

Taiwan and the WTO

Steve Charnovitz*

The World Trade Organization (WTO) is the only major international organization that permits Taiwan to become a member.¹ Taiwan was granted accession to the WTO in November 2001 with an effective date of 1 January 2002. (China became a member of the WTO 22 days earlier.) Before Taiwan became a WTO member, it had been a WTO observer for 10 years.² The reason why the WTO was able to admit Taiwan, in spite of its contested international status, is that membership in the WTO is not contingent upon statehood. Taiwan is apparently the only “territory” ever admitted to the multilateral trading system without direct sponsorship by a state exercising diplomatic relations for it.

Almost all WTO member countries are “states,” but WTO membership is available not only to states, but also to any “separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this [WTO] Agreement”³ The WTO is not necessarily bound by United Nations (U.N.) practice in determining what entities

*The views expressed are those of the author only. This is a draft for a presentation delivered to the International Conference on the United Nations and Taiwan, New Century Institute, New York, September 5, 2003.

¹The Asian Development Bank is another. Recently Taiwan was treated as implementing the Kimberley Process Certification Scheme.

²Taiwan has not been given many opportunities to be an observer in multilateral organizations. For example, the United Nations has given observer status to the Sovereign Military Hospitalier Order of Malta, but not to Taiwan.

³Marrekesh Agreement Establishing the WTO, art. XII:1. This provision is based on Article XXXIII of the General Agreement on Tariffs and Trade (GATT). The Charter of the International Trade Organization (art. 86.3) provided for membership in the ITO by a Separate Customs Territory, but only if proposed by the competent Member having responsibility for the formal conduct of its diplomatic relations. Compare GATT art. XXVI:5(c) which was used for newly independent states. By contrast, no Separate Customs Territory entered the GATT under Article XXXIII.

qualify as “states.”⁴ The WTO appears to be the sole judge of whether an entity qualifies as a “separate customs territory possessing full autonomy in the conduct of its external commercial relations.”

At the time of accession, the WTO called Taiwan the “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”. It is now listed in the WTO website as “Chinese Taipei”, under the T’s.⁵ In this paper, it will be called “Taiwan.”

The purpose of this paper is to provide an overview of the key developments surrounding Taiwan’s membership in the WTO. Part I will note the highlights of Taiwan’s accession negotiations. Part II will report on Taiwan’s contributions to WTO policymaking. Part III will look at some recent developments. Part IV will reflect on the implications of the WTO experience for the overall topic of Taiwan’s role in world public order.

I. Taiwan’s Accession

The long saga of Taiwan’s participation in the world trade system began in the late 1940s. The Nationalist government of China was one of the original signatories of the General Agreement on Tariffs and Trade (GATT), but the Nationalist government withdrew in 1950. In 1965, Taiwan applied for and received GATT observer status. But in 1971, the GATT took away Taiwan’s observer status. The GATT/WTO has not done that on any other occasion.

Taiwan renewed its odyssey to join the GATT in 1990, and a working party on Chinese Taipei was set up in 1992.⁶ At that time, the Chairman of the GATT Council stated that all parties had

⁴The GATT tended to follow U.N. decisions on certain political matters. WTO, *Guide to GATT Law and Practice*, 1995, at 877. This may be part of the “GATT *acquis*” which is presumptively followed in the WTO.

⁵See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. By contrast, Taiwan (or Chinese Taipei) is listed on the website of the Organization for Economic Co-operation and Development (OECD) in the Non-Member Countries/Territories, under the Cs.

⁶Lei Wang, *Separate Customs Territory in GATT and Taiwan’s Request for GATT Membership*, *Journal of World Trade*, Vol. 25, October 1991, at 5.

agreed that there was only one China, and thus the Chairman proposed that Taiwan's entry should not be finalized until after China's entry.⁷ Because of that initial decision, Taiwan's accession was delayed for years until China's accession could be negotiated. The details of China's accession were very difficult to work out because, in a sharp break from precedent, China was subjected to extraordinary requirements in negotiating its accession far in excess of any changes required by WTO rules.⁸ By contrast, not as many "WTO Plus" concessions were demanded of Taiwan.⁹

In its accession negotiations, Taiwan made a number of concessions in 26 bilateral agreements and in its negotiations with the WTO. For goods, Taiwan agreed to reduce its average tariffs from 6.0 percent to 4.15 percent for industrial goods and from 20.0 percent to 12.9 percent for agricultural goods. For services, Taiwan agreed to permit expanded foreign investment in telecom, and to permit foreign insurance companies to sell more types of insurance. Taiwan also agreed to become a member of the optional WTO Agreement on Trade in Civil Aircraft and to seek accession to the optional Agreement of Government Procurement. These are just highlights; Taiwan's Protocol of Accession contains 63 specific commitments. Its entire membership documentation with the WTO is about 1200 pages.

