committee fails to reach an agreement after consultations, or after thirty days following referral for such consultations, the Party concerned may adopt the appropriate measures to deal with the difficulties resulting from the practice in question.
- (b) As regards *(Here provides the Article Numbers in this agreement regarding Dumping, Emergency action on imports of particular products, and Re-export and serious shortage)*, the Joint Committee shall examine the case or the situation and may take any decision needed to put an end to the difficulties notified by the Party concerned. In the absence of such a decision within thirty days of the matter being referred to the Joint Committee, the Party concerned may adopt the measures necessary in order to remedy the situation.
- (c) As regards *(Here provides the Article Numbers in this agreement regarding Fulfillment of obligations)*, the Party concerned shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a commonly acceptable solution. If the Joint Committee fails to reach such a solution or if a period of three months has elapsed from the date of notification, the Party concerned may take appropriate measures.
4. The safeguard measures taken shall be notified immediately to the Parties to this Agreement and to the Joint Committee. They shall be restricted with regard to their extent and to their duration to what is strictly necessary in order to rectify the situation giving rise to their application and shall not be in excess of the injury caused by the practice or the difficulty in question. Priority shall be given to such measures that will least disturb the functioning of this Agreement. The measures taken by Taiwan against an action or an omission of Mainland China may only affect the trade with the other party. The measures taken against an action or omission of Taiwan may be taken only by that or those Mainland China the trade of which is affected by the said action or omission other than those taken under *(Here provides the Article Numbers in this*

agreement regarding Emergency action on imports of particular products and Re-export and serious shortage).

5. The safeguard measures taken shall be the object of regular consultations within the Joint Committee with a view to their relaxation, substitution or abolition, when conditions no longer justify their maintenance.
6. Where exceptional circumstances requiring immediate action make prior examination impossible, the Party concerned may, in the cases of *(Here provides the Article Numbers in this agreement regarding Dumping, Emergency action on imports of particular products and Re-export and serious shortage)* and in cases of state aid having a direct and immediate incidence on trade between the Parties, apply forthwith the precautionary and provisional measures strictly necessary to remedy the situation. The measures shall be notified without delay and consultations between the Parties to this Agreement shall take place as soon as possible within the Joint Committee.

3. Agriculture

(a) Agriculture negotiation under the WTO regime

Protectionism and discrimination are key features of international trade in agriculture products. Governments have always used various measures to assist or subsidize agricultural both in domestic production and in the trade of agricultural goods. Trade policy instruments such as domestic subsidies on products and inputs, export subsidies, import barriers, quantitative restrictions, and non-tariff barriers have deal with the disposal of surplus production associated with the cyclical nature of agricultural production, instability and inadequacy of agricultural prices and earnings, and access to domestic markets. In addition, agriculture trade policy has been shaped by major political and economic developments. Under the GATT/WTO regime, two “agriculture exceptions” to the general rules were built into GATT: Article XI:2(c) on

imports and Article XVI:3 on exports.²² On domestic subsidies, the GATT had no special rules but a number of provisions that covered agriculture as well as manufactures: Article III:8(b) allows payment of subsidies to domestic producers, Article XVI:1 on notification to the GATT, and Article XXIII:1(b) on the nullification of benefits.²³

The final outcome of Uruguay Round Negotiation substantially changed the multilateral trading environment. The achievements of earlier rounds were codified, new areas of trade were brought within the rules, a new system for setting disputes was established, and a separate agreement on agriculture was concluded. However, the Uruguay Round Agreement on Agriculture (URAA) is a result of numerous compromises – its basic principle has a number of exceptions, and in some cases its wording is somewhat ambiguous.²⁴ To be sure, the URAA represented a turning point in the way agriculture was treated under the multilateral trade regime. It established the first ever framework for a long-overdue transformation in agricultural trade regime.

²² See GATT art. XI:2 (c) provided for non-tariff border measures (quantitative restrictions), used to enforce domestic market management programs of the economically advanced countries. GATT art. XVI:3 determined that agricultural export subsidies (illegal for industry) were legal, provided they were not used to gain “more than an equitable share of world trade.”

²³ Merlinda D. Ingco & John D. Nash eds., *Agriculture and the WTO*, 25 (Oxford U. Press 2004).

²⁴ *Id.* at 26-27.

The URAA contains 21 articles and five annexes. It applies to all agricultural products as defined by Annex 1 of the agreement (essentially all agriculture and food products including raw fibers and hides, but excluding fish and forestry products). Other WTO agreements also apply to trade in agricultural products. If a conflict arises between the URAA and any other WTO agreements, the URAA has the priority. However, in many areas, it is the general GATT/WTO rules that apply, because the URAA does not include the detailed implementation provisions. For example, the administration of tariff quotas is governed by the GATT Article XIII (non-discriminatory Administration of Quantitative Restrictions) and by the Agreement on Import Licensing Procedures (ILA). Commencing in 1995, the implementation period for completing URAA commitments is defined in Article 1 as six years for developed countries, but for the purpose of Article 13 (Peace Clause), a nine-year period applies. Article 15 provides an implementation period of 10 years for developing countries.

Bringing trade in agriculture under multilateral discipline is considered a momentous achievement of the Uruguay Round. Although a watershed agreement, the URAA did not succeed in influencing high levels of subsidies, agricultural support and protection in any manner. However, the URAA was to require ratification of all non-tariff measures, such as quotas. This made the levels of protection much more transparent, and provided a framework for negotiating.

The Doha Ministerial Communication pragmatically recognized that appropriate trade policies for developing and industrial economies differ substantially. Agriculture is a make-or-break issue of the Doha Round. Besides, the framework agreement or the so-called “July Package” establishing modalities was essentially based on the URAA and has been reformed to establish a fair and market-oriented trading system. It is highly significant in that it would determine the future course of action in the Doha Round negotiations on agriculture. Its objective is eventually to achieve the Doha mandate. Objectives and partial modalities have been established in this agreement. Negotiations on the lines of the framework agreement would indeed help in achieving the Doha mandate.²⁵

(b) Legal regime of Agriculture in Taiwan

As Taiwan's leader have taken pains to point out, as of yet agricultural trade is usually not governed by the rules of the GATT, so continuing protection of farmers'

²⁵ Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations* 173 (Palgrave Macmillan 2005).

interests should not affect Taiwan's application to join the WTO.²⁶ With the attention that agricultural trade is now receiving during the Doha round of the multilateral trade negotiation, there are increasing fears in Taiwan and some other Asian countries that they will be sacrificed on the alter of free trade because of pressures generated by other sectors of their nations' economies. Assuming that the Doha round will achieve some liberalization of global farm trade, the benefits for Taiwan – even with some continued subsidies for rice growers and other products – would seem considerable. Most importantly, the vast majority of Taiwan's population, who are not farmers, would enjoy the benefits of lower price resulting from cheaper foreign imports as well as the reduced prices for less subsisted domestic produce. Resources now devoted to agricultural uses, particularly scarce arable land fresh water for irrigation, might be turned to more economically efficient uses. It's time for Taiwanese government and farmers to think another way to manage agriculture industry.

(c) Legal regime of Agriculture in Mainland China

For joining the WTO, Mainland China agreed to limit its subsidies for agricultural production to 8.5% of the value of farm output. China also agreed to apply the same limit to subsidies covered by the Article 6.2 of the Agricultural Agreement.²⁷ At the time PRC's accession to the WTO, it was following the ninth Five-Year Plan for the Development of the National Economy and Society. The Plan required China to accomplish two major goals in its national economic and social development: to

²⁶ Damrosch, *supra* n. 4, at 50.

²⁷ Stewart & McDonough, *supra* n. 5, at 17.

establish the system stage and to attain a higher standard of living Accomplishing these two goals of modernization. While remarkable achievements had been made in agriculture and rural economy during the ninth Five-Year Plan, significant problems had developed that could not be ignored.²⁸ A number of policy issues needs to be examined in more important of these issues are as followings: First of all, “Analysis of price issues for staple agricultural products, particularly grain, soybeans, and cotton.” The relationship among producer prices, wholesale prices, and retail prices should be distinguished, and the actual gap between prices for China’s staple agricultural products and international market prices should be analyzed objectively. Second, “The Comparative advantages of Chinese agricultural products; labor costs give China a clear comparative advantage in many animal and aquatic products.” However, given the aggravated “green barriers” in international agricultural trade, low labor costs are not enough to constitute international competitiveness. The key is to find ways to produce agricultural products that meet international quality and safety standards. Third, reforming the foreign trade system for agricultural products. The key is to properly resolve the problems in giving non-state firms that have met the necessary conditions of foreign trade rights for importing and exporting agricultural products. Besides, both tariff concessions and tariff-rate quotas for imports of agricultural products are hard to bear in the transitional period.²⁹

(d) Core Concerns in the Negotiation of Agriculture Issue

²⁸ Deepak Bhattasali, Shantong Li & Will Martin, *China and the WTO: Accession, Policy Reform, and Poverty Reduction Strategies* 69 (Oxford U. Press 2004).

²⁹ *Id.* at 78-79.

Recently, Mainland China gives Taiwan's certain agriculture products for "Zero Tariff" in 2005 and 2006 in order to exchange for the good faith of political aspect. However, Taiwan didn't take those policies as the advantages, and still close the door for negotiation. Nonetheless, to normalize the agricultural trade relationship, there should be more tariff, non-tariff barriers, TBT, and SPS issues negotiated between the two parties. The following is the model language for the proposed agreement.³⁰

Model language

1. The Parties to this Agreement declare their readiness to foster, in so far as their agricultural policies allow, harmonious development of trade in agricultural products.
2. In pursuance of this objective, Mainland China and Taiwan concluded a bilateral arrangement providing for measures to facilitate trade in agricultural products.
3. The Parties to this Agreement shall apply their regulations in sanitary and phytosanitary matters in a non-discriminatory fashion and shall not introduce any new measures that have the effect of unduly obstructing trade.

B. Trade in Service

1. Trade in Service

(a) Trade in Service under WTO regime

The Pre-Uruguay Round GATT framework applies only to trade in goods, reflecting traditional assumptions that service are not easily tradable. These assumptions have come into question for a various reasons. First of all, because of technological

³⁰ IAEFTAPLO, *supra* n. 21, art. 11.

developments, it is possible to effect many services transactions without physical proximity between the provider and consumer of the service.³¹

Second, in almost all countries through most of the post-war period, many important service industries had been highly regulated, or maintained as state monopolies (telecommunications, transportation). The regulatory reform trend during the 1970s and 1980s resulted in a removal or loosening of prior substantial limits on domestic competition in these industries.³² It is of significance that regulatory reform in a wide range of countries has led to (at least partial) liberalization of markets in service industries such as telecommunications and transportation that themselves provide the means to bring together providers and users of many other services; for example, in many countries, online computer service have become both more feasible and less expensive as a result of regulatory reform in telecommunications.³³

Third, many services have traditionally, been viewed as functions integral to the production of goods, e.g. storage of customer or other data or engineering designs. The “Splintering”³⁴ of service from goods, and the increasing use of external contracting to obtain service inputs into the production of goods (or, indeed, inputs into other services), have created new explicit markets. In light of the various developments, all of which create increased potential for international trade in services, the reduction or elimination

³¹ Bernard M. Hoekman, *Market Access Through Multilateral Agreement: From Goods to Services*, 15 *World Econ.* 707, 710 (1992).

³² See Robert Howse, John Robert Stobo Prichard & Michael. J. Terbilcock, *Smaller or Smarter Government?*, 40 *U. of Toronto L. J.* 498, 498 (1990).

³³ See OECD, *Regulatory Reform - Privatization and Competition Policy*, Paris (1992).

³⁴ Jagdish Bhagwan, *Splintering and Disembodiment of Service and Developing Nations*, 7 *World Econ.* 133, 133-135 (1984).

of barriers to services trade became a major priority of a number of developed countries in the Uruguay Round of GATT negotiations.

Under the Uruguay Round negotiation, there is a basic Agreement so called “General Agreement of Trade in Services” (GATS) signed by all WTO members. The 29 Articles of the GATS agreement amount together to barely half the length of the GATT's 38 Articles. The agreement as a whole has six parts. An opening section sets out the scope and definition of the agreement. Part II, the longest, deals with general obligations and disciplines: that is, with rules that apply, for the most part, to all services and all members. Part III sets out rules governing the specific commitments in schedules. Part IV concerns future negotiations and the schedules themselves. Parts V and VI cover institutional and final provisions.

(b) Trade in Service in Taiwan

Trade, tourism and business-related services have become an important part of Taiwan's economy, accounting for about 40 percent of Taiwan's GDP. The Taiwanese government will be under pressure to further liberalize its financial sector as part of its WTO accession package. In anticipation of this, the Taiwanese government has announced a plan to merge three state-run banks – the bank of Taiwan, the Land Bank of Taiwan, and the Central Trust of China – which would create the world's 75th largest bank with assets of US 120 billion.³⁵ The banking industry would grow with increasing trade and investment activities. The same would be true for other business support,

³⁵ Heike Holbig & Robert Ash, *China's Accession to the WTO: National and International Perspectives*, 289 (Routledge Curzon 2002).

trade-related, such like restaurant and hotel services. However, the liberalization of the business service sector might weaken the Taiwanese government's control in a number of sensitive areas such as telecommunications, air transportation, and banking, which would make stronger economic ties with the Mainland politically more threatening.

Service sector such as banking and insurance have been reluctantly opened to the foreign entrants, since Taiwan – unlike a number of other developing countries and newly industrial Countries – has no need to accelerate the flow of foreign capital into its economy. Taiwan only has to bolster its existing regulations to comply with their terms rather than totally revamp its former restrictive rules. Of course, as Taiwan's own financial institutions and other services providers grow in size, scope and international sophistication, the existence of an open regime in Taiwan will allow them to benefit, in many countries, from reciprocity provisions which would not otherwise provide safeguards from discrimination in foreign markets.³⁶

(c) Trade in Service in Mainland China

PRC's accession to the WTO is one of the single most significant benchmarks in the process of opening and restructuring Mainland China's economy, a process that has been delivering continuous and rapid change since 1978. However, many foreign-oriented companies will be disappointed with the gradual pace of adoptions laws and by the lengthy timeframe before all substantive restrictions are eliminated in the service sectors. Among the more important of the restrictions that remain, though not

³⁶ Damrosch, *supra* n. 4, at 50-51.

necessarily inconsistent with WTO obligations, are business-scope restrictions and government approval requirements. These issues will inevitably impact the implementation of PRC's commitments, especially if the approval process is used as a mechanism to allow PRC to delay or "backslide" from its agreed commitments.

A wide array of other factors will affect the implementation process: transparency of laws, implementation of the non-discrimination and national treatment principles under GATS, corruption, the political effects of continued state-sector reform, and whether Beijing will be able effectively to control dissenting local and provisional authorities are but some of the more difficult issues Mainland China will have to face. Notwithstanding that China is now a formal member of the WTO, it still has a great deal of legislative drafting work to do in order to ensure that its laws and regulations impacting on service sector and other relevant sectors will be WTO compliant. Much of this legislative drafting work will need to be undertaken at the provincial and local levels, where resources and expertise are most lacking. Nevertheless, PRC's WTO accession is the first step on the road leading to full foreign participation in the most service sector and is a significant milestone in the development of PRC's service industries.³⁷

(d) Core Concerns in the Negotiation of Trade in Service

³⁷ Dene Yeaman, *The Impact of China's WTO Accession Upon Regulation of the Distribution and Logistics Industries in China* in *China and the World Trading System* 238, 261-262 (Deborah Z. Cass, Brett G. Williams & George Barker eds., Cambridge U. Press 2003).

The economic impact of PRC's WTO accession on Taiwan would depend heavily on the willingness of Taiwanese government and the pressure that the WTO might apply on Taiwan to open its economy to the Mainland China.³⁸ The service sector is the big issue for the two parties to negotiate. The following is the model structure for the FTA service sector.³⁹

Model Structure

Trade in Services

This Chapter shall apply to measures by the Parties affecting trade in services. In respect of air transport services, this Agreement shall not apply to measures affecting traffic rights, however granted; or to measures affecting services directly related to the exercise of traffic rights, other than measures affecting: aircraft repair and maintenance services; the selling and marketing of air transport services; and computer reservation system services. Government procurement of services shall be governed by (*Here provides the Chapter regulating the government procurement issues*).

- (i) Scope of and Definitions
- (ii) Market Access of Trade in service
- (iii) National Treatment under Trade in Service
- (iv) Service Suppliers of Any Non-Party
- (v) Schedule of Specific Commitments under Trade in service
- (vi) Domestic Regulation
- (vii) Monopolies and Exclusive Service Suppliers
- (viii) Business Practices
- (ix) Payments and Transfers
- (x) Restrictions to Safeguard the Balance of Payment under Trade in service
- (xi) General Exceptions
- (xii) Denial of Benefits

³⁸ Holbig & Ash, *supra* n. 35, at 289.

³⁹ Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan-Sing., Dec. 3, 2002, WT/REG140/1 (WTO 2002) [hereinafter JSEPA], available at <http://docsonline.wto.org/DDFDocuments/t/WT/REG/140-1.doc> (last visited July 29, 2006).

2. Telecommunications

(a) Telecommunications under the WTO regime

Propelled by a critical mass of technology and managerial innovation, the telecommunication sector has entered a revolutionary period. Yet more is needed to sustain this revolution: national and international agreement on pro-competitive policies and complementary regulations. Only if this is achieved will the potential of telecom innovations be realized worldwide.⁴⁰ Competition in a domestic telecom market requires a professionally staffed, well-financed, autonomous regulatory agency. Telecom competition cannot flourish without highly specific guidelines and rulings on a variety of issues, such as interconnection, structural and accounting separations, number portability, and pricing policies. Experience worldwide demonstrates that the success of the regulatory process depends on its transparency and public accountability. Common performance objectives for national regulations could be an early milestone for worldwide liberalization.⁴¹ To achieve goals such as widespread transparency in the regulation of telecom markets, cooperation above the national level is needed. Without parallel international agreements on the principles of competition, the promise of a new telecom era will be enjoyed by comparatively few nations, while others continue to lag far behind. At this juncture, negotiations within the framework of the WTO, in

⁴⁰ See Ronald A. Cass & John Haring, *International Trade in Telecommunications* 240-246 (MIT Press 1998). National reform of telecommunication sectors was already taking place in few countries, for example: the U.S., the United Kingdom, Mexico, Chile, and New Zealand.

⁴¹ *Id.* at 248.

particular within the Negotiation Group on Basic Telecommunications (NGBT), provide the most promising venue for achieving meaningful international agreement.

Born out of the Marrakesh agreement that concluded the Uruguay Round, the NGBT's main goal is an all-encompassing global accord for opening domestic telecom markets both to competition and private investment. The NGBT aims are based on two indisputable factors: telecom technology and liberalization. The former has changed dramatically in the past decade, yet in many countries market structures and ownership arrangements still needs to adjust. The latter – especially through increased competition but also in the form of greater private participation – has proved the best means for delivering the benefits of new technology. For most countries, the question is not whether to liberalize telecom services but how and when to reform has a very high cost for national competitiveness, and competition is more important and desirable than privatization.⁴²

⁴² See Ben Petrazini, *Global Telecom Talks: A Trillion Dollar Deal* 67-69 (Inst. for Intl. Econ. 1996).

The NGBT talks that ended 30 April 1996 represented a first attempt to reach global agreement on liberalization were presented. Negotiators knew the stakes, the issues, the deadlines, and the process. Yet they still failed to successfully conclude the talks. The NGBT's failure to meet its deadline raises a long-standing, important question: whether the WTO can deliver results in the context of single-sector negotiation. With many "intra-sectoral" trade-offs to be made within the single-sector context of telecom talks, it was hoped that an unconditional MFN basis could be achieved through the NGBT. Obviously, the result was not encouraging. By granting themselves a 10-month extension to reach a deal by February 1997, negotiators kept alive the hope that successful sectoral negotiations can serve as an adjunct to the hefty WTO rounds. But many commentators are already saying that the negotiation structural, not the underlying readiness of the telecom sector for international agreement, is to blame for the failure to reach an early deal. After all, similar failed outcomes have occurred in financial and maritime service. If the NGBT fails a second time, the single-sector negotiation will have to be left: continue single sector talks but conduct them on a conditional MFN basis – in which only members of the "club" get the benefits of market access according to club rules – or fold the talks into a big-package WTO negotiation.

(b) Legal regime of Telecommunications in Taiwan

Two draft laws, “Communications and Broadcasting Basic Law” and the statute for the organization of the proposed Cabinet-level “National Communications and Broadcasting Commission (NCC),” have been introduced by the Cabinet. The Basic Law was passed on December 27 and the reorganizing statute is currently pending in the legislative process. The NCC will be an independent regulatory body that will unify regulatory authority now split between DGT for wired or wireless communications and the Government Information Office for radio and television broadcasting. In June 2003 the DGT announced regulations governing equal access service, allowing Type I subscribers to select the long distance and international network service of other enterprises. Taiwan has introduced the Communications and Media Act at the end of 2003 and will soon set up National Communications Council (NCC) to regulate the communications and media industry. NCC will encourage fair competition among telecommunications and broadcast operators to upgrade Taiwan's competitiveness in this field.

In August 2003 the DGT amended regulations to open Taiwan's mobile virtual network operator (MVNO) market and began licensing in September 2003. The MVNO opening offers an alternative third-generation (3G) wireless service to local consumers and allows service providers to operate without a 3G license by partnering with existing 3G operators. In November 2003 the DGT announced the regulations governing number portability service, enabling subscribers to retain their existing telephone numbers when

switching from their original Type I enterprise to another Type I enterprise engaging in the same business.

However, international submarine cable firms remained limited to only one gateway for their links from the cable landing site to network providers while they are permitted to build their own backhaul facilities. Taiwan's telecommunications market saw a merger of KG Telecom and Far East in October 2003. The merger will likely transform the competitive landscape of Taiwan's telecommunications market, allowing the merged entity opportunities to become one of the top players in Taiwan, in addition to CHT and Taiwan Cellular. It is expected that the merged entity will generate significant synergies.

(c) Legal regime of Telecommunications in Mainland China

The opening in telecommunications services is potentially one of most far reaching. For the first time China will allow direct foreign investment in firms providing telecommunications services, including Internet content and Internet service providers.⁴³ Before China joined the WTO, foreign firms were important suppliers of telecommunications equipment, but they were frozen out of the business of providing telecommunications services. Given the sensitive of the sector, however, the right of

⁴³ *Id.* at 72-74. Foreign investors have been able to buy shares in China Telecom (Hong Kong), the Hong Kong listed arm China Telecom, since its initial offering on the Hong Kong Stock Exchange in the fall of 1997. In the spring of 2000 China Telecom was divided into three separate companies. Subsequently, China telecom (Hong Kong) was renamed China Mobile (Hong Kong). A number of foreign telecommunications companies in the mid-1990s sought to evade China's ban on direct investment in the industry through investment structures that came to be known as Chinese-Chinese-Foreign. In 1999, the Ministry of Information Industry ruled that these arrangements violated Chinese regulations and must be abandoned.

foreign firms to invest directly in the provision of various telecommunications services is phased in over time, and majority foreign ownership is precluded in all types of telecommunications services. Upon accession China allowed 30 percent foreign ownership in firms providing paging and value-added services.⁴⁴ The permitted foreign share will rise to 49 and 50 percent in the first and second year after accession, respectively. Investment in mobile services also was allowed upon accession, but the foreign share initially is limited to 25 percent. It will rise to 35 percent and then 49 percent one and three years after accession, respectively.⁴⁵ For domestic and international wired service foreign investment will not be allowed until the third year after accession and initially will be limited to 25 percent. This share will not rise to 49 percent until six years after accession.⁴⁶

The telecommunications sector is a highly sensitive area in China. Since the sector is regarded as being of strategic importance of the national economy, the Chinese government is only reluctantly opening it – or at least the operator side – to foreign companies. During the past decade, telecommunications have developed extremely rapidly in China. The sector has become one of the key pillars of the country's economic and technological growth. Over this period, the Chinese government has

⁴⁴ *Id.* at 96-97. Value-added services specified in China's November 1999 bilateral agreement with the United States included electronic mail, voice mail, on-line information and data base retrieval, electronic data interchange, enhanced/value-added facsimile services, code and protocol conversion, and on-line information and data processing. Internet services are subsumed within value-added services. In August 2001 China's Ministry of Information Industry promulgated a new catalog of value-added telecommunications services that is somewhat broader than that outlined in the November 1999 Agreement. It is not clear whether the additional value-added services also are subject to the liberalizing steps outlined in China's WTO agreement.

