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Cross-Taiwan Strait Relations: What are the Legitimate Expectations from the WTO?

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INTRODUCTION

On December 11, 2001, China acceded to the World Trade Organization (WTO).¹ Taiwan followed on January 1, 2002 as the "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu."² Accession of both China and Taiwan to the world trading body has triggered a fever of activities by Taiwanese businesses, but the governments on both sides of the Taiwan Strait have been slow to make policy adjustments. The coexistence of business enthusiasm and governmental indifference

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1. China submitted the Instrument of Ratification on the Protocol on the Accession of the People's Republic of China to the WTO's Ministerial Conference in Doha on November 11, 2001. World Trade Organization, *Accession of the People's Republic of China*, WT/L/432 (Nov. 23, 2001), available at <http://docsonline.wto.org/DdfDocuments/t/WT/L/432.doc>. The Protocol entered into force on December 11, 2001, and pursuant to paragraph 1 Part 1 of the Protocol, China became a member of the WTO on December 11, 2001. *Id.*

2. World Trade Organization, *Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/L/433 (Nov. 23, 2001), available at <http://docsonline.wto.org/DdfDocuments/t/WT/L/433.doc> [hereinafter *Accession of Taiwan Territories*]. Taiwan submitted its Ratification on the Protocol on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the WTO's Secretariat on December 1, 2001. *Id.* The Protocol entered into force on January 1, 2002 and Taiwan became a member of the WTO on January 1, 2002. *Id.*

may be attributed to the combination of a favorable business environment and unresolved political contentions over the recognition of Taiwan's status. The post-WTO diplomatic struggle between China and Taiwan over Taipei's recognition in the WTO poses a question of whether the WTO can accommodate both sides of the Taiwan Strait.³ China has insisted that implementing direct cross-strait talks requires Taiwan accept the "One China" policy.⁴ But Taipei's Democratic Progressive Party (DPP) government has called the "One China" provision unacceptable.

3. Nations' representative offices to the WTO, based in Geneva, are accorded the status of diplomatic missions. Taiwan had operated its "Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" until February 2003 when Mr. Supachai Panitchpakdi, Director-General of the WTO, met with Taiwan's representative to the body, Yen Ching-chang, to issue three demands:

(1) that the title of Taiwan's mission be changed to "office," which is the title used by Hong Kong and Macau; (2) that members of the Taiwan mission refrain from using the customary diplomatic titles and ranks; and (3) that Taiwan refrain from using any words in WTO-related documents such as the country's name or references to its central government that imply that Taiwan is a sovereign country.

Laurence Eyton, *Status Quo: Beijing, Taipei and the WTO*, ASIA TIMES, at <http://www.atimes.com> (last visited Oct. 9, 2004). Supachai based his demand on a 1992 agreement by the General Council of the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), when it was decided that the representation of Chinese Taipei in GATT would "be along the same lines as that of Hong Kong and Macau" during the course of its status as an observer and subsequently as contracting-party delegation and "titles carried by its representatives would not have any implication on the issue of sovereignty." Taiwan News, *Taiwan Rebuffs Pressure to Alter the WTO Moniker*, available at <http://www.taiwanheadlines.gov.tw/20030529p1.html> (May 29, 2003). Taipei, however, insisted that the Director General's demands were a direct result of pressure from Beijing. *Id.* See generally GATT, *infra* note 7.

4. As to the definition of "One China," the Chinese government's original position is that "[t]here is one China in the world. The People's Republic of China represents that China, and Taiwan is part of China." Su Wei, *Some Reflections on the One-China Principle*, 23 FORDHAM INT'L L. J. 1169, 1169 (2000). This definition is still valid when used in the world community. However, since the pro-independence Democratic Progressive Party (DPP) came to power in 2000, China has amended the definition in hopes of gaining the support of the Taiwanese people for its "One China" principle. See *id.* at 1176-77. This amended version is that there is only one China, that Taiwan is part of China, and that China's sovereignty and territory can not be severed. *Id.* From a purely legal perspective, the "Republic of China" helmet that Taiwan carries cannot easily be transformed into a "Republic of Taiwan" system and it would be even more difficult to transform Taiwan and China into a "one country, two system" hypothesis, unless a constitutional revolution takes place. See Hongdah Su, *The EU Experience and the Cross-strait Integration: Establishing a Bilateral Commercial Dispute Settlement Mechanism within the WTO Framework*, 40 ISSUES & STUD. 1, 7 (2001).

I. RELATIONSHIP BETWEEN CHINA AND TAIWAN IN THE WTO

The relationship between China and Taiwan in the WTO should be, in theory, no different from the normal relationship between WTO members. The *de facto* relationship between the two members, however, contributes to a deviation from such a normal course in the context of cross-strait rivalry. While Taipei finds Taiwan's existence as a "Separate Customs Territory" an isolated victory in expanding its political presence and impact, Beijing is traditionally unaccepting of any Taiwanese expansion toward a political presence distinct from China. Recent Chinese actions and omissions, however, indicate that Beijing's position may be evolving toward one more accepting of Taipei's political maneuvering.

A. RELATIONSHIP BETWEEN WTO MEMBERS

The WTO Agreement⁵ generally does not allow its members to make any reservations.⁶ Exceptions provided by the Multilateral Trade Agreements in the WTO are limited to a few cases such as national security.⁷ A member can be exempt from enforcing the provisions of the WTO Agreement if it considers the provisions contrary to essential security interests or to pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁸ Except for national security or other specified reasons, the WTO Agree-

5. For a survey of the Agreement Establishing the World Trade Organization and the Multilateral Trade Agreements, see GATT Secretariat, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* (WTO 1995) (1994), available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

6. A "reservation" is a legal term, which means that a country acceding to an international treaty reserves the right not to be bound by the "reserved" article or articles of the treaty. BLACK'S LAW DICTIONARY 113 (2d pocket ed. 2001). Article XVI (5) of Agreement Establishing the World Trade Organization states that

[n]o reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Supra note 5.

