LEGAL ELIGIBILITY OF TAIWAN’S ACCESSION TO GATT/WTO

CHO Hui-Wan

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I. INTRODUCTION

Taiwan is an anomaly in international law and thus has a special kind of interstate relations. The government of the Republic of China (ROC), Taiwan's official country name, was established on the Chinese mainland in 1912 and retreated to Taiwan in 1949. United Nations Resolution 2758 (XXVI) of October 25, 1971, deprived the ROC of its U.N. representation, holding that the People's Republic of China (PRC) was the sole lawful representative of China to the United Nations. From then on, the Republic of China on Taiwan becomes an invisible actor in the world. The country called 'Republic of China' disappears from the publications of the United Nations and its affiliated agencies. Statistics for Taiwan, Penghu, Kinmen, and Matsu, islands under the ROC's control, become non-existent in the World Bank index. For states that do not recognize it (142 out of 170 in 1990, 160 out of 189 in 2000), Taiwan becomes a "non-state." These states respect Taiwan's domestic laws as well as its immigration laws and customs regulations, just as they do those of other sovereign states. They trade and reach agreements with Taiwan, and they contact the Taiwan authority on matters that are official in nature. For them, however, these contacts are private, and agreements are between peoples. They ac-

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knowledge that the government of the Republic of China has sole
jurisdiction over the Taiwan area, but they do not recognize Taiwan
as a sovereign state. Their attitude is, in effect, "We do not see you
(as a state), but we will deal with each other." As of 1988, out of a
total of 1,769 intergovernmental organizations (UIA 1990, 1723, Ta-
ble 1), Taiwan was a member of only 10 (compiled from UIA 1990).
Taiwan thrived, nevertheless. Invisibility did not keep it from
double-digit annual growth during the 1970s. Taiwan became the
world's 15th largest trader in the late 1980s (GATT 1992a, 3); its
per capita income ranked 20th globally. The actor might be invis-
ible, but its actions and their effects began to be felt in the 1980s.
Starting in 1987, Taiwan began its efforts to re-enter the General
Agreement on Tariffs and Trade. On January 1, 1990, Taiwan filed
a formal application for membership under the name of "the Cus-
toms Territory of Taiwan, Penghu, Kinmen and Matsu," asserting
that its trading role warranted it a place in the world organization
that regulates trade practices.
With Taiwan's special status in international law, its application
involved more than an investigation of its trade regime, which nor-
mally would have been the main concern of GATT. The legal ques-
tion of eligibility needed to be addressed first. In those IGOs from
which Taiwan had been expelled, it had been decided that Taiwan
no longer had the standing that came with statehood. How did Tai-
wan deal with this question when it came to GATT? I assert that
GATT opened a window of opportunity for an unrecognized state
such as Taiwan through its functional-standing clause. While Tai-
wan continued to have difficulties in formal diplomacy, the eco-
nomic nature and the organizational mechanism of GATT made its
bid possible.

II. TAIWAN'S PAST LINKS WITH GATT

The General Agreement on Tariff and Trade was negotiated
and agreed upon during 1946-1947 and has been provisionally ap-
plied since January 1, 1948.\footnote{1} The negotiations partly paralleled the

\footnote{1. GATT Article XXVI: 6 provides that the Agreement will enter into force, be-
tween governments which have accepted it, 30 days after the deposit of instruments of
acceptance on behalf of the 35 governments listed in Annex H. Only two, the govern-
ments of Liberia and Haiti, accepted it; therefore the Agreement has never entered into
force. Instead, the Agreement is applied "provisionally" by contacting parties under
the Protocol of Provisional Application or subsequent protocols of accession to the
General Agreement (GATT 1994, 857).}
negotiations for the Havana Charter for an International Trade Organization (ITO).

The idea of an ITO was developed during World War II for reconstruction of the world trading system in the postwar period. The first meeting of the United Nations Economic and Social Council (ECOSOC), in February 1946, adopted a resolution calling a United Nations Conference on Trade and Employment and established a Preparatory Committee of representatives of the governments of 19 countries. The Republic of China was one of them.

