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Steve Charnovitz

*George Washington University Law School, [scharnovitz@law.gwu.edu](mailto:scharnovitz@law.gwu.edu)*

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# TAIWAN'S WTO MEMBERSHIP AND ITS INTERNATIONAL IMPLICATIONS

*Steve Charnovitz\**

## ABSTRACT

*In contrast to other international organizations, the World Trade Organization does not require its members to be states. This constitutional feature has allowed Taiwan to join the WTO alongside China. As a result, the WTO is now the only major international organization in which Taiwan can participate as a full member.*

*This article explores some implications of this unique situation for Taiwan, for the WTO, and for international law. The article contends that Taiwan's membership in the WTO is not itself a bilateral treaty with China and does not itself change the legal relationship between Taiwan and China. What Taiwan's membership does do, however, is to establish some rule of law between Taiwan and China and to give Taiwan standing in an international tribunal should it wish to assert that China has violated WTO rules. The parallel memberships of Taiwan and China also provide a neutral international forum for those two governments to meet and negotiate if needed. The article also points out some dangers to the WTO that stem from Taiwan's exclusion from international standard-setting organizations. The article recommends that the WTO do more to assist Taiwan in carrying out its WTO obligations that involve the international community.*

*In joining the WTO, Taiwan has enhanced its sovereignty in the*

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\* George Washington University Law School, Washington, D.C. A preliminary version of this study was delivered at the "International Conference on the United Nations and Taiwan," sponsored by the New Century Institute in September 2003. This article is current as of July 31, 2006.

*modern sense of being able to participate in world governance. So far, Taiwan's membership in the WTO has not facilitated its quest for a capacity to participate in the World Health Organization.*

**KEYWORDS:** *accession; China; dispute settlement; Doha round; environment; GATT; health; IMF; international agreement; international law; international organization; international relations; sovereignty; Taipei; Taiwan; world trade; WTO*

## I. INTRODUCTION

The fifth year of Taiwan's membership in the World Trade Organization (WTO) is an appropriate time to consider the implications of this special status for the WTO, for Taiwan's relationship with the People's Republic of China ("China"), and for international law. International trade has been occurring regularly since antiquity and was one of the earliest areas for economic regulation by governments. The building of the world trading system culminating in the establishment of the WTO in 1995 is an important achievement in international cooperation to supervise governmental trade policies and other policies that affect trade. Because the scope of WTO law is so broad within a globalizing world economy, the ability of a government to join and participate in WTO decisionmaking is now more vital than ever.

The purpose of this article is to explore the implications of Taiwan's membership in the WTO. The WTO is now the only major international organization (IO) that permits Taiwan to become a Member. Because most commentators consider Taiwan to be a part of unitary China, Taiwan cannot be and is not considered a "state," and thus is not eligible for membership in the United Nations (U.N.) or most other international organizations. Besides the WTO, Taiwan is a Member of the Asian Development Bank, the Asia-Pacific Economic Cooperation (APEC) Forum, the Pacific Economic Cooperation Council, and some other organizations noted below.

Nevertheless, WTO membership is Taiwan's most important achievement in revitalizing its status on the international plane. Being a WTO Member will give Taiwan the same opportunities that other WTO Members have. Yet Taiwan's WTO membership also carries with it some distinctive features that stem from Taiwan's lack of international personality.

The purpose of this article is to analyze these features, which heretofore have been given little attention by commentators. Hundreds of articles have been written about China and the WTO, but few about Taiwan and the WTO.

Taiwan's WTO membership also has implications beyond the WTO. If Taiwan can join the WTO, why not other international organizations that purport to be world organizations, such as the World Health Organization (WHO)? The answer is that Taiwan is not recognized as a state and this lack of status is apparently more important than Taiwan's interest in public health and the world community's interest in Taiwan's activities regarding public health. Yet the world community's disassociational tendencies toward Taiwan are in tension with Taiwan's good standing in the WTO. This anomalous situation is discussed further in this article.

The article proceeds in five parts: Following this brief Introduction, Part II provides background information on Taiwan's quest for WTO membership. Part III describes the main developments regarding Taiwan's role in the WTO, and then analyzes some implications of Taiwan's membership for the WTO and for Taiwan's bilateral relationship with China. Part IV considers the implications of Taiwan's WTO membership for Taiwan's status in international law and international organizations, particularly the WHO. Part V concludes.

Because the nomenclature of "Taiwan" is politically controversial, Taiwan goes by different names as a Member of various intergovernmental organizations. In the WTO, Taiwan is called the "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)". (Yet in the short-name listings on the WTO website, Taiwan is called "Chinese Taipei," and is listed alphabetically as the first "T.") In the Asian Development Bank, Taiwan is called "Taipei China." In APEC, Taiwan is called "Chinese Taipei." In the Asian Productivity Organization, Taiwan is called the "Republic of China." That is also the name for Taiwan in the Afro-Asian Rural Development Organization and the Central American Bank for Economic Integration. In the International Cotton Advisory Committee, Taiwan is termed "China (Taiwan)." In the International Labour Organization (ILO), the current practice 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."<sup>1</sup> In the OECD's High-Level Group of Trade and Industry Officials, Taiwan is referred to as "Chinese Taipei." In this article, Taiwan will be called "Taiwan."

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<sup>1</sup> See <http://www.ilo.org/public/english/standards/reIm/ctry-ndx.htm>.

## II. BACKGROUND ON TAIWAN IN THE WORLD TRADING SYSTEM

The saga of Taiwan's participation in the world trade system began in the late 1940s. The Republic of China was one of the original signatories of the General Agreement on Tariffs and Trade (GATT), but the Nationalist government withdrew in March 1950 in part because it could no longer fulfill trade commitments of Mainland China. In 1965, Taiwan applied for and received GATT observer status.<sup>2</sup> Then in 1971, the GATT took away Taiwan's observer status after the People's Republic of China was given China's seat in the United Nations, and Taiwan's representatives were expelled.<sup>3</sup> This was one instance of the practice of the GATT to follow U.N. decisions on high political matters.<sup>4</sup>

Taiwan began its odyssey to join the GATT in 1990.<sup>5</sup> A working party on Chinese Taipei was set up in 1992 and Taiwan became an observer.<sup>6</sup> At that time, the Chairman of the GATT Council stated that all parties had agreed that there was only one China, and the Chairman then proposed that Taiwan's entry should not be finalized until after China's entry.<sup>7</sup> That sequencing was agreed to.

Because of that initial decision, Taiwan's accession was delayed for 11 years until China's accession could be negotiated.<sup>8</sup> The details of China's accession proved very difficult to work out because China was asked to accept special rules in its accession different from what was required by normal WTO rules.<sup>9</sup> Taiwan was granted accession to the WTO on 11

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<sup>2</sup> James V. Feinerman, *Taiwan and the GATT*, 1992 COLUM. BUS. L. REV. 39, 41 (1992).

<sup>3</sup> Susanna Chan, *Taiwan's Application to the GATT: A New Urgency with the Conclusion of the Uruguay Round*, 2 IND. J. GLOBAL LEGAL STUD. 275, 278-79 (1994).

<sup>4</sup> See WTO, GUIDE TO GATT LAW AND PRACTICE 877 (1995).

