

THE ASEAN-CHINA FREE TRADE AREA (ACFTA): A LEGAL RESPONSE TO CHINA'S ECONOMIC RISE?

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INTRODUCTION

On July 1, 2005, a pivotal agreement on trade in goods¹ between China and the Association of Southeast Asian Nations² (ASEAN) took effect. The implementation of this free trade agreement marked the beginning of the China-ASEAN Free Trade Area (ACFTA), which is expected to become the world's largest trading bloc.³ Most notably, ACFTA will surpass the free trade areas created by the North American Free Trade Agreement (NAFTA) and the European Union (EU) in terms of population. Upon completion, ACFTA will encompass an economic region with 1.7 billion consumers, a regional GDP of about \$2 trillion, and total annual trade volume of approximately \$1.23 trillion.⁴

ACFTA's sheer size alone is sufficient to merit further analysis. When coupled with China's economic rise and World Trade Organi-

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1. Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China, Nov. 29, 2004, PRC-ASEAN, available at <http://www.aseansec.org/16646.htm> (last visited Sep. 30, 2005).

2. ASEAN is a regional organization comprising the ten Southeast Asian Nations: Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam.

3. Vincent Wei-Cheng Wang, *The Logic of China-ASEAN FTA: Economic Statecraft of "Peaceful Ascendancy"*, in CHINA AND SOUTHEAST ASIA: GLOBAL CHANGES AND REGIONAL CHALLENGES 17, 26 (Ho Khai Leong & Samuel C.Y. Ku eds., 2005).

4. ASEAN-CHINA EXPERT GROUP ON ECONOMIC COOPERATION, FORGING CLOSER ASEAN-CHINA ECONOMIC RELATIONS IN THE TWENTY-FIRST CENTURY 2 (2001), available at http://www.aseansec.org/newdata/asean_chi.pdf (last visited Nov. 14, 2005).

zation (WTO) accession, ACFTA has the potential to significantly impact the WTO-led multilateral trade system.⁵

Most importantly, ACFTA serves as a tangible reminder of China's growing influence in East Asia.⁶ While the rise of China has prompted significant debate and research, little attention has been paid to ACFTA, particularly in the legal field. Instead, most of the scholarship on ACFTA has focused exclusively on economic and geopolitical issues, despite the fact that creation of a free trade area is also a legal process.⁷

Furthermore, one of the greatest impediments to ACFTA's long-term success is ASEAN's lack of a sufficient legal structure, namely a capable dispute resolution mechanism. Hence, the success of this groundbreaking free trade area may depend on whether ASEAN as an organization undergoes the legal reform necessary for the implementation of ACFTA. A similar question has often been posed with respect to China and its evolving trade regime: can China undergo sufficient legal reform to meet its WTO obligations?⁸ Yet, few studies have focused on ASEAN and its ability, or lack thereof, to implement and legally enforce its own trade ambitions.

Thus, this Note will focus on the relatively overlooked issue of whether ACFTA will succeed despite ASEAN's nascent legalism. To provide the fullest understanding of ACFTA, this note will also review the many geopolitical hurdles to ACFTA's success. A free trade area of this magnitude involving only developing countries would be ambitious for any region. In particular, the troubled history of Chi-

5. For a discussion of the relationship between ACFTA and WTO, see generally, Qingjiang Kong, *China's WTO Accession and the ASEAN-China Free Trade Area: The Perspective of a Chinese Lawyer*, 7 J. INT'L ECON. L. 839 (2004).

6. See Wang, *supra* note 3, at 17-19.

7. Jeffrey A. Kaplan, *ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA*, 14 UCLA PAC. BASIN L.J. 147, 148 (1996):

Free trade, now closely linked to ASEAN's economic emergence, has captured the imagination and enmity of national policymakers and scholars alike. The free trade debate, however, is typically confined to its economic and geopolitical underpinnings. Parallel legal developments, crucial to the efficacy of any free trade agreement, are mainly ignored even though the process of defining a free trade area and eliminating trade barriers is, in large part, a legal process.

8. See, e.g., Sibao Shen, *WTO and China's Legal System*, in *WTO AND EAST ASIA: NEW PERSPECTIVES* 267, 268-71 (Mitsuo Matsushita & Dukgeun Ahn eds., 2004) ("Therefore, China's accession into the WTO is more than a matter of economic and trade concerns (not just like Japan and Brazil who have adjusted their social and legal systems to the western style), it is really a true challenge to China's current system and her adjustability, especially in the case of administrative and legal regimes.").

nese-ASEAN relations casts significant doubt vis-à-vis the long-term feasibility of ACFTA.

Part II of this Note will provide some background regarding the motivations, origins, and current status of ACFTA, and Part III will examine the history of the Sino-ASEAN relationship since ASEAN's formation. Part IV will analyze ASEAN's current legal structure, while Part V will discuss ASEAN's attempt to create an intra-ASEAN free trade area and the legal institutionalization that has resulted from this initiative. In Part VI, this Note will turn to a discussion of two key geopolitical hurdles to ACFTA's success: the lack of cohesion in ASEAN and competition between ASEAN and China. Finally, Part VII will include some basic remarks about an issue that should be the focus of future research: ACFTA's likely effect on the WTO and other nations with considerable influence in East Asia.

I. ASEAN-CHINA FREE TRADE AREA: MOTIVATIONS, ORIGINS, AND CURRENT STATUS

A. Motivations

The rise of China has prompted frequent discussion and concern in the United States.⁹ Much of this discussion has focused on the future economic and security threat China may pose to the United States. In contrast, for the ASEAN member states, China's growing status as a global power is not a future challenge but a daily reality.¹⁰

In particular, the significant growth of Sino-ASEAN trade and Chinese investment in the ASEAN member states has increased these nations' dependence on the emerging superpower.¹¹ This increasing dependence coupled with the security threat that China poses predominantly in the South China Sea, makes the "China ques-

9. See, e.g., Fareed Zakaria, *Does the Future Belong to China?*, NEWSWEEK, May 9, 2005, at 26 ("[China] is a country whose scale dwarfs the United States—1.3 billion people, four times America's population. . . . But now the very size and scale that seemed so alluring is beginning to look ominous. And Americans are wondering whether the 'China threat' is nightmarishly real."); see also, Robert W. Radtke, *China's "Peaceful Rise" Overshadowing U.S. Influence in Asia?*, CHRISTIAN SCIENCE MONITOR, Dec. 8, 2003, at 9; see generally, ROSS TERRILL, *THE NEW CHINESE EMPIRE: AND WHAT IT MEANS FOR THE UNITED STATES* (2003).

10. Jong Wong, *The Rise of China: Challenges for the ASEAN Economies, in CHINA'S POST-JIANG LEADERSHIP SUCCESSION: PROBLEMS AND PERSPECTIVES* 355, 363 (Jong Wong & Zheng Yongnian eds., 2002) ("[T]he rise of China's economy can disrupt its neighboring economies, especially in the short run. This is particularly so for the ASEAN economies.").