The first session of the Preparatory Committee was held in London from October to November 1946. Its procedural subcommittee drew up a “Resolution Regarding the Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions” and “Procedures for Giving Effect to Certain Provisions of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee.” The United States, thereafter, invited members of the Preparatory Committee to meet and negotiate concrete arrangements for the relaxation of tariffs and trade barriers, under the sponsorship of the Preparatory Committee and as a part of the committee’s second session.

This second session was held in Geneva from April through October 1947. The Preparatory Committee completed a draft charter as a basis for discussion at the Havana Conference, while the first round of the GATT multilateral tariff negotiation was conducted between members of the committee. At the conclusion of the session, the Preparatory Committee adopted the Final Act, which includes the October 30, 1947, text of the General Agreement, the Schedules of Tariff Concessions negotiated in Geneva in 1947, and the Protocol of Provisional Application (GATT 1994, 4-5). Under the protocol, provisional application of the 1947 text of the Agreement began as of January 1, 1948.

The United Nations Conference on Trade and Employment was then held at Havana, Cuba, from November 1947 to March 1948, and concluded the Havana Charter for an International Trade Organization. However, no acceptances of the charter by governments were received, and the Havana Charter thus never entered

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2. Members of the Preparatory Committee appointed by the ECOSOC resolution were the representatives of the following countries: Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, South Africa, the Union of Soviet Socialist Republics, the United Kingdom, and the United States (3).
into force. GATT became the only regime governing international trade.

As one of the 23 original signatories of the Final Act, the government of the ROC signed the Protocol of Provisional Application on May 21, 1948 (GATT SR 27/1, 2), and became a contracting party of GATT. That status, however, was soon interrupted.

The ROC government moved its seat to Taiwan in December 1949 when the Chinese Communists took over the Chinese mainland. Given that most of the products to which GATT concessions applied were from the mainland where the ROC government was no longer in control, and that Taiwan itself exported few products at that time, the government decided to withdraw from GATT. The ROC served notice of withdrawal from the Protocol on March 6, 1950, and the withdrawal took effect on May 5.

When exports from Taiwan took off in the mid-1960s, the ROC government requested to be represented by observers at sessions of the CONTRACTING PARTIES, and this request was granted. According to the record, the CONTRACTING PARTIES relied on four major points in reaching this decision. First, Rule 8 of the Rules of Procedure for Sessions of the CONTRACTING PARTIES provides:

The representatives of countries signatories of the Final Act adopted at the conclusion of the United Nations Conference on Trade and Employment at Havana, which have not become contracting parties, may attend meetings in the capacity of observers participating in the discussions without vote (GATT 1994, 1009).

Second, there were precedents. Lebanon, Syria, and Liberia, which were signatories of the Final Act of Havana, became observers after they withdrew from GATT. Third, the CONTRACTING PARTIES had always followed the policy expressed in Article 86 of the Havana Charter to avoid passing judgment on essentially political matters and to follow decisions of the United Nations on such questions. Fourth, it was consistent with the practice of the United Nations that admitting observers would not prejudice the position of the CONTRACTING PARTIES or of individual contracting par-

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3. All governments of the Preparatory Committee except the Soviet Union, plus the governments of Burma, Ceylon, Pakistan, Southern Rhodesia, and Syria.
4. The term CONTRACTING PARTIES refers to "all contracting parties acting jointly." The CONTRACTING PARTIES to GATT is analogous to the General Assembly of the United Nations.
ties toward recognition of the governments in question. It was also the legal opinion of the United Nations that “the question of representation in an international organization was distinct from the question of recognition of a government by other members of that organization” (GATT SR 22/3, 1-2).

Based on the reasoning that the CONTRACTING PARTIES would follow the decisions of the United Nations, GATT acted upon U. N. Resolution 2758 (XXVI) and deprived the ROC of its observer status in 1971 (GATT SR 27/1, 1-3). The ROC has been outside GATT ever since.

III. NEW NAME, NEW STANDING

Referring to GATT Article XXXIII, the ROC government formally applied for membership in GATT under the name “the Customs Territory of Taiwan, Penghu, Kinmen and Matsu” (hereafter referred as TPKM) on January 1, 1990. Article XXXIII stipulates:

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority (GATT 1994, 943).

Government

The contracting parties were defined in GATT as “governments” and not “states” or “nations” as in most intergovernmental organizations. This is clearly spelled out in Article XXXII:

The contracting parties to this Agreement shall be understood to mean those governments, which are applying the provisions of this Agreement under Article XXVI or XX-XIII or pursuant to the Protocol of Provisional Application (939, emphasis added).