One interesting feature of Taiwan's Accession is that the WTO approved a Special Exchange Agreement with Taiwan on monetary issues. Such action is provided for in Article XV:6 of the General Agreement on Tariffs and Trade (GATT) which provides that any WTO Member that is not a member of the International Monetary Fund (IMF) shall become a member of the Fund or enter into a "Special Exchange Agreement" with the WTO. Because the IMF has not permitted Taiwan to

⁷WTO, Guide to GATT Law and Practice, 1995, at 1018. See also "Timeline of Taiwan's WTO Membership," available at www.trade.gov.tw/english/page31-1.htm.

⁸Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System. An Appraisal of the China Accession Protocol, *Journal of World Trade*, Vol. 37, 2003, at 483.

⁹See WTO, Report of the Working Party, WT/ACC/TPKM/18 (5 October 2001); Robin J. Winkler, Taiwan WTO Survey, *China Law & Practice*, Vol. 15, 1 December 2001, at 47.

become a member, Taiwan negotiated a Special Exchange Agreement with the WTO as part of Accession. This Agreement is enforceable under WTO dispute settlement.

The Agreement is interesting because it imposes a series of disciplines on Taiwan regarding: economic and exchange policies, the avoidance of restrictions on payments to current account, controls on capital transfers, and restrictions on payments.¹⁰ These disciplines go well beyond WTO rules and seemingly well beyond the general rules of the IMF. One wonders how this Special Exchange Agreement can be reconciled with the requirement in GATT Article XV:7(b) that “The terms of any such [Special Exchange] agreement shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed by the Articles of Agreement on the International Monetary Fund on members of the Fund.”

Having signed the Agreement as one price of accession, Taiwan cannot now challenge it as a contract under duress. That’s because the WTO dispute system does not provide a right of action against the WTO itself. As far as I can tell, Taiwan is the only new WTO Member that has been asked to sign such an Exchange Agreement.

Because Taiwan is not a member of the IMF, the Agreement provides that whenever the WTO consults with the IMF on issues particularly affecting Taiwan, the WTO shall take measures to “ensure effective presentation” of Taiwan’s case to the Fund, including, without limitation, the transmission to the Fund of any views communicated by Taiwan to the WTO.¹¹ This may give Taiwan, in a small way, indirect access to the IMF in matters involving IMF-related WTO issues.

When Taiwan’s accession to the WTO was approved by the WTO Ministerial Council in November 2001, the WTO Director-General of that time, Mike Moore, declared that “With Chinese

¹⁰WTO, Special Exchange Agreement, Annex II, in Accession Decision, WT/L/433, (23 November 2001).

¹¹Id. art. VI:3.

Taipei's membership, the WTO is taking another step towards achieving universal membership."¹² Moore seemed to be saying that the WTO would increase its universality by having Taiwan as a member, a sentiment that does not seem to be shared in other international organizations.

II. Taiwan's Contributions to WTO Policymaking

The Government of Taiwan has been a constructive participant in the ongoing WTO multilateral trade negotiations. Taiwan's Mission to the WTO has delivered several papers on key topics in the negotiations, some of which are discussed below.

On non-agricultural market access, Taiwan has taken the lead in suggesting that newly-acceded member governments be treated differently in negotiations.¹³ Taiwan's concern is that acceding countries have recently made the greatest effort they could on trade liberalization. Asking them to immediately liberalize again in the Doha Round is inappropriate, according to Taiwan, because private enterprises in the acceding country have a reasonable expectation of some continuity of trade policy for their business decisions. Taiwan is not arguing that liberalization is bad for the country as a whole; rather, the argument is that having liberalized as part of its WTO entry, a new Member government should not have to swallow a second dose and thereby hurt its domestic industries. Taiwan is also making a fairness argument: namely, that most WTO Members have just come off a six-year "resting period" from new liberalization, and therefore are in a different situation than new Members. The solution Taiwan is proposing is that newly-acceding Members get a "reasonable grace period" of time before having to implement a new round of market access concessions.

¹²WTO Press 253 (11 November 2001).

¹³TN/MA/W/19/Add.1 (16 May 2003) and TN/MA/W19/Add.3 (8 July 2003).