11. See Wang, *supra* note 3, at 31 (noting that ASEAN's total trade with China in 2004 amounted to \$78.3 billion).

tion” a pressing issue for Southeast Asia. As stated by the director of a leading Southeast Asian research center, “[f]or better or worse, the rise of China is a development we can ill afford to ignore.”¹²

However, while China’s economic rise at the end of the Cold War was viewed primarily as a “threat” by its neighbors and the United States, China’s continued rise has recently begun to be viewed more as an opportunity.¹³ Beijing has worked hard to cultivate such a view. On several recent occasions, China has suggested to its neighbors that its own ascendancy would not hurt the region but would actually provide many benefits.¹⁴ For example, when Premier Wen Jiabao appeared at the 2003 China-ASEAN summit, he argued that China’s ascendancy should be seen as a “win-win” situation.¹⁵ Later, in a visit to Harvard University, the Premier emphasized that China subscribed to the idea of “heping-jueqi” which literally means “peaceful rise.”¹⁶

Certainly, there are indicators that ASEAN is beginning to view China’s rise more favorably. At least one scholar has suggested that the creation of ACFTA symbolizes recognition by the ASEAN states that China’s burgeoning economy is no longer a threat.¹⁷ However, other scholars have suggested the contrary: ASEAN has pushed ACFTA because it still views China as a threat and ACFTA is the most appropriate response.¹⁸

Whether or not ACFTA is a response to the China threat, it is not surprising that ASEAN has supported the creation of this free trade area. In fact, ASEAN is still trying to fully implement an intra-

12. K. Kesavapany, *Forward*, DEVELOPING ASEAN-CHINA RELATIONS: REALITIES AND PROSPECTS—A BRIEF REPORT ON THE ASEAN-CHINA FORUM, at vii (Singapore: Institution of Southeast Asian Studies 2004).

13. *Id.* at 4; see also Wang, *supra* note 3, at 35 (noting that ASEAN member states see closer integration with China in the form of an FTA as a method of gaining personally from China’s growing prosperity).

14. See, e.g., Kesavapany, *supra* note 12, at 4.

15. Willy Wo-Lap Lam, *China Aiming for a Peaceful Rise*, CNN, Feb. 6, 2004, <http://www.cnn.com/2004/WORLD/asiapcf/02/02/willy.column/index.html> (last visited Nov. 3, 2005).

16. See Wang, *supra* note 3, at 32.

17. Kong, *supra* note 5, at 841-42.

18. See Wang, *supra* note 3, at 26 (“Size is important, and China towers over each individual ASEAN member and all of them combined. . . . This is why there is a widely accepted view, expressed by former Singaporean Trade and Industry Minister George Yeo, that an integrated ASEAN is the only viable response to an economically-rising China.”).

ASEAN free trade area called “AFTA.”¹⁹ From an economic perspective, any free trade area provides many benefits to the ASEAN states as it allows them to “overcome the disadvantage of smallness by pooling resources and combining markets.”²⁰

China’s motives, however, are less evident.²¹ As has been suggested, ACFTA may be China’s way of preempting other powers’ dominance of Asia. For example, as Vincent Wei-Cheng Wang suggests, China can use ACFTA to defuse American influence in the region and to:

[C]ultivate goodwill among China’s important neighbours, maintain peace and security...and secure key markets and raw materials needed for China’s economic security. It is thus a *sine qua non* of “peaceful ascendancy” — the fundamental strategy of China’s new diplomacy for survival and development.²²

B. Origins

The idea of a free trade area between China and ASEAN was first proposed by Chinese Premier Zhu Rongji at the November 2000 China-ASEAN summit.²³ In October 2001, the China-ASEAN Expert Group on Economic Cooperation issued an official report recommending a “WTO-consistent ASEAN-China FTA within ten years.”²⁴ A month later, at the November 2001 China-ASEAN summit, the relevant leaders endorsed the ideas of the Expert Group and the negotiation process officially commenced.²⁵ Then, at the Eighth China-ASEAN Summit in November 2002, the ASEAN leaders and Chinese Premier Zhu Rongji signed the “Framework Agreement on Comprehensive Economic Co-operation”²⁶ (ACFTA Framework

19. ASEAN’s difficulties in establishing an intra-ASEAN free trade area further discussed *infra* at Part V.

20. John Wong & Sarah Chen, *China-ASEAN Free Trade Agreement*, ASIAN SURV. 507, 508 (2003).

21. See Wang Jiang Yu, *The Legal and Policy Considerations of China-ASEAN FTA: The Impact on the Multilateral Trading System*, in CHINA AND SOUTHEAST ASIA: GLOBAL CHANGES AND REGIONAL CHALLENGES 42, 43 (Ho Khai Leong and Samuel C.Y. Ku eds., 2005).

22. Wang, *supra* note 3, at 34.

23. Wong & Chen, *supra* note 20, at 507.

24. ASEAN-CHINA EXPERT GROUP ON ECONOMIC COOPERATION, *supra* note 4, at 36.

25. Wang, *supra* note 21, at 45.

26. Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People’s Republic of China, PRC-ASEAN, Nov. 5, 2002, available at <http://www.aseansec.org/13196.htm> (last visited Sept. 30, 2005) [hereinafter *ACFTA Framework Agreement*].

Agreement). This agreement has served as a roadmap for the development of the free trade area. As laid out in the ACFTA Framework Agreement, a free trade area covering trade in goods between China and the original six ASEAN members is to be completed by 2010.²⁷ The remaining four ASEAN members are expected to fully join by 2015.²⁸ The ACFTA Framework Agreement is a groundbreaking document, for while individual ASEAN members had previously created free trade agreements, ASEAN as an organization had never before made such a pact with an outside nation.

Moreover, the ACFTA Framework Agreement was China's first free trade agreement with a foreign nation.²⁹ Since the ACFTA Framework Agreement, both China and ASEAN have entered into negotiations with other countries regarding free trade agreements.

C. ACFTA'S Current Status

In January 2004, ACFTA's "Early Harvest-Programme" (EHP) commenced. The purpose of the Early Harvest Programme is to facilitate the reduction of tariffs before ACFTA is fully implemented. One of the most interesting aspects of EHP is that it is almost entirely one-sided, with China making the immediate concessions. As EHP has been described, "it allows ASEAN products to be exported to China at a very concessionary rate so that ASEAN countries can actually get the benefits of a free trade agreement even before the agreement is realized."³⁰ In return for China's concessions to the ASEAN members under the EHP, China gets some tariff reductions for certain agricultural products.³¹

One of the most critical aspects of EHP is that it was negotiated on a bilateral basis between China and the individual ASEAN members.³² Since the ASEAN members were unable to reach consensus amongst themselves, China negotiated individually with each

27. *Id.* art. 8.

28. *Id.*

29. Wang Jiang Yu, *supra* note 21, at 45 (emphasizing that while China has had agreements with Hong Kong and the other semi-autonomous Chinese territories, never before had China signed an agreement with an entirely "foreign" nation).

30. *Id.* at 46 (quoting *Malaysia Early Harvest Clause a Way Out for RB*, MANILA TIMES, Apr. 7, 2003).

31. *See id.* (noting that these agricultural products include meat, fish, fruit, vegetables and milk).

32. *Id.* at 47.