<sup>5</sup> Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19, 24 (1992); Sheryl WuDunn, *Taiwan's Chances Rising for World Trade Status*, N.Y. TIMES, Sept. 29, 1991, § 1, at 21.

<sup>6</sup> Lei Wang, *Separate Customs Territory in GATT and Taiwan's Request for GATT Membership*, 25(5) J. WORLD TRADE, 5 (1991).

<sup>7</sup> WTO, *supra* note 4, at 1017-18.

<sup>8</sup> It is interesting to recall Lori Damrosch's observation in 1992 that it would be irrational and legally unwarranted to put Taiwan's application to the GATT on hold if either economic or political reasons might delay consideration of China's entry for a prolonged period. See Damrosch, *supra* note 5, at 34, 37.

<sup>9</sup> See Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System. An Appraisal of the China Accession Protocol, 37(3) J. WORLD TRADE 483 (2003). See also Yang Guohua & Cheng Jin, *The Process of China's Accession to the WTO*, 4 J. INT'L ECON. L. 297 (2001). Even during the GATT era, there were some GATT-plus and GATT-minus accession protocol provisions. For example, in 1967, Poland agreed to increase its imports annually by seven percent (GATT-plus). See JOHN H. JACKSON, THE WORLD TRADING SYSTEM 287 (1st ed. 1992); Donald C. Clarke, *GATT Membership for China?*, 17 U. PUGET SOUND L. REV. 517, 520 (1994). Poland (in 1967), Romania (1971), and Hungary (1973) agreed to accept discriminatory safeguards against it (GATT-minus). See Robert E. Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 LAW & POL'Y INT'L BUS. 371, 397 (1986).

November 2001, a day after similar action occurred with respect to China. The effective date of Taiwan's entry into the WTO was 1 January 2002, which was 21 days after China's entry.

The reason why the WTO was able to admit Taiwan, in spite of its contested international legal status, is that membership in the WTO is not contingent upon statehood. Almost all WTO Member countries are "states," yet 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 . . ."<sup>10</sup> Taiwan entered into the WTO through accession as a customs territory. Taiwan is apparently the only "customs territory" ever admitted to the multilateral trading system (that is, from 1947 forward) without direct sponsorship by a state exercising diplomatic relations for it.<sup>11</sup> No judicial review in the WTO is available as to the determination of whether an entity qualifies as a "separate customs territory possessing full autonomy in the conduct of its external commercial relations."<sup>12</sup>

### *Taiwan's Accession Agreement*

The most useful prism for examining an accession agreement identifies "WTO-plus" and "WTO-minus" provisions.<sup>13</sup> WTO-plus provisions are additional obligations applying to the acceded Member that do not apply to incumbent WTO Members. For example, a requirement to implement a provision of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS") immediately rather than on the timetable that would apply to incumbent WTO Members constitutes a WTO-plus provision. WTO-minus provisions are reduced obligations on incumbent WTO Members with regard to the treatment they must apply to the acceded Member. For example, a discriminatory safeguard against a new entrant is a WTO-minus provision. Some analysts would characterize a WTO-minus provision as a reduction in the "rights" of the joining Member,

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<sup>10</sup> Marrakesh Agreement Establishing the World Trade Organization, Art. XII:1, Apr. 15, 1994, in WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 7 (1999) [hereinafter WTO Agreement].

<sup>11</sup> In other words, the other customs territories that became GATT parties through accession did so pursuant to GATT 1994 Art. XXVI:5(c) rather than the provision that Taiwan based its original application on which was GATT 1994 Art. XXXIII. See Pasha L. Hsieh, *Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization*, 39(6) J. WORLD TRADE 1195, 1200 (2005). No separate customs territories entered the GATT 1994 under Article XXXIII.

<sup>12</sup> The term "customs territory" is defined in GATT 1994 Art. XXIV:2. Part III of this paper takes note of some incapacities by Taiwan that raise a question as to its eligibility to have been made a WTO Member.

<sup>13</sup> See Qin, *supra* note 9, for an articulation of the WTO-plus concept, but not the WTO-minus concept.

in contrast to a WTO-plus provision which is an increase in international obligations. In this article, I do not use such “rights talk.”

WTO-plus and WTO-minus provisions are the product of a negotiation ending in mutual agreement. The applicant consents to WTO-plus and WTO-minus provisions as part of the price for joining the WTO. The applicant remains free not to join the WTO, and so one might say that nothing at all is imposed.

Such a view is unrealistic, however, and misses the “new sovereignty” in international law.<sup>14</sup> In the traditional view, sovereignty is autonomy, and so a decision by a government to WTO-minus and WTO-plus provisions is an exercise of its sovereign choice.<sup>15</sup> In the *modern* view, sovereignty is the legal capacity to belong to the international community and to participate in IOs. From that perspective, when a government wants to join the WTO but cannot, that government’s sovereignty is diminished. In order to gain that sovereignty, a government may be willing to accept the imposition of unequal and unfair membership conditions. But even though they are accepted, such conditions are still being imposed.

Accession negotiations occur formally between the WTO and the applicant government.<sup>16</sup> The WTO Agreement states that accession occurs on terms “to be agreed between it [the applicant] and the WTO.” Thus, an accession negotiation results in a quasi-contractual agreement between the WTO itself and the acceded Member. That agreement is a “Protocol” to the WTO treaty and notionally is enforceable under WTO dispute settlement. So far, no cases have occurred over the enforcement of Accession Protocol provisions, but consultations are now ongoing against China regarding accession commitments on auto parts.

Who is responsible for writing the provisions contained in an accession agreement? Two views are possible.

One view emphasizes that although the WTO Agreement states that decisions on accession are made by the Ministerial Conference through a two-thirds vote,<sup>17</sup> the actual practice is that the terms of an accession are negotiated in a working party that uses consensus decision-making. Thus, a government applying to the WTO cannot join until it gains the consent of all WTO Members. (China was not yet a Member when the WTO approved Taiwan’s accession.) As a result, accession agreements are an amalgam of

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<sup>14</sup> See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 27 (1995) (introducing these concepts); see also Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 286 (2004) (discussing the work of CHAYES & CHAYES). For a discussion of sovereignty-enhancing theory, see Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L ECON. L. 841 (2003).

<sup>15</sup> Another perspective is that a country can lose sovereignty when it is on the weak end of a power-based negotiation.

<sup>16</sup> See WTO Agreement, Art. XII:1.

<sup>17</sup> *Id.* Art. XII:2.

the results of the individual negotiations between interested WTO Members and the applicant country.<sup>18</sup> So from that perspective, one could say that the terms of accession are the responsibility of the individual incumbent Members.

The other view is that the WTO itself is the responsible entity for the provisions in accession agreements. Thus, the WTO qua organization should get the credit or blame for the WTO-plus and WTO-minus provisions in an accession agreement.

Accession agreements are almost by definition unequal treaties. The acceding country makes all (or nearly all) the commitments. The incumbent WTO Members do not undertake new obligations (or only rarely do so).<sup>19</sup> A country joining the WTO cannot seek a WTO panel to challenge the fairness of the accession agreement because WTO dispute settlement lacks any judicial review of WTO Ministerial Conference decisions.