⁴⁵ *Id.* at 101-103. Under the bilateral agreement, China negotiated with the United States in 1999 the limits on foreign ownership of providers of mobile telecommunications services were 25, 35, and 49 percent at 1, 3, and 5 years after accession, respectively. The schedule was accelerated in bilateral negotiation between China and the European Union.

⁴⁶ Lardy, *supra* n. 6, at 66 -67

invested enormous sums in building up a modern telecom network. In doing so, it permitted foreign business partners to set up modern production facilities in the country – in the form of Chinese-foreign joint ventures and wholly foreign owned companies. This development led to expensive technology transfers as well as to the substantial training of Chinese partners in the areas of production and management.

In the manufacturing, the Administration Bureau of the Ministry of Information Industry (MII) is responsible for the licensing of all types of telecom equipment. Chinese partners profit from the development of local manufacturing capacity by foreign companies, increasing sales on the domestic markets as well as exports. This, in turn, generates the foreign currencies needed to modernize Chinese manufacturing equipment and processes. The State Development Planning Commission and the MII set quotas for all wholly foreign-owned enterprises as well as Chinese-foreign joint ventures; a practice intended to give local companies the possibility to strengthen their own market positions. This is especially obvious in the production of mobile phones in China, in which Motorola, Nokia, Ericsson and Siemens dominate the market. To enhance the competitiveness of local companies, the Chinese government encourages banks to provide loan to operators who purchase domestic products. Operators are encouraged to purchase from local suppliers.⁴⁷ China's WTO accession will not solve all problems and disputes for the telecommunications industry and its players. However, we can assume that international rules of the game will have far greater relevance to China's telecom sector than they had in the past. Since China will continue to demand open global markets for its own companies and products, it will presumably comply

⁴⁷ Holbig & Ash, *supra* n. 35, at 100-101.

with the signed agreements – though probably later than sooner. It will, therefore, certainly be necessary to call on the country now and again to keep its word. Ultimately, of course, this in China's own interests in the global market.⁴⁸

(d) Core Concerns in the Negotiation of Telecommunications

The telecommunication service owns a big market value in both Taiwan and Mainland China. Because this is the newly industry, and there is no international agreements or WTO rules regulate this issue yet. Reviewing the FTAs around the world, there is just few FTAs would address certain principle cover the service of telecommunication sector. The following is the model language of the proposed article.⁴⁹

Model language

Telecommunications services

The Parties shall expand and strengthen cooperation in this area, and shall to this end initiate notably the following actions:

- (a) Exchange information on telecommunications services policies,
- (b) Exchange technical and other information and organize seminars, workshops and conferences for experts of both sides,
- (c) Conduct training and advisory operations,
- (d) Carry out transfers of technology and know-how in all elements of telecommunications services,
- (e) Have the appropriate bodies from both sides carry out joint projects,
- (f) Promote Cross-Strait standards, systems of certification and regulatory approaches,
- (g) Promote new communications facilities, services and installations, particularly those with commercial applications.

⁴⁸ *Id.* at 103.

⁴⁹ Interim Agreement on Trade and Trade-Related Matters between the European Community and Mexico, EC-Mex., 1997 O.J. (C 356) 11, COM (1997) 525. [hereinafter EC-Mexico Agreement].

These activities shall focus on the following priority areas:

- (a) Development and application of a sectorial market policy in telecommunications services in both parties, of legal and regulatory acts and procedures,
- (b) The modernization of Cross-Strait's telecommunications network and its integration into Asia and world networks,
- (c) Cooperation within the structures of Cross-strait standardization,
- (d) The integration of Cross-Strait systems; the legal and regulatory aspects of telecommunications,
- (e) The management of telecommunications in the new economic environment: organizational structures, strategy and planning, purchasing principles.

C. Trade Dispute Settlement Mechanism

1. Dispute Settlement under the WTO regime

The new text of GATT/WTO dispute settlement system solves many of the issues that have plagued the GATT dispute settlement system. It accomplishes the followings: (1) DSU establishes a unified dispute settlement system for all parts of the GATT/WTO system, including the new subjects of services and intellectual property. Thus, controversies over which procedure to use will not occur. (2) DSU clarifies that all parts of the Uruguay Round legal text relevant to the matter in issue and argued by the parties can be considered in a particular dispute cases. (3) DSU reaffirms and clarifies the right of a complaining government to have a panel process initiated, preventing blocking at that stage. (4) DSU establishes a unique new appellate procedure, which will substitute for some of the former procedures of Council approval of a panel report. Thus, a panel report will effectively be deemed adopted by the new Dispute

Settlement Body (DSB), unless it is appealed by one of the parties to the dispute. If appealed, the dispute will go on an appellate division. After the Appellate Body has ruled, its report will go to the DSB, but in this case it will be deemed adopted unless there is a consensus against adoption, and presumably that negative consensus can be defeated by any major objector. Thus, the presumption is the reverse of previous procedures, with the ultimate result that the appellate report will come into force as a matter of international law in virtually every case. The opportunity for a losing party to block the adoption of a panel report will no longer be available.

The DSU is designed to provide a single unified dispute settlement procedure for almost all the Uruguay Round texts. However, there remain some potential disparities. Many of the separate documents entitled "agreements" including the GATT in Annex 1A and certain other text such as the subsidies "code" or the textiles test, have clause in them relating to dispute settlement. But the DSU Article 1 provides that the DSU rules and procedures shall apply to all disputes concerning "covered agreements" listed in a DSU Appendix, so presumably this trumps most of the specific dispute settlement procedures. However, even the DSU provision allow for some disparity. For example, parties to each of the plurilateral agreements (Annex 4) may make a decision regarding dispute settlement procedures and how the DSU shall apply (or not apply). In addition, another DSU appendix specifies exceptions for certain listed text. Thus, the goal of uniformity of dispute settlement procedures may not be 100% achieved. Actual practice will determine to what degree this may be a problem.⁵⁰

⁵⁰ John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* 72-73 (Routledge 1998).

Differences of opinions among member countries of an FTA regarding the extent and meaning of commitments to tariff removal/reduction and quality of treatment, procedures and formalities, and eventually even the “fairness” of how the FTA works out over time for a given country are inevitable. Particular issues areas likely to cause disputes are the safeguards and trade remedy provisions. This will necessitate negotiation of effective institutional and procedural provisions for the consultation, negotiation, and resolution of disputes. Such a system should consider precedents for trade dispute resolution in the GATT and other successful economic integration agreements and should take into account, as well, the differing legal and administrative system of its member countries themselves and then, only if unavailing of resolution, referral of the matter to arbitral panels of disinterested experts in the issue areas confronted.

2. Core Concerns in the Negotiation of Dispute Settlement

Both Mainland China and Taiwan are now members of the WTO. Their entry into the world trading body allows for optimism about the prospects of closer trade ties and the likelihood of less confrontation of the Cross-Strait relations. In case of trade disputes between Mainland China and Taiwan, the build-in dispute settlement mechanism of the WTO provides for the possibility of consultation or a forum for mandatory adjudicating between the two parties with a view to resolving the disputes. In other words, Mainland China and Taiwan are in the same international organization does provide opportunities for both parties to deal with each other concerning trade issues.

Mainland China and Taiwan hold different approaches to the WTO dispute settlement mechanism. Accession to the WTO is a key step for the Taiwanese government to return to the international society with its own name, and is a major breakthrough for pragmatic diplomacy. As the WTO is the only international organization of which Taiwan is a full member, it is expected that Taiwan will not spare this unprecedented opportunity to use the WTO as a forum to boost its image as a political entity that is different from Mainland China. However, Beijing's unyielding resistance to any attempt to discuss in the international society about Taiwan issue. This is because Mainland China views Cross-Strait relation as an "internal affair." Mainland China has made clear that it will not try to resolve Cross-Strait trade disputes via the WTO dispute settlement mechanism. It would follow an approach to Cross-Strait trade dispute on a case-by-case basis.

To be sure, the use of the WTO dispute settlement mechanism, whether initiated by Mainland China or Taiwan, will pose a dilemma for Beijing. On one hand, the use of the mechanism may lead to the resolution of trade disputes between the two sides. On the other hand, Mainland China is fully aware that using the dispute settlement would establish the international stage for Taiwan. In this context, it would be reasonable for Mainland China to discourage the use of the dispute settlement mechanism. It is clear that frictions may arise if either side hijacks the organization to push non-trade-related concerns. The WTO framework is in no position to help undo the political disagreements that had plagued the cross-strait economic and trade ties prior to the accessions. If Mainland China wants to pursue trade interests and at the same time force a recognition of the "One China" principle, or if Taiwan intends to take the

advantage of the dispute settlement mechanism to enlarge its “international status,” the dispute settlement mechanism will not be able to apply to play its expected role of resolving dispute between the two sides. Indeed, the mechanism may even break down once either side tries to manipulate it for non-trade-related political purposes.

In this regard, it is imperative that the other WTO members that do not want to see the dispute settlement mechanism being politicized help both Mainland China and Taiwan foster a common approach to the mechanism.⁵¹ According to the analysis above, if the Mainland China and Taiwan can negotiate and establish certain “Cross-Strait Dispute Settlement Mechanism,” it would be better to serve the dispute resolution between the two parties. The following is the model language of dispute settlement doctrine in the FTAs.⁵²

Model language

Dispute Settlement

1. The Parties shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations within the Joint Committee to arrive at a mutually satisfactory resolution of any matter that might affect its operation.
2. The Joint Committee may settle any dispute by means of a decision.
3. If a dispute regarding the interpretation or application of this Agreement has not been resolved within two months in accordance with paragraph 2, each Party may notify the other Party of the appointment of an arbitrator. The other Party must then appoint a second arbitrator within two months.

⁵¹ Qingjiang Kong, *Can the WTO Dispute Settlement Mechanism Resolve Cross-Strait Trade Disputes?*, 2001 East Asia Inst. (EAI) Background Brief, No. 121, at 1-3 (Nat'l. U. of Sing.).

⁵² Free Trade Agreement between Bulgaria and Israel, Bulg.-Isr., Apr. 14, 2003, WT/REG/150/1 (WTO 2003), available at <http://docsonline.wto.org/DDFDocuments/t/WT/REG/150-1.doc> (last visited July 29, 2006). [hereinafter BIFTA].

4. Within two months from the appointment of the first arbitrator, the Joint Committee shall appoint a third arbitrator who shall be the chairman. The third arbitrator shall not be a national of either Party, nor permanently reside on the territory of either Party.
5. The arbitrators' decision shall be taken by majority vote within three months, unless a longer period has been agreed by the Joint Committee.
6. Each Party shall be bound to take the necessary measures involved in carrying out the decisions taken under paragraphs 2 and 5.

IV. NEGOTIATING INTERMEDIATE LEVEL ISSUES

A. Investment

1. Investment Issue under the WTO Regime

Until recently, international trade arrangements did not include the provisions relating to foreign investment. Trade was addressed in trade-specific agreements and investment in investment-specific agreements, like Bilateral Investment Agreements (BITs).⁵³ Only more recently has the focus of such agreements turned to other areas than just trade in goods – such as service, foreign direct investment, and protection of Intellectual Property Rights. This patterns the development of the GATT itself, which did not address these issues until the most recent MFN, the Uruguay Round, but which

⁵³ Most bilateral investment treaties deal with a varying number, or sometimes with all, of the following issues: (1) Preamble; (2) Scope of application; (3) Conditions for the entry of an investment; (3) Promotion of investment; (4) General standards of Treatment (i. Fair and equitable treatment; ii. National Treatment; iii. Most-Favoured-nation treatment); (5) Standards of treatment on specific issues (i. Operational conditions of the investment; ii. Transfer of payments and repatriation of capital; iii. Losses due to armed conflict or investor; iv. Subrogation; v. Settlement of disputes). See Richard Baldwin, Daniel Cohen, Andre Sapir, & Anthony Venables, *Market Integration, Regionalism and the Global Economy* 26-28 (Cambridge U. Press 1999).

produced agreements that are now part of GATT/WTO regime. FDI is now addressed in the Uruguay round Agreement on Trade-Related Investment Measures (TRIMS).⁵⁴ What is notable about this development is that some of the provisions of each of these two agreements were innovated in recent FTA agreements, notably the Free Trade Agreement between Canada and U.S., and the NAFTA.

FDI is generally defined as an investment made to acquire and manage a continuing interest in a target entity and is measured by the IMF and OECD as comprising ownership of at holding of a right to ten percent or more of the profits of an unincorporated entity. While the GATT addressed FDI in its TRIMS agreement, the coverage of FDI issues therein is not extensive. It does require national treatment for FDI and prohibits so-called “performance requirements” (such as export quotas, domestic content requirements, “trade balancing” provisions, etc.), but it does not address some of the more contentious issues described above – Establishment, Expropriation, and Dispute Resolution. Thus, FTA negotiators in the future are more likely to confront demands for explicit FDI-related provisions and guarantees in the development of FTA agreements. The most important issues likely to be confronted are Admission/Establishment and the demands for guarantees of National Treatment, MFN, or the better if both. Provisions ensuring against Expropriation without guarantees of judicial due process, adequate and effective compensation, and access to international adjudication of investment disputes are also likely to become standard negotiating areas.

⁵⁴ *Id.* at 34-37. Basic issues related to FDI include: (1) Admission/Establishment, e.g., the legal regime and the regulatory/administrative procedures through which FDI is recognized and legitimized within a nation’s sovereignty; (2) Treatment, which related to the manner in which FDI and foreign investors will be treated in that foreign country; (3) Expropriations and the resources therefore, and (4) Dispute Resolution, which relates to how investment-related dispute between foreign investors and the host governments will be resolved.

It's difficult to separate FTA from BITs,⁵⁵ because the FTAs usually include some doctrines or a chapter related to "Investment Issues," no matter the contracting parties are or more than two states. The importance of BITs stems not only from the sharp increase in their use, but also from the fact that many recent regional and plurilateral investment arrangements incorporate concepts and standards derived from these treaties. BITs tend to be relatively brief and broadly comparable in structure. Virtually all contain provisions on scope of application, admission of investments, general treatment standards, standards of treatment on specific matters, and dispute settlement. Despite this similarity in structure and areas of substantial convergence, there are also areas characterized by wide variation in the substantive provisions. BITs are usually reciprocal in nature, setting forth rules applicable to investments made by investors of either party in the territory of the other party. While designed to promote and protect foreign investment, BITs seldom contain positive obligations for home countries to take measures to foster investments by their nationals in the territory of the other party. The promotion of foreign investment is sought, instead, through reductions in various types of uncertainty peculiar to such investments.

⁵⁵ *Id.* at 50. Bilateral investment treaties typically contain a broad, flexible concept of "investment." It is viewed as a form of property and is usually defined through an open-ended (illustrative) list of assets, including movable and immovable property, ownership rights in companies, claims to money and intellectual property rights. The scope of the investments covered by the BIT in some cases has been expressly limited to investments made in accordance with the domestic law of the host state or to investments approved or duly registered by the host state. Another important aspect concerns the definition of the persons and companies which will be treated as investors of one of the parties. In this respect, BIT practice is marked by relatively important discrepancies, especially in regard to the definition of corporate nationality. Bilateral treaties for the promotion and protection of foreign investment are a prominent feature of current inter-State cooperation on foreign direct investment. Such treaties – which are legally binding on the parties – have been concluded in large numbers mainly between Western countries on the one hand, Central and Eastern European countries, on the other. Increasingly, however, these treaties are also being concluded between newly industrializing countries and others; developing and Central and Eastern European countries; and between developing countries.

2. Investment Laws in Taiwan

The ROC government and Taiwan's private sector have always welcomed foreign investment. However, the country's industrial development policies and the need for foreign exchange in the early years of the Statute for Investment by Foreign Nationals (SIFN) have made the foreign investment review process complicated and extremely discretionary.⁵⁶ Establishing and operating a successful foreign investment project requires careful thought and planning as to the application and interrelation of the patchwork of laws, regulations, policies, and practices. Importantly, foreign investors must never assume that certain rules applicable in their home countries will have counterparts in Taiwan. By the same token they should be aware that, because of its development strategies and foreign investment policies, Taiwan has some unique rules governing foreign investment. Knowledgeable foreign investors will be able to apply these rules to design investment strategies to their advantage. Such strategies are particularly important, since Taiwan is undergoing a rapid transformation following the wave in the mid-1980s. Foreign investors will also do well to monitor developments in the future liberalization of these foreign investment laws. Every new deregulatory measure presents potential business opportunities. Developments in Taiwan's financial services merit special attention, as they offer the greatest potential for growth.⁵⁷

⁵⁶ Lawrence S. Liu, *The Legal Framework for Foreign Investment in Taiwan Trade and Investment Law* 132, 133 (Mitchell A. Silk ed., Oxford U. Press 1994).

⁵⁷ *Id.* at 177

3. Investment Laws in Mainland China

The Agreement on Trade-related Investment Measures (TRIMs) precludes WTO members from imposing restrictions on investment that create trade restrictions or distortions. The measures that are precluded under the agreement are local content requirements, which typically require a wholly foreign-owned or joint venture manufacturing company to acquire a certain minimum amount or share of its inputs from local rather than international sources; trade balancing requirements, which typically compel a wholly foreign-owned or joint venture company to meet verting domestic currency earnings to foreign exchange. China agreed to implement the provisions of the WTO agreement on TRIMs upon accession. Again since it had expired, China was ineligible for the five-year phaseout that was available to developing countries when the WTO was formally established in 1995. China also agreed that it would no longer enforce provisions of existing contracts with foreign firms that are inconsistent with its TRIMs commitment.⁵⁸

Membership in the WTO opens China's economy further for foreign investors. China has promised to open telecommunications, banking and finance, insurance, commercial, and other service industries to foreign investors. It has allowed foreign investors to acquire business enterprises in China, besides setting up joint or cooperative ventures and wholly owned enterprises. It has agreed to eliminate restrictions on markets, by allowing them to set up domestic sales outlets. It will lower tariffs and thus the costs of production, but the advantage of production for domestic

⁵⁸ Lardy, *supra* n. 6, at 100.

sales will be decreased by competition from imports.⁵⁹ The net effect of the further opening is to increase foreign investment. The composition will also change towards more of the service industries opened up under WTO membership. The effects on China's economy are essentially positive. Domestic industries will be subject to more competition. State enterprises will be under more pressure to restructure. It may affect the unemployment situation adversely. On the other hand, the state enterprises will improve by absorbing foreign capital, technology, and management methods. Some may become joint ventures or be sold to foreign investors. Multinationals are helping China develop high-technology industries, which the Chinese are not able to develop for lack of capital and management skills. Thus the industrial structural will be more rapidly modernized. The economic infrastructure of China will be improved by foreign investment in many sectors. The business legal system will improve by the larger presence of foreign corporations. These corporations will help promote a modern legal system in China.⁶⁰

4. Core Concerns in the Negotiation of Investment Issues

In spite of the government's restriction, trade and investment between Taiwan and the Mainland China has existed by flowing through Hong Kong and other avenues.⁶¹

⁵⁹ See Danian Zhang, Dong Shizhong & Milton R. Larson, *Trade and Investment Opportunities in China : the Current Commercial and Legal Framework* 147-172 (Quorum Bk. 1992).

⁶⁰ Gregory C. Chow, *China's Economic Transformation* 317-318 (Blackwell Publishers 2002).

⁶¹ There is a number of ways that cargos found their way across the Taiwan Strait. The most frequently used method was to export goods to Hong Kong first and then re-export the goods to either Taiwan or the Mainland. The Ishigaki Island in Japan, Pusan in South Korea, and Singapore have also been used to re-export goods between Taiwan and the Mainland. Other approaches include trans-shipment (cargos changing ships in Hong Kong), transit shipment (cargos traveling through Hong Kong without changing

The exact amount, however, is hard to estimate, due to conflicting figures and statistics. According to Taiwan's statistics, Hong Kong was Taiwan's second largest export destination, behind only the U.S., and accounted for 22 percent of its total exports.⁶² A significant portion of the exports to Hong Kong was re-exported into Mainland China. One estimate indicates that Mainland China is Taiwan's seventh-largest trading partner. According to PRC statistics, Taiwan is Mainland China's fifth largest trading partner. It was estimated that almost 20 percent of Taiwan's exports and 4 percent of its imports were traded with the Mainland China and that Cross-Strait trade has been growing at more than 7 percent a year.⁶³ Due to the imbalance between exports and imports, Taiwan enjoyed a huge surplus trading with the Mainland China. Putting political concerns aside, opening up the three links would be beneficial to Taiwan's economy.

Increasing trade with the Mainland China could help Taiwan deal with some of the problems that come with its WTO accession. Although Taiwan has greatly liberalized its trading system in the last decade, high tariff and non-tariff measures (e.g. import license, quotas) are still imposed on a number of imports, including passenger vehicles, automobile parts, food products, and to a smaller extent textiles and apparel. Joining the WTO would undoubtedly bring overall economic growth to Taiwan.⁶⁴

ships), and illegal shipment involving chartered ships flying flags of a third country. Since April 1997, a new shipping route has been added to the Cross-Strait trade, which is referred to as "fixed-point direct shipping" or the "offshore trans-shipment center." Six shipping companies both from the Mainland and Taiwan have been approved to use their foreign-registered vessels to operate a direct freight service between Fuzhou and Xiamen on the Mainland and Kaohsiung in Taiwan. This was the first officially-approved direct shipping link between Taiwan and the Mainland since 1949. See Gordon G. Chang, *The Coming Collapse of China* 56 (Random H. 2001).

⁶² Holbig & Ash, *supra* n. 35, at 286.

⁶³ *Id.*

⁶⁴ *Id.* at 288. A study conducted by Taiwan's Council for Economic Planning and Development indicates that joining the WTO would increase Taiwan's GDP by an additional 0.9 percent year-by-year. However, this might come at the expense of turning Taiwan's long-standing trade surplus into a deficit of US \$5.3

Furthermore, Taiwan's exports to Asian Markets have declined since the onset of the Asian financial crisis as a result of lower purchasing power in the region.⁶⁵ Increasing trade with Mainland China might reduce the potential trade deficit as the Mainland China would have needs for numerous high-tech and telecommunication products. However, this might also lead to opening Taiwan to a flood of cheap goods and raw materials from the Mainland China, making Taiwan over-reliant on the Mainland, which would be a huge political concern for the Taiwan government.

In order to discourage Taiwanese investment in the Mainland, the Taiwanese government has vigorously pushed forward a "Going South Strategy" since 1993, which pumped US\$ 28 billion into countries such as Thailand, Malaysia, Indonesia, and the Philippines.⁶⁶ These investments resulted in heavy losses during the Asian Financial Crisis.