7. See, e.g., General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 55 U.N.T.S. 194, 266 [hereinafter GATT]; General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex. 1B, 108 Stat. 4809, 1869 U.N.T.S. 183, 194-95 [hereinafter GATS Agreement].

8. WTO Agreement, *supra* note 7, art. XIV, § 1.

ment is binding on all the members, subject to Article XIII of the Agreement Establishing the World Trade Organization, which authorizes a member to opt not to apply the WTO Agreement with respect to its relations with another member.⁹ Therefore, the WTO Agreement can be regarded as binding international law on its members, or at least as special international law, applicable to trade relations among members that do not exclude the application of the Agreement as between themselves. This means both that a country may not act contrary to this international law, and that if a country violates this international law, it will bear all legal consequences arising from the breach, such as providing compensation to other affected countries and even being retaliated against.

Furthermore, the WTO Agreement specifically requires its members to align their domestic laws with the provisions of the WTO Agreement;¹⁰ it requires members to inform the relevant WTO committee of any measures affecting its obligations under relevant Multilateral Trade Agreements,¹¹ and to give favorable consideration to other members' requests for consultation.¹²

B. DE FACTO RELATIONSHIP BETWEEN CHINA AND TAIWAN IN THE WTO

The current arrangement permits different interpretations of the relationship between China and Taiwan within the WTO. Taiwan's status as "Separate Customs Territory"¹³ under the name of "Chinese Taipei" allows China to interpret Taiwan's status in the WTO as a separate customs territory of China similar to Hong Kong or Macau.¹⁴ The relation between Beijing

9. See WTO Agreement, *supra* note 7, art. XIII, § 1 ("This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.").

10. WTO Agreement, *supra* note 7, art. XVI, § 4.

11. See, e.g., Agreement of Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299, 326 [hereinafter TRIPS Agreement].

12. See, e.g., GATS Agreement, *supra* note 7, art. XXII, § 1; Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 4, § 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 108 Stat. 4809, 1869 U.N.T.S. 401, 404.

13. See *Accession of Taiwan Territories*, *supra* note 2 and accompanying text.

14. With the entry into force of the Sino-British Joint Declaration on the Question of Hong Kong and the Sino-Portuguese Joint Declaration on the Question of Macau, Hong Kong, and Macau have been legally established as Chinese territories.

and Taipei in the WTO is equal but asymmetrical, similar to the "One China, Separate Interpretations" principle—the notion that both Beijing and Taipei agree that there is just one unified China, but disagree as to which center is the legitimate representative of China.¹⁵ The WTO is supposed to be able to provide the arena for self-justification for either side as long as there is to be a minimal *détente* across the Taiwan Strait. An example of the subsurface tension lies within the term for the Taiwanese capital, itself. The English expression "Chinese Taipei" can be translated two different ways into the Chinese language. It is often termed as "Chunghua Taipei" in Taiwan, which has only cultural connotations, and "Taipei of China" in China, which conveys a political connotation.¹⁶

China and Taiwan did not exclude the application of the WTO Agreement as between themselves when they joined the WTO. In principle, both are bound by the WTO Agreement, as special international law, in their trade relations with each other. In practice, however, as international law is by nature law among nations, it will not be accepted as binding norms on cross-strait relations by China as long as Taiwan is seen as a renegade province.¹⁷ In these circumstances, the legal effect of

Sino-British Joint Declaration on the Question of Hong Kong, Government Printer, Hong Kong (Dec. 19, 1984); Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao, Government Printing Bureau (Macao SAR) (2004), available at <http://www.imprensa.macao.gov.mo/bo/i/88/23/dc/en/>. Therefore, it is indisputable that they are viewed as "Separate Customs Territories of China" in the WTO context. In fact, they have identified their missions to the WTO as "Representative Offices," which carry no diplomatic connotations.

15. "One China, Separate Interpretations" is supposedly the consensus agreed to in oral form by the Government of the People's Republic of China and the Government of the Republic of China (i.e. Taiwan), with the Kuomintang Party as the ruling party in 1993. Central News Agency, *SEF Head May Repeat 'One China, Separate Interpretations'*, available at <http://taiwansecurity.org/CNA/2001/CNA-033001.htm> (Mar. 30, 2001). However, the DPP has disputed the existence of the consensus since the Party came to power in 2000. *Id.* "One China, Separate Interpretations" means that both sides of the Taiwan Strait recognize that there is only one China but either side may claim to be the legitimate representative of China. *Id.* The jargon provides the minimum accommodating atmosphere for the two rivals to coexist across the Taiwan Strait before they decide to unify in the future. See generally http://news.xinhuanet.com/ziliao/2003-01/23/content_704742.htm (last visited Sept. 29, 2004).

16. A recent example with China is that, in its notification addressed to Taipei concerning antidumping and a temporary safeguard measure investigation, Beijing changed Taiwan's official English name of "Chinese Taipei" in the WTO into "Taipei, China" in the Chinese language. Cf. *supra* note 3 and accompanying text.

17. As a matter of fact, it is because of the political classification that international law, as has developed so far, cannot provide a solution to the impasse of the

the WTO Agreement is compromised in cross-strait trade relations.

1. *Taipei's Approach*

When Taiwan was under Chiang Kai-shek's authoritarian regime, its government claimed to be the legitimate government of the whole of China, including mainland China and Taiwan, and thus took a hostile and uncompromising attitude towards mainland China in international arenas even at the expense of its own diplomatic space.¹⁸ Since it began democratizing in the late 1980s, Taiwan has spared no effort to boost its image and expand its diplomatic space—for example, by applying for membership in the United Nations. As a result of Chinese countermeasures, Taiwan's efforts to expand its diplomatic space have thus far produced little effect except for its WTO accession. Due to China's compromise with the international trading community for the sake of its own entry into the WTO,¹⁹ acceding to the WTO has, to a degree, become Taiwan's only victory in its efforts to join international organizations.²⁰

Taiwan issue. This highlights the dilemma in the context of international law. Theories of modern international law do not provide any clue to the Taiwan issue. In international law and its theories, rules concerning state succession are irrelevant to this issue. Also, rules regarding the succession of governments do not apply. Again, neither rules concerning insurgence nor national determination are instrumental to the Taiwan issue. For a discussion of the relationship between international law and the Taiwan issue, see Su, *supra* note 4, at 10–11.