In addition to rule-based commitments, an accession agreement also includes specific commitments on market access for goods and services. Such commitments are neither WTO-plus nor WTO-minus because the WTO does not require any particular level of market access. A government seeking to join the WTO might be asked to provide more market access than some incumbent WTO Members apply, but such "entry-fees" are a traditional part of the trading system, and distinguishable from the new WTO-plus and WTO-minus rule-based provisions.

A commitment to follow WTO rules is also not WTO-plus or WTO-minus. Such a commitment is plain WTO. Although it would seem redundant for an applying country to commit to follow WTO rules that it would be obligated to follow anyway, such provisions are common in accession negotiations, perhaps because they provide comfort to current WTO governments. A commitment to enact a law (or regulation) required by WTO rules or to repeal a law (or regulation) disallowed by WTO rules is also not a WTO-plus provision, but rather an action taken to conform to WTO rules.<sup>20</sup>

In contrast to the WTO Protocol with China, the Protocol with Taiwan has far fewer WTO-plus or WTO-minus provisions.<sup>21</sup> Taiwan's market accession commitments were substantial, however, and were developed through 26 bilateral negotiations. For goods, Taiwan agreed to reduce its

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<sup>18</sup> See RAJ BHALA, *MODERN GATT LAW* 1117 (2005).

<sup>19</sup> During the GATT era, there were a few accession protocols where incumbent contracting parties made commitments to the new GATT entrant. See Gardner Patterson, *The GATT: Categories, Problems and Procedures of Membership*, 1992 COLUM. BUS. L. REV. 7, 14 (1992) (giving the examples of Poland, Hungary and Romania vis-à-vis countries in the European Communities).

<sup>20</sup> See the Conformity Clause in the WTO Agreement, Art. XVI:4.

<sup>21</sup> See Working Party, *Report of the Working Party on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, ¶ 21, WT/ACC/TPKM/18 (Oct. 5, 2001). See also Robin J. Winkler, *Taiwan WTO Survey*, 15 CHINA L. & PRACTICE 47 (2001).



average tariffs from 6.0% to 4.15% for industrial goods and from 20.0% to 12.9% for agricultural goods. For services, for example, Taiwan agreed to permit expanded foreign investment in telecom, and to permit foreign insurance companies to sell more types of insurance.

Taiwan's Protocol has some important applicant WTO-plus provisions. In particular, Taiwan agreed to permit advertising for alcoholic beverages in all media (subject to regulation on content and timing), to ensure transparency in privatization, to apply TRIPS without recourse to the normal transitional period, and to notify any new measures related to TRIPS to the WTO at least 60 days *before* they are implemented.<sup>22</sup> In addition, Taiwan agreed to become a Member of the optional WTO Agreement on Trade in Civil Aircraft and to seek accession to the optional Agreement on Government Procurement.

Another specialized feature of Taiwan's Accession is that the WTO negotiated a Special Exchange Agreement with Taiwan on monetary issues. Such action is provided for in the GATT article on Exchange Agreements 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.<sup>23</sup> Because the IMF has not permitted Taiwan to become a Member, Taiwan negotiated a Special Exchange Agreement with the WTO as part of Accession.<sup>24</sup> By its terms, this Exchange Agreement is enforceable through WTO dispute settlement.<sup>25</sup>

The Exchange Agreement is WTO-plus 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. These disciplines go well beyond WTO rules and seemingly well beyond the general rules of the IMF. If so, 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

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<sup>22</sup> *Id.* ¶ 219. No such requirement is contained in Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 63.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, in WORLD TRADE ORGANIZATION, THE LEGAL TEXT: THE RESULT OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 348 (1999) [hereinafter TRIPS].

<sup>23</sup> GATT 1947 Art. XV:6. The GATT 1994 headnote ¶ 2(b) explains that the references to CONTRACTING PARTIES are replaced by WTO.

<sup>24</sup> WTO Doc., *Special Exchange Agreement between the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the World Trade Organization*, Annex II, in Accession Decision, WT/L/433 (Nov. 23, 2001).

<sup>25</sup> *Id.* Art. VI:4.

on Members of the Fund.” 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.<sup>26</sup> This may give Taiwan, in a small way, an indirect channel into the IMF, and in that sense, the provision enhances Taiwan’s sovereignty.

Finally, it is interesting to note that as with all WTO accession protocols, Taiwan’s Protocol was to be registered in accordance with the provisions of Article 102 of the U.N. Charter. That Article requires “Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.” Of course, neither the WTO nor Taiwan is a Member of the United Nations.

### **III. THE INFLUENCE OF TAIWAN’S MEMBERSHIP ON THE WTO AND WORLD TRADE**

This part addresses several interrelated topics: first, Taiwan’s intellectual contribution to the Doha trade round; second, other important contributions by Taiwan to ongoing WTO work; third, the special problems in the world trade regime arising from Taiwan’s anomalous status; and fourth, the implications of Taiwan’s WTO membership for Taiwan’s bilateral relationship with China.

#### ***A. Taiwan and the Doha Round***

The Government of Taiwan has been a constructive participant in the ongoing WTO multilateral trade negotiations. Taiwan has issued several proposals 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-acceding Member governments be treated differently in negotiations.<sup>27</sup> 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 a country as a

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<sup>26</sup> *Id.* Art. VI:3.

<sup>27</sup> See WTO Doc., TN/MA/W/19/Add.1 (May 16, 2003); see also WTO Doc., TN/MA/W19/Add.3 (July 8, 2003).

whole; rather, the argument is that having extensively 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. In services, Taiwan has proposed a negotiating initiative on computer and related services and noted that it could contribute to addressing the digital divide among countries.<sup>28</sup> On regional trade agreements, Taiwan has offered a far-reaching proposal to create a new discipline requiring that regional agreements on goods and/or services contain an accession clause that would allow non-parties to join the agreement under reasonable conditions.<sup>29</sup> Such a clause could reduce the discrimination inherent in a regional or bilateral agreement and move countries in the direction of open regionalism. On countervailing duties, Taiwan has proposed new rules regarding facts available, sunset, sampling, and new shipper reviews.<sup>30</sup> On antidumping, Taiwan has proposed new rules de minimis margins, affiliated parties, and the definition of a domestic industry.<sup>31</sup>

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.<sup>32</sup> 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 argued against the U.S. proposal that calls for making public a government's submissions to a WTO panel. 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 has argued 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." Taiwan, of course, does not lack trade-related social resources. At present, Taiwan has at least two think tanks focusing on the WTO: the WTO

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<sup>28</sup> See WTO Doc., TN/S/W/10 (Jan. 8, 2003).

<sup>29</sup> See WTO Doc., TN/RL/W/182 (June 9, 2005).

<sup>30</sup> See WTO Doc., TN/RL/GEN/96 (Jan. 19, 2006).

<sup>31</sup> See WTO Docs., TN/RL/GEN/62 (Sept. 16, 2005), TN/RL/GEN/68 (Oct. 13, 2005), TN/RL/GEN/82 (Nov. 17, 2005).

<sup>32</sup> See Dispute Settlement Body Special Session, *Contribution by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Doha Mandated Review of the Dispute Settlement Understanding (DSU)*, TN/DS/W/25 (Nov. 27, 2002).