However, Mainland China would provide Taiwan with numerous investment opportunities, not only in hardware manufacturing but also in other areas such as textiles and food production.⁶⁷ Taiwan's technology and telecommunications companies have already indicated that they are prepared to invest more in the mainland. Although this might hurt Taiwan's manufacturing industry, it would provide profits for further enhancing Taiwan's service sector, as Hong Kong has experienced. The Taiwanese government is also ready to relax restrictions on firms with a Mainland China interest to

billion. The study suggests that Taiwan should deal with this threat by increasing the exports of high-tech products.

⁶⁵ See Chow, *supra* n. 60, at 254.

⁶⁶ *Id.* at 257.

⁶⁷ See Yülong Wei, *Dalu Tai Shang Fa Lü Bao Hu* 大陸台商法律保護 (Shang Zhou Chu Ban 2001).

invest Taiwan as long as this would not lead to losing the control of its economy to the Mainland China.⁶⁸

Although Taipei and Beijing never negotiate about bilateral investment issues or integrate the legal regime FDI in both parties, the trade and investment interdependence is increasing between the Cross-Strait year by year, even there still high barriers of trade between the two parties. The followings are the model language and structure of bilateral investment agreements.⁶⁹

Model language

Investment promotion and protection

1. Cooperation shall aim at maintaining and, if necessary, improving a legal framework and a favourable climate for private investment and its protection, both domestic and foreign, which is essential to economic and industrial reconstruction and development in both parties. The cooperation shall also aim to encourage and promote foreign investment and privatization in the Cross-Strait.
2. The particular aims of cooperation shall be:
 - the conclusion, where appropriate, by Taiwan and Mainland China of agreements for the promotion and protection of investment,
 - the conclusion, where appropriate, of agreements between Taiwan and Mainland China to avoid double taxation,
 - to implement suitable arrangements for the transfer of capital,
 - to proceed with deregulation and to improve economic infrastructure,
 - to exchange information on investment opportunities in the form of trade fairs, exhibitions, trade weeks and other events,
 - to exchange information on laws, regulations and administrative practices in the field of investment.
3. Both parties shall honour the rules on trade related aspects of investment measures (TRIMs), once these have been adopted within the GATT.

Structure of the Chapter of Investment Issues

- (i) Scope of Chapter of Investment

⁶⁸ Holbig & Ash, *supra* n. 35, at 289.

⁶⁹ See EC-Mexico Agreement, *supra* n. 49, art. 21; also see JSEPA, *supra* n. 39, Ch. 8.

- (ii) Definitions under Chapter of Investment. Such as “investments,” “investor” “person,” “investor of the other Party,” “natural person of the other Party,” “enterprise,” “enterprise of the other Party,” “owned,” and “controlled”
- (iii) National Treatment under Chapter of Investment
- (iv) Access to the Courts of Justice
- (v) Prohibition of Performance Requirements
- (vi) Specific Exceptions
- (vii) Expropriation and Compensation
- (viii) Repurchase of Leases
- (ix) Protection from Strife
- (x) Transfers
- (xi) Subrogation
- (xii) Settlement of Investment Disputes between a Party and an investor of the other Party
- (xiii) General Exceptions under Chapter of Investment
- (xiv) Temporary Safeguard
- (xv) Prudential Measures
- (xvi) Intellectual Property Rights
- (xvii) Taxation Measures as Expropriation
- (xviii) Joint Committee on Investment
- (xix) Application of Chapter of Investment

B. Intellectual Property Protection

1. Intellectual Property Rights under the WTO regime

Intellectual property rights⁷⁰ refer to the right of the owner to receive effective protection for his exclusive use or control of intellectual property for a given period of time specified in law. Intellectual property is divided into two major subdivisions: (1) industrial property – which relates to inventions, marks, trade names, indications of source or origin, and repression of unfair competition from violations of his IPR – it is generally understood as applying not only to industry and commerce, but to agriculture

⁷⁰ Holbig & Ash, *supra* n. 35, at 291. As a general concept, “Intellectual Property Rights” (IPR) refers to an author’s or inventor’s right to the exclusive ownership, use, or control of an original product of human thought or imagination. It includes rights relating to literary, artistic, and scientific works; performances of performing artists, phonograms, and broadcasts; inventions of all skills; scientific discoveries; patents; trademarks; service marks, and commercial names and designations.

and extractive industries as well and to all manufactured products; and (2) Copyright – which relates to the protection of rights of authors and artists and protects original creations such as books, music, original paintings, sculpture, sound recordings, motion pictures, and computer programs.

Many industrial and other producers have complained of violation of their IPR around the world usually because countries: (1) fail to accord and enforce any protection at all against violations of such rights and tolerate patent infringement, counterfeiting, and piracy; and/or (2) impose conditions upon such protection that are unacceptable to holders of IPRs such as compulsory licensing of patents. Until very recently, international rules governing national IPR protection regimes were confined to a number of global agreements.⁷¹ But the protections afforded owners of IPRs in any country under these agreements depended on whether that country was a signatory to the appropriate treaty or convention and had the technical competency and bureaucratic to enforce compliance with its disciplines. It wasn't until 1980s that IPR concerns became conceptualized as “trade” issues, when an effort to confront trade in counterfeit goods was introduced into the Tokyo round. Besides, the IPR issue became important in the multilateral trade negotiation is because the weak enforcement of World Intellectual Property Organization (WIPO).

However, IPR came to front focus during the Uruguay Round and conclusion of the Agreement on Trade-Related Intellectual Property (TRIPS) Agreement established minimum standards of IPR protection binding upon all WTO members, obliging them

⁷¹ Such Agreements are like (1) Paris Convention for the Protection of Industrial Property (Mar. 20, 1883) (last revised July 14, 1967), 21 U.S.T. 1583, 828 U.N.T.S. 305; (2) Patent Cooperation Treaty (June 19, 1970), 28 U.S.T. 7645; and (3) Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (as amended Sept. 28, 1979), 25 U.S.T. 1341, 828 U.N.T.S. 221.

to take positive action to provide IPR protections, while leaving it up to them to determine how such obligations will be implemented. The TRIPS agreement also established a binding enforcement mechanism for the various international IPR-related treaties and conventions that preceded it. It requires application of MFN and National Treatment to IPR protection, establishes minimum periods of protection for trademark, copyright and other types of Intellectual Property. It also deals with the competition law aspects of IPR protection and with enforcement and dispute resolution procedures.

Nevertheless, although the TRIPS agreement goes well beyond the protection of prior IPR-related treaties and conventions, there are a number of controversial issues of coverage, term of protection, and enforcement that remain. These are likely to become subjects for negotiation in FTA agreements as part of the “quid-pro-quo” for tariff and other commitments implicit in such arrangement.

2. Legal Regime of Intellectual Property Rights in Taiwan

Trade-related aspects of intellectual property have been central issues in the Uruguay round of the GATT.⁷² Indeed, there are indications that many GATT members would like to see the GATT take over most of the functions of the World Intellectual Property Organization (WIPO), the existing watchdog for international intellectual property violations.⁷³ Such developments parallel the progress Taiwan has made over the past decade from internationally notorious haven for intellectual property piracy to

⁷² See Paul Edward Geller, *Can the GATT Incorporate Berne Whole?*, 11 Eur. Intellectual Prop. Rev. 423 (1990).

⁷³ See Karl-Friedrich Beier & Gerhard Schricker eds., *GATT or WIPO? New Ways in the International Protection of Intellectual Property* (VCH Verlagsgesellschaft 1989).

protector of copyrights, patents and trademarks almost on a par with the United States, Japan, and most European nations. In 1989, after almost two years of talk with the United States, Taiwan agreed to extend to foreign authors copyright protection for their lifetimes plus fifty years – the prevailing international standard.⁷⁴ Cementing the reforms in the process of preparing a protocol of accession to the WTO, however, may have the dual benefit for intellectual property protection of preventing ROC backsliding (an obvious plus for foreign exporters to Taiwan) and of deflecting domestic grumbling (where private interests can be contrasted with the gain for the whole nation of WTO membership).⁷⁵ It is an important way to improve the quality of FDI as well as attract high-value investment with advanced technological content. This has been driven by the policy of gradually moving FDI from labor-intensive to high-value-added sectors. In this connection, protection of IPRs has become a pre-condition for Taiwan to attract more FDI, especially in the high-tech area, as the preferential treatment provided in taxation and other incentives is not sufficient to maintain Taiwan's appeal to foreign investors. The enforcement of IPRs will make Taiwan a stable, low-risk market, since infringement of IPRs has become a major risk for high-tech investment.

3. Legal Regime of Intellectual Property Rights in Mainland China

⁷⁴ Eduardo Lachica, *U.S., Taiwan Set Accord on Formula or Copyright Law*, Wall St. J. B6 (Jan. 30, 1989).

⁷⁵ *See Id.* Although a developing Taiwan in the early stages modernization might have had much to gain and little to loose from lax enforcement of, or failure to legislate, basic intellectual property protection laws, Taiwan today and its major exports to world markets now clearly fear violation of their intellectual property rights abroad. The increasing pressures of the WTO with respect to intellectual property protection coincide with a growing awareness of the business and governmental leadership of Taiwan's own best interests.

Mainland China must be firm and determined in the field of protection of IPRs even though it has to pay a high cost at this stage. Mainland China has made this difficult strategy choice to comply with the TRIPs agreement in many aspects. If Mainland China does not develop its own patents, copyrights, and trademarks it will forever trail behind the developed countries and will never become a major economic power. The consensus is that new technology developments will not be commercialized without IPRs protection. This issue has some special characteristics in Mainland China, which distinguish it from many other countries. It has huge domestic market. It has a sound basis for technology development, including scientific and technological infrastructure and human talent. To protect IPRs means, in the first place, to protect Mainland China's own IPRs.⁷⁶ Mainland China has consented to uphold the provisions of trade-related aspects of intellectual property (TRIPTs) beginning from its date of accession. Mainland China was not eligible for the one-year grace period of meeting the basic obligations of TRIPs, nor the additional four-year delay available to developing and transition economies before they come into full compliance with all provisions. These two benefits, which were provided for in the TRIPs Agreement, had expired by the time Mainland China became a WTO member.⁷⁷ Mainland China's agreement is consistent with the bilateral agreements on intellectual property that it signed with the U.S. in 1992 and 1995.⁷⁸

⁷⁶ A. Magarinos Carlos, Youngtu Long & C. Sercovich Francisco, *China in the WTO – the Birth for a New Catching-up Strategy* 167 (Palgrave Macmillan, 2002).

⁷⁷ See WTO Secretariat, *The Results of the Uruguay Round of Multilateral Negotiations: the Legal Texts* (WTO 1994), available at http://www.wto.org/English/docs_e/legal_e/legal_e.htm (last visited July 29, 2006).

⁷⁸ Holbig & Ash, *supra* n. 35, at 100.

Inadequate protection of foreign intellectual property rights in Mainland China is yet another major area in Mainland China's legal regime that needs overhauling to confirm to WTO requirements. So far, Mainland China's contravention of IP rights remains one of the main complaints from the international community.⁷⁹ Although Mainland China has strived to establish a comprehensive and high-standard IP regime in its bid to join the WTO, protection of foreign IP rights in Mainland China is still difficult because of specific clauses. Mainland China has committed itself to implement the TRIPS (Agreement on Trade-related Aspects of Intellectual Property Rights) immediately upon accession – with no transition period. Although the enforcement of IP rights still remains sporadic, the commitment to abide by the TRIPs Agreement (which requires a country to make available enforcement measures and sanctions able to deter further infringing activities) is expected strengthen the protection of IP rights in the country.⁸⁰ Mainland China knows that only if PRC follows rules such as those of the WTO's TRIPs agreement, can their own investors be treated on the same terms. Even though China's outward investment is still low, its potential in the next decade could be enormous. And protection of IPRs in the host countries will be a strong incentive for Mainland China to invest abroad.⁸¹

4. Core Concerns in the Negotiation of Intellectual Property Rights

⁷⁹ See Xiangjun Kong, *WTO Zhi Shi Chan Guan Xie Ding Jiqi Guo Nei Shi Yong (WTO TRIPs Agreement and Its Domestic Application in China)* WTO 知識產權協定及其國內相關適用 (Fa Lü Chu Ban She 2002).

⁸⁰ Qingjing Kong, *Is China's Legal System Ready for WTO Members?*, E. Asia Inst. (EAI) Background Br. No. 103, at 5-6 (U. of Sing. Press 2001).

⁸¹ Carlos et al., *supra* n. 76, at 168-169.

The legal regime of protection of Intellectual Property Rights is a critical issue under the negotiation process. Both Mainland China and Taiwan experienced the intellectual property disputes not only between each other, but also the disputes with other countries, especially the United States. The follow article is the model language of the FTAs.⁸²

Model language

Protection of intellectual property

1. The Parties shall grant and ensure adequate and effective protection of intellectual property rights in accordance with the highest international standards. They shall adopt and take adequate and effective measures for the enforcement of such rights against infringement thereof, in particular against counterfeiting and piracy.
2. The Parties shall co-operate in matters of intellectual property in accordance with Article 26 (Technical assistance) of this Agreement.

Technical assistance

In order to facilitate the implementation of this Agreement the Parties shall agree upon appropriate modalities for technical assistance and co-operation of their respective authorities in trade-related matters. To this end, they shall co-ordinate efforts with relevant international organizations.

The implementation of this Article shall be regularly reviewed by the Parties. If problems which affect trade arise in connection with intellectual property rights, urgent consultations shall be undertaken within the framework of the Joint Committee, at the request of any Party, with a view to reaching mutually satisfactory solutions.

Protection of intellectual property

1. The Parties shall grant and ensure adequate, effective and non-discriminatory protection of intellectual property rights including measures for the grant and the enforcement of such rights. The Parties confirm their will to respect Conventions on protection of intellectual property, which are specified in Annex IV to this Agreement.
2. For the purpose of this Agreement "intellectual property" includes, in particular, copyright and neighbouring rights, trade marks, geographical indications, industrial

⁸² See IAEFTAPLO, *supra* n. 21, art. 15; Also see JSEPA, *supra* n. 39, Ch. 10.

designs, utility models, patents, topographies of integrated circuits, undisclosed information including "know-how" and new varieties of plants.

3. The Parties shall co-operate in matters of intellectual property. They shall hold, upon request of each Party, expert consultations on these matters, in particular, on activities relating to the existing or to future international conventions on harmonization, administration and enforcement of intellectual property and on activities in international organizations, such as the World Trade Organization, the World Intellectual Property Organization, as well as relations of the Parties with other countries on matters concerning intellectual property.

C. Environment and Public Health

1. Environment issue

(a) Environmental Issue under the WTO Regime

Environmental protection is a very broad concept, extending from concern about traditional forms of pollution, such as emission of dangerous substances into the air and the water, to the protection of endangered species and the aesthetic purity and integrity of natural landscapes. It has been increasingly recognized that environmental problems cross national boundaries, and that many of the most pressing challenges cannot be addressed adequately without international cooperation and international rules. The relationship between international trade and environment has only recently become aware by the leaders and put in the trade negotiation agenda, although it has been a concern of environmentalists for a long time. Much of the debate on this issue has been highly emotive and polarized. Often, environmentalists tend to identify liberal trade with environmentally destructive unrestrained economic growth. Many free traders, on the other hand, are largely dismissive of the environmentalists' concerns as either disguised

protectionism or irrational fanaticism.⁸³ The links between trade and environment are complex and multi-faceted. There are several crucial distinctions that must be made in order to clarify and better focus the debate. The first is between the use of trade restrictions to protect the domestic environment of the importing state and the use of such restrictions as a response to the environmental policies of other states. However, the second category, the most important is between environmental and competitiveness aims of environmentally based trade restrictions.⁸⁴

The need for greater integration of trade and environmental policies is undeniable, in other words, trade and environmental policies can't be mutually exclusive. As one economist has observed, "Most environmental policies are not in conflict with basic WTO rules."⁸⁵ Although environmentalists have many grievances with WTO,⁸⁶ their ire is misdirected. If the real concern is that liberal trade may reduce

⁸³ See, generally, Daniel C. Esty, *Greening the GATT* (Inst. for Intl. Econ. 1994).

⁸⁴ Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* 507-508 (Routledge 2005).

Some international environmental treaties, such as the Convention on International Traffic in Endangered Species (CITES), use control of trade as a direct means of achieving an environmental purpose. Even where there is no such direct relationship between trade restrictions and environmental regulation, environmentalists may view trade restrictions as appropriate sanctions for non-compliance with international environmental standards, as a means of imposing such standards where there are none, or as a response to the failure of particular nations to engage in negotiations to develop or adopt such standards. Whether trade measures are an appropriate or effective means of achieving these ends raises a wide variety of normative and empirical issues. Environmentalists, in addition to this concern about international standards, are also concerned about the so-called "race to the bottom" – the possibility that in response to the competitive advantage that is gained from lower environmental standards in some industries, a greater share of jobs and trade in those industries will shift to countries with lower domestic environmental standards. This, it is feared, will put downward pressure on environmental standards in countries that presently have higher levels of protection.

⁸⁵ Piritta Sorsa, *GATT and Environment: Basic Issues and Some Developing Country Concerns in International Trade and the Environment* 325, 327 (Patrick Low ed., World Bank 1992).

⁸⁶ The following are the grievances environmentalists have with WTO: (1) WTO limits national sovereignty and thus restricts the environmental measures a country may wish to use; (2) WTO does not permit production-based grounds as a reason for excluding an imported product; (3) WTO does not permit the imposition of countervailing duties on imports from countries with lax environmental laws; (4)

worldwide environmental standards to the lowest common denominator, then the problem lies either in the market's failure to reflect environmental costs in prices or in government interference with the market through subsidization of polluting industries. A market approach to environmental problems has not proven entirely effective.⁸⁷ For example, one potential approach to mitigating pollution would be to adopt a "polluter pays principle."⁸⁸ That is, those who pollute should bear the cost of pollution or pass it on to the consumer. International environmental problems require a model that invites and arguably requires government regulation of the market.⁸⁹ Thus environmentalists are justified in challenging the free traders' basic assumption that markets are capable of effectively protecting the environment.⁹⁰

Environmentalists have criticized GATT and WTO rules and procedures as being trade-biased in favor of commercial interests and absent of environmental expertise.⁹¹ Yet, GATT and WTO rules do recognize broad environmental goals to adhere to in the pursuit of liberalized trade. These rules aspire to pursue free trade in a

WTO encourages harmonization of product standards, which leads to a lowering of standards; (5) WTO prevents export bans on products except in very narrowly defined circumstances; (6) WTO prevents the unilateral, extraterritorial imposition of environmental standards by one country upon another; (7) WTO's most-favored-nation obligation prohibits countries from distinguishing between countries in treatment on the basis of different environmental policies; (8) WTO's dispute settlement mechanisms are secretive and do not permit environmentalists to intervene in the decision-making process. See Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* 88-90 (Brookings Instn. 2003).

⁸⁷ *Id.*, at 94. Growing problems resulting from international trade in endangered species and hazardous substances are examples of market failures requiring government regulation.

⁸⁸ Rio Declaration on Environment and Development, A/Conf. 151/26/Rev.1 (vol.1), reprinted in 31 I.L.M. 874 (1992), at 878.

⁸⁹ See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 Wash. & Lee L. Rev. 1227, 1231 (1992).

⁹⁰ See Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 Loy. L.A. Intl. & Comp. L.J. 33, 34-42 (1992); Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of A Neutral Forum and Neutral Principles*, 49 Wash. & Lee L. Rev. 1279, 1290-92 (1992).

⁹¹ See Jrgen Wiemann, *Green Protectionism: A Threat to Third World Exports?* in *Multilateralism versus Regionalism: Trade Issues after the Uruguay Round* 91, 91 (Meine Pieter Van Dijk & Sandro Sideri eds., Frank Cass & Co. 1996).

manner consistent with the optimal use of the world's resources and acknowledge the need for sustainable development and protection of the environment.⁹² Recognizing the need to protect the environment, Article XX of the GATT provides for “environmental” exceptions to trade barriers which are disallowed under Article XX.⁹³ These kinds of dispute are understood to resolve around complex relationship between WTO rules and other international environmental agreements, and for all but the most extreme activities, the question is one of interpretation and international evolutions of the trade and environmental norm and practices, rather than a zero-sum struggle between the cause of the environment on the one side and that of trade liberalization on the other. At the same time, arguments about “unfair trade” have increasingly focus on non-environmental policies, with environmentalists now largely accepting that there will naturally be a gap in environment, and instead focusing on the redistributive and other policies needed to help close that gap.⁹⁴

(b) Environmental Laws in Taiwan

⁹² Asif H. Qureshi, *The World Trade Organization: Implementing Trade Norms* vii (Manchester U. Press 1996).

⁹³ See WTO Appellate Body Report: *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, AB-1998-4 (Oct. 12, 1998) (*adopted* Nov. 6, 1998).

The WTO Appellate Body rulings in the Shrimp/Turtle case have gone a considerable distance to providing a jurisprudential framework for the application to such measures of Article XX exceptions, with which most WTO Members and many environmental groups appear to be able to live. The Appellate Body has acknowledged that unilateralism raises special concerns in the WTO regime, which need to be carefully addressed while at the same time it may be a necessary, legal and legitimate response in certain circumstances.

⁹⁴ Trebilcock & Howse, *supra* n. 84, at 555-556.

The first Taiwanese environmental law was adopted in 1992. Even though it had a relatively late start compared to Mainland China, the law and policy-making principles are much more transparent, and conflict between different regulatory bodies is a rare phenomenon. The government acknowledged the distinct nature of environmental problems and formulated regulations based on the principles that polluters pay and polluters remediate, stressing preventive measures, straighten technological control, encouraging consultation and participation, and ensuring public access to relevant information. The content follows the models of direct government involvement, command and control, and economic means (tax, charges, permits and incentives). The laws and polities can be grouped into five categories: basic, administrative, control, preventive and remedies. This late start also has a bearing on the number of laws and regulations in effect. Beside the basic laws, vibration control, management of chemicals for environmental use, soil pollution prevention, drinking water management and toxic substance control acts are buried somewhere in the legislative process.

There are also some challenges in Taiwanese Environmental Legal regime. First of all, Taiwanese Environmental Protection Act (TEPA) has been criticized for failing to solicit advice from industry before implement regulations and standards. As far as TEPA is concerned, it obeys the mandates to make public comment allowance within a fixed published period. TEPA claimed to receive minimum industrial participation in this regard and resented answering complaints after the implement of law. Perhaps, the channels of notice distribution were to be blamed. The existing practice is distribution via trade associations and targeted industrial leaders. Trade association then identify

interested parties from whom to invite comments. The operation strongly favors huge, influential local corporations, as they are invariably well-tapped into the network. As the internationalization process speeds up, Taiwan has no choice but to subscribe to the global mandates.⁹⁵

(c) Environmental Laws in Mainland China

In 1992, after the United Nations Conference on Environment and Development, the Central Committee of the Party of China and the State Council approved the “ten countermeasures” to ensure sustainable development. This movement changes demonstrated PRC’s commitment to becoming a global citizen. In 1988, the National Environment Protection Agency (NEPA), which replaced a similar organization funded in 1984, was set up by the State Council to supervise the effort. A sound organizational structure for environmental protection proved conducive to the formulation of related laws and regulations. Since the early 1980s, China has passed four main pieces of legislations, plus 20 environmental protection regulations and more than 320 environmental standards, apart from local regulations. Despite the plethora of regulations, the coverage of the laws is still far from adequate⁹⁶ and the implementation has been difficult. Courts have been reluctant to impose serve penalties on offenders and few take environmental well-being to heart.