18. "Diplomatic space" is a generally accepted term used to describe Taiwan's efforts to have its voice heard in the international forum. Taiwan's withdrawal of its membership in the name of "Republic of China" at the turn of the admission of the "People's Republic of China" into the United Nations was an example of Taiwan taking a hostile and uncompromising attitude toward the Mainland at the expense of its own diplomatic space.

19. China was reluctant to block Taiwan's accession to the WTO for two main reasons. First, it aspired to join the WTO, and therefore needed to compromise with existing WTO members on Taiwan's WTO accession. Second, the WTO is basically concerned with trade issues. Therefore, once Taiwan's status in the WTO was identified as a "Separate Customs Territory," China did not act as usual in association with Taiwan's membership in an international organization.

20. The post-WTO era witnessed another failed endeavor by Taiwan to join international organizations. During the Severe Acute Respiratory Syndrome (SARS) crisis of 2003, Taipei again applied for membership in the World Health Organization (WHO). But Beijing thwarted Taipei's attempt in a quick move, despite the support of the U.S. Congress, which passed a bill mandating the U.S. government to seek ways for Taiwan to enter the WHO. See An Act Concerning Participation of Taiwan in the World Health Organization, Pub. L. No. 108–28, 117 Stat. 769 (2003).

According to some observers, Taipei has attempted to use the WTO framework to regulate cross-strait economic relations.²¹ It is understood that the administration of the DPP, the current pro-independence party, views the ability to talk with China on equal footing as evidence of Taiwan's de facto independence.²² In this regard, no better opportunity can be provided for Taipei than the WTO. Needless to say, talks with China in disregard of China's precondition of the "One China" principle helps create an impression that Taipei is on par with Beijing.²³ Taiwan has insisted on negotiating with China under the framework of the WTO since its accession.²⁴ Taipei is also cautious of any efforts by China to downgrade Taiwan's position in any international arena. It insists that its WTO mission in Geneva carry out bilateral trade consultations with China under its official name, regardless of Beijing's acceptance or opposition.

2. Beijing's Evolving Approach

Claiming sovereignty over Taiwan, and in accordance with the "One China" principle, China has attempted to oppose Taiwan's membership in any international intergovernmental or-

21. Yin Cunyi & Jiang Shan, *Cross-Strait Economic Cooperation Mechanism*, 52 P.R.C. REV. 4, 11 (2002).

22. John Mo, A Preliminary Study of Cross-Strait Direct Transportation Links Arranged by Non-Governmental Channels (Sept. 18, 2002) (unpublished manuscript, submitted to the Annual Conference of China International Economic Law Society).

23. In November 2002, China notified Taiwan's mission to the WTO of a desire to discuss exports of cold-rolled steel. In its correspondence, China referred to Taiwan's mission as an economic and trade office rather than using its official title. Taiwan promptly told the Chinese side that it had no obligation or intention to sit down for talks until requested to do so in the appropriate manner, that is, using the appropriate title. China subsequently overcame its reluctance to officially recognize the Taiwanese mission so that talks could start in January 2003.

24. In the words of John C.C. Deng, Vice Chairman of Taiwan's cabinet-level Mainland Affairs Council, Taipei's official position is:

1. Taiwan is willing to utilize all possible avenues, including the WTO, to address trade issues encountered by both sides, in order to achieve a normalized trade relationship.
2. For the long-term benefit of the WTO, both sides shall refrain from raising political issues in the organization.
3. Both sides should engage each other in a spirit of cooperation. Consultation is the best means to address problems.

John C.C. Deng, *How Will Taiwan Interact with the Mainland under WTO?*, Remarks at the Center for Strategic and International Studies Program, Taiwan: Economic Issues Ahead (Feb. 6, 2002), available at <http://www.csis.org/asia/eventsw/020206deng.pdf> (last visited Sept. 26, 2004).

ganization. On July 27, 2000, in a paper submitted to its WTO accession working party, China sought to attain support for its entry into the organization as a sovereign state, while also requesting that Taiwan be categorized as a "Separate Customs Territory of China," but the U.S. Deputy Trade Representative, Rita Hayes, rejected this proposal.²⁵ As illustrated in an unofficial WTO document, China offered a package concerning Taiwan's and its own memberships in the multilateral trading body; both China and Taiwan would obtain membership, but Taiwan would join the trading body as a separate customs territory and would obtain membership after China.²⁶ In theory, it would have been less problematic for China if it had been able to claim that Taiwan was a province of China. At the time, however, China had not had the chance to insert the Protocol on the Accession of the People's Republic of China—a "One China" provision regarding the post-WTO cross-strait trade arrangement. Otherwise, China would have been able to forcefully argue that cross-strait trade be viewed as trade within one country and therefore the WTO Agreement should not be applied as between China and Taiwan.²⁷

25. *China, US at Loggerheads over WTO Entry Wording*, PEOPLE'S DAILY, available at http://fpeng.peopledaily.com.cn/200007/28/eng20000728_46739.html (July 28, 2000); see also *U.S. Rejects China's WTO Powerplay*, Haoyah.com, at http://www.haoyah.com/English/news/e_asia8.asp (quoting U.S. Trade Representative Rita Hayes, "[t]he U.S. position is that we cannot accept the language that China has put forth on Taiwan") (last visited Oct. 17, 2004).