Such a definition was developed during the negotiation stage of the Agreement, and was made intentionally so that governments with less than complete sovereignty could be contracting parties to GATT (939). During the negotiation of the General Agreement in 1947, Burma, Ceylon, and Southern Rhodesia (now Myanmar, Sri
Lanka, and Zimbabwe), then still colonies of the United Kingdom, participated in the negotiations during the second session of the Preparatory Committee upon certification by the United Kingdom of their autonomy in commercial matters. The subcommittee, which recommended these governments be admitted as full contracting parties, also recommended consequential change to the preamble, to the provisions on acceptance that became Article XXVI: 5, and to the accession provisions in Article XXXIII (GATT E/PC/T/198, 3-4). Accordingly, these three governments became signatories of the Final Act, accepted the Protocol of Provisional Application, and thereby acquired the status of contracting parties.

Pursuant to Article XXXIII, two different categories of governments may accede to GATT: governments not party to this Agreement, or governments acting on behalf of separate customs territories possessing full autonomy in the conduct of their external commercial relations and of the other matters provided for in this Agreement. The first group, governments not party to this Agreement, refers to any government that was not a signatory of the Final Act or did not sign the Protocol of Provisional Application, thereby acquiring the status of a contracting party. Chile was the first such case. Chile was a signatory of the Final Act, but did not sign the Protocol of Provisional Application by the deadline of June 30, 1948, as specified in the Protocol. It became the first government to accede to GATT under Article XXXIII (944-945) later in 1948.

Taipei applied for membership as the government “on behalf of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu,” which “is fully autonomous in the conduct of the external commercial relations of the Territory.” 5 It, therefore, falls in the second category of governments in Article XXXIII.

**Autonomous Customs Territory**

Several questions may be, and indeed were (Tsai 1988, 264-266), raised about Taipei’s claim of an “autonomous customs territory.” What constitutes a separate customs territory? Should the autonomy be de jure or de facto? What about the claim by the People’s Republic of China of sovereignty over this area? Answers to these questions can be found in the Agreement, the Guide to GATT Law and Practice: Analytical Index, and various documents of GATT.

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Article XXIV, Paragraph 1, provides:

The Provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party (GATT 1994, 736, emphasis added).

Paragraph 2 further provides:

For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories (736, emphasis added).

According to the text of the two paragraphs, customs territories are what really count as contracting parties. Governments of the customs territories are eligible to accede to the Agreement only because governments hold the powers of commerce for the customs territories. The Customs Territory of Taiwan, Penghu, Kinmen and Matsu does have separate tariffs and other regulations of commerce, and these have been maintained throughout TPKM. The claim of autonomy of the ROC government over TPKM can be verified by the fact that it is the government that TPKM's counterparts have had to deal with. Taipei's claim of an autonomous separate customs territory, therefore, conforms to the definition set by GATT.

Should the autonomy be de jure or de facto? It simply does not matter in GATT. To examine the situation of Burma, Ceylon, and Southern Rhodesia in 1947, an ad hoc subcommittee was appointed. The subcommittee requested the United Kingdom to submit information on the autonomy of these territories in approving and modifying their tariffs, in applying the General Agreement, and in entering into contractual relations with foreign governments on commercial matters. Basing its decision on the U.K. Declaration establishing the ability of these three territories to enter into and fulfill all obligations under the General Agreement, as well as evidence presented, the subcommittee concluded that Burma, Ceylon, and Southern Rhodesia, “according to their status de jure and/or de
"facto," could be admitted to participate as full contracting parties (GATT E/PC/T/198, 1-3). The wording "and/or" indicates that either one will do. So the fact that there may be different opinions on Taipei's de jure claim does not interfere with the application as long as TPKM's de facto autonomy is recognized by the CONTRACTING PARTIES.