ASEAN member.³³ The Philippines was the last country to enter the EHP, as recently as May 2005.

Another crucial aspect of EHP is that, by granting ASEAN members access to certain markets not currently open to WTO members, it gives the ASEAN members a “first mover” advantage over other WTO members.³⁴ In other words, because sectors of the Chinese economy remain closed to foreign companies, the ASEAN members will benefit as their companies will be the first to enter new Chinese markets.

II. THE SINO-ASEAN RELATIONSHIP IN HISTORICAL PERSPECTIVE

When ASEAN was founded in 1967, the news of its formation was not well received by China.³⁵ Although the Bangkok Declaration, ASEAN’s founding document, sets forth seven overarching aims that focus primarily on political and economic cooperation,³⁶ China originally viewed ASEAN as a military association with anti-Chinese aims.³⁷ China’s view of ASEAN as anti-Chinese was not entirely an overreaction. Indeed, while relations between China and most Southeast Asian nations had traditionally been benign, they rapidly declined throughout the 1960s.³⁸ By 1967, the Cold War and specific Chinese policies had created an aura of distrust between China and its southern neighbors.³⁹ In particular, Chinese support for communist groups within several Southeast Asian states reinforced Southeast Asian distrust and suspicion of the PRC.⁴⁰ Hence, when the Bangkok Declaration was signed, none of the original five ASEAN members

33. *Id.*

34. Maghaisvarei Sellakumaran, *WTO at the Crossroads and the Road Ahead for ASEAN*, in *ECONOMIC OUTLOOK 2004-2005* 52, 54 (Institute of Southeast Asian Studies, 2005).

35. KHAW GUAT HOON, *AN ANALYSIS OF CHINA’S ATTITUDES TOWARD ASEAN: 1967-1976* 5 (Institute of Southeast Asian Studies, 1977) (noting that ASEAN was referred to as a “counter-revolutionary alliance” and an “instrument of U.S. imperialism”).

36. ASEAN Declaration [Bangkok Declaration], Aug. 8, 1967, available at <http://www.aseansec.org/1212.htm> (last visited Aug. 1, 2005).

37. HOON, *supra* note 35, at 5-6. (“[T]his reactionary association formed in the name of economic co-operation is a military alliance directly specifically against China.”) (quoting 10 PEKING REVIEW, Aug. 18, 1967, at 40).

38. See Alice D. Ba, *China and ASEAN: Renavigating Relations for a 21st-Century Asia*, 43 *ASIAN SURV.* 622, 623 (2003).

39. *Id.*

40. See JÜRGEN HAACKE, *ASEAN’S DIPLOMATIC AND SECURITY CULTURE: ORIGINS, DEVELOPMENT, AND PROSPECTS* 113 (2003).

(Thailand, Singapore, Indonesia, Malaysia, and the Philippines) had normal relations with China.⁴¹

However, as the United States' relations with China began to improve, ASEAN members became more open to the idea of normalizing relations with China.⁴² Moreover, with the end of the Cultural Revolution, China became more interested in forming relationships with other "third world" countries.⁴³

Malaysia, Thailand, and the Philippines were the first ASEAN nations to resume diplomatic relations with China between 1974 and 1975.⁴⁴ Singapore developed a trade relationship although it did not officially normalize relations until 1990.⁴⁵ And although Indonesia also refused to normalize relations until 1990, it still accepted limited commercial interaction beginning in 1985 when it signed a Memorandum of Understanding (MOU) with China.⁴⁶ However, this document was intended to be "unofficial" and did not even contain the names of either country.⁴⁷ Nevertheless, despite its unofficial and legally-lacking nature, Indonesia's MOU with China led to the resumption of direct trade between the two countries.⁴⁸

Meanwhile, as the United States began to withdraw from the region, demonstrated particularly by its minimal response to Vietnam's invasion of Cambodia, many ASEAN members recognized the need to deepen relations with China.⁴⁹ However, the founding ASEAN members could not agree on how relations with China should develop.⁵⁰ As Alice Ba has described, the ASEAN states "differed, mostly, over whether China or Vietnam constituted the larger threat

41. Ba, *supra* note 38, at 624.

42. *See id.*

43. HOON, *supra* note 35, at 30.

44. Chia Siow-Yue, *China's Economic Relations with ASEAN Countries*, in *ASEAN AND CHINA: AN EVOLVING RELATIONSHIP* 189, 194-95 (Joyce K. Kallgren et. al. eds., 1988).

45. *Id.* at 195 (noting that, while Malaysia, the Philippines, and Thailand established diplomatic ties with China between 1974-1975, Singapore only had an exchange of commercial representatives); *see also* Ong Keng Yong, *Securing a Win-Win Partnership for ASEAN and China*, in *ASEAN-CHINA RELATIONS: REALITIES AND PROSPECTS* 19, 20 (Saw Swee-Hock et. al. eds., 2005) (noting that Indonesia, Singapore, and Brunei Darussalam all normalized relations with China in 1990).

46. Hadi Soesastro, *Indonesia-China Relations*, in *ASEAN AND CHINA: AN EVOLVING RELATIONSHIP* 217, 219-21 (Joyce K. Kallgren et. al. eds., 1988); *see also* Ong, *supra* note 44.

47. *Id.* at 220.

48. *Id.*

49. *See* Ba, *supra* note 38, at 625.

50. *Id.* at 625-26.

to ASEAN security.”⁵¹ Nevertheless, as ASEAN fumbled to find a solution to the Vietnam issue, China viewed closer relations with ASEAN as a useful step in its process of economic reform.⁵² Hence, in 1978, Deng Xiaoping took a tour of Southeast Asia to develop support for China’s economic reforms.⁵³ Furthermore, between 1970 and 1985, two-way trade between China and ASEAN member nations grew from \$0.2 billion to \$4.2 billion.⁵⁴

By 1991, all of the ASEAN members had normalized relations with China.⁵⁵ Meanwhile, relations between ASEAN and the United States were declining.⁵⁶ While the United States remained ASEAN’s main extra-regional ally, the ASEAN members began to realize they might need to find alternative political-security arrangements: “economic growth and growing trade tensions contributed to a greater willingness to explore alternative arrangements.”⁵⁷

From the Chinese viewpoint, normalizing relations and increasing cooperation with ASEAN was beneficial as the ASEAN members provided potential investors and political allies.⁵⁸ However, even as economic cooperation was increasing, China consistently rejected efforts at regional military cooperation. The main source of contention was China’s actions in the South China Sea with respect to the Spratly Islands.⁵⁹ This ongoing dispute focuses on a group of islands in the southern part of the South China Sea which are now claimed by six nations: China, Taiwan, Vietnam, Malaysia, Brunei, and the Philippines. In 1992, the ASEAN foreign ministers crafted a legal response to this dilemma by adopting the ASEAN Declaration on the South China Sea, which emphasized in the Preamble, “the necessity to resolve all sovereignty and jurisdictional issues pertaining to the South

51. *Id.* at 625.

52. See Chia Siow-Yue, *supra* note 44, at 195-96.

53. See Ba, *supra* note 38, at 626.

54. Chia Siow-Yue, *supra* note 44, at 207.

55. Ba, *supra* note 38, at 627.

56. *Id.* at 627.