26. In early 1965, Taiwan requested and was granted observer status at sessions of the General Agreement on Tariffs and Trade (GATT 1947). In 1971, this status was revoked, following a decision by the UN General Assembly that recognized the People's Republic as the only legitimate government of China. At its September 1992 meeting, the GATT's Council of Representatives decided to establish a separate working party to examine the request for accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu ("Chinese Taipei"). The Chairman said he had carried out extensive consultations on the subject of establishing a working party. He noted that all contracting parties had acknowledged the view that there was only one China, as expressed in the United Nations General Assembly Resolution 2758 of 25 October 1971. Many contracting parties, therefore, had agreed with the view of the People's Republic of China (PRC) that Chinese Taipei, as a separate customs territory, should not accede to the GATT before the PRC itself. Some contracting parties had not shared this view. There had been, however, a general desire to establish a working party for Chinese Taipei. See *World Trade Organization, China's accession to the WTO and its relationship to the Chinese Taipei accession and to Hong Kong and Macau, China*, CHINA 1-2 (2001).

27. Article 43 of the Foreign Trade Law specifically provides that this Law, which governs "foreign trade," does not apply to separate customs territories of the People's Republic of China.

In principle, if WTO members were persuaded to prevent Taiwan from invoking the WTO Agreement in its trade relation with China, this would have helped to strengthen the impression that Taiwan is part of China. Intriguingly, Beijing did not invoke the "non-application" clause of the Agreement Establishing the World Trade Organization.²⁸ One explanation is that this was the result of a compromise between China and the WTO community. Another possibility is that China did not want to invoke the non-application provision because of other considerations, such as hoping to induce and engage Taiwanese businessmen and Taipei with tremendous business opportunities in China in exchange for compromise on certain issues on the Taiwanese side.²⁹ However, it could also be related to China's awareness that exclusion of the application would contradict the purpose of the WTO, or that acceptance of the application could even be a gesture of Beijing's good will towards Taipei and other existing WTO members.³⁰

As a general practice, even in a forum where both Beijing's and Taipei's representatives are present, Chinese officials have been unwilling to make contact with Taiwan officials, let alone hold formal talks on any subject. Beijing is wary that such formal contacts or talks may contribute to creating an impression that Taiwan is on par with China and may be used by Taiwan to boost its image or even expand its diplomatic space. China's diplomatic representatives are very cautious in dealing with their Taiwanese counterparts on the occasion when both are present. From the Chinese perspective, Taipei's relentless campaigns to expand its diplomatic space are independence-driven and thus China must ready itself to block such efforts. Beijing

28. International lawyers often refer to Article XIII of the Agreement Establishing the WTO as the "non-application clause," which reads: "This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application." WTO Agreement, *supra* note 7, art. XIII. This clause does not necessarily relate to "national security."

29. It should be noted that the benefits available to Taiwan result substantially from the trade liberalization required by the WTO and predicate on the condition that China agrees to apply the WTO Agreement in its relation with Taiwan.

30. In the process of the accession negotiations, existing members expressed concern that China and Taiwan's long-standing quarrels would function to politicize the WTO. China has never changed its position on the "One China" debate and makes every attempt to "impose" the principle of "One China." This is why China only ceased to insist on the wording—Taiwan would have to join the WTO as "a customs territory of China"—when it was made impossible by the opposition of the United States.

views Taipei's use of the WTO framework to regulate cross-strait economic relations as a pro-independence strategy and therefore insists that contacts between the two sides are internal matters not to be conducted under WTO auspices.³¹ The Chinese government was advised to prevent the island from using the WTO as a forum for contacts.³²

China's obstinate attitude in refusing formal talks in the WTO forum might have something to do with its understanding of the WTO Agreement in general and its understanding of its implications for cross-strait trade relations in particular, and with confidence in its ability to deal with Taipei in the WTO context. Beijing's reluctance to talk with Taiwan within the WTO framework is grounded in two factors. First, China perceives the Taiwan issue as an internal Chinese affair, and is not willing to see a third party, a state, or an international organization, mediating or interposing between the two sides across the Taiwan Strait. Second, Beijing is afraid that the WTO, which is dominated by western countries, might side with Taiwan if both China and Taiwan deal with each other within the WTO forum.³³

Therefore, it was surprising when Shi Guangsheng, China's foreign trade minister, suggested in an interview with the *Financial Times* on November 25, 2002, that both sides might meet to discuss particular issues within the WTO.³⁴ The speech signified that China was ready to ease its ban on official talks with rival Taiwan. Shi announced that Beijing was willing to abide by WTO rules in notifying Taipei of any action that would affect Taiwanese exporters. He explained that "[c]urrently Taiwan and the mainland do not have a normal trading relationship, but both are WTO members. . . . Consultations on specific issues can be held between the two sides through their representatives in Geneva."³⁵

31. A spokesman for the State Council Office of Taiwan Affairs confirmed this position in the first official statement issued after Taiwan's accession to the WTO. See generally <http://www.taimeng.org.cn/newsdetail.asp?ID=3270> (last visited Sept. 29, 2004).

32. See, e.g., Guo Pingtan et. al., *Cross-Strait Trade Relations in the WTO Context*, 17 INTERNAL REFERENCE FOR REFORMS, 33–36 (2001).

33. See, e.g., CAO JIANMING ET. AL., TREATISES ON WTO AND CROSS-STRAIT ECONOMIC RELATIONS 29–30 (Shanghai: Shanghai Institute of Taiwan Affairs 1999).

34. See Mure Dickie, *Taiwan and China Move Closer to Official Talks*, FIN. TIMES (London), Nov. 25, 2002, at 9, available at <http://www.taiwansecurity.org/News/2002/FT-112502.htm> (last visited Sept. 29, 2004).

35. See *supra* note 31 and accompanying text.

On December 12, 2002, not long after Shi's speech, representatives of both China and Taiwan met in Geneva to talk about China's temporary safeguard measures against Taiwan's steel imports.³⁶ The meeting between China and Taiwan under the WTO framework caught the attention of other WTO members. China's new stance appears to be a response to Taipei's protest. The change in attitude is possibly an attempt to resolve the dilemma posed by Taiwanese requests for WTO talks over China's recent imposition of tariffs on a range of steel products. The policy change may also have resulted from pressure by other WTO members. Under the WTO Agreement, any member has the right to consult with any other on trade measures,³⁷ and China, by refusing to cooperate with Taiwan upon its request, had put itself at risk of undermining its reputation as a rule-abiding member. In this sense, Taipei's stated position, which is to require China to act according to the WTO Agreement within the WTO framework, is likely to win the sympathy of other WTO members.