On dispute settlement transparency, Taiwan has adopted the line of other Asian countries to oppose the U.S. and European initiatives for improving transparency in WTO dispute settlement.¹⁴ The arguments Taiwan is making for exclusion of nongovernmental views are similar to arguments made by other governments. Yet the fact that Taiwan is making them is noteworthy and surely sends a signal. As a new Member, Taiwan has no need to defend the constitutional provisions in the WTO that inhibit transparency because Taiwan did not participate in writing those rules. Nevertheless, Taiwan argues against the U.S. proposal for releasing to the public governmental submissions to panels. According to Taiwan, “taking the dispute process into the public domain could lead to complications that get in the way of an efficient settlement.” In addition, Taiwan argues that the WTO dispute mechanism was “never conceived as a public process.” In its submissions, Taiwan has also opposed the European Community’s proposal to permit unsolicited amicus curiae briefs. The reason offered by Taiwan is that only some WTO member countries have well developed social resources such as think tanks. Thus, according to Taiwan, opening the WTO’s doors to more information “would create a situation where those Members with the least social resources could be put at a disadvantage.”

If any WTO Member should realize the dangers of rigid categories and closed processes against competing views, it is Taiwan. The fact that Taiwan is willing to argue against fostering communication between the public and the WTO shows the rapid inculcation of the WTO “club” mentality. Typically, governments argue against briefs by nongovernmental organizations (NGOs) on the grounds that such views should be communicated upward through one’s own state. For obvious reasons, perhaps, Taiwan does not parrot that state-centric line. Instead, Taiwan premises its support for exclusion on the assumption that some WTO Members have more “social resources” than others. Obviously, this is true, but it is surprising that Taiwan leaps to the conclusion that think tanks

¹⁴TN/DS/W/25 (27 November 2002).

in Country A are going to support Country A in a dispute. If this conclusion is wrong, then it is possible that allowing nongovernmental voices to be heard may somewhat alleviate the current distortions of debate at the WTO in which the richer countries have greater diplomatic resources.

On trade and the environment, Taiwan has sided with those governments advocating a broad interpretation of the negotiating mandate regarding the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements. In particular, Taiwan states that specific trade obligations should include not only the obligations in a treaty but also certain decisions made by the Conference of the Parties to an agreement.¹⁵ The more inclusive view is appropriate, according to Taiwan, because the mandate should cover “regimes with institutional function, which engage in law-making process and create mandatory regulations among their contracting parties.” Taiwan’s position is being welcomed by the environmental community.

A related question that has come up in the course of negotiations is that if the WTO is to provide some deference to environmental treaties, a method is needed for determining which treaties qualify. A number of conditions have been proposed over the years including that a qualifying environmental treaty would need to be open to all WTO member governments. In its submission to the WTO, Taiwan makes the cogent observation that if there is a WTO Member not able to participate in environmental treaties, then this condition could end up excluding all those treaties from the intended WTO deference.¹⁶

Taiwan has also taken a strong position regarding tariff elimination on fishery products.¹⁷ Taiwan notes that the economic value of liberalizing international trade in fish might be dwarfed by the environmental disadvantages from further depletion of fisheries stimulated by trade. Taiwan does

¹⁵TN/TE/W/36 (3 July 2003).

¹⁶TN/TE/W/11 (3 October 2002).

¹⁷TN/MA/W19/Add. 2 (7 July 2003).

not argue that more trade will have that effect. Instead, Taiwan offers a more nuanced point that there is a need to take into consideration the full extent of environmental impact from higher levels of trade. Taiwan points to a recent study by WWF which indicates that wild fish are the main ingredient in fish feed used in aquaculture. Taiwan's interest in WTO environmental issues may stem from its forward-looking environmental policies.

III. Recent Developments in the Politics of Taiwan's Membership

When Taiwan's accession to the WTO was approved, Taiwan's President Chen Shui-bian said, with regard to Taiwan and China, that "The WTO offers a forum for both sides to interact in a multilateral context and try to learn to live with each other under one roof, as competitors, business rivals, or even partners."¹⁸ So far, little of that harmony has occurred.

The WTO is the only multilateral organization that enjoys both China and Taiwan as members. This equal status for Taiwan is a sensitive issue for the Government of China. According to a press account, the Chinese Mission to the WTO sends a note to any government whose delegate uses the name "Taiwan" in WTO proceedings.¹⁹ In that regard, one might recall the current practice in the International Labour Organization (ILO) which is that *if*, in exceptional cases, there is a need to mention Taiwan in an ILO document, then the reference should be to "Taiwan, China."²⁰ It is interesting to note that the ILO website lists 348 geographical entities of interest to the ILO, but does not include Taiwan.²¹ Nevertheless, data on Taiwan is included in some ILO publications.

¹⁸Chris Rugaber, WTO Membership Could Improve Cross-Strait Ties, Taiwan Official Says, BNA International Trade Reporter, 20 December 2001, at 2038.

¹⁹Daniel Pruzin, WTO Chief Supachai Urges Members to Resolve Dispute Over Taiwan Titles, BNA Daily Report for Executives, 27 June 2003, at A-33.

²⁰See <http://www.ilo.org/public/english/standards/relm/ctry-ndx.htm>.