⁹⁵ Terence Tsai, *Corporate Environmentalism in China and Taiwan* 98-99 (Palgrave Macmillan 2002).

⁹⁶ See Guiguo Wang & Ruilin Jin eds., *Zhongguo Huan Jing Fa 中國環境法* (Fa lü chu ban she 1998).

There are still some challenges for present China's government. First of all, there is "Conflicting order of law." The political struggle between central and local government frequently spilled onto, among others (investment incentives, tax discount, etc), environmental policy-making and law enforcement. This further complicates the highly complex and confusing issues of legal jurisdiction.⁹⁷ Each local government retains sovereignty over policy enforcement and formulation irrespective of the national mandates. Second, there is "Haphazard adoption of regulations and standards." Mainland China has some of the most stringent environmental standards in the world and yet regulations governing the handling of radioactive and solid (hazardous) wastes are non-existent. Certain laws even exhibit negligence of environmental utility and are abstract in nature, hence poor on operational details. The procedural components of environmental laws lack essential administrative features and thus present an obvious obstacle in implementation and enforcement.⁹⁸ Third, there is "disconnection with industry." The potential conflicts of interests between the environmental authority and its governmental "comrades" should in any case be minimized to achieve harmony in the central administration. As such, the mission of environmental protection is a difficult one to accomplish.⁹⁹ Ignorance of industrial needs and responses leads to the

⁹⁷ The Chinese government has rightly advocated an integrated approach to environmental protection. Under the traditional system, each national agency and municipality reserves the right to draft its own environmental protection regulations and standards, and this endeavor is often performed without close consultation with each other or NEPA. A duplication of effort is thus evident at the provincial, municipal and country levels with a separate network of Environmental Protection Bureaus (EPBs) as the law-enforcement departments. See Sylvia Ostry, Alan S. Alexandroff & Rafael Gomez, *China and the Long March to Global Trade: The Accession of China to the World Trade Organization* 71 (Routledge 2002).

⁹⁸ Tsai, *supra* n. 95, at 91-92

⁹⁹ See Ostry et al., *supra* n. 97. Under the current policy of prioritizing deadlines to meet environmental targets, state-owned enterprises retain the luxury of "delayed" timetables. This is understandable due to the antiquated State of the operational equipment. Perhaps because of the comfort level in dealing with only the state-owned enterprises in the past, whereby regulations are conceived and enforced through

miscalculation of penalty levels, and encourages defiance or avoidance behavior from the industry. In China there is rather little discussion of policy between the regulatory and the regulated organizations.¹⁰⁰

(d) Core Concerns in the Negotiation of Environmental Laws

In the commercial world, Mainland China and Taiwan are dependent on each other. Taiwanese investment in Mainland China has provided hundreds of thousands of jobs, supplied foreign reserves, improved product quality, modernized production technology, and contributed substantially to the overall GDP. Mainland China's open position to Taiwanese investment can also be seen as politically motivated in order to forge economic interdependence as a basis for reunification. Despite Taiwan's financial and technological contribution to Mainland China, there is an increasingly large trade deficit in favor of Taiwan, coupled with the less than desirable side effects of the investment such as environmental pollution, really have their roots in political motivation. China and Taiwan are two rival siblings experiencing unprecedented economic growth. Despite its recent economic achievements, China is still considered a developing country. Taiwan through the past four decades of laborious struggle has brought itself into the rank of newly industrial country. Rapid economic growth invariably damages the natural environment and neither China nor Taiwan is well-prepared to tackle the adverse effects of industrialization. The concepts of sustainable

multiple channels, the Chinese environmental authority is ill-prepared to deal with foreign investors and the unruly behavior of the most notorious polluters, township and village enterprises.

¹⁰⁰ Tsai, *supra* note 95, at 94.

development has recently been introduced to the Greater China Area, and under international mandates both China and Taiwan are actively pursuing measures to improve their records in environmental protection.¹⁰¹ The following is the model language of FTAs regarding the environmental protection.¹⁰²

Model language

Environment

1. The Parties shall develop and strengthen their cooperation on environment and human health, which they have judged to be a priority.
2. Cooperation shall concern:
 - (a) Effective monitoring of pollution levels; systems of information on the state of the environment
 - (b) Combating local, regional and transboundary air and water pollution
 - (c) Sustainable, efficient and environmentally effective production and use of energy; safety of industrial plants
 - (d) The management of water resources for Taiwan Strait in compliance with the principles of international law and in particular in conformity with the provisions of the Convention on the protection and use of transboundary watercourses
 - (e) Classification and safe handling of chemicals
 - (f) Water quality, particularly of transboundary waterways
 - (g) Effective prevention and reduction of water pollution, especially of sources of drinking water,
 - (h) Waste reduction, recycling and safe disposal, implementation of the Basle Convention
 - (i) The environmental impact of agriculture; soil degradation, salinity and acidification
 - (j) The protection of forests and flora and fauna; restoring ecological stability of the countryside
 - (k) Global climate change and its prevention
 - (l) Environment education and awareness
 - (m) Implementation of regional international programmes
3. Cooperation shall take place notably through:
 - (a) Exchange of information and experts, including information and experts dealing with the transfer of clean technologies
 - (b) Training programmes

¹⁰¹ *Id.* at 101-102.

¹⁰² EC-Mexico Agreement, *supra* n. 49, art. 28.

- (c) Harmonization of laws (Community standards) regulations standards, norms and methodology
- (d) Cooperation at regional level, possibly including the implementation of joint programmes at international level, particularly as regards the management, the protection and quality of the waters of transboundary waterways; cooperation within the framework of the European Environment Agency once it comes into existence
- (e) Development of strategies, particularly with regard to global and climatic issues
- (f) Environmental impact studies
- (g) Improvement of the environmental management, inter alia water management

2. Public Health and Safety

(a) Public Health and Safety Laws under the WTO regime

There has been a steady growth in the regulations that pertain to public health, safety, consumer protection and the environment over the past three decades. In many respects, these regulatory trends can be viewed as part of the elaboration of the modern welfare state in much of the industrialized world, reflecting in part the proposition that greater safety, a cleaner environment, etc. can be thought of as normal economic goods, the demand for which rises as income levels rise, so that greater prosperity (in significant part engendered by trade liberalization) has been accompanied by increased demands for these kinds of domestic policies. As trade liberalization, at least with respect to border measures, has continued to advance, these “within the border” regulatory measures require new disciplines under international trade rules, particularly in a globalizing economy which, it is argued, has a low tolerance for “system frictions.”¹⁰³

¹⁰³ Trebilcock & Howse, *supra* n. 84, at 202

The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) was intended to address measures designed to protect human, animal and plant life and health, and is used primarily as a tool to regulate SPS measures as non-tariff barriers.¹⁰⁴ SPS measures are highly controversial area of regulation as they concern for the most part of safety of a nation's food supply and have consequently been the focus of intense NGO lobbying efforts. Central SPS issues such as scientific justification and allowable risk are difficult to arbitrate and lie at the heart of a country's sovereignty. The SPS Agreement applies to a defined set of measures, to the exclusion of TBT, namely as wide range of measures that protect human, animal or plant life or health from pests, contaminants, toxins, disease-carrying organisms, etc.¹⁰⁵

The SPS agreement gives rise to several types of rights obligations: first of all, the Agreement contains provisions that encourage, without requiring, the use of international standards, including those of the Codex Alimentarius; second, there are provisions that require that SPS measures (unless they confirm to international standard) be based on scientific evidence, and an assessment of risk in accord with scientific principles. This is subject to the right of a Member to adopt provisional measures where scientific evidence is insufficient to conduct a risk assessment (5.7); third, the SPS Agreement contains disciplines to ensure that Members' SPS measures are not unnecessarily trade-restrictive in relation to the level of risk the Member is prepared to

¹⁰⁴ Donna Roberts, *Preliminary Assessment of the WTO Agreement on Sanitary and Phytosanitary Regulations*, 1 J. Intl. Econ. L. 377 (1998).

¹⁰⁵ Trebilcock & Howse, *supra* n. 84, at 207. GATT rights and obligations concerning such measures (including National Treatment Article III:4) run parallel to the rules in SPS. Thus, the same food safety measure could give rise to a claim that it violates both certain provisions of SPS as well as certain GATT rules. In such case, a panel would follow the principle of examining the measure first against the more specific norms (here those of SPS) and only then considering the more general provisions of GATT.

tolerate (5.6), and also to ensure that Members do not address different risk differently so as to engage in arbitrary and which are not, applying more demanding criteria in areas where the risks arise primarily from imported as opposed to domestic products (5.5); and fourth, the SPS Agreement contains a range of provisions in conformity assessment, the testing and sampling of products at the border, for instance.¹⁰⁶

(b) Public Health and Safety Laws in Taiwan

As a member of the WTO, Taiwan must abide by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (including notification of such measures). In 1999, Taiwan agreed to accept meat and poultry imports from plants approved by the USDA Food Safety Inspection Service. In 1999 and 2000, Taiwan agreed to accept GATT/WTO standards. However, concerns have been raised in a number of areas regarding whether Taiwan plant and animal quarantine measures are based on sound science and are the least trade restrictive while providing adequate protection to agriculture.

(c) Public Health and Safety Laws in Mainland China

PRC was required by the Protocol to notify the WTO all laws, regulations and other measures relating to its SPS measures within 30 days of accession. U.S. and other agricultural exporters have been concerned about Mainland China's conformance with

¹⁰⁶ *Id.* at 207-208.

the norms of the SPS Agreement. Mainland China did not begin to submit notification of its SPS measures until some time after 30-day deadline. Indeed, the first notices published by the WTO were dated April 30, 2002 (Almost 3 months after the Protocol requirement).¹⁰⁷

Besides China's commitments to reduce tariff, to introduce a tariff-rate quota system for gains, soybean oil, and cotton, limit domestic agricultural subsidies, and eliminate agricultural export subsidies on entry, it agreed to comply with the provisions of the WTO Agreement on Sanitary and Phytosanitary Standards (SPS). This means that all measures to protect human, animal, and plant life and health from pests and diseases will be based on scientific standards and will not be a disguised restrictions on trade. Even before entering the World Trade Organization China had already reached related bilateral agreements with the United States covering citrus, meat, wheat, and leaf tobacco. Although they are not part of China's WTO agreement, each of these bilateral agreements embodies WTO principles on sanitary and phytosanitary standards.¹⁰⁸

¹⁰⁷ Stewart & McDonough, *supra* n. 5, at 23.

Mainland China submitted additional notifications which were published 140 notifications submitted by China regarding existing laws, regulations or other measures relating to SPS measures. In addition to the SPS notification submitted pursuant to the Protocol, Mainland China has submitted two notifications of emergency measures. The first emergency notification stated that China was taking an emergency interim quarantine measure applicable to wood packing materials made of coniferous trees from Korea. The measure was intended to prevent pinewood nematode from spreading into China. The Second emergency notification concerned an emergency interim quarantine measure applicable to seedling pineapple, seedling banana and other host plants of burrowing nematode. This measure was intended to prevent burrowing nematode from entering China.

¹⁰⁸ Lardy, *supra* n. 6, at 94

(d) Core Concerns in the Negotiation of Public Health and Safety Laws

The public health issue becomes more and more important between the Cross-Straits. Not only the Severe Acute Respiratory Syndrome (SARS) serious attacked Mainland China, including Hong Kong in 2003, the “Bird Flus” is also the newly worried potential infectious disease in Southern Mainland China. Taiwan and Mainland China is so close not only in geographic location, but also bilateral trade and economic activities. Thus, to establish the regime for cooperation of public health is critical in proposed FTA. The following is the model language may content in the agreement.¹⁰⁹

Model language

Sanitary and phytosanitary measures

The Parties shall apply their sanitary and phytosanitary measures in accordance with the provisions of the GATT 1994 and the other relevant WTO agreements. The Parties shall not apply their regulations in human, animal, and plant health and in veterinary, in an arbitrary, unjustifiable or discriminatory way or as a disguised restriction on trade between them.

¹⁰⁹ Free Trade Agreement between Turkey and Poland, Turk.-Pol., Jul. 19, 2000, WT/REG107/1 (WTO 2000), art. 13, available at <http://docsonline.wto.org/DDFDocuments/t/WT/REG/107-1.doc> (last visited July 29, 2006)[hereinafter TPFTA].

V. NEGOTIATING HIGHER LEVEL ISSUES

A. Non-Economic Factors

1. Labor Standard

(a) International and Comparative Labor Standard

The trade and labor linkage has a long history.¹¹⁰ It has become one of the most contentious contemporary issues in the trade and labor policy circles and debates.¹¹¹ Intergovernmental action for international labor legislation began to be reflected in international conferences beginning in 1890.¹¹² Many of these early efforts were motivated by the concern that in the absent of international labor standards, international competition in environment of increasingly free trade would precipitate a “race to the bottom.”

The treaty of Versailles in 1919 established the International Labor Organization (ILO). The preamble of ILO Constitution notes that “the failure of any nation to adopt humane condition of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries’. The ILO, a tripartite organization of

¹¹⁰ Steve Charnovitz, *The Influence of International Labor Standards on the World Trading System: An Historical Overview*, 126 Intl. Lab. Rev. 565, 565-584 (1987); Virginia A. Leary, *Works' Rights and International Trade: The Social Clause in Fair Trade and Harmonization: Prerequisites for Free Trade?*, vol.2, 177-230 (Jagdish Bhagwati & R. Hudec eds., MIT Press 1996).

¹¹¹ For an excellent review of the surrounding debates, see Brain A. Langille, *Eight Ways to Think About International Labor Standards*, 31 J. World Trade 27 (1997).

¹¹² *Id.* at 30. The idea of using international labor standar to protect workers from economic exploitation was first promoted by individual social reformers in Europe in the first half of the nineteenth century at the early stage of Industrial Revolution. The work if these reformers were later taken over by various non-governmental organizations. Calls for international labor legislation increased dramatically during the second half of the nineteenth century and found expression in various international organizations that were formed (often international association of trade union).

government, employers and work representatives, has mostly pursued its mandate by setting minimum international labor standards through Conventions and Recommendations, subject in the former case to ratification by Member States and promoted by investigation, public reporting and technical assistance, but not formal sanctions.

The ILO formally entered the trade/labor interface debate in 1994 at the time of discussion of a possible inclusion of a social clause in the GATT/WTO,¹¹³ the establishment of a link between trade and labor in differing forms within NAFTA and the EU, and the conditioning of trade preferences and concessions by some developed countries in respect for labor standards. The ILO set up a working party in the social dimensions of the liberalization of international trade, but in 1995 the ILO's governing body concluded that the working party would not pursue the question of trade sanctions and that further discussion of a link between international trade and social standards or a sanction-based social clause mechanism would be suspended.¹¹⁴

¹¹³ Charnovitz, *supra* n. 110, at 565-568.

The 1948 Havana Charter that was intended to embody the framework for a new world trading system declared that "Members recognize that unfair labor conditions, particularly in production for export, create difficulties in international trade and accordingly each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory." However, the Havana Charter was never adopted because of oppositions in the U.S. Congress, and the GATT in Article XX refers only to measures relating to products of prison labor (Article XX (e)), measures necessary to protect public morals (Article XX (a)), and measures relating to human life and or health (Article XX (b)).

¹¹⁴ *Id.* at 571. In 1998, the ILO adopted a Declaration of Fundamental Principles and Rights at Work providing that all members have an obligation to respect and promote certain core labor standards (CLS): (1) Freedom of association and the right to engage in collective bargaining; (2) the elimination of forced labor; (3) the elimination of child labor; and (4) the elimination of discrimination in employment. This Declaration parallels in many respects references to core international labor standards in the UN Universal Declaration of Human Rights (1948) and the U.N. Covenant on Civil and Political Rights and UN Convention on Economic, Social, and Cultural Rights that came into force in 1976. The ILO membership, however, rejected a proposal by its Director-General in 1997 that the ILO promote and

The Ministerial Declaration following the first WTO Ministerial Conference in Singapore in 1996 appears to have removed labor issues from the WTO agenda and remitted them to the ILO. The recent Doha Ministerial Declaration reaffirms this position.¹¹⁵ However, the issue of a trade/labor linkage seems unlikely to go away. Regionally, the potential expansion of NAFTA into a Free Trade Area of the Americas (FTAA) will raise the scope and status of the NAFTA Labor Side-Agreement in this broader context. And unilateral trade actions by states on account of labor practices prevailing in other states may well provoke trade disputes that will require adjudication by international trade dispute settlement bodies. Recently, the debate over trade and labor rights has been extended to human rights more generally, and entirely logical development. However, in the case of other human rights, the debate is much less focus on “linkage,” including sanctions, and much more on the effects on trade obligations on the ability of states, especially developing countries, to fulfill economic, social and culture rights, such as the right to health or to adequate food. Here, developing countries, although wary about sanctions, have been generally supportive of efforts to evaluate and interpret trade agreements in human rights terms.¹¹⁶

(b) Legal regime of Labor Standard in Taiwan

administer a country-based certification and labeling programme for products from countries complying with core labor standards.

¹¹⁵ See World Trade Organization, *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Ministerial Declaration], available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited July 29, 2006).

¹¹⁶ Trebilcock & Howse, *supra* n. 84, at 557-559.

The basis of workers' welfare is prescribed in Article 153 of the ROC Constitution.¹¹⁷ Several significant laws have been passed to guarantee labor rights Under this constitutional provision, including the basic Labor Standards Law, and the Employment Service Act.

The key labor law in the Taiwan is the 1984 "Labor Standards Law," defines such terms as worker, employer, wages, and contract. It delineates the rights and obligations of workers and employers; prescribes the minimum requirements for labor contracts; and has provisions on wages, work hours, leave, and the employment of women and children. Since December 1998, the law has been extended to cover all employer-employee relationships, except in a few selected work categories such as private school teachers and workers, athletes and coaches of professional sports, lawyers, and accountants. This law also prohibits unreasonable work hours and forced labor and grants workers the right to receive compensation for occupational injuries and layoffs, as well as a pension upon retirement. Effective January 1, 2001, the maximum number of work hours is 44 regular hours per week, and no more than 84 hours every two weeks.

The Employment Services Act, promulgated on May 8, 1992, guarantees equal job opportunities and access to employment services, with the objective of balancing manpower supply and demand, efficiently using human resources, and establishing an employment information network. To protect workers' rights during times of economic slowdown, the act stipulates that the central government should encourage management,

¹¹⁷ See *Zhonghua Minguo Xianfa* (Constitution of Republic of China) e.g. *Minguo Xianfa* art. 153 (1947) : "The State, in order to improve the livelihood of laborers and farmers and to improve their productive skill, shall enact laws and carry out policies for their protection."

labor unions, and workers to negotiate work hour reductions, wage adjustments, and in-service training to avoid layoffs. As of mid-2001, employment discrimination evaluation committees have been established under the Employment Services Act in Taipei, Kaohsiung, and 17 of Taiwan's 21 counties and cities. These committees, formed by government, labor, management representatives, scholars, and experts, ensure equal employment opportunities and determine whether discriminatory actions have been taken by an employer against an employee.

(c) Legal regime of Labor Standard in Mainland China

Over the last two decades, Mainland China has enacted a great deal of legislation, regulations and other administrative rules to regulate employment relationships, especially the protection of employee's legitimate rights. Except for strike, the potentially sensitive means of handling employment relationships, all other means that are available in Western countries are also available in Mainland China. Statutory protection of employees' rights and interests are thus quite comprehensive in Mainland China. But one concern raised by foreign investors is that Mainland China may have over-protected its employees and is far of its Asian neighbors. Such over-protection obviously reduces Mainland China's attraction to foreign investors. But as far as employment legislation is concerned, the real problem is widespread non-compliance with employment legislation because neither employing units, nor employees, would

enthusiastically pursue strict compliance with some employment legislation. The only sound solution seems to be the adjustment of employment legislation.¹¹⁸

Only when this issue is addressed can the foreigners reasonably call for strict implementation of the rule of law principle in the area of employment relationships. Trade unions have been assigned very important roles in the protection of employees' legitimate rights and interests. From the employee' perspective, the strong connection between trade unions and government organs may make the implementation and operation of legal protection biased towards employees. That may be consistent with the legislative objective of the labor law. But as far as the Chinese employment law system itself is concerned, it may not be a healthy and good phenomenon, because the three major players in employment relations are the State, employing units, and employees.

In many aspects, employment law has the functions to provide the three players equal opportunities to express their opinions and to bargain with each other so as to reach a balance among the individual interests of the employee, the interests of the employing units, and the interests of the State. However, employees are not really govern the opportunities under existing employees fight for their interests against the employing units, they may benefit from the existing arrangement. But when they fight for their rights and interests against the State, there exist hardly any channels for them. Hence, for the long-term benefits of employments, it should be feasible to sever the

¹¹⁸ See Xiaoli Shi, *WTO Gui Ze Yu Zhongguo Wai Mao Guan Li Zhi Du* WTO 規則與中國外貿管理制度 (Zhongguo Zheng Fa Da Xue Chu Ban She 2002).

links between trade unions and governments. In so doing, a more healthy employment relationship can be developed in China.¹¹⁹

(d) Core Concerns in the Negotiation of Labor Standard

Labor standard issue is one of the difficult subjects when negotiating FTA between the parties, especially the countries in different stage of economic entity. Even in Doha round negotiation known as the "Development Round," the countries are still hard to establish some consensus about labor standards, and even more, many WTO members didn't agree to bring the social causes into the GATT/WTO regime. The labor standard is very different from Taiwan to Mainland China. The fundamental principle related to human rights protection and labor union bargaining power, which are sensitive issues for Beijing's authorities.

Besides, the majority of big enterprises in Mainland China are still formed by State-Owned characteristic, this made labor standard more difficult regarding to Beijing's national sovereignty and internal affairs. Besides, the labors in Mainland China don't have the right to organize the labor union, and still need to follow many restrictions. However, a well-organized labor rights protection regime would be the best policy to prevent labor disputes or protests. The side agreement of labor standard was adopted in NAFTA as well as some other FTAs, the following is the model language for labor issues.¹²⁰

¹¹⁹ Feng Lin, *Employment Law in China* in *Chinese Law* 445, 474-475 (Wang Guihuo & John Mo eds., Kluwer L. Intl. 1999).

¹²⁰ EC-Mexico Agreement, *supra* n. 49, art. 101.

Model language

Movement of workers

1. Subject to the conditions and modalities applicable in each party:
 - (a) The treatment accorded to workers of each nationality, legally employed in the territory of the Cross-Strait shall be free from any discrimination based on nationality,
 - (b) As regards working conditions, remuneration or dismissal, as compared to its own nationals,
 - (c) The legally resident spouse and children of a worker legally employed in the territory of the Cross-Strait, with the exception of seasonal workers and of workers coming under bilateral Agreements, unless otherwise provided by such Agreements, shall have access to the labour market of that Member State, during the period of that worker's authorized stay of employment.
2. With a view to coordinating social security systems for workers of one party, legally employed in the territory of the other and for the members of their family, legally resident there, and subject to the conditions and modalities applicable in each party,
 - (a) All periods of insurance, employment or residence completed by such workers in each party shall be added together for the purpose of pensions and annuities in respect of old age, invalidity and death and for the purpose of medical care for such workers and such family members,
 - (b) Any pensions or annuities in respect of old age, death, industrial accident or occupational disease, or of invalidity resulting therefrom, with the exception of non-contributory benefits, shall be freely transferable at the rate applied by virtue of the law of the debtor member,
 - (c) The workers in question shall receive family allowances for the members of their family as defined above.
3. Taking into account the labour market situation in each side, subject to its legislation and to the respect of rules in force in each party in the area of mobility of workers,
 - (a) The existing facilities for access to employment for Cross-Strait workers accorded by Member States under bilateral Agreements ought to be preserved and if possible improved,
 - (b) The other Member States shall consider favourably the possibility of concluding similar Agreements.
4. The Association Council shall examine granting other improvements including facilities of access for professional training, in conformity with rules and procedures in force in

the Member States, and taking account of the labor market situation in the Member States and in the Community.