The new development could also be related to China's frustration of non-governmental channels to resolve trade disputes established after WTO accession. It was once proposed that the Taiwanese government not bring such disputes to the WTO Dispute Settlement Body.³⁸ However, in order to avoid the deterioration of cross-strait trade, non-governmental organizations stepped in to help resolve trade disputes. For example, in February 2002, the Taiwan Steel & Iron Industries Association (TSIA) and the China Steel and Iron Industry Association (CSIA) met in Taipei and reached a four-point consensus to establish a mechanism for the resolution of disputes concerning cross-strait steel trade. Unfortunately, in the absence of competent governmental authorities, the result of such non-governmental efforts proved to be limited in resolving cross-strait trade disputes. For example, although the TSIA was informed of the temporary safeguard measures and was invited to discuss the future of steel imports from Taiwan with the CSIA, the consultation between the two non-governmental organizations failed to touch on the issue of consistency of the temporary safeguard measures in the Safeguard Agreement, central to the

36. See generally <http://www.npf.org.tw/PUBLICATION/FM/092/FM-C-092-179.htm> (last visited Sept. 2004).

37. Cf. *infra* note 58.

38. See generally <http://www.npf.org.tw/PUBLICATION/FM/092/FM-C-092-179.htm> (last visited Sept. 29, 2004).

dispute regarding China's imposition of temporary safeguard measures against Taiwanese steel imports. In this context, China notified Taiwan's mission to the WTO in November 2002 of a desire to talk over the steel dispute. China indeed had overcome its reluctance to address the Taiwan mission by its official title, and talks finally started in January 2003.³⁹

A more likely explanation than either outside pressure or frustration of non-governmental routes is that China has developed a new understanding of the features of the WTO and Taiwan's status in the WTO. As for its perception of the WTO's nature, first, regardless of whether the international trading community is obligated to comply with the "One China" principle, nothing in the WTO Agreement can be interpreted to negate the principle. Second, the WTO is basically a functionalist international organization, concerned solely with trade issues. It is trade interests, not a political agenda, that prompt members to take advantage of the mechanisms available in the WTO.

With its accession to the WTO, Taiwan acquired membership in a club available to sovereign states, which, even without direct talks with the Mainland, elevates its status. On the other hand, since Taiwan did not accede to the WTO as a sovereign state, but as a "Separate Customs Territory," its status would not be elevated to that of a sovereign state, no matter how and what Taipei does in the WTO. In other words, Taiwan will not acquire statehood by virtue of its talks with China or any other WTO member. Thus it is reasonable for Beijing to talk with Taipei if circumstances make such talks necessary, but Beijing will proceed in a cautious and inconspicuous manner.

This leaves open the possibility that Beijing will try to limit these talks to private bilateral contacts before China clarifies whether such "consultations" in Geneva could be held under the WTO umbrella.⁴⁰ Taipei has made it clear that such an arrangement would be unacceptable to Taiwan.⁴¹

39. See *supra* note 3 and accompanying text.

40. In the WTO, consultations are a part of the formal process for dispute settlement. A consultation must be initiated by a formal request, which is circulated to all the WTO members through the WTO Dispute Settlement Body. See Understanding on Rules and Procedures Governing the Settlement of Disputes, art III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226. In contrast, private bilateral talks can be held in an informal way and can be interpreted as irrelevant to the formal process of dispute settlement.

41. The *Financial Times* quoted one Taiwanese trade official as saying: "I can't see any reason why they cannot negotiate under the framework of the WTO." Dickie, *supra* note 34, at 9.

II. CROSS-STRAIT TRADE RELATIONS IN A BROADER CONTEXT: BUSINESS ENTHUSIASM VERSUS GOVERNMENTAL INDIFFERENCE

Both China and Taiwan are now WTO members. Accession of both sides of the Taiwan Strait to the WTO has aroused interesting speculations about the trend of cross-strait trade relations. Existing WTO members closely watch interactions between the two new rival members.

Indeed, trade has surged across the Strait. Cross-strait trade rose from \$32.34 billion in 2001 to \$42.30 billion in 2002 and \$58.37 billion in 2003.⁴² China has become Taiwan's top trade partner; Taipei's trade with Beijing accounting for 24.5% of Taiwan's total trade.⁴³ The trade surplus of Taiwan with China rose from \$18.16 billion in 2001 to \$24.40 billion in 2003.⁴⁴

However, surging trade is primarily a result of business exchanges, and trade relations between China and Taiwan remain hampered by general cross-strait relations. The two sides have always maintained different viewpoints regarding certain political issues. The possibility of sudden confrontation across the Strait is remote, however. Still, there have been no significant changes for the better. From China's perspective, Taipei's refusal to recognize the "One China" principle prevents the Mainland from improving cross-strait relations, while in the eyes of Taipei, the Mainland's military deployment against Taiwan and refusal to renounce the use of force to resolve the Taiwan issue pose a threat.

Cross-strait trade relations are often part of a more general problem and susceptible to the ups and downs of the broader relationship. Trade measures of either side shall be perceived in the context of a much broader bilateral relation. Whenever

42. See Xinhua News Agency Domestic Service, Beijing, *China Issues Policy Paper on Direct Links with Taiwan*, BBC WORLDWIDE MONITORING, Dec. 18, 2003, LEXIS, News Library, Bbcmir File; Xinhua General News Service, *Cross-Straits Trade, Economic Cooperation Maintain Momentum*, XINHUA NEWS AGENCY, Apr. 4, 2002, LEXIS, News Library, Xinhua File; Sofia Wu, *Cross-Strait Trade Hits New High*, CENTRAL NEWS AGENCY-TAIWAN, Jan. 15, 2004, LEXIS, News File, Cenews File.

43. An Analysis of Cross-Strait Trade, Board of Foreign Trade of Taiwan, Ministry of Economic Affairs, Taiwan, at <http://ekm92.trade.gov.tw/BOFT/web/reportlist.jsp?databaseid=DB009&categoryid=CAT3182> (Mar. 1, 2004).