57. *Id.*

58. *Id.* at 632 (noting that China began to view its relationship with the ASEAN members as so significant that it actually referred to the re-opening of diplomatic relations with Indonesia as “a breakthrough progress in China’s diplomatic field”).

59. AMITAV ACHARYA, CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER 133 (2001) (“The Spratlys dispute is widely viewed by ASEAN governments as the major ‘flashpoint of conflict’ in post-Cold War Southeast Asia.”).

China Sea by peaceful means, without resort to force.”⁶⁰ Finally, in 2002 after years of negotiation, China’s Vice Foreign Minister Wang Yi signed an agreement derived from the 1992 Declaration entitled “Declaration on the Conduct of Parties in the South China Sea.”⁶¹ Just as ACFTA is considered the economic pillar of Sino-ASEAN relations, this non-binding declaration is considered the security pillar of this relationship. The Declaration calls on all parties to resolve all territorial and jurisdictional disputes “by peaceful means.”⁶²

III. THE ROAD TO LEGALISM

A. An Introduction to the “ASEAN Way”

Decision making and lawmaking within ASEAN is conducted through what is known as the “ASEAN way.” The ASEAN way is ASEAN’s trademark: a phrase that is used to describe ASEAN’s unique consensus approach. The ASEAN way is steeped in the history and culture of the region. It is derived from the Malaysian concepts of “musjawarah” and “mufukat.”⁶³ “Musjawarah” refers to the process of decision-making through consultation and discussion, while “mufukat” refers to the unanimous decision that is achieved through musjawarah. As described by Paul Davidson, the ASEAN way:

[I]nvolves processes including intensive informal and discreet discussions behind the scenes to work out a general consensus which then acts as the starting point around which the unanimous decision is finally accepted in more formal meetings, rather than across-the-table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law.⁶⁴

Thus, the ASEAN way is fundamental in shaping every aspect of this regional organization. Not only are meetings conducted through the consensus approach, but the resulting regulations and agreements reflect this consensus style. Indeed, most ASEAN documents reflect this kind of “soft” law. Consequently, agreements generally do not contain many legally-binding provisions but rather consist of a set of very broad principles.

60. ASEAN Declaration on the South China Sea (July 22, 1992), available at <http://www.aseansec.org/1196.htm> (last visited Nov. 1, 2005).

61. *Declaration on the Conduct of the Parties in the South China Sea* (Nov. 4, 2002), PRC-ASEAN, available at <http://www.aseansec.org/13163.htm> (last visited Aug. 1, 2005).

62. *Id.* art. 4.

63. SHAUN NARINE, EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA 31 (2002).

64. Paul J. Davidson, *The ASEAN Way and Role of Law in ASEAN Economic Cooperation*, 8 S.Y.B.I.L. 165, 167 (2004).

The ASEAN way may indeed be reflective of an Asia-wide approach to law.⁶⁵ As Shin-yi Peng describes, “[a]mbiguity is almost an art form; it is viewed as a useful device in mitigating conflict and building common positions and confidence. . . . Asians tend to avoid legalism and emphasize group ‘harmony’ and consensus.”⁶⁶ Hence, when consensus cannot be reached on a particular issue, the flexible ASEAN way allows the member states to push aside the controversial issue so that they can discuss other matters.⁶⁷ It is likely because of this flexibility that the organization has been able to survive during very contentious times.

The ASEAN way can be viewed as a rejection of the formal legalism of international institutions.⁶⁸ Yet, even the current ASEAN Secretary-General has suggested that ASEAN needs to reform its legal structure—particularly its economic laws—to bring them more into line with international norms:

As ASEAN engages in more and more economic cooperation schemes, both among its own Member Countries and with partners outside of Southeast Asia, ASEAN has to become increasingly legalistic. Economic agreements have to be implemented with a high degree of certainty. When disputes arise, there must be some efficient process to settle them amicably and fairly.⁶⁹

Thus, while ASEAN has been able to survive without significant legal institutionalization, ASEAN must undergo legal reform for ACFTA to succeed. As economic analyst Rajenthiran Armugam stated when discussing the need for ASEAN to create economic laws more in touch with international norms, “[i]nvariably, failure to do so would result in erosion of economic comparative and competitive advantage—thus leading to heavy economic loss.”⁷⁰

Other scholars suggest that the ASEAN states may become more inclined to embrace legal institutionalization not only because it is

65. Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *ASIAN-PACIFIC L. & POL'Y J.* 13, 20 (2000).

66. *Id.* at 21.

67. NARINE, *supra* note 60, at 31:

Within ASEAN, conflicts are dealt with by postponing difficult issues, compartmentalizing an issue so that it does not interfere with other areas of cooperation, and quiet diplomacy. As a result, ASEAN is not capable of *resolving* many issues of contention between its members, but it can move those issues aside so that they do not prevent progress in other areas.

68. See Davidson, *supra* note 61, at 167.

69. H.E. Ong Keng Yong, *ASEAN and the 3 L's: Leaders, Laymen, and Lawyers*, <http://www.aseansec.org/17356.htm> (last visited Nov. 3, 2005).

70. Rajenthiran Armugam, *Revisiting the Law and Development Paradigm in ASEAN*, *ECONOMIC OUTLOOK 2004-2005* 59, 61 (Institute of Southeast Asian Studies, 2005).

necessary for the sustainability of free trade agreements, but also because the rejection of legalism is not as culturally-based as widely believed.⁷¹ As scholar Miles Kahler has argued, “those in ASEAN, reject legalization of regional institutions when it is to their disadvantage, not because of culturally distinct approaches to legalism.”⁷²

B. The Evolving ASEAN Legal Framework

Beginning with the Bangkok Declaration, ASEAN was predetermined to be non-legalistic. The Declaration itself was only a political statement that required no ratification.⁷³ As the current ASEAN Secretary-General has described: “[t]he intention was clear: the Founding Fathers wanted ASEAN to be just a loosely-organized political association with minimum institutionalization, and without legal personality or constitutional framework.”⁷⁴

ASEAN made its first overtures towards developing a more comprehensive legal framework in 1976, nine years after it was founded, when the ASEAN member states established the ASEAN Secretariat.⁷⁵ Prior to the ASEAN Secretariat, all coordination among ASEAN states had to occur through the secretariats based in each member country. In 1993, the ASEAN Secretariat was again restructured.⁷⁶ Although the ASEAN Secretariat still lacks any real decision-making authority, as described by Paul Davidson, “the evolution of the Secretariat indicates the maturation of ASEAN as an entity and may be considered as an initial step in formalizing the legal personality of ASEAN as a corporate entity governed by its own constitution and by-laws.”⁷⁷

One of the major limitations preventing ASEAN from using a legalistic approach for economic regulation, specifically free trade regulation, is ASEAN’s underdeveloped dispute settlement mechanism. ASEAN never even discussed the possibility of a regional dis-

71. NARINE, *supra* note 60, at 198.

72. *Id.*

73. See generally Bangkok Declaration, *supra* note 36.

74. Ong, *supra* note 66.

75. The ASEAN Secretariat was created by the Agreement on the Establishment of the ASEAN Secretariat (Feb. 24, 1976), ASEAN, <http://www.aseansec.org/1265.htm> (last visited Nov. 3, 2005).