Research Center at the National Taiwan University College of Law and the Chung Hua Institution for Economic Research.

If any WTO Member should see the fallacy of rigid categories and closed processes, surely Taiwan should. The fact that Taiwan is willing to argue against fostering communication between the public and the WTO shows its 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, 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 in Country A are going to support Country A in a dispute. If this conclusion is wrong, then it would be possible that allowing international nongovernmental social resources to be heard may somewhat alleviate the current distortions of debate at the WTO in which the richer countries have greater diplomatic resources.

On other dispute settlement matters, Taiwan has proposed several thoughtful amendments to Dispute Settlement Understanding.<sup>33</sup> For example, Taiwan proposed that third parties have greater access to submissions of the parties to panels and the Appellate Body and that third parties receive the panel report at the interim review stage. So on this issue, Taiwan does see the benefit of transparency. Another Taiwanese transparency proposal is to facilitate third party intervention of dispute proceedings.

On trade and the environment, Taiwan has sided with those governments advocating a broad interpretation of the negotiating mandate regarding the relationship between 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.<sup>34</sup> This 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 nongovernmental environmental community because Taiwan apparently recognizes the more dynamic character of environmental governance as compared to trade governance.

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. Several conditions have

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<sup>33</sup> See WTO Doc., TN/DS/W/36 (Jan. 22, 2003).

<sup>34</sup> See WTO Doc., TN/TE/W/36 (July 3, 2003).

been proposed over the years including that a qualifying environmental treaty would need to be open to all WTO Member governments.<sup>35</sup> In its submission to the WTO, Taiwan makes the cogent observation that a WTO Member unable to participate in environmental treaties, then this condition could end up excluding all those treaties from the intended WTO deference.<sup>36</sup> That is because Taiwan generally is not allowed to be a party to or to participate in environmental treaties.

Taiwan has taken a constructive position regarding tariff elimination on fishery products.<sup>37</sup> 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 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.<sup>38</sup> 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 relatively forward-looking environmental policies.<sup>39</sup>

Note that all of Taiwan's proposals discussed above are proposals that Taiwan has made on its own. Taiwan has also joined other WTO Members, such as Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, the European Communities, Guatemala, Honduras, Hong Kong China, Israel, Japan, Korea, Liechtenstein, Mongolia, Namibia, New Zealand, Norway, Peru, the Philippines, Singapore, Switzerland, Thailand, Turkey, and the United States in making joint negotiating proposals. Taken as a whole, Taiwan has participated as fully as any other country in ongoing WTO negotiations and has networked well.<sup>40</sup>

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<sup>35</sup> See generally Duncan Brack, *Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System*, in *TRADE, ENVIRONMENT, AND THE MILLENNIUM* 321 (Gary P. Sampson & W. Bradnee Chambers eds., 2d ed. 2002).

<sup>36</sup> See WTO Doc., TN/TE/W/11 (Oct. 3, 2002).

<sup>37</sup> See WTO Doc., TN/MA/W19/Add. 2 (July 7, 2003).

<sup>38</sup> For background on the issue itself in an Asian context, see René Vossenaar & Veena Jha, *Competitiveness: An Asian Perspective*, in *ASIAN DRAGONS AND GREEN TRADE* 49 (Simon S.C. Tay & Daniel C. Esty eds., 1996).

<sup>39</sup> In 2006, Taiwan ranked 24 out of 133 countries in the annual Environmental Performance Index. (Lower is better in this study.) Taiwan ranked just below Germany and Spain and just above Slovakia, Chile, the Netherlands, and the United States. The full study is available at [http://beta.sedac.ciesin.columbia.edu/es/epi/downloads/2006EPI\\_Brochure.pdf](http://beta.sedac.ciesin.columbia.edu/es/epi/downloads/2006EPI_Brochure.pdf).

<sup>40</sup> For example, Taiwan is a Member of the informal WTO negotiating groups "Friends of Sectoral Approaches," Friends of Antidumping, and the G-10 group of food importing Members.

### ***B. Other Contributions by Taiwan to the WTO***

Outside of formal Doha Round negotiations, Taiwan has been active on several fronts in WTO governance. Taiwan proposed some improvements in the fairness of WTO Accession processes with regard to government procurement.<sup>41</sup> Its specific reform initiative states that Members of the Agreement on Government Procurement shall not request WTO applicant countries to make offers that exceed those of most of the existing parties to the Agreement. Taiwan's proposal also provides a time limit for parties to respond to the offer of the applicant country. In the WTO negotiations on trade in generic drugs, Taiwan agreed to join leading industrial countries in opting out of using the system as an importer.<sup>42</sup> In addition, Taiwan has contributed over \$730,000 to the Doha Development Agenda Global Trust Fund.

In June 2006, Taiwan received its first Trade Policy Review at the WTO. During the discussion WTO Members expressed concern that inbound cross-strait trade was prohibited on some 2,000 tariff lines, and that little inbound cross-strait investment had been allowed.<sup>43</sup> At the end of the discussion, the chairperson said that "Chinese Taipei provides an excellent model as a newly-acceded WTO Member."<sup>44</sup> At one point in the discussion, China's representative asked the representative from El Salvador to respect WTO regulations after El Salvador referred to Taiwan as the "Republic of China."<sup>45</sup>

During its WTO Membership, Taiwan has been a steady participant in WTO dispute settlement. Taiwan has been a third party in 15 cases in which panel reports have been issued, four of them without China. 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.<sup>46</sup> In 2004, Taiwan joined the Advisory Center on WTO Law, which will enhance Taiwan's access to trade dispute settlement expertise.

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<sup>41</sup> See WTO Doc., GPA/W/224 (Nov. 20, 2002).

<sup>42</sup> See *The General Council Chairperson's Statement*, WTO News, Aug. 30, 2003, [http://www.wto.org/english/news\\_e/news03\\_e/trips\\_stat\\_28aug03\\_e.htm](http://www.wto.org/english/news_e/news03_e/trips_stat_28aug03_e.htm).

<sup>43</sup> Concluding Remarks by the Chairperson, Trade Policy Review, Chinese Taipei (June 20 & 22, 2006), ¶ 5, available at [http://www.wto.org/english/tratop\\_e/tp\\_r\\_e/tp266\\_crc\\_e.htm](http://www.wto.org/english/tratop_e/tp_r_e/tp266_crc_e.htm).

<sup>44</sup> *Id.* ¶ 10.

<sup>45</sup> This is based on a press report. *Taiwan Trade Policy Review at WTO Draws to "Perfect End"*, BBC MONITORING, June 22, 2006. The minutes of the Trade Policy review remain a restricted WTO document.

<sup>46</sup> See Qingjiang Kong, *Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes between China and Taiwan?*, 5 J. INT'L ECON. L. 747 (2002).