44. The statistical data are available at the website of the Board of Foreign Trade, Ministry of Economic Affairs, Taiwan, <http://cus.moeaboft.gov.tw> (last visited Oct. 22, 2004).

there is a détente in the Taiwan Strait, trade is no longer an issue between Beijing and Taipei. When cross-strait relations deteriorate, both sides accuse each other of creating trade barriers, which seems to represent the usual business of both Beijing and Taipei. The following examples are illustrative.

For many years Taiwan has discriminatorily treated imports from the Mainland while enjoying a trade surplus in its trade with mainland China. This was not a serious problem in times of “good cross-strait relations.” In fact, the two Koo-Wang Talks between the Strait Exchange Foundation (SEF) of Taiwan and the Association for Relations Across the Taiwan Strait (ARATS) of the Mainland in 1993 and 1998,⁴⁵ which were a symbol of détente across the Strait, were followed by surging imports and investment from Taiwan. But not long after Taiwan’s President Chen Shui-bian advocated the “One Side, One Country” stance in August 2002 by stating “[l]et’s make it clear, there is one county on each side of the Taiwan Strait,”⁴⁶ and the cross-strait relations came to a stalemate, did China decide to apply final safeguard measures against imports from Taiwan⁴⁷ and accuse Taiwan of procrastinating on the establishment of the “Three Links”—direct exchanges in mail, transportation, and trading between the two sides.⁴⁸ Taiwan also exhibited the

45. In the early 1990s, in order to establish a formal communication channel between the two sides, Taiwan set up the SEF and China set up the ARATS. In 1993, Koo Chen-fu, chairman of Taiwan’s SEF, and Wang Daohan, chairman of China’s ARATS, met for the first time in Singapore and reached four agreements and the “One China, Separate Interpretation” consensus. United Daily News, *Chen: We Can Accept ‘Separate Interpretations’*, available at <http://www.taiwanheadlines.gov.tw/20000628/20000628p1.html> (June 28, 2000). The Koo-Wang Talks were suspended by Beijing since mid-1995 to protest Taiwan President Lee Teng-hui’s high-profile visit to Cornell University in the United States. Ralph A. Cossa, *Koo-Wang Talks: Can the ‘Use of Force’ Dispute be Resolved?*, PACIFIC FORUM CSIS, available at <http://www.taiwansecurity.org/CSIS-Pacnet-39.htm> (Oct. 9, 1998). They were resumed in 1998 when Koo and Wang met in China. See *id.*

46. Lilian Wu, *Mac Issues Position Paper on One Side, One Country*, CENTRAL NEWS AGENCY-TAIWAN, LEXIS, News Library, Cenews File (Aug. 7, 2002).

47. See *infra* notes 55–56.

48. The “Three Links” refers to direct exchanges in mail, transportation, and trading between the two sides of the Taiwan Strait. These exchange services were suspended in the late 1940s when Kuomintang withdrew from the Mainland to Taiwan. Since the 1990s, with the surging trade and investment, the two sides have been talking about, and the business circles have been pressing for, opening the “Three Links.” However, all the efforts have so far produced no results, for China insists that implementing direct links requires acceptance of the “One China” policy, while Taiwan sees the condition as Beijing’s hidden agenda to “suppress and belittle Taiwan in the international community.” Central News Agency, *MAC Calls ‘One China’ Provision for Direct Links Unacceptable*, available at <http://www.taiwan>

same behavioral pattern. For example, when China rebuffed the DPP administration's policy of progressive independence, Taiwan responded by adopting the Special Safeguard Mechanism Against Products from Mainland, which imposed a ceiling for prospective Taiwanese investment on the Mainland, and accused China of politicizing trade relations by imposing anti-dumping investigations and safeguard measures.

The WTO should not be expected to ease the political fissure between the two sides. In fact, the difficulties of managing cross-strait economic ties after the WTO accession have been underlined by dimming hopes for establishing the "Three Links." Taiwan has banned direct trade, transport, and postal links with mainland China since 1949. The only exception to the absence of the "Three Links" is the so-called "Mini Three Links" between the offshore islands of Kinmen and Matsu and the Chinese coast.⁴⁹ Even the high-profile chartered flights around the Chinese New Year in 2003 cannot be seen as a breakthrough. Although Taipei allowed local airlines to fly to destinations on the Mainland for the first time, it insisted that flights include a stop in Hong Kong or Macau and did not permit Mainland carriers to take part.

III. FACILITATING CROSS-STRAIT TRADE RELATIONS WITHIN THE WTO FRAMEWORK

Cross-strait trade relations within the WTO framework are not entirely hopeless. As an old Chinese proverb states, "good fortune lieth within bad." There are several factors that would contribute to a minimum degree of normal relations between China and Taiwan in the WTO.

First, since Taipei eased its ban on trade relations in 1987, China and Taiwan have been natural trade partners due to their geographical, racial, linguistic, and cultural proximity. There is no reason to believe, particularly in an era of globaliza-

security.org/CNA/2003/CNA-071903.htm (July 19, 2003). Therefore, trade links across the Strait still involve substantial indirect transportation costs.

49. The Provisional Implementation of the "Mini-Three Links" between the Offshore Islands of Kinmen and Matsu and Mainland China, adopted at the end of 2000, authorizes trade between the offshore islands of Kinmen and Matsu and the Chinese coast. See Mainland Affairs Council, *Overview of the Provisional Implementation of 'Mini-three-links' Between the Offshore Islands of Kinmen & Matsu and Mainland China*, available at <http://www.mac.gov.tw/english/english/macpolicy/mtlink2.htm> (Dec. 18, 2000).

tion, that such natural trade relations would be severed completely by political contentions.