76. See Joint Communique of the Twenty-Sixth Asean Ministerial Meeting (July 23-24, 1993), ASEAN, available at <http://www.aseansec.org/2009.htm> (last visited Nov. 3, 2005).

77. Davidson, *supra* note 61, at 169.

pute settlement mechanism until nearly ten years after the organization was founded.⁷⁸ However, in 1976, ASEAN developed such a mechanism for political disputes with the signing of the Declaration of ASEAN Concord and the Treaty of Amity and Cooperation (Treaty of Amity). Perhaps the most significant provision of the Treaty of Amity is Article 2(d), which requires the “[s]ettlement of differences or disputes by peaceful means.”⁷⁹ Other notable provisions are Articles 14-18, which create a High Council composed of representatives from the Southeast Asian member states who are responsible for resolving all covered disputes.⁸⁰

Furthermore, while the Treaty of Amity was originally conceived as a legally binding code of conduct for the Southeast Asian countries, in 1987, the Treaty of Amity was amended to allow non-ASEAN members to accede to the treaty.⁸¹ While New Guinea was the first country to ratify the Treaty of Amity, China was the first of ASEAN’s major allies to sign this Treaty.⁸² Currently, key non-ASEAN members of the Treaty of Amity are: China, India, Japan, Pakistan, the Russian Federation, the Republic of Korea, and New Zealand. Until July 2005, Australia declined the invitation to accede to the Treaty of Amity because of potential conflicts with an existing alliance with the United States.⁸³ However, Australia’s refusal to sign this non-aggression treaty had tangible consequences: until Australia indicated that it would sign the treaty, ASEAN was not going to allow it to participate in the first East Asian summit to take place in Kuala Lumpur in December 2005.⁸⁴ The Treaty of Amity is a noteworthy legal framework for its role in East Asian cooperation and as the first legally binding non-economic agreement among ASEAN members.⁸⁵

78. *Id.* at 172.

79. Treaty of Amity and Cooperation in Southeast Asia (Feb. 24, 1976), ASEAN, art. 2(d), available at <http://www.aseansec.org/1217.htm> (last visited Aug. 1, 2005).

80. *Id.* arts. 14-18.

81. Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia (Dec. 15, 1987), ASEAN, available at <http://www.aseansec.org/1218.htm> (last visited Nov. 3, 2005).

82. China signed the Treaty at the China-ASEAN Summit in October 2003.

83. Reuters, *Canberra to Sign Asia Peace Pact* (July 27, 2005), <http://www.cnn.com/2005/WORLD/asiapcf/07/27/australia.summit.reut/index.html>.

84. *Id.*

85. Ong, *supra* note 69.

Additionally, in 2001, ASEAN created rules of procedure for the High Council.⁸⁶ With the Rules of Procedure, the High Council is now intended to be a more formalized dispute resolution body that can hear political disputes as long as both parties consent.⁸⁷

Meanwhile, since 1995, ASEAN has been in the process of developing a dispute resolution mechanism to resolve economic disputes. At the 1995 Bangkok Summit, the ASEAN members agreed that they would adopt a General Dispute Settlement Mechanism ("DSM"). As the ASEAN members stressed, the DSM would have jurisdiction to hear "all disputes arising from ASEAN economic agreements."⁸⁸ A year later, the ASEAN members adopted The Protocol on Dispute Settlement Mechanism ("1996 Protocol").⁸⁹ The Preamble of the 1996 Protocol states that it was created in recognition of "the need to expand Article 9 of the [Framework] Agreement [on Enhancing ASEAN Economic Cooperation] to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic cooperation."⁹⁰ The 1996 Protocol was modeled on the WTO Dispute Settlement Understanding.⁹¹

The DSM created by the 1996 Protocol was a significant step for the evolution of ASEAN's legal framework. Under the 1996 Protocol, when an economic dispute arose, and bilateral negotiations and mediation attempts had failed, the dispute was to be referred to the Senior Economic Officials Meeting ("SEOM").⁹² The SEOM was then to convene a panel of experts to do the relevant fact-finding.⁹³ The SEOM's decision only required a simple majority and not unanimity.⁹⁴ As Davidson notes, the 1996 Protocol's DSM was quite significant as it was "the first formal use of non-consensual decision-making in ASEAN."⁹⁵

86. Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia (Jul. 23, 2001), ASEAN, available at <http://www.aseansec.org/3639.htm> (last visited Nov. 3, 2005).

87. See *id.*

88. PAUL J. DAVIDSON, ASEAN: THE EVOLVING LEGAL FRAMEWORK FOR ECONOMIC COOPERATION 147 (2002).

89. Protocol on Dispute Settlement Mechanism (Nov. 20, 1996), ASEAN, available at <http://www.aseansec.org/16654.htm> (last visited Aug. 1, 2005).

90. *Id.* at Preamble.

91. DAVIDSON, *supra* note 88, at 147.

92. See Protocol on Dispute Settlement Mechanism, *supra* note 89, art. 4.

93. *Id.* arts. 4-7.

94. *Id.* art. 7.

95. DAVIDSON, *supra* note 88, at 148.

The 1996 Protocol even allowed for appellate review of SEOM decisions by the ASEAN Economic Ministers.⁹⁶ However, the DSM created by the 1996 Protocol was never invoked. When explaining why this DSM was never used, ASEAN Secretary-General Ong Keng Yong has stated, “the 1996 Protocol was perceived to be ineffective because of its excessive bureaucratic nature, and thus it had never been invoked.”⁹⁷

Consequently, in 2004, ASEAN created a new Protocol: the ASEAN Protocol on Enhanced Dispute Settlement Mechanism⁹⁸ (“2004 Protocol”). One of the key differences between the two Protocols is that under the 2004 Protocol, both government and non-government officials are involved in resolving the dispute.⁹⁹

Moreover, rather than appellate review by the ASEAN Economic Ministers, under the 2004 Protocol, appellate review is conducted by experts that are not associated with any government.¹⁰⁰ The purpose of this change according to Secretary-General Ong is to settle “trade and economic disputes through objective assessment instead of bureaucratic negotiation.”¹⁰¹ However, the appellate body still lacked terms of reference to guide their decision-making.¹⁰² Nevertheless, the move of distancing dispute resolution from diplomacy is a significant step in the direction of legalism, and stands in direct contrast to the 1996 Protocol.

Another significant change introduced by the 2004 Protocol was the creation of the “Consultation to Solve Trade and Investment Issues.” The avowed purpose of this body is to “handle complaints of the private sector and operational problems encountered in the implementation of ASEAN economic agreements.”¹⁰³ As of March 2005, ASEAN was also trying to create an “ASEAN Compliance Body.”¹⁰⁴ The purpose of this body would be to “perform a quasi-

96. Protocol on Dispute Settlement Mechanism, *supra* note 86, art. 8.

97. Ong, *supra* note 69.

98. ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Nov. 29, 2004), ASEAN, available at <http://www.aseansec.org/16754.htm> (last visited Nov. 3, 2005).