2. National Security issue

(a) National Security under the WTO regime

In the post-9/11 world, issue of trade and security became more and more important, and yet there is no multilateral – or indeed regional – forum in which these issues are being considered systematically. One dimension is the contribution of globalization – free or freer movement of persons, capital and goods – to the maintenance and expansion of non-governmental networks of crime and terror. To what extent have post-9/11 restrictions on the movement of people – particularly temporary workers and key personnel – affected foreign investment and service trade? Are there multilateral or regional solutions that can better balance legitimate security needs and open markets? Existing international trade agreements do contain broad national security exceptions, albeit rarely subject to dispute settlement in the past. The question is whether and in what forum collective action, as opposed to unilateral action based on such exception, is necessary and appropriate.

The first attempt in the GATT/WTO regime to address such issues in an explicit way came in 1993, when the GATT Membership considered a GATT waiver in respect of provision of the so-called Kimberley Agreement on conflict diamonds¹²¹ that provided for trade restrictions in the case of non-adherence to the standards in the

¹²¹ Joost Pauwelyn, *WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for Conflict Diamonds*, 24 Mich. J. Intl. L. 1177, 1180-1181 (2003).

agreement, which was essentially aimed at preventing trade in diamonds to finance military conflict in Africa. A question may be raised as to why a waiver was needed at all, given the security and public morals exceptions in the GATT.¹²² Other issues are posed by the attempt to link trade and security policy by rewarding allies in military conflict – and punishing those who refuse to be allies. It is fortunate that despite significant tensions with a number of its major trading partners over the decision to go to the war in Iraq, neither the U.S. nor those trading partners allowed the tensions to spill over into major trade conflict. The way in which certain countries were excluded or limited in their ability to bid for contracts in the rebuilding of Iraq is of greater concern, although in the circumstances of occupation, and given that Iraq itself is not a WTO member, whether existing WTO rules apply, and to what extent, is unclear. In addition, the USA has been quite selective recently in who it will enter into bilateral trade treaties with, rewarding allies (e.g. Australia) and punishing critics (e.g. New Zealand).

(b) National Security Issue in Taiwan

The changing security environment in the Asia-Pacific region coupled with the historic transformation in Taiwan's domestic political environment, i.e., political liberalization and the search for national identity in understanding Taiwan's security policy. Taiwan's search for its security began in earnest when the Kuomintang (KMT)

¹²² *Id.* at 1183. Although, of course, the security exception is for national security as well as trade restrictions pursuant to action of the UN Council; this points out a limit to using trade restrictions though other collective security processes that may need to be addressed systematically.

lost its civil war with the Chinese Communists. Since 1949, Taiwan has been under some kind of threat of an invasion from the PRC (Mainland China), both physically and verbally. Nonetheless, with the United States acting as Taiwan's security guarantor from 1949-1979, PRC is kept at arms length and thereby providing Taiwan some breathing space.

Being diplomatically isolated, Taiwan needed to carve out an "independent" national security policy. Most foci on national security have always been on military issues, and less attention has been placed on the use of trade as part of statecraft. Taiwan's active participation in the world's trading regime, particularly after the United States switched its recognition to the PRC, can be seen in the light of its need to secure its own survival by being firmly attached to the global economy and the protection process. Since in this light, Taiwan's motivation for trade related to some version of the neo-realist and neo-liberal views of ensuring security through trade and functional relationships.¹²³

By firmly integrating Taiwan's economy with the international economy, Taiwan makes itself an important player in the world manufacturing economy. As a result, this transformation to a capital and knowledge intensive industrial structure in some ways decreases the vulnerability of Taiwan's important trading partners. By binding Taiwan's economic "fate" to the world, Taiwan can avail itself of some security

¹²³ Taiwan's approach can be seen as both a neo-realist and neo-liberal prescription. As neo-realist prescription concern for balance of power and power dynamics are considered together with the importance of trade and economics in achieving security. As a neo-liberal prescription, Taiwan is also concerned with developing a complex network of independence to maintain peace and create a security community to ensure its national security. See Kung-Chi Li, *The Perspective of Economic Integrity – Economic and Trade between the Counterparts of Taiwan Strait* 121 (Shengmin 1994).

as the world becomes vulnerable to instability in Taiwan.¹²⁴ Trade plays an important role in Taiwan's strategy to ensure its own security and survival as a sovereign nation-state. Since the 1990s, however, Taiwan was also able to play an important role as important financier in the region. Taiwan's large capital surplus and its huge foreign exchange reserves are seen within Taiwan's government not only in commercial terms but also as an important tool in the fight against diplomatic isolation.¹²⁵

The adoption of the "status quo" as an equilibrium strategy allows Taiwan to buy time to allow peaceful democratic transformation in the PRC to achieve the so-called "Democratic Peace." Having said this, the maintenance of the status quo also means active engagement with the PRC in the economic front. The combination of Taiwan's comparative advantage in banking, communication, high technology, and market expertise combined with the abundant supply of labor and land in Mainland China present a win-win scenario (a positive sum game) for both sides to build on in the future. The greater the democratization of Taiwan, the more favorable opinions of Taiwan become increasingly in the world community. In fact, the coverage about Taiwan is positive and seems to imply that Taiwan is an important part of the world economy.¹²⁶

¹²⁴ Alexander C. Tan, Steve Chan & Calvin Jillson eds., *Taiwan's National Security: Dilemmas and Opportunities* 119-121 (Ashgate Pub. Ltd. 2001).

¹²⁵ *Id.* at 123.

¹²⁶ *Id.* at 127-128.

(c) National Security Issue in Mainland China

The defining feature for China's security interests is comprehensiveness and Chinese strategic planners often use the more inclusive term "comprehensive national strength," in discussing long-term security strategy.¹²⁷ PRC's national security could be categorized in several aspects. In particular, military,¹²⁸ political,¹²⁹ economic,¹³⁰ scientific and technological security, and social security are the elements of the "new security concept."

¹²⁷ See Weixing Hu, *China's Security Agenda after the Cold War*, 8 Pac. Rev. 120, 122 (1995). Chinese adoption of a comprehensive security concept has also been noted by Western academics; also see David Shambaugh, *Growing Strong: China's Challenge to Asian Security*, 36 Survival 43, 43-59 (Summer 1994).

¹²⁸ From the viewpoint of military security, Chinese description in the *Jiefanjyn Bao* states:

The military force shoulders the important mission of defending the state's territorial sovereignty and integrity, resisting foreign aggression and safeguarding state unification. Therefore it is necessary to strengthen army building, develop armament and reform the military organizations. The military forces of all countries should play a role in a broader scope such as cracking down on terrorism and drug trafficking, rescue work and humanitarian aid.

See Russell Ong, *China's Security Interests in the Post-Cold War Era*, p. 18-19. Also see Qinggong Li & Wei Wei, *The World Need a News Security Concept*, *Jiefanjyn Bao* 5 (Dec. 24, 1997).

¹²⁹ *Id.* As for the Chinese definition of political security, the *Jiefanjyn Bao* states:

The political body and system of the state cannot be changed by another country, encroachment of a country's sovereignty and unification shall not be tolerated, and no country shall meddle in the internal affairs of another country. One the international stage, all countries, big or small, poor or rich, are all equal. The big and strong should not be allowed to bully the small and weak. In international political affairs, the superpowers should not be allowed to order other countries about pursue power politics and impose their values on others. These are the indispensable prerequisites for global and regional security.

¹³⁰ *Id.* About the economic security, the *Jiefanjyn Bao* states:

The economic interests of a country must not be encroached upon; state-to state economic relations should be established on the basis of equality, cooperation and common development; no country should be allowed to apply economic sanctions to retaliate against the other, still less use economic sanctions to obtain political gains; trade investment and other economic activities should be carried out in the light of the principle of mutual benefits and the most favored-nation trading status and entry to the WTO should not be used as "cards" to expert pressure on another country and disrupt the country's economic development; economic competition should proceed in accordance with international rules and regulations; economic problems, friction and differences are normal, and should be resolved through dialogue on equal footing, consultation and talks.

PRC now seeks comprehensive security, with the connotation that building up a strong economic base will allow it to stand up to any future challenges in the international system. This type of thinking has coincided with expansion in the scope of the security concept over the years.¹³¹ While Chinese leaders today are frequently able to determine their country's strategic direction, it is fair to say that they have much less control over the country's economic affairs. As Mainland China seeks greater trading links with the outside world, it must come to terms with the concept of economic interdependence. Economic strategies are in general much more difficult to ascertain in an increasingly interdependent world, and quite often not as clear-cut as geopolitical strategic initiatives.¹³²

(d) Core Concerns in the Negotiation of National Security issue

National security issues can't be solved simply in the FTAs. Based on the complicated political conflict between Taiwan and Mainland China, national security issues would involve military, political, economic, as well as psychological aspects. The national security issue addressed here is merely "Trade-related" and for the "exception doctrine" about normalized bilateral trade relationship between the two parties. The followings are the model language of national security under the various FTAs.¹³³

Model language

¹³¹ Russell Ong, *China's Security Interests in the Post-Cold War Era* 31 (Routledge 2002).

¹³² *Id.* at 32.

¹³³ See TPFTA, *supra* n. 110, art. 17; see also EFTAPLO, *supra* n. 21, art. 15.

Security exceptions

In accordance with Article XXI of GATT 1994, nothing in this Agreement shall prevent a Party to this Agreement from taking any appropriate measures which it considers necessary:

- (a) To prevent the disclosure of information contrary to its essential security interests;
- (b) For the protection of its essential security interests or for the implementation of international obligations or national policies
 - (i) Relating to the traffic in arms, ammunition and implements of war, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes, and to such traffic in other goods, materials and services as is carried on directly or indirectly for the purpose of supplying a military establishment; or
 - (ii) Relating to the non-proliferation of biological and chemical weapons, nuclear weapons or other nuclear explosive devices; or
 - (iii) Taken in time of war or other serious international tension.

B. Public Sectors

1. Government Procurement

(a) Government Procurement under the WTO regime

The market access and equal treatment commitment made by WTO members do not apply to goods and services procured by government agencies.¹³⁴ But there is a separate agreement on government procurement negotiated in Uruguay Round. This agreement requires governments to give foreign firms the same opportunity as domestic firms to bid for government contracts. The agreement achieves this objective by setting forth detailed provisions on tendering procedures, conditions on the qualification of suppliers eligible to bid, time limits for tending, and so forth. All of these provisions are

¹³⁴ U.S. Gen. Acctg. Off., *World Trade Organization: Analysis of China's Commitments to Other Members* (Pub. No. GAO-03-4, Oct., 2002), available at <http://www.gao.gov/new.items/d034.pdf> (last visited July 29, 2006).

designed to ensure that foreign firms can compete on an equal basis with domestic firms. The agreement on Government Procurement, however, is plurilateral, meaning that each country's participation is voluntary. Participation is not a condition of membership in the WTO. In 2006, only thirty-seven members had signed the Agreement on Government Procurement,¹³⁵ and Taiwan is negotiating accession and China is an Observer Government.

The main instrument for dealing with Government Procurement issue is the WTO's plurilateral Agreement on Government Procurement (GPA). However, there are also some general rules in the GATT and the GATS that are relevant to government procurement issues. The need for a separate WTO Agreement on Government Procurement arises because this activity is largely excluded from both the GATT, which deals with trade in goods, and the General Agreement on Trade in Services (GATS),¹³⁶ covering trade in service. Nevertheless, there are some limited obligations under the

¹³⁵ WTO Secretariat, *Committee on Government Procurement*, available at http://www.wto.org/english/tratop_e/gproc_e/membos_e.htm. (Sept. 13, 2001)(last visited July 29, 2006).

¹³⁶ The GATS, negotiated for the first time during the Uruguay Round, likewise exempts procurement from its most substantial obligations: GATT Article XIII, para. (2) provided that:

Articles II, XVI and XVII shall not apply to "laws regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial resale." Article II is the general MFN obligation of GATS. Article XVII is the GATS national treatment rule, and Article XVI contains rules to limit restrictions on general market access (such as national restrictions on the number of firm permitted to operate in a particular service field). However, other GATS obligations do apply, including the transparency obligations of Article III. These include a requirement to publish all "measures of general application" relating to the field covered by GATS, which appears to include legislation, general administrative provisions (such as purchasing guidelines), judicial decisions and general administrative rulings concerning services procurement. See Kim Van der Borghed ed., *Essays on the Future of the WTO: Finding a New Balance* 62 (Cameron May Ltd. 2003).

GATT and GATS that may be relevant to procurement, in particular obligations concerned with transparency.¹³⁷

Besides, a more relevant provision is Article XVII, which deals generally with state trading, including the purchase of products for resale or for use in production for sale. Article XVII (2) provides that general obligations relating to state trading imposed by Article XVII (1) are not apply to “imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale o use in the production of goods for resale” – that is, to most procurement of goods for governmental activities. With respects to these imports, however, Article XVII dose impose an obligation to give other WTO Members “fair and equitable treatment.” The meaning of this has never been explored in a Penal Decision, and its application is obscure. Arguably, it might impose a MFN obligation with respect to the treatment of products originating in states with which the purchasing state has no specific reciprocal access agreement.

During the Uruguay Round negotiations were undertaken to improve the general agreement, which eventually lead to the conclusion of the new Agreement on Government procurement (GPA) at the end of the Round. This now deals with government procurement of services (including construction) as well as procurement of goods, and extends beyond central government to cover many sub-federal entities and other governmental bodies.

However, procurement still was not deal with on a multilateral basis: the Agreement became one of the plurilateral agreements administered by the GATT/WTO regime. Currently, membership of the GPA is limited to certain signatory countries. The

¹³⁷ The basic principles are “National Treatment” in Article III, and “MFN”, *see* GATT art. I.

basic objective of the GPA and of its predecessor, stated at the beginning of the preamble, is to establish a multilateral framework for government procurement “with a view to achieving greater liberalization and expansion of the world trade and improving the international framework for the conduct of the world trade.” This has been sought through two fundamental principles, non-discrimination and transparency, which are also the major principles of the other WTO agreements.¹³⁸

(b) Legal regime of Government Procurement in Taiwan

Taiwan committed to accede to the WTO Agreement on Government Procurement (GPA) as part of its WTO accession. While Taiwan had applied for accession to the GPA, its accession has not yet been completed due to differences regarding nomenclature issues. To prepare for accession, Taiwan implemented a new Government Procurement Law in mid-1999. This was an important first step toward establishing a transparent and predictable environment for Taiwan’s multi-billion dollar market for public procurement projects.

In August 2001, Taiwan and the United States signed a Memorandum of Understanding (MOU) on Government Procurement. The MOU calls for Taiwan to implement certain procedural commitments immediately, while others will be implemented upon accession to the GPA. Taiwan agreed to establish new procedures providing for the independent review of complaints that arise during the tendering

¹³⁸ Sue Arrowsmith, *Towards an Agreement on Transparency in Government Procurement*, Program for the Stud. of Intl. Org. Occasional Paper Series No. 9, at 23 (the Graduate Inst. of Intl. Stud. 1998).

process, to encourage its procuring entities to make use of mediation procedures, and to cooperate fully when such procedures are invoked.

Despite these commitments, Taiwan officials have continued to incorporate provisions in its public procurement tenders that appear to be inconsistent with the GPA. Further, the lack of transparency in the government procurement process as well as the review process for complaints remains a serious issue. U.S. participation in Taiwan's government procurement market continues to decline as a result of these practices. The United States continues to remain concerned with the government procurement environment.

(c) Legal regime of Government Procurement in Mainland China

Nonetheless, Members of the working party requested that China make a commitment to join the Agreement on Government Procurement and agree to start the process within two years of accession. The Chinese negotiators, while starting the government's intention to join eventually, were not willing to be bound by any specific date.¹³⁹ On the positive side, China did agree that state-owned companies, including state-owned trading companies have to make purchasing decisions based on commercial considerations and provide foreign companies, including U.S. firms, with the same opportunity to compete as domestic firms. In other words purchases by Chinese state-owned companies, apart from purchases for the government's own use, are governed by

¹³⁹ See WTO Secretariat, *Draft Report of the Working Party on the Accession of China*, WT/ACC/SPEC/CHN/1/rev.8 (July 31, 2001), available at <http://docsonline.wto.org/DDFDocuments/t/WT/ACC/SPEC/CHN1R8.doc> (last visited July 29, 2006).

normal WTO trade rules. Equally important, China agreed, effective on its date of entry into the WTO, that all public authorities, including those at the central, provincial, and local level, will apply the most favored nation principle of the Agreement on Government Procurement. Thus whenever a government body or authority procures goods or services from foreign suppliers, it must provide all potential foreign suppliers with an equal opportunity to compete for the business through bidding or another similar open process. However, although members of the working party asked China to consider joining, China declined to do so.¹⁴⁰

(d) Core Concerns in the Negotiation of Government Procurement

During the negotiation of Government Procurement related issues, “transparency” is the critical concern, especially the highly-controlled government. Taiwan was already the GPA member, but Mainland China didn’t sign the agreement. Since Mainland China is still a Communist political system, the transparency of public policy decision making process is very difficult to discover outside the government. Thus, it is better for the two parties to follow the instructions set in GPA, and then negotiating bilateral arrangement. The following is the model language of Government Procurement doctrines in FTAs.¹⁴¹

Model language

¹⁴⁰ *Id.* at 105.

¹⁴¹ JSEPA, *supra* n. 39, Ch. 11; also see BIFTA, *supra* n. 52, art. 31.

Government Procurement

1. The Parties consider the liberalization of their respective government procurement markets as an objective of this Agreement. The Parties aim at opening up of the award of public contracts on the basis of non-discrimination and reciprocity.
2. The Parties will progressively develop their respective rules, conditions and practices on government procurement.
3. The Joint Committee shall review progress in this area and may make recommendations so as to ensure transparency and a mutual opening of their respective markets. During this review the Joint Committee may consider, especially in the light of international regulations in this area, the possibility of extending the coverage and/or the degree of the market opening provided for in paragraph 2.
4. The Parties shall endeavour to accede to the relevant Agreements negotiated under the auspices of the WTO.
5. The government officials of the Parties responsible for procurement policy shall meet upon the request of either Party and, subject to the laws and regulations of each Party, exchange information in respect of government procurement.

2. Competition Policy

(a) Competition Policy under the WTO regime

To the extent that the diversity of national competition laws poses problems in a context of dramatically increased international trade, the two principles – the National Treatment Principle and limited (inbound) extraterritoriality – adequately address the most serious problems. Voluntary cooperation between national competition authorities in the investigation and enforcement of the kind that already exist between a number of national enforcement authorities.

To the extent that pointless incompatibilities between international competition laws exist with respect, for example, to information requirements and decision time-line in merger reviews, a convergence on common requirements is best promoted through

forums such as the International Competition Forum, which represents about 80 national antitrust enforcement authorities. Similar spontaneous regulatory convergence on best practices in various other areas of antitrust-law enforcement can also be most effectively promoted through such a forum.¹⁴²

Recent events in international antitrust demonstrate the likely futility and undesirability of a substantive harmonization agenda. Even apparently modest proposal for harmonization have engendered strong disagreements, indicating that harmonization is impractical. Moreover, the reason for disagreement may sometimes relate to self-interest, but often seem motivated by good faith difference in opinion over optimal law.¹⁴³ While this is a much more modest agenda than comprehensive international harmonization of competition laws (with a much-reduced focus on market access issues), a recent report released by the WTO Working Group on the Interaction between Trade and Competition Policy to the WTO General Council¹⁴⁴ reports a striking diversity of views among Member states on all of these issues. In the final hours of the 2003 Cancun Ministerial the EU dropped its insistence that competition policy be included in the Doha negotiating agenda.

¹⁴² Trebilcock & Howse, *supra* n. 84, at 610.

¹⁴³ See WTO, *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited July 29, 2006). Proposals for sweeping international harmonization competition laws, such as those espoused the Munich Group or by Guzman, do not reflect current mainstream preoccupations. The Doha Ministerial Declaration of 14 November 2001, launching the current multilateral round of trade negotiations, identified an apparently much more modest trade and competition policy agenda principally promoted by the EU. In the period until the Fifth Session, further work in the WTO Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least developed country participants and appropriate flexibility provided to address them.

¹⁴⁴ Trebilcock & Howse, *supra* n. 84, at 608.

The desire to harmonize all or some aspects of national competition laws may come at the price of eliminating competitive politics and policy-making. Competition in the latter domain is important for social welfare, just as is competition in the economic domain.¹⁴⁵

(b) Legal regime of Competition Policy in Taiwan

If one wishes to summarize the policies behind the recent transformation of Taiwan's economy, they would be "internationalization" and "liberalization." These terms had become buzz-words by the mid-1980s. However, globalization and liberalization does not mean a laissez-fair environment. Indeed, another policy of the government is "systemization." That policy refers to the adoption of laws, regulations, and enforcement policies to ensure some orderliness in the internationalized and accessible market place in Taiwan. Competition rules have therefore become the emerging "rules of the game." Generally speaking, consumer welfare is the most important policy goal behind the rules. More controversial, however, are the ways and means by which new laws, such as the Fair Trade Law (FTL) and the draft Consumer Protection Law (CPL), seek to achieve this goal. In any event, one can surmise that these laws will be enacted in the early 1990s. An adjustment will be required, and the contours of Taiwan's economy and the mechanisms through which it operates will change substantially.

¹⁴⁵ *Id.* at 610.

The government has to adjust, since in the past it has taken a very paternalistic policy stance on economic issues. It should avoid an enforcement policy, which will make the administration of these emerging laws a new bureaucratic enterprise. The business community, too, has to adjust to the new laws. Some formerly tolerated market practices will be prohibited or restricted. Taiwan enterprises will have to deal with the cost of complying with these new market-oriented laws. One uncertainty in such compliance cost is punitive damage. Consumers will have to adjust as well, by first becoming more aware of the rights they have under these new laws. One would expect to see more consumer litigation or other similar public-interest litigation in the 1990s. Unlike the Civil Code and other similar statutes reflecting the strong influence of the Continental legal system, these new market-oriented laws are less detailed and more vague. But the task of transplanting all competition of these new rules, through public and private enforcement efforts, will be required in order to fill in the gaps. Interested foreign business, practitioners, and scholars should monitor the further development of Taiwan's emerging competition law.¹⁴⁶

(c) Legal regime of Competition Policy in Mainland China

Competition law in Mainland China is a developing subject. As part of the government's policy of restructuring the planned economy of the past into a "socialist market" economy,¹⁴⁷ a mechanism to obtain an efficient allocation of economic goods is a key policy goal. At present a patchwork of laws and regulations seeks to prevent the

¹⁴⁶ *Id.* at 616.