It is conspicuous that both China and Taiwan have used internal trade powers to influence or manipulate their relations with each other. Beijing is pressing its skillfully designed "business leverage for containing Taiwan politics" approach, which induces Taiwanese business with business opportunities and potential on the Mainland and in turn causes Taiwanese businessmen to press the Taiwan authority to, for example, lift the ban on direct links.⁵⁰ The expected potential benefits from the expansion of cross-strait trade would result in tremendous pressure on the Taiwanese government for further lifting bans on trade between the two sides. In this context, there would be a possibility that Taiwan would be induced to yield to China's demand: recognizing the "One China" principle. If Taiwan ceases correlating cross-strait trade to "special nation-nation trade,"⁵¹ or recognizes cross-strait trade as domestic trade, Taiwanese businesses would possibly be given privileges in China vis-à-vis businesses from other WTO members. For example, China has made clear that if cross-strait transportation services are defined as domestic services, Taiwanese businesses will enjoy the privileges available to domestic shipping companies presumably under the United Nations Convention on the Law of the Sea (UNCLOS).⁵² Taiwanese businesses are keen on tapping the Chinese market and taking the lead when China, pursuant to its commitments regarding WTO accession, begins to gradually open its market to foreign businesses. In order to meet the benchmark that China has set, Taiwanese businesses would turn to the Taiwanese government for recognition of the "One China" principle.⁵³

50. See, e.g., Liberty Times, at www.libertytimes.com.tw/2002/new/may/22/today-t2.htm (May 22, 2002).

51. It was Taiwan's former President Lee Teng-hui who, for the first time, formally defined the cross-strait relation as "a relation between two states, or at least that between two special nations" when he was interviewed by a *Voice of Germany* journalist on July 9, 1999. Lee Teng-hui, *Views on Cross-Taiwan Strait Ties: Responses to Questions Submitted by Deutsche Welle (Voice of Germany)*, TAIPEI.ORG, <http://www.taipei.org/press/Lee-view.htm> (July 9, 1999).

52. Article 2(1) of the UNCLOS provides that a coastal state has sovereignty over its territorial sea. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. II, para. 1, 1833 U.N.T.S. 397, 400 (entered into force Nov. 16, 1994). However, it is controversial to argue that this provision allows a coastal state that is a contracting party to both the UNCLOS and the WTO Agreement to evade its WTO obligation regarding opening marine transport.

53. In 2002, Wang Yongqing, an influential industrial tycoon of Taiwan, re-

Second, the WTO Agreement may be applied to trade relations between China and Taiwan. The WTO can be a constraining factor to both sides of the Taiwan Strait in their existing trade relations, while it is unable to reconcile the volatile cross-strait relations. The WTO Agreement places both Beijing and Taipei under a legal framework that appeals to widely accepted principles and norms used by the international community. It drives the laws of both sides closer to each other. As empirical evidence has shown, the more similarity between Beijing and Taipei, the more likely they will deal with each other.⁵⁴

Third, the multilateral framework of the WTO creates many occasions for both sides of the Taiwan Strait to contact or even work with each other. Some occasions call for bilateral consultations in the event of trade measures by mainland China or Taiwan that specifically address or affect the other side,⁵⁵ or in the event of trade disputes.⁵⁶ For example, after Taiwan's accession to the WTO on March 23, 2002, China announced the launching of an anti-dumping investigation on steel imports from Taiwan. Not long after the announcement, an anti-dumping investigation was launched against imports of PVC from Taiwan. On May 24, 2002, China declared its intention to impose temporary safeguard measures⁵⁷ on some steel products from Taiwan.⁵⁸ Under the WTO Agreement, such trade meas-

portedly called for the Taiwanese Government to recognize the so-called "92 Consensus," which would be equivalent to recognizing the "One China, Separate Interpretations" stance. See Central News Agency, *supra* note 15.

54. It has often been observed that as the economic and political systems of both sides have gradually become more similar, both sides have established more trade links. In fact, the Taiwan side under the Kuomintang regime once proposed that the two sides would become united if the Mainland were to become democratized. See Cossa, *supra* note 45.

55. See, e.g., GATS Agreement, *supra* note 7, art. XXII, § 1.

56. See, e.g., Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement annex 2, art. 4, § 2.

57. See Agreement on Safeguards, WTO Agreement, annex 1A. A WTO member may apply temporary safeguard measures (e.g. a tariff or quota) for a period of six months to prevent surging imports of foreign products, regardless of origin, from injuring its domestic industry; after six months, the country invoking the safeguard must decide whether to apply permanent safeguards or to remove the temporary safeguards. *Id.*

58. In order to prevent surplus steel products on the international market from flooding into the Chinese market, the Chinese Government introduced temporary safeguard measures on imports of some steel products starting on May 24, 2002. *China Selectively Re-imposes Import Tariffs on Cold-rolled Steel Sheets; Russia Expresses Surprise*, at <http://www.interfax.com/com?item=Chin&pg=0&id=5681204> &req= (Jan. 15, 2004). These measures imposed a tariff quota on imports of nine kinds of steel products of forty-eight tariff numbers, namely ordinary medium plate,

ures would call for consultations. Similarly, pursuant to the Understanding on Rules and Procedures Governing the Settlement of Disputes,⁵⁹ when a dispute arises between the two sides it could also possibly lead to consultations. Since either side's nonconforming trade policies towards the other⁶⁰ harbors prospective disputes between the two sides,⁶¹ it would not be surprising to see their trade relations evolve into disputes submitted before the Dispute Settlement Body and give rise to consultations.⁶²

Some occasions call for direct contact in the multilateral context, for example, in the context of the Trade Policy Review Mechanism. According to the trade policy review procedures, upon the request of an interested member, the member whose trade policy is to be reviewed is required to provide the requesting member with certain information.⁶³ During the eight year transitional period, other WTO members are scrutinizing China's trade policy.⁶⁴ Having substantial interests in China, Taiwan is keenly interested in China's trade policy, particularly as to whether China will honor its commitments. In the first session of Trade Policy Review in 2002, for example, Taiwan's representative addressed directly to his Chinese counterpart various questions, covering slash of tariffs, quota administration, prohibition of import of used electronic appliances, beer, films, etc.⁶⁵

ordinary sheet, silicon steel, stainless plate, coil rod, section, seamless tube, and billet, with a term of 180 days. A portion of these steel products was from Taiwan.