99. *See id.* art. 12.

100. *Id.*

101. Ong, *supra* note 69.

102. This was the case in March 2005.

103. *Id.*

104. *Id.*

judicial function by issuing findings and opinions on non-compliance in respect of subject matter before it.”¹⁰⁵

In short, the implementation of DSM is critical to the development of an ASEAN legal framework. In particular, a strong dispute resolution mechanism is essential if ACFTA is to succeed. While the DSM created by the 2004 Protocol is a significant improvement over the 1996 version, the reader must not forget that ASEAN’s new DSM still lacks necessary implementing regulations, and most importantly, remains untested.

Aside from the still developing DSM, there other indicators that ASEAN has yet to fully embrace legalism. In particular, the pivotal security agreement—the Declaration on the Conduct of Parties in the South China Sea—remains a non-binding document. In a 2004 China-ASEAN academic forum, the Chinese participants suggested that they were willing to create a binding code of conduct.¹⁰⁶ Yet, it was the ASEAN members who resisted such legal development: “some ASEAN countries are not ready for such a Code of Conduct, fearing that it might be ‘too legalistic.’”¹⁰⁷ Consequently, as Ralf Emmers suggests, the current Declaration is essentially “an interim accord.”¹⁰⁸ The fear is that ASEAN and China may never be able to agree to a legally-binding code of conduct regarding the South China Sea.¹⁰⁹

Moreover, Deborah Haas has identified as an impediment to the development of an ASEAN legal regime the fact that the ASEAN states have varying domestic legal systems: some civil law, some common law, and some a hybrid of both legal traditions.¹¹⁰ A further hurdle to ASEAN’s legal reform is the reality that some ASEAN members—particularly Laos, Myanmar, and Cambodia—are still in the process of establishing a national legal system and finding a legal

105. *Id.*

106. DEVELOPING ASEAN-CHINA RELATIONS: REALITIES AND PROSPECTS—A BRIEF REPORT ON THE ASEAN CHINA FORUM 36 (Singapore: Institute of Southeast Asian Studies, 2004).

107. *Id.*

108. Ralf Emmers, *Keeping Waters Calm in South China Sea*, STRAITS TIMES, Nov. 21, 2002, at 23.

109. *Id.*

110. Deborah Haas, Note, *Out of Others’ Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 AM. U. J. INT’L L. POL’Y 809, 862 (1994).

identity.¹¹¹ Other impediments include “differences in colonial backgrounds, language, culture, religion, [and] political systems.”¹¹²

IV. THE INTRA-ASEAN FREE TRADE AREA (AFTA) AND THE RESULTING LEGAL DEVELOPMENT

In 1967, when ASEAN was created, trade among the member nations was minimal. The ASEAN founding fathers never spoke about regional “economic integration.”¹¹³ Thus, some of the earliest economic agreements were aimed at increasing intra-ASEAN trade.

In particular, in 1977, ASEAN attempted to develop an intra-ASEAN free trade area with the establishment of the ASEAN Preferential Trading Arrangements (“PTAs”).¹¹⁴ As Mohammad Ariff has described, the PTAs adopted a “cumbersome item-by-item approach” to reducing trade barriers.¹¹⁵ Consequently, the PTAs failed to create free trade amongst the Southeast Asian nations because the flexible provisions resulted in each country developing lengthy exclusion lists.¹¹⁶ Instead of free trade, the PTAs created “a rather comical free trade in snow plows and other Southeast Asian nonessentials.”¹¹⁷ Twenty years after the PTAs had been created only five percent of intra-ASEAN trade was subject to the reduced tariffs.¹¹⁸ In fact, a 1987 study of the PTAs revealed that intra-ASEAN trade actually dropped since the PTAs introduction.¹¹⁹

Meanwhile, during the 1980s and early 1990s, ASEAN shifted some of its attention away from creating its own free trade area to

111. George O. White, III, Note, *From Snowplows to Siopao—Trying to Compete in a Global Marketplace: The ASEAN Free Trade Area*, 8 TULSA J. COMP. & INT’L L. 177, 192 (2000).

112. Haas, *supra* note 106, at 862-63.

113. Mohamed Ariff, *Trade, Investment and Interdependence*, in REINVENTING ASEAN 45, 46 (Simon S.C. Tay, et al. eds., 2001).

114. The PTAs were created by the Agreement on ASEAN Preferential Trading Arrangements (Feb. 24, 1977), ASEAN, <http://www.aseansec.org/1376.htm> (last visited Nov. 3, 2005).

115. Ariff, *supra* note 113, at 47.

116. *Id.*

117. White, *supra* note 111, at 184.

118. Michael Haas, *ASEAN’s Pivotal Role in Asian-Pacific Regional Cooperation*, 3 GLOBAL GOVERNANCE 329, 331 (1997).

119. Juanjai Ajanant, *The ASEAN Free Trade Agreement*, in ASEAN FREE TRADE AGREEMENT: IMPLICATIONS & FUTURE DIRECTIONS 13, 15 (Kao Kim Hourn & Sarah Kanter eds., 1997).

participation in the GATT and Uruguay Round negotiations.¹²⁰ However, after the Uruguay Round, ASEAN began to tackle the issue of free trade once again. As Michael Haas suggests, the combined effect of Europe's Maastricht Treaty in 1991 and the 1992 North American Free Trade Agreement left ASEAN worrying about the access to Western markets.¹²¹ ASEAN began to feel that it would need to create a similar regime in order to compete in the global marketplace. In particular, ASEAN's leaders were concerned that: "they were being bypassed by their relaxed approach to regional cooperation."¹²²

In 1992, ASEAN adopted the Framework Agreement on Enhancing Economic Cooperation¹²³ ("AFTA Framework Agreement"). The AFTA Framework Agreement was adopted at the 1992 Singapore Summit after the completion of a study analyzing the potential for deeper economic cooperation among the ASEAN member states. As the full name of the AFTA Framework Agreement suggests, the document does not set out detailed implementing instructions but rather is a general framework listing plans for deepening economic cooperation among the ASEAN states. Article 2(A) is the most relevant provision of this Framework Agreement as it contains the plan to create an intra-ASEAN Free Trade Area ("AFTA").¹²⁴

While the Framework Agreement sets out the basic policies for further economic cooperation, the mechanism for actually achieving AFTA is the "Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area" ("CEPT Scheme"). When created, AFTA and the CEPT Scheme called for the reduction of tariff rates to between zero and five percent by 2008. The target date was later pushed up to 2003 and then again to 2002. According to ASEAN, as of 2004, the six original CEPT members had met this goal with respect to more than 99% of the products on the CEPT in-

120. H. S. Kartadjoemena, ASEAN and the International Trading System: Regional Trade Arrangement vs. the WTO, in ASEAN BEYOND THE REGIONAL CRISIS: CHALLENGES AND INITIATIVES 203, 218 (Mya Than ed., 2001).

121. Haas, *supra* note 118, at 331.

122. *Id.*

123. Framework Agreement on Enhancing ASEAN Economic Cooperation (Jan. 28, 1992), ASEAN, available at <http://www.aseansec.org/1165.htm> (last visited Nov. 3, 2005).