¹⁴⁷ Holbig & Ash, *supra* n. 35 at 299.

most damaging anti-competitive activities found in the transitional economy, but a strong theoretical foundation for the competitive mechanism is currently lacking, as is a comprehensive legal code to set market rules. However, since at least 1994 central government has been considering its options. State organs have been studying competition regimes around the world, seeking to gain insight into how governments police free-market systems. The help of multilateral organizations, particularly the OECD, has been sought and an outline competition law for Mainland China has been prepared for comment.¹⁴⁸ Mainland China's imminent entry into the WTO has increased pressure on senior government officials. A comprehensive anti-monopoly law is needed to strengthen domestic industries in the face of foreseeable ferocious foreign competition in the hitherto-protected Mainland Chinese domestic market. However, not all government factions are favorably disposed to an effective competition regime that would inevitably reduce their power and prestige.¹⁴⁹

Mainland China has made remarkable progress in economic restructuring in the last 25 years. However, a great deal remains to be done. Competition law is one of the most policy tasks necessary if Mainland China is to complete its transformation from a centrally planned economy to a market-focused one.¹⁵⁰ The adoption and proper implementation of a comprehensive competition law will be a key test of the level of

¹⁴⁸ *Id.* at 297. Outline of the Anti-Monopoly Law of the People's Republic of China, adopted on 29 March 1993, but not defined or explained. There are inherent contradictions within the phrase "socialist market," but the policy of restructuring of Chinese economy has progressed without interruption since the inception of the open door policy at the third plenum of the Eleventh Communist Party Congress in 1978.

¹⁴⁹ *Id.* at 230.

¹⁵⁰ *Id.* The central government of PRC seeks to achieve four principles objectives is pushing the Chinese economy in a more market-oriented direction: (1) to complete a genuine internal market; (2) to promote more rational and efficiency distribution of scarce economic resources; (3) to encourage the growth of more market-oriented, large and viable firms; and (4) to provide a mechanism to regulate the activities of new market entrants from abroad.

political support for the marketization of the Chinese economy. It will also test the commitment of the government to advancing the cause of the rule of law and to honor the spirit and the letter of its market-opening commitments made in the bilateral trade agreements with the United States and European Union and in the WTO Accession Protocol. Unless the wider economic issues are resolved, a workable set of competition rules adopted and a genuine internal market developed, greater economic efficiency will survive market opening will be threatened.¹⁵¹

Protecting the consumer from exploitation is not one of the principal objectives. Therefore, the likely adoption of a competition law in China has been catalyzed, through not principally caused, by China's WTO accession. Whether the economic reforms in the Chinese government who support an active competition policy will prevail cannot, at present, be predicted with certainty. The balance of advantage seems to be in their favor, especially when the post-accession c-lock starts to tick away the time that remains to the current economic structures. The reality of increased imports and the ever more urgent need to tackle the structural imperfections of the Chinese domestic economy will militate in favor of an active competition policy.¹⁵²

(d) Core Concerns in the Negotiation of Competition Policy

Competition policy in Taiwan had implementation for more than a decade, but it's a newly legal concept in Mainland China. Given the majority enterprises in

¹⁵¹ See Mingxia Cui & Junliang Peng, *Guo Jia Shang Fa Jing Ji Fa Yu Taiwan Xiang Guan Gui Ding Bi Jiao Yan Jiu* 國家商法經濟法與台灣相關規定比較研究 (Wuhan chu ban she 1998).

¹⁵² See Holbig & Ash, *supra* n. 35, at 317-318.

Mainland China, the most of the market are monopoly or non-competition. To further open the domestic market in Mainland China, the competition policy reform would be the big national construction for Beijing. The model language of competition policy related doctrines lied on the FTAs is as following.¹⁵³

Model language

Anti-competitive Activities

Each Party shall, in accordance with its applicable laws and regulations, take measures which it considers appropriate against anti-competitive activities, in order to facilitate trade and investment flows between the Parties and the efficient functioning of its markets.

Each Party shall, when necessary, endeavour to review and improve or to adopt laws and regulations to effectively control anti-competitive activities.

Co-operation on Controlling Anti-competitive Activities

The Parties shall, in accordance with their respective laws and regulations, co-operate in the field of controlling anti-competitive activities subject to their available resources.

The sectors, details and procedures of co-operation under this Chapter shall be specified in the Implementing Agreement.

C. Monetary Integration

1. International and Comparative Monetary Integration issue

The Bretton Woods rules and institutions did in many respects prove well adapted, or at least adaptable, to sustaining a relationship between trade and money conducive to liberal trade. The liquidity and balance of payments adjustment problems

¹⁵³ See JSEPA, *supra* n. 39, Ch. 12.

are increasingly being addressed through IMF assistance, conditioned upon acceptance of an open trade and payments system. Moreover, the GATT and IMF rules and the institutional arrangements of the IMF have proven effective in addressing the substitutability problem, whereby countries attempt to undercut trade concessions by resorting to currency measures.¹⁵⁴ With respect to volatility under floating rates, and the corresponding increase in the risk of international transactions, the system has proven less effective in explicitly addressing the challenge. Where the system has been least effective is in addressing the trade pressures that result from and/or intensify conflicts over domestic macroeconomic policies. Monetary cooperation together with trade liberalization is becoming more and more important in some regions, especially Europe and East Asia.

The European Monetary System (EMS) provides an interesting case study of the difficulties of maintaining a system of managed or fixed exchange rate under conditions of increasing liberalization and globalization of financial markets and in the absence of an agreed common macroeconomic policy approach.¹⁵⁵ Established in 1978, the EMS applied to many but not all of the Members of the European Union (EU) (for instance, the UK chose to stay out until quite recently). This agreement was made possible, it is generally thought, by the presence of Germany in the system as a hegemonic financial power. In fact, until the full liberalization of financial markets in the EU in 1992, a

¹⁵⁴ To review the relationship between IMF and GATT/WTO regime, see Richard Peet, *Unholy Trinity: the IMF, World Bank and WTO* (Zed Bk., 2003); Ahn Dukgeun, *Linkages between International Financial and Trade Institutions: IMF, World Bank & WTO*, 34 J. World Trade 1, 1-35 (2000); David Vines, *The WTO in Relation to the Fund and the Bank: Competencies, Agenda, and Linkages in The WTO as an International Organization* 35 (Ann O. Krueger ed., U. of Chi. Press 1998); and Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: the WTO, the IMF and the World Bank*, 53 Intl. Soc. Sci. J. 569, 569-583 (2001).

¹⁵⁵ R. Portes, *EMS and EMU after the Fall*, 16 World Econ. 2, 3 (2003).

number of the countries with weaker currencies continued to maintain exchange controls. The expectation of devaluation would intensify sale of the currencies already under pressure, and therefore increase that pressure enormously (especially after the lifting of capital controls).¹⁵⁶

2. Core Concerns in the Negotiation of Monetary Integration issue

After joining the WTO, China's monetary policy was also affected. The dramatically, increased international capital flow will dilute, sometimes may eliminate, the effect of the Chinese interest rate policy and foreign proportion of the money supply.¹⁵⁷ The trade balance will have more and more impact on the economy and the financial sector. Using money supply as a policy tool, its stability and controllability will become lower. After China joined the WTO, foreign banks competed with local banks, but foreign banks already conducted investment banking business. In order to create a competitive environment, some people support the idea that Chinese commercial banks should be allowed to conduct investment banking business. They say that a major benefit would be maximization of profits by utilizing the specialties of both kinds of banks. The separation of commercial banks and investment banks involves the question of asymmetric information, adverse selection and other information economic theories. To apply these theories to the Chinese situation involves the theories of liberalization of

¹⁵⁶ Trebilcock & Howse, *supra* n. 84, at 173-175.

¹⁵⁷ See Wenhua Liu ed., *WTO Yu Zhongguo Jin Rong Fa Lü Zhi Du De Chong Tu Yu Gui Bi WTO 與中國金融法律制度的衝突與規避* (Zhongguo Cheng Shi Chu Ban She 2001).

financial markets.¹⁵⁸ The following is the model structure of European Central Bank under European monetary integration.¹⁵⁹

Model structure

Chapter I	European System of Central Banks
Chapter II	Objectives and Tasks of the European System of Central Banks
Chapter III	Organization of the European System of Central Banks
Chapter IV	Monetary Functions and Operations of the European System of Central Banks
Chapter V	Prudential Supervision
Chapter VI	Financial Provisions of the European System of Central Banks
Chapter VII	General Provisions
Chapter VIII	Amendment of the Statute and Complementary Rules
Chapter IX	Transitional and Other Provisions for the European System of Central Banks

V. CONCLUSION

This Chapter developed a new approach to examine the different level (from lower to higher) of substantial negotiation issues that appear in the economic integration. The criteria of the selected issues based on two criteria, which are “Multilateralism” test, and “Sovereignty” test. Based on the two criteria above, the lower level issues are regarding to less sovereignty conflict, and more multilateral negotiation regulatory. Taiwan and Mainland China would be necessary and easier to negotiate the lower level issues as the beginning of economic integration. This chapter analyzed the current

¹⁵⁸ Young Guo, *Banking Reforms and Monetary Policy in the People's Republic of China: Is the Chinese Central Banking System Ready for Joining the WTO?* 104-105 (Palgrave Macmillan 2002). See also Zhongfei Zhou, *Chinese Banking Law and Foreign Financial Institutions* (Kluwer L. Intl. 2001).

¹⁵⁹ See Protocol on the Statute of the European System of Central Banks and of the European Central Bank annexed to the Treaty establishing the European Community, 1992 O.J. (C 191) 29.

regulatory and import-export limitations, trade barriers, market access, and the degree of interdependence in each negotiation topic from Taiwan and Mainland China.

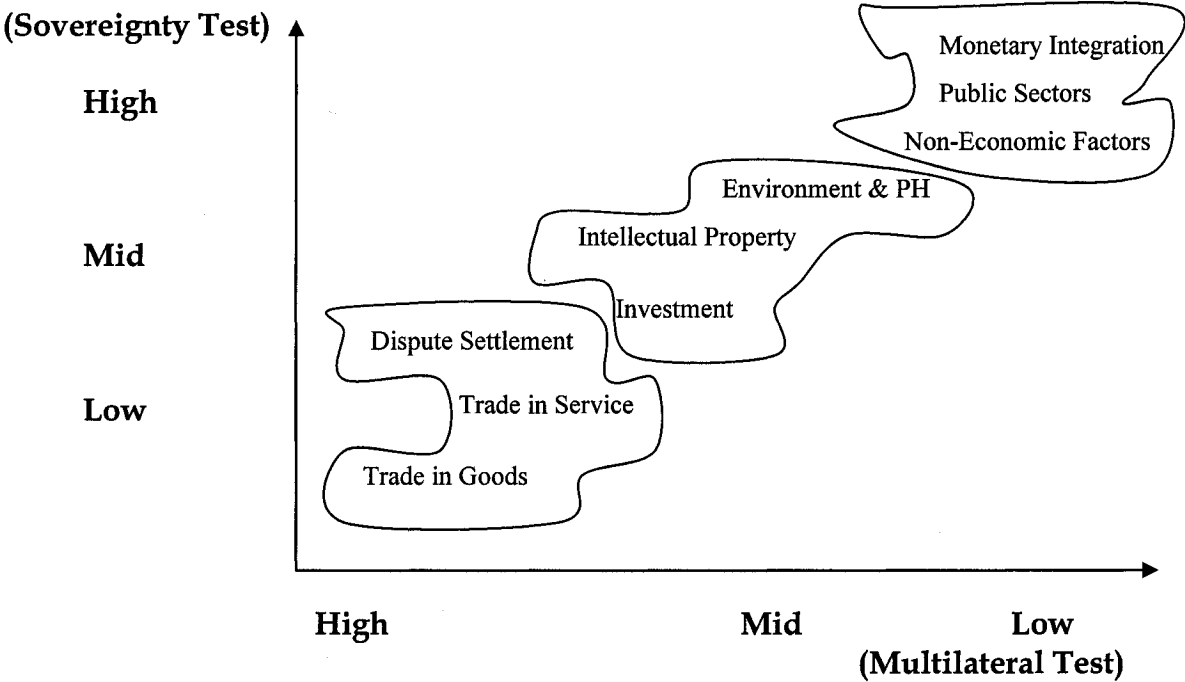


Table 4 Substantial Negotiation Issues of Cross-Strait Economic Integration

The lower level issues of economic integration are “Trade in Goods,” “Trade in Service,” and “Dispute Settlement Mechanism” (*Table 4*). “Trade in Goods” is the fundamental trade negotiation issues of the accession into the WTO, and the sub-topic of negotiation are (1) market access, (2) trade remedy laws (anti-dumping, safeguard, and Subsidies/Counter valuing duty), and (3) agriculture. Regarding to “Trade in

Service,” this chapter divides into two sub-topics: (1) Trade in Service and (2) Telecommunications. Finally, the dispute settlement is also the basic framework of every regional or multilateral trade agreement.

The intermediate level of the negotiation issues includes “Investment,” “Intellectual Property Rights,” and “Environmental and Public Health issues” (*Table 4*). The first section examines the bilateral investment issues between two parties, especially the bilateral investment issues as well as foreign direct investment (FDI). The second issue concentrates on the “Intellectual Property Rights.” Finally, the last issue discusses “the Environmental and Public Health issues” in East Asian region, and besides, Sanitary and Phytosanitary Measures (SPS) is also addressed in this chapter.

The higher level of the negotiation issues of economic integration involved national sovereignty, full of public interests, and most of these issues are not well-developed in the WTO regime (*Table 4*). The first topic is “Non-Economic Factors.” These issues are “Labor Standard” and “National Security” concern. The second topic is “Public Sector” issues, including “Government Procurement” and “Competition Policy.” The last issue focuses on “Momentary Integration” as the negotiation topics. Financial and momentary integration process includes the common momentary policy, central banking system, common tariff policy and integrated banking and securities regulations. Based on the analysis in this chapter, this dissertation provided the proposed “Cross-Strait Economic Integration” legal framework as in the following page. (*Table 5*)¹⁶⁰

¹⁶⁰ See KCFTA, *supra* n. 12; also see Thomas Hennessey, *The Northern Ireland Peace Process: Ending the Troubles?* 159-164 (Palgrave 2001).

Preamble

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Table 5 Contents of Potential Cross-Strait Economic Integration Agreement

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION: NEGOTIATING POTENTIAL ARRANGEMENT BETWEEN TAIWAN AND MAINLAND CHINA

I. INTRODUCTION

Chapter Four discussed the substantial negotiation issues of economic integration between Taiwan and Mainland China. This Chapter would follow the issues regarding the negotiation institutions and process. Because of the complex political conflict involved in the Cross-Strait relations, every single negotiation procedure would possibly cause the serious debates. Successfully negotiation would happen not only by the right timing, but also by the positive attitude from the leaders of Taipei and Beijing.

In this Chapter, Part II discusses the “Title” of the potential legal document. Almost 90% of the economic integration negotiation between the two countries used the title as “Free Trade Agreement (FTA)” without any problem. However, the circumstance in the Cross-Strait relations would be more difficult than usual case. The creation of the new title to satisfy each party is necessary. Just like Beijing doesn’t accept “Free Trade Agreement”; Taipei doesn’t accept “Closer Economic Partnership Arrangement.” Thus, the “Title” of the legal document would be the first issue of negotiation.

Part III explores the institutional system design for the Cross-Strait economic integration. There are two different approaches addressed in the first section for the

interim system design: “Inter-Governmentalism” and “Super-Nationalism.” Comparative studies is used to analysis the different approaches in this section. The WTO institutional framework is the model for “Inter-Governmentalism,” and the EU internal organizations are the best model of “Super-Nationalism.” In the next section, it provides “Dual Approach for Cross-Strait Interim System Design.” For inter-governmentalism, it is suggested to establish Cross-Strait Community Conference (CSCC) for legislative power. For super-nationalism, it is suggested to establish Cross-Strait Community Secretariat (CSCS) as the excusive Power, and Cross-Strait Community Dispute Settlement Body (CSCDSB) as the juridical power.

Part IV addresses the possible procedure of Cross-Strait economic integration. It is divided into three sections: “Pre-Negotiation Process,” “Trade Negotiation Rounds,” and “WTO Notification.” The first section provides the pre-negotiation process. There are at least three areas of a negotiation on which to prepare: on emotion, on process, and on substance (discussed in Chapter IV). The second section suggests the three negotiation rounds, includes (1) Free Trade Round; (2) Trade plus Round; (3) Common Market Round. The third section is based on the WTO notification procedure, which are notification requirements, provision of information, multilateral surveillance, and regional trade agreement examination procedures.

Part V summarized the main purpose of economic integration between Taiwan and Mainland China as the first step of peace negotiation. It also provides the next steps - building the “Three Pillars” of Cross-Strait Integration. The first pillar is “Economic Integration toward Single Market.” The second pillar is “Justice and Democracy Affairs.” The third pillar is “Common Security and Foreign Affairs.”

II. TITLE

A. “Free Trade Agreement” or “Closer Economic Partnership Arrangement”?

“Free Trade Agreement” as the title of bilateral or regional economic integration is not the problem in most of the cases under the WTO regime. However, “Title” of the legal document of negotiating economic integration between Taiwan and Mainland China becomes the serious concern and even the unsolved dispute. “Free Trade Area” is popular title used by majority of the regional trade agreements. Under the Article GATT XXIV, the members can negotiate certain agreement to establish “Free Trade Area (FTA),” “Custom Union (CU),” or “Interim Agreement” to establish FTA or CU. In Beijing’s position, “FTA” or “CU” always signed among “Sovereignty” states. Beijing strongly indicated that Cross-Strait relationship is not “State-to -State” relations, and thought Taiwan and Mainland China belongs to “One China.” Thus, Beijing disagreed to use the title as “FTA” or “CU,” because they are symbolic of “Agreements” between two different “States.” For example, Beijing negotiated with Hong Kong and Marco and signed “Closer Economic Partnership Arrangement” as economic integration. Beijing ignored to use “Agreement,” and change the title to “Arrangement.” This is a unique case among Mainland China, Hong Kong, and Marco with the same “Sovereignty” state, but different independent custom territory.

However, the case of “Closer Economic Partnership Arrangement between China and Hong Kong (CEPA)” should not apply to Taiwan. The main reason is that the

“Sovereignty” of Hong Kong and Marco belong to Beijing (People’s Republic of China, PRC) after 1997 and 1999, the ending of colonial era. But Taiwan’s situation is totally different. The central government in Taipei belongs to “Republic of China (ROC),” which established in 1911, and Taiwan’s sovereignty never belongs to PRC. Basis on this unique relationship, Taipei would not accept the condition, CEPA, which Beijing negotiated with Hong Kong and Marco. If Taiwan accepted Beijing’s condition as CEPA, it would look like that Taiwan was a “provision” of PRC, and make international society confused of Taiwan has the same status as Hong Kong and Marco.

B. Creation of the Legal Title of Cross-Strait Economic Integration

Under the GATT/WTO regime, in fact, there are no further rules or restrictions to limit the parties to “create” new title other than FTA or CU unless there “content” is fulfilled the requirements of GATT/WTO regime. For this reason, there are lots of “creation title” existing and accepted under the WTO-Committee on regional trade agreement. For example, the titles are as followings:

- (1) Closer Economic Relations Trade Agreement¹
- (2) Cooperation Agreement²
- (3) Association Agreement³
- (4) Trade, Development and Cooperation Agreement⁴

¹ See Closer Economic Relations Trade Agreement, Austl.-N.Z., Mar. 28, 1983, 1329 U.N.T.S. 176, 22 I.L.M. 945.

² Cooperation Agreement between the European Community and the Arab Republic of Egypt, EEC-Egypt, 1978 O.J. (L 266) 9, last amended by Regulation (EEC) 3069/90, 1990 O.J. (L 295) 10.

³ Agreement Establishing an Association between the European Economic Community and the Republic of Cyprus, Council Regulation (EEC) 1246/73, 1973 O.J. (L 133) 1.

- (5) Economic Area
- (6) A New-Age Economic Partnership⁵
- (7) Interim Agreement⁶
- (8) Community⁷
- (9) Economic Community⁸
- (10) Community and Common Market⁹

In Sum, “Title Dispute” as the barrier for Cross-Strait economic integration is because of lack of trust between the two parties. Beijing and Taipei have lots of options to negotiate the title of legal document. This dispute merely came from the “Ideology,” but not the substances issue. Beijing and Taipei should use the “Brainstorming method” to fulfill the perspectives of each side, and the title can be changed or adjusted during every stage of the economic integration process. To fulfill both parties’ concerns, the suggestions of the proposal title in different process of economic integration would be as followings:

- (1) Free Trade Round ----- “Closer Economic and Trade Relations between China and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu”
- (2) Trade and Plus Round ----- “Cross-Strait Economic Community”

⁴ Trade, Development and Cooperation Agreement between the European Community and South Africa, E.C.-S. Afr., O.J. (L 127) 4.

⁵ Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership (JSEPA), Japan-Sing., Dec. 3, 2002, WT/REG140/1 (WTO 2002), available at <http://docsonline.wto.org/DDFDocuments/t/WT/REG/140-1.doc> (last visited July 29, 2006).

⁶ Interim Agreement on Trade and Trade-Related Matters between the European Community and Mexico, E.C.-Mex., 1997 O.J. (C 356) 11, COM (1997) 525.

⁷ Treaty for East African Co-operation (East African Community), Jun. 6, 1967, 6 I.L.M. 932.

⁸ Treaty of the Economic Community of West African States, May 28, 1975, 1010 U.N.T.S. 17, reprinted in 14 I.L.M. 1200.

⁹ Treaty Establishing the Caribbean Community, July 4, 1973, 946 U.N.T.S. 17, 12 I.L.M. 1033.

- (3) Common Market Round ----- “Cross-Strait Common Market”

III. INSTITUTION

A. Different Approaches

The main approaches for negotiating economic integration in the current world era are “Inter-Governmentalism” and “Super-Nationalism.” Inter-Governmentalism is a theory of decision-making in international organizations, where power is possessed by the member states and decisions are made by unanimity. It is used by most international organizations today, such as U.N., WTO, and World Bank. Alternative approach is “Super-Nationalism.” Super-Nationalism is a method of decision-making in international organizations, where power is held by independent appointed officials or by representatives elected by the legislatures or people of the member states. Member-state governments still have their own sovereignty power, but they must share this power with other members. Furthermore, decisions are usually made by majority votes, thus, it is possible for a member-state to be forced by the other member-states to implement a decision against its will. Although these different approaches are conflict in the fundamental structure, the possibilities for combination would still exist in the negotiation process of international institutions or regional economic integration.

1. Inter-Governmentalism – the case of World Trade Organization (WTO)

The case of “Inter-Governmentalism” in the multilateral trading system is the World Trade Organization (WTO). The WTO is a “Member-driven” organization, in

other words, it is “Inter-Governmental Approach.” The members – and not the Director-General or the WTO Secretariat – set the agenda and take decisions. Neither the Director-General nor the WTO Secretariat had any decision-making power; instead they act primarily as an “honest broker” in, or a “facilitator” of, the decision-making processes within the WTO.¹⁰ According to the characteristic of “Inter-Governmentalism,” WTO members may participate in all councils, committees, etc., except Appellate Body, Dispute Settlement panels, and plurilateral committees. The most important decision-making body of the WTO is the “Ministerial Conference,” which has to meet at least every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements. The daily work of the ministerial conference is handled by three groups: (1) The General Council, (2) The Dispute Settlement Body and, (3) The Trade Policy Review Body.