### *C. Looming Challenges for the WTO Relating to Taiwan's Status*

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

1. The Agreement on Technical Barriers to Trade (TBT) calls for Members to use international standards as a basis for a government's technical regulations except when such international standards would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, and then defines international bodies to be bodies "whose membership is open to the relevant bodies of at least all [WTO] Members."<sup>47</sup>

2. 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."<sup>48</sup>

3. The General Agreement on Trade in Services (GATS) imposes a discipline on the use of licensing and qualification requirements that impair specific commitments, but lists as an adjudicative factor, the international standards of relevant international organizations applied by that Member, 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."<sup>49</sup>

4. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) lists three IOs that promulgate international standards under the Agreement, and then notes that for matters not covered by those organizations, international standards could include standards promulgated

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<sup>47</sup> See Agreement on Technical Barriers to Trade, Arts. 2.4, 2.6 & Annex 1, ¶ 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in WORLD TRADE ORGANIZATION, THE LEGAL TEXT: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 122,123,138 (1999) [hereinafter TBT Agreement].

<sup>48</sup> See Agreement on Preshipment Inspection, art. 2.4 & n.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in WORLD TRADE ORGANIZATION, THE LEGAL TEXT: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 202 (1999).

<sup>49</sup> General Agreement on Trade in Services, art. VI:5 & n.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, in WORLD TRADE ORGANIZATION, THE LEGAL TEXT: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 292 (1999) [hereinafter GATS].

by other relevant international organizations “open for Membership to all Members,” as identified by the SPS Committee.<sup>50</sup>

All of these provisions are problematic for Taiwan and the WTO because none of these organizations – named specifically or generally referred to – is “open” to Taiwan. It would appear that the drafters of these WTO provisions never contemplated the possibility that there would be a WTO Member who is systematically excluded from most international bodies. Even today, there is little recognition of the problem among WTO Members. For example, at the WTO Trade Policy Review of Taiwan in June 2006, WTO Members called for further harmonization of Taiwan’s technical standards and SPS arrangements with international ones.<sup>51</sup>

Eventually, the WTO will have to confront the implications of Taiwan’s isolated legal status for the implementation of these four provisions. Taiwan would appear to have leverage to keep international organizations from being recognized under WTO provisions. One might call this the Taiwan Exclusion Disqualification. For example, the Codex Alimentarius Commission and the International Organization for Standardization (ISO) could be denied recognition under the TBT Agreement. Such an action would weaken these standard-setting mechanisms, and would also hurt the WTO.

Under WTO rules, Taiwan has some important obligations with respect to standard-setting IOs:

1. The SPS Agreement directs Members to take part in the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention and to promote WTO-prescribed goals within those organizations.<sup>52</sup>

2. The TBT Agreement directs Members to play a full part in the preparation by appropriate international standardizing bodies of standards for products for which either they have adopted, or expect to adopt, technical regulations.<sup>53</sup>

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<sup>50</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Annex A, ¶ 3(d), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in WORLD TRADE ORGANIZATION, THE LEGAL TEXT: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 68 (1999) [hereinafter SPS Agreement]. The three listed organizations are the Codex Alimentarius Commission, the International Office of Epizootics (now World Organisation for Animal Health), and the International Plant Protection Convention. At this time, Taiwan is not allowed to join these three organizations which have been inscribed into the SPS Agreement despite their discrimination against Taiwan. Note that Taiwan is obligated to follow standards set by these organizations even though Taiwan can have no role in drafting the standards.

<sup>51</sup> Concluding Remarks by the Chairperson, *supra* note 43, ¶ 6.

<sup>52</sup> SPS Agreement Art. 3.4. Recently, WTO Director-General Pascal Lamy stated that “WTO Members have no choice but to be directly connected by the work of Codex!” Pascal Lamy, The WTO in the Archipelago of Global Governance, Mar. 14, 2006, available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl20\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl20_e.htm).

<sup>53</sup> TBT Agreement, Art. 2.6.



3. The GATS directs Members to “work in cooperation with relevant intergovernmental and non-governmental organizations toward the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.”<sup>54</sup> In addition, the GATS Annex on Telecommunications directs Members to promote international standards on inter-operability through the International Telecommunications Union and the International Organization for Standardization.<sup>55</sup>

Currently, Taiwan would appear to be in default of all of these provisions because it is not being allowed to participate in the international organizations, bodies, and treaties named or referred to above. Thus, Taiwan is vulnerable to dispute settlement claims being brought against it – even by China, which is the country most insistent that Taiwan not be allowed to join such international organizations.

In my view, the WTO should help Taiwan participate in these organizations as required by WTO rules. In admitting Taiwan to be a Member, the WTO understood Taiwan to be a customs territory that had “full autonomy in the conduct of its external commercial relations *and of the other matters provided for in this Agreement*.”<sup>56</sup> Yet Taiwan’s *de facto* autonomy is less than full if the organizations that Taiwan is directed to participate in by the WTO do not, in fact, allow Taiwan to do so.

Another challenge to Taiwan is that it has not been able to take part in interparliamentary activities regarding the WTO. As many commentators have pointed out, elected parliaments can make a valuable contribution to the trading system.<sup>57</sup> The most recent interparliamentary conference was held in parallel to the Hong Kong Ministerial Conference in December 2005. At that conference, eight parliamentary delegates from China attended, but none came from Taiwan.<sup>58</sup> Legislators from Taiwan did not boycott the meeting. Rather, they could not attend because they were not invited. Under the rules of the Conference, eligible parliamentary participants have to come from: (1) parliaments of sovereign States that are Members of the WTO, (2) parliaments from non-WTO Member countries that are Members of the Inter-Parliamentary Union (IPU), or from (3) listed parliamentary assemblies, such as the European Parliament.<sup>59</sup>

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<sup>54</sup> GATS, Art. VII:5.

<sup>55</sup> See GATS Annex on Telecommunications, ¶ 7(a).

<sup>56</sup> WTO Agreement, Art. XII:1 (emphasis added).

<sup>57</sup> See, e.g., Meinhard Hilf, *How Can Parliamentary Participation in WTO Rule-Making and Democratic Control Be Made More Effective? The European Context*, in REFORMING THE WORLD TRADING SYSTEM. LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 413 (Ernst-Ulrich Petersmann ed., 2005).

<sup>58</sup> See List of Participants, [http://www.ipu.org/splz-e/hk05/final\\_list.pdf](http://www.ipu.org/splz-e/hk05/final_list.pdf).

<sup>59</sup> Parliamentary Conference on the WTO, Rules of Procedure, Art. 2.1, available at <http://www.ipu.org/splz-e/trade04/rules.pdf>.

In my view, these rules for participation are objectionable because they lead to overrepresentation of some countries. For example, an individual living in France had *four* representatives at the Hong Kong Conference – from the Parliament of France, the European Parliament, the Parliamentary Assembly of the Council of Europe, and the *Assemblée parlementaire de la Francophonie* – while an individual living in Taiwan had *zero* representatives. To my knowledge, none of the organizers of the Parliamentary Conference have offered any justification for such discrimination.

#### ***D. Taiwan's WTO Membership and the Bilateral China-Taiwan Relationship***

Taiwan's membership in the WTO has led to mild tension with China in Geneva. According to a press account, the Chinese Mission to the WTO sends a complaining note to any government that calls Taiwan "Taiwan" in WTO proceedings.<sup>60</sup> A few years ago, China 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.<sup>61</sup> Then WTO Director-General Supachai Panitchpakdi reportedly asked Taiwan to adhere to China's request.<sup>62</sup> Taiwan refused such a name change.