124. *Id.* art. 2(a)(1).

clusion list.¹²⁵ The newest members of ASEAN are still in process of implementing the CEPT scheme and have varying target dates.¹²⁶

Although ASEAN's official website promotes AFTA as a success,¹²⁷ other scholars have described ASEAN's progress towards AFTA as a "struggle."¹²⁸ As Peofilo C. Daquila notes, the Asian Financial Crisis in 1997 was particularly problematic for AFTA, as it distracted the ASEAN countries from implementing their AFTA obligations.¹²⁹ Hence, because Singapore became frustrated by the pace of AFTA, it began to seek out its FTAs with non-ASEAN countries.¹³⁰

One of the reasons that the realization of AFTA has been slow is that compliance with tariff reductions has consistently been achieved through bargaining processes and the ratification of new protocols. Thus, while the slow pace of AFTA has been frustrating to certain ASEAN member nations, the process suggests that ASEAN is indeed moving towards greater legal institutionalization. In particular, since 1995, AFTA-related protocols have become more legalistic, formal, and detailed.¹³¹

V. KEY GEOPOLITICAL HURDLES TO ACFTA'S SUCCESS

A. Lack of Cohesion in ASEAN

In the few years since the ACFTA plan was unveiled, the ASEAN states have indicated that they may not be ready for such a legal agreement because of their continued inability to function as a unit. At a 2004 China-ASEAN academic forum, some scholars noted that ASEAN needed to "better synchronize its moves towards [ACFTA] or CAFTA."¹³² Indeed, the inability of the ASEAN states

125. ASEAN, TRADE, available at <http://www.aseansec.org/12021.htm> (last visited Nov. 3, 2005).

126. *Id.* Because they joined ASEAN later, Vietnam, Laos, Myanmar, and Cambodia have later target dates. Vietnam's target date is 2006, Laos' and Myanmar's is 2008, while Cambodia has until 2010.

127. See generally Official Website of the Association of Southeast Asian Nations, AFTA, <http://www.aseansec.org/12025.htm> (last visited Aug. 1, 2005).

128. Peofilo C. Daquila & Le Huu Huy, *Singapore and ASEAN in the Global Economy: The Case of Free Trade Agreements*, ASIAN SURV. 908, 912 (2003).

129. *Id.*

130. *Id.*

131. HELEN E. S. NESADURAI, GLOBALISATION, DOMESTIC POLITICS AND REGIONALISM: THE ASEAN FREE TRADE AREA 163-64 (2003).

132. Kesavapany, *supra* note 12, at 26.

to negotiate the EHP tariff reductions multilaterally does not bode well for their future ability to function multilaterally.

Moreover, ASEAN's inability to negotiate as a single body with China on other matters may prove to be problematic for ACFTA. For example, as described earlier, with respect to the Spratly Islands dispute, one of the reasons China and ASEAN were not able to develop a legally-binding code of conduct but instead adopted a political declaration is because the ASEAN members could not work collectively.¹³³ Because the ASEAN members were not able to reach consensus with respect to the dispute, ASEAN as an organization was weakened in negotiations with China.¹³⁴

The Spratly Islands dispute certainly differs from ACFTA to the extent that not all ASEAN members have legal claims to the Spratly islands; hence since the ASEAN members' interests in the dispute vary significantly, China has been able to divide up the ASEAN members and negotiate bilaterally. However, the importance of ACFTA to each ASEAN member may differ significantly according to its state of development and export structure. Hence, for ACFTA to be most effective, and so that ASEAN has sufficient weight at the bargaining table, the ASEAN members must work collectively toward the goal of establishing ACFTA.

B. Competition between ASEAN and China

If from an economic viewpoint China and ASEAN are primarily competitors, ACFTA may prove unsuccessful. At a 2004 China-ASEAN academic forum, one Thai participant noted "[t]he economic initiatives of China cannot erase the fact that China and most of the ASEAN states are competitors in the export market."¹³⁵

Some scholars have suggested that the competitive nature of the ASEAN-Chinese relationship is demonstrated by the reality that China and ASEAN are not each other's major export markets.¹³⁶ As John Wong and Sarah Chan articulate, the export levels between China and ASEAN suggest that their trade structures are fundamentally competitive rather than complementary. Both sides are economically oriented toward the industrialized countries of the West

133. *Id.*

134. Emmers, *supra* note 108.

135. Kesavapany, *supra* note 12, at 30.

136. See, e.g., Wong & Chen, *supra* note 20, at 517.

and Japan.”¹³⁷ The United States remains ASEAN’s main trading partner. In 2001, while trade between ASEAN and China was \$55.4 billion, trade between ASEAN nations and the United States was \$120 billion.¹³⁸ Hence, as Vincent Wei-cheng Wang writes, “although increasing trade and investment ties have increased the economic interdependence between China and ASEAN, these relationships are still trailing the region’s economic relationships with the United States, although the gap is narrowing.”¹³⁹

Therefore, because the ASEAN and Chinese economies are not “complementary,” the ASEAN member states will compete with China for exports to developed countries. This competition may occur for both traditional and non-traditional manufactured goods.¹⁴⁰

Furthermore, tensions between ASEAN and China have increased due to the perception that China is diverting investment away from ASEAN. “Although the decline of ASEAN-bound FDI [Foreign Direct Investment] has been overstated, the perception in Southeast Asia is nevertheless that FDI is having a ‘hollow out effect’ and this perception has contributed to a growing sense of threat across much of the Southeast Asian region.”¹⁴¹ In 2002, China’s FDI inflows reached \$53 billion, while all of the ASEAN members combined received only \$14 billion.¹⁴²

VI. ACFTA, THE WTO, THE UNITED STATES, AND JAPAN

A. ACFTA and the WTO

In theory, ACFTA is intended to be WTO-consistent.¹⁴³ Within the ACFTA Framework Agreement, there are eight references to the

137. *Id.*

138. Wang, *supra* note 3, at 31.

139. *Id.*

140. Wong & Chen, *supra* note 20, at 519-21 (“In the area of traditional labor-extensive industries like textiles, clothing, and footwear, China’s gains have come at the expense of ASEAN.”). Authors also note that in the area of non-traditional and more capital intensive-manufactures such as manufacturers of computers, printers, disk drives etc., ASEAN has been negatively impacted by the growth of exports of these non-traditional goods from China to the world market. *See id.*

141. Kesavapany, *supra* note 12, at 30.

142. Denis Hew, Regional Economic Trends, in ECONOMIC OUTLOOK 2004-2005 46, 47 (Institute of Southeast Asian Studies, 2005).

143. Yu, *supra* note 21, at 54 (“In theory, any WTO member’s regulations and state activities relating to trade have to comply with WTO rules.”).