First, the “General Council” is WTO’s highest-level decision-making body in Geneva, meeting regularly to carry out the functions of the WTO. It has representatives (usually ambassadors or equivalent) from all member governments and has the authority to act on behalf of the ministerial conference which only meets about every two years. The council acts on behalf on the Ministerial Council on all the WTO affairs. Second, the “Dispute Settlement Body” made up of all member governments, usually represented by ambassadors or equivalent. “Dispute Settlement panels” and “Appellate Body” were subsidiary under the Dispute Settlement Body to resolve disputes and the Appellate Body

¹⁰ Peter Van den Bossche, *The Law and Policy of the World Trade Organization* 137 (Cambridge U. Press 2005).

to deal with appeals. Third, the “Trade Policy Review Body” (TPRB) undertook the trade policy reviews of Members under the GATT/WTO legal regime, and the Trade Policy Review Body is thus open to all WTO Members. Finally, the lowest level is “Subsidiary Bodies” under each of the three councils. There are eleven committees under Council for Trade in goods, consisting of all member countries, dealing with specific subjects, such as agriculture, market access, subsidies, anti-dumping measures and so on. Besides, Subsidiary Bodies under the Council for Trade in Services, which deals with financial services, domestic regulations and other specific commitments.¹¹

2. Super-Nationalism – the Case of European Union (EU)

The European Union has a singular governmental structure, which is so called “Supernationalism.” Superficially, it resembles that of a familiar national system: The EU has a council, a parliament, and a court of justice that apparently replicate a national government’s executive, legislature, and judiciary. Yet the similarity is misleading. The council, made up of member state’s government ministers, shares legislative authority with the directly elected Parliament. Only the European Court of Justice (ECJ), consisting of judges appointed by the member states, approximates its national counterpart. In addition, the EU has a number of unusual ancillary institutions and bodies. The European Union functions through four principal interlinking institutions that have the following

¹¹ *Id.*, at 119-163.

functions: “The European Commission,” “The European Parliament,” “The Council of Ministers,” and “The European Court of Justice.”¹²

First, “The European Commission” is a “super civil service” that lies at the heart of the union. It acts as a guardian of the treaty, formally originates all legislative measures and is responsible for the implementation of all decisions agreed by the Council of Ministers. It has a number of direct decision-making powers in such spheres as the coal and steel industries, agriculture and the environment.¹³

Second, “The European Parliament” is the parliamentary body of the European Union (EU), directly elected by EU citizens once every five years. Together with the Council of Ministers, it composes the legislative branch of the institutions of the Union. Their powers have been progressively expanded over the last twenty years. They approve the president and members designate of the European Commission and may force the Commission to resign through a vote of censure.¹⁴

Third, “The Council of Ministers” is the central and ultimate decision-making body in the union. There are, in fact, many “Councils” consisting of ministers from member states with specific portfolios - such as agriculture, transport and social affairs.

¹² Other institutions of European Union include: (1) The European Central Bank: the principal institution is maintaining price stability in the eurozone. (2) The European Investment Bank: its purpose is to ensure that weak regions and sectors are given assistance in order to develop more in line with EU norms. (3) The Court of Auditors: this body audits the accounts of the European Union. (4) The European Ombudsman: this is an office established by the European Parliament to investigate complaints of maladministration. (5) The Economic and Social Committee (ESC): this is composed of representatives from employers' associations, trade unions and consumers' groups. (6) The Committee of the Regions: this is established to ensure that locally elected representatives are consulted on EU policy and legislation. See Elizabeth Bomberg & Alexander Stubb eds., *The European Union: How Does It Work?* 20-34 (Oxford U. Press 2003).

¹³ *Id.* at 33. At the head of the Commission is a committee of 20 nominated commissioners who are appointed for a five-year renewable term of office. They are answerable to a president and up to two vice-presidents.

¹⁴ *Id.* at 45. The European Parliament, on a day-to-day basis, they remain largely a “talking shop” with the authority to put forward amendments and comment on intended legislation.

No directive can be issued, or amended, unless it is agreed by the Council. The Council is serviced by a number of working groups operated by the Committee of Permanent Representatives in Brussels. Their job is to ensure that the ground is prepared for Council decisions and that the appropriate “fine tuning” of legislative documents is carried out after Council meetings.

Fourth, “The European Court of Justice (ECJ)” - is different from the European Court of Human Rights. The ECJ, based in Luxembourg, is the guardian of the directives and regulations adopted by the Council. Its job is to be the court of last resort and it tends to make its decisions based upon the perceived intentions of the legislators, rather than just the letter of the law. The court’s decisions are final and take immediate effect, unless the ECJ has been called upon to advise a national court on points of legal interpretation.¹⁵

B. Dual Approach for Cross-Strait Interim System Design

Back to 1945, KMT and CCP negotiated the “Post-War National Reconstruction Plan” of the Mainland China at Chongching, but they didn’t reach the agreement. During 1990 to 1993, Taipei and Beijing negotiated in Kimmen and Singapore for several home affairs, and implied the consensus of “Agree to Disagree.” All these negotiations are under “Inter-Governmental Approach,” and the two parties never try to negotiate under “Super-National Approach.” In fact, Inter-Governmental talk between the Cross-Strait would be met in some conditions, such as Beijing’s “pre-accepted One China Principle,”

¹⁵ *Id.* at 65. Nine advocates are general advising the court, who gives preliminary rulings on each case. Their opinions are published in advance of important cases and the courts frequently rule in line with their advice.

KMT's "One China, but different descriptions," and DPP's "No pre-requirement of One China Principle." The critical barriers to the negotiation are resulted from sensitive political concerns, and it is difficult to remove. In current situation, if Taipei and Beijing can't initiate the Inter-Governmental negotiation in advance, that would be impossible to establish the Super-National institutions.

Since Taiwan and Mainland China are WTO members, it's easy to negotiate under the WTO regime. This Inter-Governmental approach can avoid the political conflicts and focus on the trade issues between the Cross-Strait. There are many potential trade disputes between the two parties that can be done by negotiation before going to WTO dispute settlement body. In a positive way, Taiwan and Mainland China can negotiate economic integration under the WTO regime. Of course, the two governments have their own independent power and authority to negotiate certain bilateral agreement. The political conflicts between the Cross-Strait can't be solved in a short-term, and the possible first step is to separate "Economic" perspectives from "Political" issues.

WTO is the best platform provided for the two parties to initiate the Inter-Governmental talk. Based on the analysis above, the following "Dual Approach" could be the possible solution for the future negotiation. The first approach is to build "Cross-Strait Community Conference" under "Inter-Governmentalism." The second approach is to establish "Cross-Strait Community Secretariat" and "Cross-Strait Community Dispute Settlement Body" under "Super-Nationalism."

1. Legislative power: Cross-Strait Community Conference (CSCC)

The fundamental institution of this dual agenda depended on the “Cross-Strait Community Conference (CSCC),” the legislative power of the intergovernmental system. Like WTO and the initiative stage of European Community, the intergovernmental conference is the only “Decision Making” institution. The Cross-Strait intergovernmental conference will discuss and create the regulations of exclusive institution, and the conference also makes the rules for juridical review.

Cross-Strait Intergovernmental Conference is the formal procedure for negotiating amendments to the founding agreements of the Cross-Strait Community. Under the agreements, the Cross-Strait Community Conference (CSCC) is called into being by the two parties, and is composed of representatives of Taipei and Beijing, and to a lesser degree that Hong Kong and Marco are also participating. An IGC will conclude with a meeting of the two governmental representatives, at which any economic issues requiring resolution at the level of Heads of State or Government will be resolved, and final economic integration agreement will be reached. A final legal text will then be prepared by the legal experts of the two parties, before being presented to the leaders from both sides for signature and ratification.

2. *Excusive power: Cross-Strait Community Secretariat (CSCS)*

The “Cross-Strait Community Secretariat (CSCS)” is the excusive power under this dual agenda. The power of CSCS is not so strong compared to the European Commission, but it’s more powerful than the WTO secretariat. The functions of CSCS not only help the two governments enforce the agreements done by Cross-Strait

Community Conference, but also manage many working groups and councils for the fields under negotiation.

The Cross-Strait Secretariat has regular staff and is headed by a Director-General. Since decisions are taken by the Cross-Strait Community Conference only, the Secretariat has no decision-making powers. Its main duties are to supply technical and professional support for the various working groups and committees, to provide technical assistance for the two parties, to monitor and analyze developments in bilateral economics and trade, to provide information to the public and the media, and also provide some forms of legal assistance in the dispute settlement process. The Secretariat staff includes individuals representing Taipei and Beijing. The professional staff is composed mostly of economists, lawyers and others with a specialization in international trade policy. There is also a substantial number of personnel working in support services, including informatics, finance, human resources and public relations services.

3. Juridical power: Cross-Strait Community Dispute Settlement Body (CSCDSB)

Finally, the “Cross-Strait Community Dispute Settlement Body (CSCDSB)” is the juridical power to solve economic and trade dispute between the two parties. The critical function of CSCDSB is to ensure and interpret the agreements (includes rules and regulations) dealing with the disputes between the parties.

The Cross-Strait Dispute Settlement Body (CSDSB) decides the outcome of a trade dispute on the recommendation of a “Dispute Panel” and, if necessary, on a report from the Appellate Body, which may have amended the Panel recommendation. The

CSDSB uses a special decision procedure known as “reverse consensus” or “consensus against” that makes it almost certain that the Panel recommendations in a dispute will be accepted. The process requires that the recommendations of the Panel (as amended by the Appellate Body) should be adopted “unless” there is a consensus of the two parties against adoption. Because the parties “winning” under the Panel’s ruling would have to agree on this reverse consensus, it is difficult to conceive of how it ever could.

Once it has decided on the case, i.e., whether the complaint had been shown to be right or wrong, the DSB may direct the “losing” party to take action to bring its laws, regulations or policies into conformity with the “agreements” between the Cross-Strait. This is the only direction that emerges from a Cross-Strait economic and trade dispute. There is no concept of “punishment” or even restitution. The CSDSB will give the losing party a “reasonable period of time” in which to restore the conformity of its laws etc. If the losing party fails to restore the conformity of its laws within the “reasonable period of time,” the CSDSB may -- on an exceptional basis -- authorize a successful complainant to take retaliatory measures to induce action on the part of the losing party.

IV. PROCEDURE

A. Pre-Negotiation Process

In the past half century, Taiwan and Mainland China did not set a good negotiation process, and these two parties even do not have positive communication between each other. Before going back to negotiation table, there are at least three areas

of a negotiation on which to prepare: on emotion, on process, and on substance.¹⁶ Too many historical dead knots put on both sides, and it made the peace negotiation more difficult than any other place around the world.

During the past six years, only in 1992-1993 that Beijing and Taipei set down in front of the negotiation table, and reach some mutual consensus. However, it's a pity that there was no any legal document sign at that time, and it became a riddle for both sides. In fact, KMT and CCP negotiated at that time, and the achievement was both parties "Agreed to Disagree," and they agreed to set aside the complex sovereignty and political issues, and began to negotiate economic and home affairs from the starting point. But after 2000 presidency election, DPP became the ruling party in Taiwan, deny any consensus made in 1993, and stop any talk between the governmental officials. Later on, so the CCP stop all the talks with Taipei administration unless the ruling party "giving up seeking Taiwan independent, and further recognizes one China principle."

The basic element for Beijing and Taipei is to maintain and create certain "Positive Emotions." Although emotions are often thought of as obstacles to a negotiation – and certainly can be – they can be a great asset. They can help the two parties to achieve their negotiation process, whether to find creative ways to satisfy interests or to improve a rocky relationship.¹⁷ The critical and dangerous part is coming from the "political leaders" of Beijing and Taipei.

From the Cross-Strait negotiation history, only the superior leaders from both sides have the positive emotions did the relationship improve and led to the right

¹⁶ Roger Fisher & Dan Shapiro, *Beyond Reason: Using Emotions as You Negotiate* 170 (Viking 2005).

¹⁷ *Id.* at 6.

direction. However, this was just a little possible that the leaders think about the future of the development but not the political interests. The positive emotions for the superior as well as the negotiators should include: express appreciation for others' concerns (even disagree), respect others' autonomy, and acknowledge other's status...etc. From Beijing's position, "Taiwan's seeking independent," and "One China Policy" are the central concerns. From Taipei's position, "Maintaining Taiwan's Autonomy" and "Remove Military Threaten from Mainland China" are the core concerns. Accordingly, to respect both parties' concerns, and prepare peace negotiation with positive emotions are the basis for future consideration.

The other element is to prepare the structure of negotiation process. There are too many "Untying Knot" between Taiwan and Mainland China, and they are always the barriers to negotiation. Thus, to better prepare the initiative of Cross-Strait peace negotiation, there are some steps need to be prepared for the process itself.

First, identify the goal of the certain negotiation. Peace negotiation involves hundreds of topics related to political and economic aspects, so how to breakthrough the negotiation topic and focus on the main issue for each negotiation is the first stage.

Second, open up the options for the negotiation. Successful negotiation was not the game of "Agree/Disagree," or "Accept/Deny." Negotiation is an "Art" for each party to communicate and satisfy his interests in "Joint Brainstorming" approach.

Finally, identify the "legal document" to be signed after the meeting. Only the two parties agree to sign for the legal arrangements, would both governments be ensured the enforcement and implementation of the result. Within the legal documents, the negotiation parties would fulfill their obligations and protect their rights.

B. Negotiation Rounds

In order to manage so many negotiation issues in the timetable, it is necessary to divide and categorize all these topics in different “Rounds.” The term “Round” is coming from the multilateral trade negotiation, especially the negotiations under the GATT/WTO regime. “Negotiation Round” means a series of meeting and negotiation with specific focus and the parties seek to obtain specific goal in certain “Round,” and finally sign an agreement as the primary result.

Taking the WTO for example, the “Rounds” aim to strengthen the rules that ensure orderly and fair conduct of international trade and to reach mutually beneficial agreements reducing barriers to world trade. Eight rounds have been held under GATT auspices since 1947. Each round has consisted of long bargaining sessions. The eight completed rounds and the names by which they are commonly known were: Geneva (1947), Annecy (1949), Torquay (1950), Geneva (1955-56), Dillon (1960-61), Kennedy (1963-67), Tokyo (1973-79), and Uruguay (1986-94). The ninth round was launched by the Doha Ministerial Conference in November 2001. The content of rounds up to the Kennedy Round was tariff reductions only. The early rounds essentially were made up of a series of bilateral negotiations only, the results of which were then made available to other members on a most-favoured-nation (MFN) basis. From the Kennedy Round onwards, non-tariff measures and systemic issues were also on the agenda. The abbreviation “MTN” was in common use during the Tokyo Round, and it is often used to refer specifically to that Round. Up to now, the “Doha round” is also called

“Development Round,” which the members negotiate lots of issues regarding the trade and development.

The Cross-Strait peace negotiation should go through the “Economic Integration” as the first step. In order to achieve the negotiation, the various topics can be divided into three different “Rounds,” which are: “Free Trade Round” as the lower level negotiation issues, “Trade and - Round” as the intermediate negotiation issues, and finally “Common Market Round” as the higher negotiation issues.

1. Free Trade Round

The first round is primary aim at the “Free Trade” negotiation. Taiwan and Mainland China join the WTO in the past few years, and the obligations under the WTO regime should be seriously enforced. However, the political conflict made the situation more complicated. There are still many trade restrictions, non-tariff barriers, and ban regulations between the Cross-Strait. The free trade round is for Beijing and Taipei to implement the WTO rules, and further negotiating economic integration under the WTO regime, especially GATT Article XXIV. The proposed negotiation topics in this round include:

- (1) Trade in goods – Market Access issue, Trade Remedy Laws, and Agriculture Products;
- (2) Trade in service – General Service Sectors and Telecommunication;
- (3) Trade Dispute Settlement Mechanism.

2. Trade Plus Round

The second round is primary aim at the “Trade and ‘-’” negotiation. The idea came from the “side agreements of North America Free Trade Area.” The first – free trade – round is dealing with most WTO “build-in” issues, which involved more multilateral consistency and less national sovereignty. Thus, the second round – Trade and “-” Round – will negotiate more complicated issues, which some of them can’t apply to any multilateral agreements, or possible involved in a bit national sovereignty. These issues are “intermediate level” of the whole economic integration negotiations. The proposed negotiation topics in this round include:

- (1) Trade-related Investment – Foreign Direct Investment issues and Bilateral Investment issues (Between Taiwan and Mainland China, includes Hong Kong);
- (2) Intellectual Property Protection;
- (3) Environment and public health – Environmental and substantial issues and Public Health issues.

3. Common Market Round

The third round is primary aim at the “Common Market” negotiation. According to the GATT XXIV, there are three categories that the members can negotiate as the economic integration: Free Trade Area, Custom Union, and Interim Agreement toward FTA or CU. For the theory of economic integration, “Common Market” is the highest level than FTA and CU. The Common Market make different members be treat as a single market, and allow members to establish a common will or collective activities

regarding tariff policy, monetary policy, currency policy, even includes the common economic development policy. For this regard, the proposed negotiation topics in this round includes: (1) Non-Economic Factors – Labor Standards and National Security; (2) Public Sectors – Government Procurement and Competition Policy; (3) Monetary Integration.

C. WTO Notification

In 1 August 2002, WTO Secretariat declared a document “Compendium of issues related to regional trade agreements,” which is the general legal framework for the members to notify economic integration. The followings are the summary (annex) from that document:¹⁸

1. Notification Requirements

WTO Members are required to notify the Regional Trade Agreements they conclude:

“Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement ... shall promptly notify ...” [GATT Article XXIV:7(a)]

“Any contracting party taking action to introduce an arrangement ... shall: (a) notify ...” [Paragraph 4(a) of the Enabling Clause]

¹⁸ See WTO Secretariat, *Compendium of Issues Related to Regional Trade Agreements*, TN/RL/W/8/Rev.1 (Aug. 1, 2002), available at <http://docsonline.wto.org/DDFDocuments/t/tn/rl/W8R1.doc> (last visited July 29, 2006). WTO provisions governing Members’ participation in customs unions, free-trade areas (FTAs), and interim agreements are contained in GATT Article XXIV para. 4-11. During the Uruguay Round, a number of provisions contained in the original Article XXIV, drafted in 1947, were clarified or interpreted, as contained in para. 1-12 of the 1994 Understanding. Rules with respect to reciprocal (tariff and non-tariff) preferential arrangements on trade in goods among developing countries are found in para. 1, 2(c), 3(a & b) and 4 of the Enabling Clause.

“Members which are parties to any agreement referred to in paragraph 1 shall promptly notify ...” [GATS Article V:7(a)]

2. Provision of information

WTO Members are required to submit information on their agreements:

“Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement ... shall make available to [the CONTRACTING PARTIES] such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.” [GATT Article XXIV:7(a)]

“Any contracting party taking action to introduce an arrangement ... shall: (a) ... furnish [the CONTRACTING PARTIES] with all the information they may deem appropriate relating to such action.” [Paragraph 4(a) of the Enabling Clause]

“Members which are parties to any agreement referred to in paragraph 1 ... shall also make available to the Council [for Trade in Services] such relevant information as may be requested by it.” [GATS Article V:7(a)]

These legal texts do not characterize what the information to be provided to the WTO by RTA participant Members should encompass.¹⁹

3. Multilateral Surveillance

Regional Trade Agreements notified to the WTO are subject to surveillance in various Bodies, at various levels of depth and complexity, depending upon which provision the notifying Member avails itself of:²⁰

“No GATT 1947 provision did textually refer to any kind of “examination” or “review” of notified RTAs. As noted above, Article XXIV:7(a) foresees that Members will need information «to make such reports and recommendations ... as they may deem

¹⁹ *Id.* at sec. I.

²⁰ *Id.* at sec. II.

appropriate», and requires RTA parties to make such information available to them. A practice has been developed of mandating a working party to «examine in the light of the relevant provisions of the GATT» each RTA notified under Article XXIV, and to «report thereon». In the WTO context, paragraph 7 of the 1994 Understanding clarified that all RTAs notified under GATT Article XXIV shall be «examined ... in light of the relevant provisions of GATT 1994 and paragraph 1 of this Understanding» and that a report shall be submitted to the CTG with «findings in this regard». The 1994 Understanding also restated a neglected GATT procedure relating the periodic reporting on the operation of RTAs covered under Article XXIV.”

“The Enabling Clause (paragraph 4(b)) envisions the possibility of bilateral or multilateral consultations in the case of RTAs among developing countries in the area of trade in goods.”

“As to RTAs in the area of trade in services, the wording of GATS Article V:7(a) makes it clear that, whenever so decided by the Council for Trade in Services (CTS), an individual EIA will undergo examination with the aim «to report ... on its consistency» with GATS Article V.”

4. Regional Trade Agreement Examination Procedures

For Regional Trade Agreements seeking legal cover under Article XXIV of the GATT 1947, the process consisted of the following steps:²¹

- (a) The notification of an agreement (of which the text was also made available) was considered by the Council, which mandated the examination to a working party and invited contracting parties to ask written questions to the parties and these to reply to them, also in writing.
- (b) Once a formal document was produced with all these questions and replies, the working party began its work.
- (c) Working party meetings (usually with the participation of parties' experts from capitals) comprised a further exchange of questions and replies, political statements and legal comments. Sometimes, the parties submitted further information in writing (usually, statistics). This information was in some cases reproduced in a formal document.
- (d) The working party's report on the examination, once agreed, was transmitted to the Council, for adoption.

²¹ *Id.*

The process was confidential, internal to the working party, except for the documents produced and the agreed report. There were no minutes of the debates. Interested contracting parties had to request membership in each working party; in general, only a few contracting parties (and usually the same) were active in RTA-related working parties. Within those common procedures, each working party decided on its methods of work and these varied. The format of working party reports reflected those differences: some favoured a more descriptive approach of the work done, mixing factual information and judgments on consistency, while others had a more structured approach in line with Article XXIV provisions/requirements. Although, in most cases, working party conclusions merely recorded divergent views on the assessment of the RTA's full compatibility with the rules (usually by summarizing elements detailed in previous sections), these could take up a single paragraph or a whole section.

Today, the process through which RTAs are dealt with after its notification and distribution of its text has changed, partly because of developments in WTO rules and partly as a consequence of the creation of the CRTA and the procedures developed therein:

- (a) The notification of an agreement (together with its text) is considered by the CTG (if notified under GATT Article XXIV), the CTS (if notified under GATS Article V) or the Committee on Trade and Development, if notified under the Enabling Clause). If examination of the agreement is needed, the relevant body adopts the terms of reference for the examination and transfers the examination task to the CRTA.
- (b) The parties to the RTA are invited to submit preliminary information on the agreement in the form of a Standard Format, which is published as a formal document. This is the initial step of what is called the "factual" examination.
- (c) During (at least one or two) CRTA regular sessions, there is an exchange of oral questions and replies on the examined RTA, as well as more general statements by the parties and other Members. Detailed minutes are produced on each meeting devoted to the RTA examination, and published as formal documents.

- (d) Between each of those meetings, usually a round of additional written questions and replies takes place. These are also published as a formal document.
- (e) Once the CRTA feels that the factual part of the examination has concluded, the Secretariat is requested to draft a report on the examination, as the basis for consultations among Members (in open-ended informal CRTA meetings).
- (f) The consensual CRTA report on a given agreement would then be sent to the WTO body which had mandated the examination, for adoption.

Information supplied by the parties, as well as questions and replies exchanged among Members in writing are issued as official, restricted WTO documents and, later, derestricted. The same applies to proceedings of formal examination debates, where Members are identified in their interventions. The CRTA formal sessions are open to Members and observers, and consultations on draft reports are held as informal CRTA meetings (open to all Members).