In July 2005, China finally accepted the name that Taiwan had given its Mission to the WTO which is the "Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu."<sup>63</sup> But China continues to protest the use of diplomatic titles for most of the staff at Taiwan's Permanent Mission. Surprisingly, the WTO Secretariat has sided with China and in 2005 removed those titles from the internal WTO Members Directory. Taiwan has protested this discriminatory action by the WTO Secretariat, but to no avail.<sup>64</sup> Note that the WTO Agreement does not provide any judicial review of administrative actions taken by the WTO Secretariat.

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<sup>60</sup> Daniel Pruzin, *WTO Chief Supachai Urges Members to Resolve Dispute Over Taiwan Titles*, Daily Rep. for Executives (BNA), at A33 (June 27, 2003).

<sup>61</sup> *Taiwan Defiant on Resisting Chinese Pressure for WTO Name Change*, BBC MONITORING, May 27, 2003.

<sup>62</sup> Pruzin, *supra* note 60.

<sup>63</sup> C.H. Lu & P.C. Tang, *China Finally Accepts Taiwan's Designation Name to WTO*, CENTRAL NEWS AGENCY TAIWAN, July 22, 2005, <http://times.hinet.net/news/20050722/English/5577281.htm>.

<sup>64</sup> Sofia Wu, *Taiwan Protests WTO Member Directory Changes*, CENTRAL NEWS AGENCY TAIWAN, Mar. 4, 2006.

Although Taiwan agreed in its accession negotiations to seek membership in the WTO Agreement on Government Procurement, that negotiation has stalled over opposition from China. China is concerned that accession could give the implication that Taiwan's government is not part of China. This implication could arise from the listing of the specific governmental entities that will abide by the Agreement. Ironically, China itself is not a party to the Agreement, but apparently can still influence who may join.<sup>65</sup>

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.<sup>66</sup> Should Taiwan ever come under the political control of China, the question of multiple votes might be raised. At this time, Macao China and Hong Kong China get their own separate votes in the WTO.

Although some commentators have suggested that Taiwan and China's membership in the WTO puts them on the same par as each other, that does not necessarily have implications for Taiwan and China's bilateral relationship.<sup>67</sup> After all, Hong Kong China and Macao China are also Members of the WTO, and no one assumes that this status will change their legal relationships with China. But given the history of animosity between Taiwan and China, the fact that the two countries are now Members of the world trade club could influence their mutual paths of legal socialization.

Some analysts have suggested that because the Agreement Establishing the WTO is a multilateral treaty that it is conceptually decomposable into a combination of all possible bilateral treaties among Members. With 149 WTO Members, that would be 11,026 bilaterals. In my view, this is a misleading way to look at the WTO. The fact that China and Taiwan are both Members of the WTO does not mean that they have a bilateral trade agreement. Rather, they have both done the same thing; each has joined the WTO.

Of course, in joining the WTO, both Taiwan and China chose not to invoke Non-Application under Article XIII of the WTO Agreement. The absence of Non-Application might be construed as "application," but

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<sup>65</sup> Daniel Pruzin, *WTO Members Reach Agreement to Facilitate Taiwan Joining Government Procurement Pact*, Daily Rep. for Executives (BNA), at A4 (June 5, 2006).

<sup>66</sup> For example, consider the example of Yugoslavia which had joined the GATT in 1966, but was excluded from the GATT in 1993 following a change in government. The successor states Serbia and Montenegro remain in line as candidates to join the WTO. By contrast, when non-GATT-party East Germany was absorbed into West Germany, which was a huge economic change for world trade, the GATT did not insist on a membership application from East Germany. In practice, East Germany was more favored than Serbia in the accession process.

<sup>67</sup> See John Shijian Mo, *Settlement of Disputes between Mainland China and the Separate Customs Territory of Taiwan within the WTO*, 2 CHINESE J. INT'L L. 145, 168 (2003) ("Being equal Members with Mainland China does not change the fact that Taiwan is part of China.").

application is not the same thing as an explicit bilateral agreement. What “application” means is that Taiwan and China agreed that WTO rules would apply inter se just as they normally apply between all other pairs of WTO Member countries. So Taiwan and China have legal obligations toward each other as Members of the WTO but not through a treaty between them. Thus, the fact that China and Taiwan are Members of the WTO does not mean that China acknowledges Taiwan’s legal personality on the international plane.<sup>68</sup> For Taiwan to join the WTO did not require China to sign any WTO document. Taiwan became a Member of the WTO after the WTO approved the Protocol of Accession with Taiwan, and then Taiwan signed (or otherwise approved) the Protocol.<sup>69</sup>

Because the WTO Agreement imposes obligations on China with respect to how it treats Taiwan and on Taiwan with respect to how it treats China, the entry of both parties into the WTO has the potential for changing their bilateral economic and political relationship. By permitting Taiwan to join the WTO through accession, the WTO and its Members acknowledged that Taiwan is a separate customs territory “possessing full autonomy in the conduct of its external commercial relations and of the matters provided for” in the WTO Agreement. Thus, it could be that WTO Member governments are now estopped from denying that Taiwan possesses such autonomy.

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.”<sup>70</sup> So far, little induced harmony has seemingly occurred, but the potential is always there for both governments to use the WTO forum for communication.<sup>71</sup>

Taiwan has a number of trade restrictions against China that may violate WTO rules and could be the basis of a dispute against Taiwan lodged by China. The chief one is Taiwan’s discrimination against trade in Chinese goods, trade in Chinese services involving investment-related commercial presence and the movement of natural persons. These types of trade entail a requirement for pre-approval.<sup>72</sup> Direct commerce between Taiwan and the

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<sup>68</sup> Recall that countries or customs unions may join the WTO following a two-thirds vote by the Ministerial Conference. WTO Agreement, Art. XII:2. Thus, the drafters of the WTO Agreement assumed that a minority of WTO Members might oppose granting membership to a particular applicant.

<sup>69</sup> See Protocol of Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, ¶ 9, WT/L/433 (Nov. 11, 2001).

<sup>70</sup> Chris Rugaber, *WTO Membership Could Improve Cross-Strait Ties, Taiwan Official Says*, Int’l Trade Rep. (BNA), at 2038 (Dec. 20, 2001).

<sup>71</sup> See Josephine Wang-Ho, *Taiwan and the GATT*, 1992 COLUM. BUS. L. REV. 61, 63 (1992); Chan, *supra* note 3, at 292.

<sup>72</sup> Hsieh, *supra* note 11, at 1213–16.

Mainland was long prohibited by Taiwan but was slightly liberalized in July 2006.

So far, however, China has not brought a case against Taiwan, apparently because doing so would acknowledge Taiwan's separateness from China.<sup>73</sup> China has also showed an unwillingness to fulfill its own requirements under WTO rules to notify Taiwan before initiating a safeguard action against its trade or an antidumping investigation of goods from Taiwan.<sup>74</sup> Even so, Taiwan has not invoked WTO dispute settlement against China. Recently, China accepted a visit by a Taiwanese government official to conduct an antidumping investigation<sup>75</sup> and agreed to talk with Taiwan about a proposed import safeguard by Taiwan on towels.<sup>76</sup>

Perhaps the most significant potential effect of Taiwan's WTO membership is that it could invoke WTO dispute settlement should China attempt to impose economic sanctions against Taiwan. The WTO dispute system is the only international body that Taiwan would have access to as Taiwan cannot lodge cases before the International Court of Justice or bring a complaint to the U.N. Security Council.