WTO.¹⁴⁴ However, ACFTA is also symbolic of a growing movement toward regionalism that is seemingly at odds with the WTO/GATT-led international trading system. As Wang Jiang Yu notes: “By definition, regionalism is at odd[s] with the MFN clause and the draftsmen of the GATT and WTO were aware of this; they created several exceptions for RTAs [regional trading agreements].”¹⁴⁵

Moreover, some scholars have suggested that ACFTA’s technical compliance with the WTO rules is not surprising since generally RTAs (regional trade arrangements) are WTO-consistent.¹⁴⁶ As at least one commentator has noted, RTAs are usually found to be consistent because “the requirements of Article XXIV and the Enabling Clause and GATS are very weak and have never been enforced.”¹⁴⁷

Indeed, the resurgence of regionalism itself may demonstrate the many weaknesses of the current WTO multilateral trading system. The failure of global trade talks in the past couple of years has arguably led to the recent proliferation of negotiations for bilateral and regional free trade agreements. Even the United States has sought out new FTAs.¹⁴⁸ However, merely because many powerful nations are negotiating FTAs does not mean that the WTO has become insignificant. Furthermore, because ACFTA’s success is far from guaranteed, and because the WTO still provides many benefits that ACFTA likely cannot provide, China and ASEAN must ensure that ACFTA is a “building block” and not a “stumbling block” with respect to the WTO.¹⁴⁹

Meanwhile, even if ACFTA and China’s newfound embracement of regionalism is not a direct threat to the WTO, ACFTA’s creation will likely significantly affect the world trading system. Even before the creation of ACFTA, scholars noted ASEAN’s potential to con-

144. See Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and People’s Republic of China, *supra* note 26, arts. 1-3, 7-9, 11-12, 14. Additionally, one of the paragraphs of the Preamble states, “REAFFIRMING the rights, obligations and undertakings of the respective parties under the World Trade Organisation (WTO), and other multilateral, regional and bilateral agreements and arrangements.”

145. Yu, *supra* note 21, at 55.

146. See *id.* for comments regarding regional trading agreements and their compliance with WTO rules.

147. *Id.*

148. Most notable is the July 2005 passage of the Central American Free Trade Agreement.

149. Sellakumaran, *supra* note 34, at 52-54; see also Yu, *supra* note 21, at 68 (noting that leading trade powers such as China have the responsibility to ensure that regionalism serves as “building blocks” for multilateral trade liberalization).

siderably influence WTO and GATT negotiations in future years.¹⁵⁰ Moreover, with China's rising economic status and recent entry to the WTO, WTO-watchers should anticipate seeing China significantly influence the making of WTO rules in years to come.¹⁵¹ Furthermore, keeping in mind China's interest in influencing the making of WTO rules, the desirability of ACFTA is more evident: "by embracing an FTA, China is anticipating that ASEAN in the ACFTA will lend support to China in rule-making. In other words, the ACFTA is expected to enhance China's balancing power in the making of rules in international fora."¹⁵²

B. ACFTA's impact on the United States and Japan

There is little doubt that the United States and other economic powers with significant influence in East Asia will be affected as China gains more influence over ASEAN through ACFTA: "[t]he pact between regional giant China and the [ten] nations aims to drop most tariffs over the next five years in a move some analysts have said is a sign Beijing may be moving to undercut America's vast influence over the region."¹⁵³

Japan, as another superpower with considerable influence in East Asia, has already taken concrete action in response to ACFTA. Even before ACFTA officially commenced in July 2005, the plan for ACFTA prompted Japan to seek a closer relationship with ASEAN.¹⁵⁴ As indicated in a recent Japanese editorial, Japan's response to ACFTA has been to act quickly out of fear of being edged out by China.¹⁵⁵ In a July 19, 2005 editorial in *The Daily Yoimuri*, a Tokyo-based newspaper, the commentator noted that Japan "should do all it can to make progress in FTA talks with ASEAN nations."¹⁵⁶

150. See, e.g., Thomas Fischer, *A Commentary on Regional Institutions in the Pacific Rim: Do APEC and ASEAN Still Matter?*, 13 DUKE J. COMP. & INT'L L. 337, 379 (2003).

151. Qingjiang Kong, *supra* note 5, at 845 ("In a nutshell, China has voiced the following approaches to WTO rules: honouring its own commitments, using WTO rules to its own advantage, and actively participating in the making of new rules.")

152. *Id.*

153. CNN, *New Zealand Looks at ASEAN Security Treaty*, Dec. 1, 2004, <http://www.cnn.com/2004/WORLD/asiapcf/12/01/laos.asean/index.html> (last visited Nov. 3, 2005).

154. Wang, *supra* note 3, at 35 (noting that the ACFTA is causing some concerns in Japan, which has led to a new emphasis on developing a closer relationship with ASEAN. As Wang states, "Interestingly, some analysts view Japan's new emphasis on fostering closer relations with ASEAN as being driven by one major consideration—not to be outdone by China.").

155. *Japan Needs Trade Pact with ASEAN*, DAILY YOMIURI, July 19, 2005, at 4.

156. *Id.*

CONCLUSION

As highlighted in Part IV, the long-term success of ACFTA will depend on ASEAN's ability to adopt more legalistic measures, particularly an enhanced dispute settlement mechanism. While the 2004 Protocol is a significant step in the development of an ASEAN DSM, it is too early to judge whether it will be sufficiently more successful than the ASEAN DSM created under the 1996 Protocol. As the reader will recall, the DSM was never utilized under the 1996 Protocol. Hence, ASEAN's significant inexperience with a DSM could prove to be problematic for the success of ACFTA, which will require a sufficiently institutionalized DSM. Moreover, not only has ASEAN's development of its own DSM been slow, but the ASEAN states who are members of the WTO have been relatively inactive in using the WTO dispute settlement system.¹⁵⁷ Whether or not this is the result of a persistent reluctance towards using legalistic approaches or is due to other unrelated factors, overall the ASEAN members are novices with respect to international economic dispute settlement systems.

In contrast, the development of an intra-ASEAN free trade area described in Part V bodes well for the future success of ACFTA. The progress already made with this intra-ASEAN free trade area demonstrates that six of the ASEAN states are capable of reducing tariffs in line with required targets. However, because the four newer ASEAN members were not required to fully implement the intra-ASEAN free trade area in the same timeframe as the elder members, it is too early to judge whether these less-developed nations will be able to maintain their commitment to free trade.

Regardless of whether ACFTA succeeds in the long-term, ASEAN's and China's commitment to this endeavour is significant. In particular, if there is one lesson to be derived from the ACFTA experience it is how China's economic rise has the potential to profoundly affect other nations' legal development. Whether or not ACFTA is, as some have suggested, the only method for dealing with China's ascendancy, it is clear that ASEAN has recognized the pressing nature of the "China question" and is responding to it through economic, geopolitical, and, most importantly, related legal reform. Indeed, ACFTA can also be seen as China's legal response to its

157. See Nohyoung Park, Overview of the State of WTO Dispute Settlement Involving the ASEAN+3, *in* WTO AND EAST ASIA: NEW PERSPECTIVES 241, 244 (Mitsuo Matsushita & Dukgeun Ahn eds., 2004).

growing economic prowess both as a method of engaging its neighbours in a “win-win situation” and as a means to influence the formation of international economic rules. What remains to be seen, however, is how other nations such as the United States will respond to China as it continues to grow as an economic superpower.