V. CONCLUSION

Summary of this Chapter are as followings:

1. The dispute of “Title” of potential agreement is the barrier for Cross-Strait economic integration, because lack of trust between the two parties. Beijing and Taipei have lots of options to negotiate the title of legal document. This dispute merely came from the “Ideology,” but not the substances issue. Beijing and Taipei should use the “Brainstorming method” to fulfill the perspectives of each side, and the title can be changed or adjusted during every stage of the economic integration process. To fulfill

both parties' concerns, the suggestions of the proposal title in different process of economic integration would be as followings:

- (1) Free Trade Round ----- "Closer Economic and Trade Relations between China and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu"
- (2) Trade and Plus Round ----- "Cross-Strait Economic Community"
- (3) Common Market Round ----- "Cross-Strait Common Market"

2. Since Taiwan and Mainland China are WTO members, it's easy to negotiate under the WTO regime. This Inter-Governmental approach can avoid the political conflicts and focus on the trade issues between the Cross-Strait. "Dual Approach" (combination of inter-governmentalism and super-nationalism) could be the possible solution for the future negotiation. This dual approach combines two different parts: the first approach is to build "Cross-Strait Community Conference (Legislative power)" under "Inter-Governmentalism." The second approach is to establish "Cross-Strait Community Secretariat (Executive power)" and "Cross-Strait Community Dispute Settlement Body (Juridical power)" under "Super-Nationalism."

3. From Beijing's position, "Taiwan's seeking independent," and "One China Policy" are the central concerns. From Taipei's position, "Maintaining Taiwan's Autonomy" and "Remove Military Threaten from Mainland China" are the core concerns. Accordingly, to respect both parties' concerns, and prepare peace negotiation under positive motivation and expectation is the basis for future consideration.

4. The Cross-Strait peace negotiation should go through the "Economic Integration" as the first step. In order to achieve the negotiation, the various topics can be divided into three different "Rounds," which are: "Free Trade Round" as the lower level negotiation

issues, “Trade and - Round” as the intermediate negotiation issues, and finally “Common Market Round” as the higher negotiation issues.

VI. RECOMMENDATION: THE NEXT STEP – BUILDING “THREE PILLARS” AS CROSS-STRAIT PEACE PROCESS

Recalling back to the title of this dissertation, “The impacts of regional economic integration under the GATT/WTO regime toward the peace process,” the likelihood of resolving the political conflict, since the past five decades, may better than before in the future by negotiating certain bilateral economic and trade agreement. This dissertation not only pointed out the idea of Cross-Strait economic integration, but also provided the action plan for policy oriented.

Whether economic integration between Taiwan and Mainland China would push the positive impacts on the peace process is the fundamental question for this dissertation. Under the interdisciplinary analysis on international law, international economics, and international relations theory, there is a very important conclusion for the debate between realism and liberalism over the past decades, and that is “trade expectation theory.” Since trade and economic interdependence between Taiwan and Mainland China is high, the possibility of war or peace would be very depending on the expectation of future trade from both sides, especially the political leaders. If the leaders had positive expectation of future trade and economic interdependence, then the likelihood of war would be reduced.

During the last half century, from Chongqing Meeting in 1945 to Lien-Hu meeting in 2006, the Cross-Strait relationship was very dynamic due to different positions of Taiwan and Mainland China. Most of the time, the leaders took the Cross-Strait relations in a negative approach, so the two parties did not negotiate or even have no mutual trust. “Ku-Wang Meeting” in 1993 was the only positive exception of the peace process. KMT and CCP back to negotiation table in 2005 and 2006, and they all recognized the “92 Consensus,” which was rejected by DPP. Reviewing the long term political conflict in the Taiwan Strait, the leaders as well as the government should set aside the “realism” approach regarding the sovereignty and turn to the “liberalism” for economic integration.

WTO is the best platform for the two parties to negotiate closer economic and trade agreement, because Taiwan and Mainland China both enjoy the membership of this critical contemporary multilateral trading institution. The famous cases of regional economic integration under the GATT/WTO regime are European single market, NAFTA, and ASEAN plus three. By negotiating the free trade agreements or the custom union agreement, the likelihood of peace between regional trade bloc members would be notable increasing. According to all these giving facts, this dissertation assumed that economic integration between Taiwan and Mainland China would be the first step of the peace process. This dissertation provided a detail plan for initiate the negotiation by three different rounds: (1) Free trade round for lower level issues (Trade in Good, Service, and Dispute Settlement Mechanism); (2) Trade plus round for intermediate level issues (Investment, IP rights, and Environment & Public Health); (3) Common Market Round for higher level issues (Non-economic sectors, Public sectors, and Monetary Integration). Besides the substantial negotiation issues, this dissertation also provided the institutional

system design for negotiation process, such as Cross-Strait Community Conference (Legislative power),” “Cross-Strait Community Secretariat (Executive power),” and “Cross-Strait Community Dispute Settlement Body (Juridical power).”

The followings final thought of this dissertation would provide the recommendation for the next steps following after the economic integration. These “Three Pillars” of Cross-Strait Integration as the peace process includes: (1) First Pillar – Economic Integration; (2) Second Pillar – Justice and Democracy Affairs; and (3) Third Pillar – Common Security Policy. (Table 6)

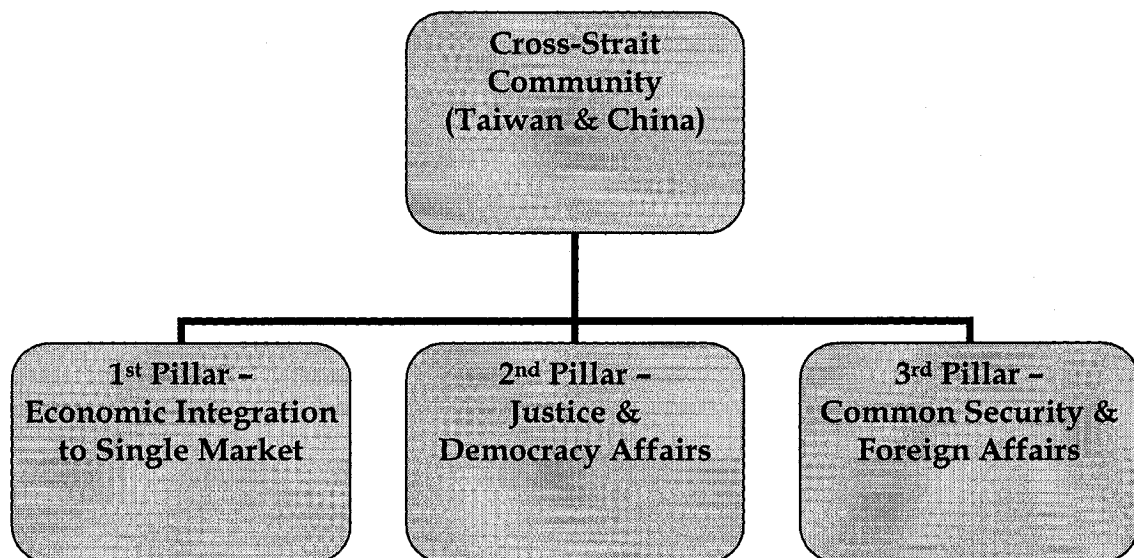


Table 6 Three Pillars of Cross-Strait Peace Process

A. First Pillar – Economic Integration

1. The Dilemma and Paradox of Negotiating

Because the foreign policies of Taipei and Beijing both focused on “Realism” approach, which based on the concerns of “Sovereignty,” “Diplomacy Power” and “National Security.” Under this policy approach, the interaction of economic relations limited in the cooperation and investment among the private enterprises. However, Taipei still set up many trade restrictions toward Mainland China for national security reasons, while Beijing changed their policy in 2005 to open trade policy toward Taiwan. As the “Liberalism” and “Economic Liberalism” appeared in the past few decades, the phenomena from economic integration “Spill-over” toward political integration was proof by the experience of European Integration. In other words, there is a possibility that the military conflict between Mainland China and Taiwan would be reduced after the Cross-Strait economic interdependence as well as the economic integration process increasing deeply and widely in the future.

Regional Economic Integration grew rapidly after 1995 in the world, and most of the WTO members sought bilateral trading partners to sign certain agreement for closer economic relationship under the WTO regime. The interdependence between Taiwan and Mainland China of economic and trade relations is increasing together with the vertical and horizontal integration of manufactory industry. Besides, trade and economic issues involve less sovereignty and national security concerns in one hand; and economic interdependence deeply improve people’s life in the other. Furthermore, the outside environment of newly establishing of world trading order also provides Taiwan and

Mainland China a good platform to negotiate economic integration arrangement. For these reasons, the Cross-Strait peace negotiation through the economic integration could be the first step, because of the substantial benefits and gains for the two parties. If the two parties can establish some mutual trust base on the negotiation process, and even “Spilled-Over” to political and security issues. Thus, economic integration would be a good possible starting point for peace negotiation project. In this regard, there are at least two main concerns should be discussed in order to build this “First Pillar”:

(a) Negotiate Cross-Strait Economic Integration Under Regional Level

There are two directions of East Asia economic integration related to the Cross-Strait relations. First, the ASEAN plus Three (PRC, Japan, and South Korea) is negotiating Free Trade Agreement in a final stage, and they further establish the annual “East Asia Summit” in 2005. Mainland China become the strongest economic power in all these negotiation process, which means that Taiwan is excluded from all these regional blocs unless Taiwan accepted “One China Policy” and negotiate with Beijing first. This is the most challenge for Taiwan’s economic development. Second, not only negotiate with other East Asia countries, Beijing also signed “Closer Economic Partnership Arrangement (CEPA)” with Hong Kong and Macro in order to build “Great Chinese Economic Community.” Although Hong Kong and Marco are the territory under PRC’s sovereignty, they are three different “Customs Territories” in WTO membership. According to the GATT Article XXIV, Beijing still needs to negotiate certain “interim agreement” for establishing “Free Trade Area” or “Custom Union” among each other.

This is very unique situation for the international law as well as WTO jurisprudence. Similar but not the same as Cross-Strait relationship, Taiwan's membership under WTO is called "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu." The critical points here are as following: How to negotiate economic integration between Taiwan and Mainland China under the WTO regime? How to ignore the sovereignty conflict under traditional international law? What kind of negotiation issues should be addressed in the initiative? How is the negotiation process?

(b) The Barriers from Political Conflict

No doubt, Cross-Strait economic integration negotiation process would involve some political issues. However, if the two parties, or at least one party, still follow the "Realism" theory approach, all the mutual interaction would be treated as then serious threaten to harm sovereignty and national security. The two parties would fall into unsolvable contradiction, and never begin the further peaceful talk. This is the biggest barrier to negotiation from 1945 till now. Accordingly, the following issues should be considered when the conflict of interests between economic integration and national security during the negotiating process: How to separate and set aside "Pure Political issues" and "Economic Issues"? How to ensure the enforcement and implementation of negotiation and reduce the political impact? How to establish certain regime to satisfy national security concerns come from the two parties? How to improve the linkage between Cross-Strait negotiation and East Asia economic integration?

2. Negotiation Strategies

(a) Negotiate in the Three Levels and from Shallow to Deep

Because the negotiation between Beijing and Taipei involved lots of sensitive political issues, the two parties should initiate the negotiation process with WTO Uruguay Round “build-in” issues as well as Doha Round new issues in the very beginning. The negotiation process should divide in three different “Rounds”: The First part is the “Free Trade Round” as the lower negotiation agenda, such as trade in goods, trade in service, and dispute settlement mechanism. Second is the “Side Agreements Round” as the intermediate negotiation agenda, such as trade-related investment, intellectual property, and environment and public health. The Third part is the “Common Market Round” as the higher negotiation agenda, such as non-economic factors, public sectors, and monetary integration. It is hope that Cross-Strait peace negotiation can build the “first pillar,” common single market, as the beginning and “Spilled-over” to other political negotiation, the second and third pillars.

(b) Set Aside from Political Issues and Sign the Legal Document

Economic integration is the most important and present topic among all the negotiation issues between Taiwan and Mainland China. However, the cross-strait peace negotiation would not be successfully establish unless the two governments through away the “Realism” approach and instead of “Economic Liberalism” to reach the goal. In other words, it is important to separate the economic issues from the political concerns, and

reduce the political intervene as much as possible during the negotiation. Among the economic integration process, the two parties should use the “international economic analysis” to figure out the “primary goal of economic integration,” “Expected Benefit,” “Strategic Policy Choice,” and “Industry Economics.” Then “international relations theory” is helpful for dealing with complex “Negotiation System Design,” improving the linkage between the multilateral trading regime and bilateral trading bloc, and combining the Cross-Strait peace negotiation with East Asia economic integration. Finally, the “International Legal aspect of Integration” would be the most important approach in every single negotiation round. For example, “Negotiating the Legal Arrangement for the Closer Economic Relationship,” consistent with GATT/WTO legal regime, signing the arrangement for building the certain super-national institution, enforcement and procedure law, and dispute settlement mechanism.

B. Second Pillar – Justice and Democracy Affairs

1. The Dilemma and Paradox of Negotiating

Although the issue of “Democracy” did not focus very much in the past Cross-Strait negotiation, it could not be avoided in the future negotiation. During the last few decades, Taipei kept asking Beijing demoralized their political system, but never descript the details. However, the U.S. president always asked Beijing’s leader to respect human rights issues, freedom of religion, and freedom of political rights etc. in every Sino-American Summit. In the past, Beijing response the democratic issues as “China’s

internal affairs” and would not accept foreign countries’ argument. However, the PRC’s leader, Hu Jintao, first response to the U.S. president George W. Bush in 2006 that PRC will accept the “Chinese’s Model Democracy” in the future. Beijing further indicated that the Chinese government will protect Chinese people’s fundamental rights wrote in their Constitutional Law, and published “Political Democracy White Book.” The international community would carefully examine Beijing’s enforcement in the coming future. During the Cross-Strait negotiation, Taipei and Beijing couldn’t exclude the important democratic debate. It’s critical for the two parties to transfer abstract idealism into concrete negotiation issues.

In this regard, there are at least two main concerns should be discussed in order to build this “Second Pillar”:

(a) Judicial Cooperation and Independent Judicial Trial System

During the “Ku-Wang Meeting” in 1993 once negotiated the issues of “Juridical Cooperation,” “Attack Smuggle,” and even the “Fisher Industry Protection.” It’s a pity that the two parties didn’t sign any official legal document addressing the consensus. However, it means that there is possible for the two parties to negotiate substantial issues of “Justice and Home Affairs” before resolving the serious sovereignty conflict. Accordingly, the following issues should be considered during the negotiating process: How to improve Cross-Strait juridical cooperation? How to deal with the jurisdiction issues? How to improve mutual recognized and enforcement of civil and criminal judgments? How to maintain the independence and neutral of the judgments?

(b) Protect the Fundamental Rights under the Constitutions

The fundamental rights under the Constitutions are the critical issues in future negotiation for the democratic development. Although the fundamental rights both wrote in PRC's and ROC's Constitutions, Beijing is still far from really enforcement. Based on the past experiences as well as the current situation, the people in Mainland China never had the fundamental rights, such as "Freedom of Religion," "Freedom of Media and Press," "Freedom of Political Participation"...etc. Chinese Communist Party is still the only and strongest power controlling PRC's central government, People's Liberation Army, and Political Party.

The lack of human right protection mechanism also includes the non-independent juridical trial system. Accordingly, the following issues should be considered during the negotiating process based on "human rights protection" and "independent judgment": First, how to implement the fundamental rights wrote in Constitutions? What is the remedy and due process for protecting the people's civil rights? How to ensure the independent and neutral judgment? What is the remedy procedure when the government or the political party violates the Constitutional due process?

2. Negotiation Strategies

(a) Cross-Strait judicial Cooperation and Independence Judicial System

Along with the closer mutual trade and economic relationship between Taiwan and Mainland China, there are not only more and more commercial and civil dispute under the private laws, but also criminal and smuggle violation under public laws.

The core concern issues are critical and necessary under the negotiation process, such as “Juridical Cooperation,” “Juridical Recognized,” and “Judgment Enforcement”...etc. The “Justice and Home Affairs” of European Union (the third pillar) is a good example for the reference of Cross-Strait peace negotiation. The key elements of EU “Justice and Home Affairs” included “Juridical Cooperation,” “Shelter and Immigration,” “Strike the Criminal Activities,” and “Protect the Human Rights.”

The legal framework of EU “Justice and Home Affairs” is clear and concrete, and it provided an opportunity for Beijing and Taipei a unique guideline for negotiate the integration of “Freedom and Justice.” Once the Cross-Strait governments establish certain regime similar to EU’s “Justice and Home Affairs,” the content would include: human rights, citizenship, free movement of people, mutual immigration, fast visa policy, cross-border management, and juridical and police cooperation. This “Second Pillar” will provide the protection of fundamental rights guaranteed by the two governments in Taipei and Beijing.

(b) Cross-Strait Constitutional Court and Court of Human Right

The core concern of the “Second Pillar” under Cross-Strait peace negotiation is based on establishing “human right protection mechanism,” “democratic government,” and “independent juridical trial system.” According to the above requirements, European

integration is the good case for reference. EU Constitution regarding the human rights protection provides the European people a single legal document with citizenships' civil, political, economic, and social rights. This important creation gives Cross-Strait peace negotiation a clear direction regarding the democratic issues. In this regard, it is critical for Beijing to release the political prisoners, untying the political control, and protect Constitution rights of Chinese people. Finally, to establish "Cross-Strait Court of Human Rights" as well as "Cross-Strait Constitutional Courts" are the future goal.

C. Third Pillar – Common Security Policy

1. The Dilemma and Paradox of Negotiating

After the civil war in 1945 between KMT and Chinese Communist Party, the whole China separated into two parts: Taiwan and Mainland China. During the past six decades, Taipei and Beijing both sink into "Realism" approach and can't escape from the Post Cold-War international regime. In other words, the two parties over believe the impacts of "Sovereignty" and "Diplomatic Power" toward national security. This situation made the two parties lack of trust for each other and stop any possible peace negotiation. According to the above, there are at least three main issues which should be addressed under the negotiation process regarding the national security concern:

(a) Hostage and the Game of Armament

For the military security, Beijing's position is "If Taiwan were not declare independence, Mainland China would not use the military force"; and Taipei's position is "Mainland China should declare not to use the military force before starting the peace negotiation." The two parties fall into this negotiation dilemma for over the half century. Thus, regarding to negotiate the military security, the following issues should be considered during the negotiating process: How to cease the hostage relationship? How to prevent the war? How to transfer military threaten into the common military security? How to establish the military trust and the hotline?

(b) The Content of "One China" and "Status Quo"

The "Sovereignty issue" is the central and critical issue during the negotiation. Beijing's position is "If Taiwan accepted One China Policy, Beijing could negotiate any issue with Taipei." However, Taiwan's position is different from the political parties. KMT indicated that "One China, but different descriptions" during the negotiation process, which already had the mutual consensus with Beijing in 1993. DPP's position is very different from KMT and CCP, and the key element is that DPP disagree with the "One China Principle" as well as "92 Consensus." Thus, the complicated negotiation process regarding the sovereignty need to first integrate the consensus inside Taiwan, which means to establish the same national identity between KMT and DPP. Taipei needs to ensure that the viewpoints about sovereignty would be similar inside Taiwanese as

well as the different political party, and not changed by the direct presidency election every four years. This is the basic requirement for Taipei authority in order to negotiate with Beijing. Then, the issues move to the negotiation between Taipei and Beijing. How to describe “One China Policy (Principle)”? How to create certain situation that both parties could accept regarding the sovereignty issue? How to reduce the potential conflict during the negotiation process? How to establish certain interim regime to ensure the enforcement and implementation?

(c) Definition of the Status of Cross-Strait Relationship

The other conflict between Beijing and Taipei is the “Zero-Sum Game” in Diplomatic War during the past six decades. Besides the potential military conflict, the other serious dispute is the “Quantity of Diplomatic Relations,” and “The Attendance of Taiwan into the International Institutions.” Beijing insisted for a long history that “PRC is the only legal representative of China,” so Taiwan can’t join any international institution which has the “National Sovereignty” requirement. Although Beijing changed her statement that “There is only one China in the world, Mainland China and Taiwan belongs to the whole China, and China’s national sovereignty can’t be separated,” the diplomatic war never cease. Taipei’s position was “protect the international status and sovereignty of ROC” in the past under KMT’s controlling. However, after 2000, when the DPP won the president election, DPP intent to change the statement as “Taiwan is an independent nation, and her current name is ROC.” Follow the analysis above, the following issues should be considered during the negotiating process regarding to

“Diplomatic issues”: How can PRC and ROC exist in the international community at the same time? How to improve the Cross-Strait relationship from “Zero-Sum Game” to “Win-Win Situation”? How to create a “Model” that can be accept by Beijing, Taipei, and the whole international society?

2. Negotiation Strategies

(a) “Military Trust Regime” and Common Security

Many scholars suggest that Beijing and Taipei should establish the “Military Trust Regime.” However, the possible success to establish this regime should be based on the “good faith,” “mutual trust,” “mutual respect” coming from the two parties. Although it is very difficult for both parties to agree the sensitive issues, such as “cut down the weapon,” “reduce the weapon phrase,” and “remove all missile” in the very beginning. The two parties still can negotiate and think of “transparency of military exercise,” and “nonaggression Pact”...etc. Further more, the two parties can negotiate positively about the establishing of “Peace-Keeping” regime. The only conclusion now is that the mutual hostage and increasing military force will definitely bring the “Arms Race,” and further collapse the internal macro economy and waste the national budget of each side.

(b) Sovereignty Conflict Resolution

The Cross-Strait conflict is very unique in the world history. Thus, the dispute resolution system design for the Cross-Strait relations can’t simply apply to “Germany

Unification Model,” “Korean Peace Negotiation Model,” or “Political Integration between European Countries.” However, the “Spirit” of “Peace,” “Dialog,” and “Focus on Economic integration before Political unification” are the important resource and revelation for the whole Chinese community. Because the conflict between the Cross-Strait can’t apply to any existing or past circumstance, the scholars, government officials, and the leaders should use the “Brainstorming” to create certain consensus in order to improve long term peace negotiation. In these years, some scholars suggested dealing the Cross-Strait Relations under “Global Governance,” or negotiating through the “Economic Integration,” of course, these are the precious references for the two governments to resolve the conflict. In fact, “Sovereignty” is the popular term in 20th century, and the basis of international relations. Along with the globalization and regional economic integration in the 21st century, “Sovereignty Transferable” is a new term for future thinking. However, the critical point is that the leaders of each party should maintain the “good faith,” and the people of each side should support the willing for peace negotiation. Otherwise, all the policy designs and suggestions are nothing but the dream, and it will never come true.

(c) Appropriate Diplomatic Interactions

Diplomacy is the extend of national sovereignty. Thus, reducing the tension between the two parties’ diplomatic policy is an important part under the future negotiation. Beijing continued striking the international status of ROC (Taiwan) for over a half century, and this made Taiwanese people angrier about Beijing’s hostage policy.

Besides, under the globalization in this new world order, Beijing's position is challenged by the international society for insisting impossible for "Sovereignty Sharing." In fact, the more Beijing isolated Taiwan in the diplomatic policy, the less that Taiwanese people would support the further integration with Mainland China. The resolution for this dilemma is to create a new interaction model accepted by both parties as well as the recognized by the international society during peace negotiation. Of course, this model will be succeed only when the "Brainstorming" under "good faith," "respectful," and "mutual equity" process. The existing international institutions, which both parties participating at the same time are WTO, APEC, and Olympic Game. Whether the both parties can create a new model to descript unique Cross-Strait relationship will base on long term negotiation and efforts.

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