#### IV. IMPLICATIONS FOR INTERNATIONAL LAW

Taiwan was able to join the WTO because membership is not restricted to states, and so being a Member does not carry with it any implication about statehood or independence and is not necessarily a way-station to statehood. Still, there is one interesting historical example of a road from GATT/WTO membership to statehood – Zimbabwe which, as the British Colony Southern Rhodesia, was an original Member of the GATT in 1948. When Southern Rhodesia became Zimbabwe, it nonetheless retained its GATT party status. In 1980 when Zimbabwe joined the United Nations, Zimbabwe was at last accepted as a state. To be sure, GATT membership was not a major cause of Zimbabwe's success.

Even though it is now a Member of the WTO, Taiwan is often considered to be part of China. 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. Analysts have suggested that the WTO experience shows the practicality of having both Taiwan and China as Members enjoying equal rights and obligations.

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<sup>73</sup> *Id.* at 1217.

<sup>74</sup> *Id.* at 1219–20.

<sup>75</sup> David Lague, *Trade Dispute Forces China to Talk with Taiwan*, INT'L HERALD TRIBUNE, Apr. 5, 2006, at 1; *Taiwan Official Visits China for Anti-Dumping Probe*, BBC MONITORING, July 4, 2006.

<sup>76</sup> *Taiwan, China Hold Talks at WTO on Towel Imports*, BBC MONITORING, July 4, 2006.

When Taiwan joined the WTO, there was a news story stating that based on the "WTO formula,"<sup>77</sup> Taiwan would seek to join other international organizations in the future, such as the World Intellectual Property Rights Organization (WIPO), the World Customs Organization, the ISO, and the Organization for Economic Co-operation and Development (OECD). So far this has not happened.<sup>78</sup> As Qingjiang Kong has pointed out, Taiwan has not gained any significant new "diplomatic space" since its accession to the WTO.<sup>79</sup>

Aside from a statehood requirement for membership, another impediment against reusing the WTO formula is that in many international organizations, there is apparently no formal status for Observers. Although that status is not part of the GATT or WTO Agreement, observership has been a long tradition of the trading system. That status made it easier for Taiwan (and China) to join the WTO.

After 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 Taipei's membership, the WTO is taking another step towards achieving universal membership."<sup>80</sup> Moore seemed to be saying that the WTO would benefit from membership universality. Unfortunately, that aspiration does not seem to be shared by most international organizations.

Even in the less formal setting of transgovernmental cooperation, Taiwan often cannot get into the door. For example, the Kimberley Process Certification scheme for conflict diamonds will not allow Taiwan to be a participating country. The Kimberley website, however, does note that Chinese Taipei has met the minimum requirements.<sup>81</sup>

### *Taiwan's Failed Quest to Join the WHO*

Perhaps the most serious contradiction between an IO's purpose and its exclusionary membership policy is the WHO which not only has resisted allowing Taiwan to rejoin,<sup>82</sup> but has also resisted an observer status for Taiwan in the World Health Assembly and meaningful participation in WHO programs. Taiwan has been seeking to gain observer status at the

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<sup>77</sup> Premier Explains Composition of WTO Team, CENTRAL NEWS AGENCY TAIWAN, Jan. 3, 2002, [http://th.gio.gov.tw/show.cfm?news\\_id=12755](http://th.gio.gov.tw/show.cfm?news_id=12755).

<sup>78</sup> Taiwan has observer status in the OECD Competition Committee and the Steel Committee.

<sup>79</sup> Qingjiang Kong, *Cross-Taiwan Strait Relations: What are the Legitimate Expectations from the WTO?*, 14 MINN. J. GLOBAL TRADE 91, 96 n.18 (2004).

<sup>80</sup> Press Release, WTO, WTO Ministerial Conference Approves Accession of Chinese Taipei (Nov. 11, 2001), [http://www.wto.org/english/news\\_e/pres01\\_e/pr253\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr253_e.htm).

<sup>81</sup> See <http://www.kimberleyprocess.com:8080/site/?name=participants>. The Kimberley Process was granted a WTO waiver in February 2003 through a consensus that apparently included Taiwan.

<sup>82</sup> Taiwan was expelled from the WHO in 1972.

World Health Assembly for over a decade. At the most recent World Health Assembly in May 2006, Taiwan again was prevented from attending, even though it has voluntarily complied with the international health regulation promulgated by the WHO. The WHO even refuses to issue press passes to journalists from Taiwan.

Is there any basis for a legitimation of the WHO's exclusionary practices toward Taiwan? One might be that the WHO lacks authority in its Constitution to open up to Taiwan.<sup>83</sup> Taiwan cannot be a WHO Member because it is not a state.<sup>84</sup> Taiwan cannot be a WHO Associate Member because it is responsible for its international relations.<sup>85</sup> Taiwan is neither an IO nor an NGO so it cannot have relations with the WHO under the relevant provisions of the WHO Constitution.<sup>86</sup> Although it is true that the World Health Assembly, as an assembly, might be thought to have some implied power of association beyond those specifically mentioned in the Constitution, the narrow decision of the International Court of Justice in the *World Health Assembly Nuclear Weapons* case might counsel against any teleological interpretation of the Assembly's competence.<sup>87</sup>

But this answer seems unsatisfactory for several reasons. One is that it is inconsistent with WHO practice of giving "observer" status to several entities whose legal personality does not fit WHO rules. Such entities currently include: The Holy See, the Order of Malta, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, and Palestine.<sup>88</sup> Another reason is that Taiwan's exclusion is inconsistent with the functional public health mission of the WHO and its claim to be a "world" organization. Article 1 of the WHO Constitution states that the WHO's objective "shall be the attainment by all peoples of the highest level of health," and it seems hard to reconcile that aspiration with the exclusion of a country that has a population of 23 million and is the world's 17th largest economy. Moreover, Taiwan has been a front-line country for public health risks such as SARS and avian flu.

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<sup>83</sup> If Taiwan is a non-State territorial entity, there is no such category of WHO membership or observership.

<sup>84</sup> See Constitution of the World Health Organization Art. 3, July 22, 1946, 14 UNTS 185. Taiwan is currently recognized as a State by about 25 nations. Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Border Relations Between China and Taiwan*, 94 AM. J. INT'L L. 453, 465 n. 88 (2000).

<sup>85</sup> See Constitution of the World Health Organization, *id.* Art. 8 (providing associate membership status for territories which are not responsible for the conduct of their international relations). Puerto Rico is an Associate Member under this provision.

<sup>86</sup> See *id.* Arts. 70, 71. Taiwan is a governmental organization. For a discussion of NGO contributions to the WHO, see DAVID P. FIDLER, INTERNATIONAL LAW AND PUBLIC HEALTH: MATERIALS ON AND ANALYSIS OF GLOBAL HEALTH JURISPRUDENCE 79 (2000).

<sup>87</sup> See GIAN LUCA BURCI & CLAUDE-HENRI VIGNES, WORLD HEALTH ORGANIZATION 115–18 (2004) (discussing the *Nuclear Weapons* decision).