59. See Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement annex 2, art. 4, § 2 ("Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.").

60. For a discussion of the inconsistency between Taipei's trade policies and the WTO Agreement, see Huang Jie, *Cross-Strait Trade Relations Deviating from the WTO Principles*, 3 CHINA REV., 2002, at 48-50.

61. Qingjiang Kong, *The WTO Dispute Settlement Mechanism and Cross-Strait Trade Relations*, 9 CHINA REV. 57, 57 (2002).

62. Qingjiang Kong, *Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes between China and Taiwan?*, 3 J. INT'L ECON. L. 747, 756-58 (2002).

63. See, e.g., GATS Agreement, *supra* note 7, art. XXII, § 1.

64. See Protocol on the Accession of the People's Republic of China, Nov. 10, 2001, WT/L/432, part I, § 18, available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc>.

65. In the report, *China has passed the Transitional Trade Policy Review*, the Xinhua News Agency revealed that "Taipei China" together with 15 other WTO members addressed to China their respective concerns during the reviewing process. See generally http://news.xinhuanet.com/newscenter/2002-12/20/content_665897.htm

Fourth, the experience of China and Taiwan in the Asia-Pacific Economic Cooperation (APEC)⁶⁶ may serve as a lesson for their dealing with each other in the WTO.⁶⁷ So far, the two sides have maintained a normal business-like relation in the APEC.⁶⁸

Finally, it should be noted that the approach of each side affects the response of the other. For example, China's attitude toward talks in the WTO could be a result of Taiwan's business-like approach in the WTO. It is too early for China, sensitive to Taiwan's every move, to say whether Taipei has behaved well in the WTO. However, if Beijing senses Taiwan's business-like attitude in the WTO, it will be encouraged to deal with Taipei under the WTO framework.

It is a positive sign that China can act in a non-political manner with Taipei, and Taipei can take a business-like attitude in its relation with Beijing on international occasions. The best examples are the two trade disputes regarding antidumping and temporary safeguard measures in the post-WTO era. Indeed Beijing, against its WTO obligation, did not inform the Taiwanese government, but rather informed only the Taiwanese companies or industry concerned in such investigations.⁶⁹ Nev-

(last visited Sept. 29, 2004).

66. APEC is the premier forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. Both China and Taiwan are member economies of the APEC. However, Taiwan's official title in the APEC is "Chinese Taipei."

67. On October 2, 1991, Director General Qin Huasun of China's Ministry of Foreign Affairs and then Chairman of Senior Officials' Meeting of the APEC, signed a Memorandum of Understanding, which agreed on the issues relating to entry of China, Hong Kong, and Taiwan into the APEC. See Monique Chu, *Taiwan Should Consider Hosting APEC: Analysts*, *TAIPEI TIMES*, available at <http://www.taiwansecurity.org/TT/2001/TT-021301.htm> (Feb. 13, 2001). Taiwan acceded to the APEC as an independent economy.

68. The only exception to this pattern was the 2001 APEC Summit in Shanghai. Prior to the Summit, the general practice had been for Taiwan to send a ministerial level official to attend annual APEC summit meetings. For this Summit, Taiwan's President Chen Shuibian intended to attend personally. After this was rejected, he ordered the dispatch of Li Yuanzu, one of his former Vice Presidents, which was again rejected. As a result, Taiwan was absent from the Summit. Chen Shuibian's move was regarded as a sort of political maneuvering—without such maneuvering, the 2001 APEC Summit would have been very different. For a discussion of China's approach towards Taiwan in the APEC, see *A STUDY OF APEC AND THE DEVELOPMENT OF CROSS-STRAIT RELATIONS* (Li Qiongli et. al. eds., Chinese Taipei APEC Research Center 2001).

69. When an antidumping investigation is instigated, public notice must be given to interested parties, including exporting WTO members and other known exporters. Agreement on Implementation of Art. VI of the GATT 1994, WTO Agreement annex 1A, art. 12.

ertheless, when the Taiwanese mission for the WTO dissented by addressing China's WTO mission, Beijing remedied its procedures.⁷⁰ As it was speculated that China's new flexibility could open a channel for the first formal talks between the two sides after the WTO accession, Yen Ching-chang, chief representative of Taiwan's delegation to the WTO, advised that no political implications should be attached to the consultations between the two sides under the WTO framework.⁷¹

CONCLUSION

Accession of both China and Taiwan to the WTO has witnessed the coexistence of an opportunity—finding fever among businesses and a sluggish policy adjustment between governments across the Taiwan Strait. The compelling trade forces and entangling political contentions over Taiwan's status are the result of coexisting business enthusiasm and governmental indifference. Given that the contention between China and Taiwan is a non-amenable zero-sum game by nature, the WTO should not be expected to ease the political fissure between the two sides. The post-WTO diplomatic struggle between China and Taiwan around Taipei's identification in the WTO illustrates this tension. Nevertheless, the fact that both Beijing and Taipei are in the WTO will be useful in providing an arena for self-justification for either side whenever a minimum *détente* exists across the Taiwan Strait.

Given the functionalist nature of the WTO, a formula agreeable to Taiwan, supported by the international trading community, and acceptable to China should be established for the relationship between China and Taiwan in the WTO. To this end, the two sides should be prompted to take business-like approaches towards each other in the WTO. Beijing should be urged to fulfill its obligations under the WTO Agreement, and Taipei should be urged not to push Beijing by attempting to take advantage of the WTO to its political end.

70. Joyce Huang, *Taiwan and China to go to WTO Mat over steel*, *TAIPEI TIMES*, at P1, available at <http://www.taipeitimes.com/News/front/archives/2002/12/06/186044> (Dec. 6, 2002).

71. See *'Downgrade' hampers China-Taiwan WTO talks*, *ASIA TIMES ON-LINE*, at <http://www.atimes.com/atimes/china/DL07Ad04.html> (Dec. 7, 2002).