²¹See <http://www.ilo.org/public/english/standards/relm/ctry-ndx.htm#Index%20of%20countries,%20territories%20and%20areas>.

Recently, China has suggested that Taiwan should change the name of its Mission to the WTO to match those of WTO Members Hong Kong, China and Macao, China. Hong Kong's Mission calls itself the Hong Kong Economic and Trade Office, and Macao has a similar designation.²² The WTO Director-General reportedly asked Taiwan to follow China's request.²³ Taiwan has refused.

Now that Taiwan is a member of the WTO, its status there seems secure. The WTO Agreement does not contain any provision for expelling or disqualifying member governments. Nevertheless, the trading system has shown a continuing ability to improvise; so anything is possible. Should Taiwan ever come under the political control of China, the question of multiple votes might be raised.²⁴ Already, Macao, China and Hong Kong, China get their own votes in the WTO.

Taiwan has already begun to participate in WTO dispute settlement. It has been a third party in some cases (e.g., the Japan *Apples* case), and has lodged one complaint against the United States on steel, but not yet sought a panel. Looking ahead, it would certainly be possible to find Taiwan and China on opposite sides of a dispute, or even for Taiwan to bring a case against China, or vice versa.

The forthcoming WTO Cancun Ministerial in September will be the first attended by Taiwan as a member. Unfortunately, no NGOs, or other social resources, from Taiwan signed up to attend as observers. This was a missed opportunity for civil society in Taiwan to step up its engagement with the WTO. Three NGOs from Hong Kong, China will be attending, but none from mainland China.

IV. Implications of Taiwan's Experience

²²Taiwan Defiant on Resisting Chinese Pressure for WTO Name Change, BBC Monitoring, May 27, 2003.

²³Daniel Pruzin, WTO Chief Supachai Urges Members to Resolve Dispute Over Taiwan Titles, BNA Daily Report for Executives, 27 June 2003, at A-33.

²⁴Similar concerns dictated the drafting of Footnote 2 of the Marrakesh Agreement Establishing the WTO which explains that the European Communities does not get an extra vote because it is a WTO Member. The number of votes it gets is equal to the number of Member States of the European Communities.

Taiwan's membership in the WTO does not provide much in the way of lessons for contemporary international law. Taiwan was able to join the WTO because membership is not restricted to states, but being a member does not carry with it any implications about a government's status in the international community. After all, Southern Rhodesia was a member of GATT for 32 years without anyone drawing an inference of statehood.

Nevertheless, given the high profile of the WTO, and the fact that it is the only multilateral organization where both China and Taiwan are members, the WTO experience will invariably be pointed to in a positive way by advocates of providing some official status for Taiwan in other functional international organizations. Observers will suggest that the WTO experience shows the practicality of having both Taiwan and China as members enjoying equal rights and obligations. When Taiwan joined the WTO, there was a news story stating that based on the "WTO formula," Taiwan would seek to join other international organizations in the future, such as the World Intellectual Property Rights Organization, the World Customs Organization, the International Organization for Standardization, and the Organization for Economic Co-operation and Development.²⁵ One problem with this strategy is that in those international organizations, there is apparently no status for Observers. Although the Observer status is not part of the WTO constitution, it has been a long tradition of the trading system. That status made it easier for Taiwan to join the WTO.

One challenge on the horizon regarding Taiwan's WTO membership involves the provisions of the WTO agreements relating to recognition, or perhaps acknowledgement, of international standard-setting organizations. These provisions are:

--The Agreement on Technical Barriers to Trade (TBT) calls for Members to play a full part in the preparation of international standards by appropriate international standardizing bodies, and

²⁵Central News Agency, Premier Explains Composition of WTO Team, January 3, 2002.

then defines international bodies to be bodies “whose membership is open to the relevant bodies of at least all [WTO] Members.”²⁶

--The Agreement on Preshipment Inspection mandates the use of international standards in some instances, and defines those standards as those adopted by a governmental or nongovernmental body “whose membership is open to all Members”²⁷

--The General Agreement on Trade in Services (GATS) imposes a discipline on the use of licensing and qualification requirements that impair commitments, but provides for a defense when a Member applies international standards of relevant international organizations, and then defines “relevant international organizations” to be bodies “whose membership is open to the relevant bodies of at least all Members of the WTO.”²⁸

It would appear that the drafters of these provisions never contemplated the possibility that there would be a WTO Member who is systematically excluded from most international bodies.

Eventually, the WTO will probably have to confront the implications of Taiwan’s anomalous status for the implementation of these provisions.

²⁶Agreement on Technical Barriers to Trade (TBT), art. 2.6, Annex 1, para. 4.

²⁷Agreement on Preshipment Inspection, art. 2.4 & n.2.

²⁸General Agreement on Trade in Services, art. VI & n. 3.