<sup>88</sup> *Id.* at 36–38. See also U.S. Public Law 108–235, An Act to Address the Participation of Taiwan in the World Health Organization, June 14, 2004, § 1(a)(8), available at <http://www.access.gpo.gov/nara/publaw/108publ.html>.

Diseases know no political boundaries, a point well recognized by the World Medical Association which supports giving Taiwan observer status.<sup>89</sup>

That the trading system has always been open to non-state entities is not accidental; the designers of the post World War II system recognized that its functional mission would be furthered by not making membership contingent on statehood.<sup>90</sup> The drafters of the WHO Constitution did not have that foresight, but this defect can be remedied by a constitutional amendment. When the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean was drafted in 2000, the drafters provided for participation in the Commission by a "fishing entity."<sup>91</sup> Taiwan joined the Commission under that provision (as Chinese Taipei) in 2004. This modality seems like a good prescription for the WHO for how to amend its Constitution.

Short of a constitutional amendment, there might be other ways of providing for ongoing interchanges between Taiwan and the WHO. For information exchange itself, the WHO could simply name certain Taiwanese officials as consultants. For transmitting Taiwan's views to the WHO, perhaps the WTO could serve as a conduit as it does between Taiwan and the IMF. As noted above, an Annex to the Accession Agreement between the WTO and Taiwan provides that the WTO "shall take measures . . . to ensure effective presentation of Chinese Taipei's case to the Fund, including, without limitation, the transmission to the Fund of any views communicated by Chinese Taipei to the WTO."<sup>92</sup> For the WTO to do that with the WHO would require authorization, however, and getting that authorization would be impossible without the consent of China.

## V. CONCLUSION

Taiwan is an anomaly in international relations. It is a self-governing, stable, prosperous nation whose identity is sharply contested. It is an island of democracy in a region where many states are not. Taiwan does not claim to be a state, and yet often operates like one. It has joined the WTO, and would like to be part of other IOs. Yet Taiwan's future as a separate identity

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<sup>89</sup> Press Release, World Medical Association, World Medical Association Urges Taiwan's Acceptance to the WHO as an Observer (May 16, 2003). The World Medical Association was founded in 1947 and succeeded a similar international NGO founded in 1926.

<sup>90</sup> See Charter of the International Trade Organization, 1948, Art. 71, available at [http://www.wto.org/english/docs\\_e/legal\\_e/prevto\\_legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm). See also Damrosch, *supra* note 5, at 38 (noting the "prescience" and pragmatism of GATT's framers, and suggesting that other international agreements and IOs can be expected to come under pressure for change when their membership is based on formalistic legal constructs).

<sup>91</sup> Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, Art. 9.2, available at <http://sedac.ciesin.columbia.edu/entries/texts/fish.west.cent.pac.2000.html>.

<sup>92</sup> Special Exchange Agreement, *supra* note 24, Art. VI:3.



is doubtful. Taiwan faces, just 90 miles away, an increasingly powerful China that yearns for eventual unification with Taiwan.

Against great odds, Taiwan finally succeeded in joining the WTO in late 2001. As with many new WTO Members, Taiwan had to make numerous concessions in its accession accord, and yet more so than with any other applicant, Taiwan's entry into the WTO enhanced Taiwan's sovereignty when sovereignty is understood in its modern meaning. Joining the WTO did not transform Taiwan into a state, but Taiwan gained greater economic and political respect and perhaps a legal bridge to the future.

As a WTO Member, Taiwan may participate in writing and administering world trade rules, and Taiwan is doing so with great relish. It has been an active participant in Doha Round negotiations and has put forward thoughtful and constructive proposals on regional trade agreements, trade remedies, trade and environment, fishery trade, and the third-party role in dispute settlement. In WTO operating committees, Taiwan has proposed reforms for negotiations on government procurement, and has supported the pharmaceutical companies in maintaining the value of their patents. In dispute settlement, Taiwan has not yet been a litigating party (complaining or defending), but it has been a third party in 12 cases.

Taiwan's lack of membership in the United Nations has not yet led to difficulties in the WTO, but may do so in the future because Taiwan cannot participate in international standard-setting mechanisms whose standards are the source of WTO obligations in the TBT, SPS, and GATS Agreements. A key problem is that WTO rules generally require that qualifying standard-setting mechanisms be "open" to all WTO Members. Because organizations like the Codex Alimentarius Commission, the International Electrotechnical Commission, and the ISO are not open to Taiwan or Taiwanese standards bodies, Taiwan could insist that standards of those international organizations not form the basis of WTO obligations.<sup>93</sup> So far, Taiwan has not invoked this Taiwan Exclusion Disqualification.

Another problem is that because of the discrimination against it, Taiwan cannot meet its obligations under the SPS, TBT, and GATS Agreements to participate in international standard-setting mechanisms. This is a current, not just theoretical, problem, and so the WTO should take action to promote Taiwan's effective participation in those organizations. One possibility would be for the WTO to act as a conduit between Taiwan and the various international standard-setting mechanisms through the WTO Committees that regularly correspond with them.<sup>94</sup>

Taiwan and China are equal in both being Members of the WTO, but that situation does not translate into a bilateral treaty between Taiwan and

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<sup>93</sup> This Disqualification would not apply to the three international standard-setting mechanisms specifically denoted in the SPS Agreement. *See supra* note 50.

<sup>94</sup> *See, e.g.*, SPS Agreement, Art. 12.3; GATS Agreement, art. XXVI; TRIPS Agreement, Art. 68.

China. In other words, Taiwan's relationship with China through the WTO is the same as Hong Kong and Macao's relationship with China through the WTO. The relationship is one of membership parallelism.

Nevertheless, WTO membership does give a country important procedural rights such as the ability to invoke WTO dispute settlement against another WTO Member. In that regard, Taiwan's membership in the WTO does accord it with world legal status that it lacked before 2002. Indeed, the WTO dispute settlement mechanism is the only international tribunal in which Taiwan has standing to insist upon the rule of law. From that perspective, one can say that Taiwan's WTO membership brings it closer to China and gives both Members a neutral forum to discuss and negotiate their mutual differences. Recently, as noted above, China and Taiwan have undertaken bilateral consultations within the context of the WTO.

That Taiwan's status as a WTO Member is meaningful can be seen by Chinese's petty protests against Taiwan in Geneva on issues such as what Taiwan is called and how its personnel are titled in the WTO phonebook. That China would cavil is perhaps not surprising but what is surprising, and disturbing, is that the WTO Secretariat is engaging in nomenclature discrimination against Taiwan. Unfortunately, WTO dispute settlement does not offer Taiwan any possibility for judicial review of this kowtowing by WTO bureaucrats.

Although Taiwan was successful in joining the WTO, Taiwan has been unsuccessful in joining the WHO, or even in gaining observer status in it. The WHO may have a constitutional reason to deny Taiwan's participation, but its animus toward Taiwan seems to go beyond that, extending even to journalists from Taiwan. Certainly if the WHO were predisposed toward a less political approach to its world health mission, it could find a way to open its doors to Taiwan.

This article has sought to take note of the very interesting development in international law of Taiwan's membership in the WTO. Examining Taiwan's membership offers a good window into how the WTO operates and the possibilities for the peaceful evolution of Taiwan's place in world affairs.

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