Following the GATT tradition of avoiding political judgments, the controversy over territorial claims is not an issue either. In 1961, when a draft protocol for the accession of Portugal was discussed by the CONTRACTING PARTIES, the representative of India sought clarification of the relationship between Portugal and certain customs territories referred to therein as "overseas provinces of Portugal." The executive secretary stated that:

[I]n adopting the text . . . the CONTRACTING PARTIES would not be taking any position with respect to the international status of these territories. Contracting parties were concerned only with what was relevant to the General Agreement, which were the trading arrangements proposed with respect to these territories and not their status in international law. Therefore, the approval of this protocol would not, in his view, in any way affect or conflict with whatever decisions might be taken or had been taken by the General Assembly of the United Nations, on these legal matters (GATT SR 19/12, 195-196, emphasis added).

Standing

So, the government in Taipei does possess, at the least, full de facto autonomy in the conduct of the external commercial relations of the separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, according to the GATT definition. But does it mean that the government in Taipei has a right of its own to accede to GATT? The PRC raised two opposing opinions (Xinhua 1989). First, Beijing argued that the CONTRACTING PARTIES should follow the 1971 decision to keep the ROC out of GATT. Second, Beijing has long taken the position that, should Taiwan want to join GATT, it can do so only after the PRC has "resumed" its contracting-party status and can sponsor Taiwan pursuant to Article XXVI:5(c). Indeed, U. N. Resolution 2758 (XXVI) is still in place and decisions of the United Nations on political questions have always been followed by the CONTRACTING PARTIES. The question before the CONTRACTING PARTIES, however, is not a political one.
When Taipei was represented by observers in GATT between 1965-1971, it did so in the capacity of the government of the Republic of China, a government that claimed to represent the whole of China. U. N. Resolution 2758 decided otherwise; hence, the ROC's observer status was taken away by GATT's adherence to the U. N. decision.

The request for accession before the CONTRACTING PARTIES in 1990 was not an application from the government of the Republic of China; instead it was one from "the government on behalf of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu." Pursuant to Article XXXIII, such a government has a standing of its own in the Agreement, regardless of the issue of sovereignty. The decision that the GATT Council of Representatives was to make about Taipei's request was a factual judgment on the existence of such a separate customs territory and a judgment of the compatibility of such a trade regime and the Agreement. Just as in Portugal's case, the decision would not be a political judgment on the status of TPKM in international law or in international politics.

(Article XXXIII vs. Article XXVI.5(c)

Article XXVI.5(c), under which Beijing maintains that Taipei should join, provides:

If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party (GATT 1994, 842).

Clearly, this sub-paragraph was written so that colonies could become contracting parties when they obtained independence or acquired autonomy in their external commercial relations. Article XXVI.5(a) provides: "Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility" (GATT 1994, 842). The latter part of the provision is what sub-paragraph 5(c) means when it states that in respect to the customs territory "a contracting party has accepted this Agreement." Up to 1990, 42 governments had succeeded to contracting-party status under this sub-paragraph (1054-1955). These included 41 colonies-turned-inde-
dependent governments, such as Indonesia (succeeding to contracting-party status in 1950), Ghana, Malaysia (1957), Nigeria (1960), Cameroon, Jamaica, Madagascar, Niger (1963), Guyana, Rwanda (1966), Mauritius (1970), Singapore (1973), Zambia (1982), Botswana (1987), and Lesotho (1988), as well as a colony that acquired autonomy in its external commercial relations, Hong Kong (1986).

It is important to note that a sponsorship by the contracting party, until then responsible for the external commercial relations of the concerned customs territory, is required for such succession. The responsible contracting party sponsors the succeeding government through a declaration establishing the fact that the customs territory in question possesses or has acquired full autonomy in the conduct of its external commercial relations. The subcommittee that drafted this provision during the negotiation of the Agreement in 1947 thought this was necessary “because other contracting parties must have sufficient information to be able to judge the legal ability of such customs territory” (853).

Once the fact of autonomy is established, however, the succession under Article XXVI:5(c) is automatic. When a request for admission under this article together with its sponsorship are received, a certification will be issued by the executive secretary to the CONTRACTING PARTIES to affirm that the condition of Article XXVI:5(c) has been fulfilled in respect to a certain customs territory, and to advise that the government therefore becomes a contracting party. The rights and obligations of such contracting parties date from the independence of a new state or the receipt of certification of a territory's autonomy in the conduct of its external commercial relations (853-854).

Since the admission is automatically granted when the condition of Article XXVI:5(c) has been fulfilled, the succeeding contracting party thereby inherits the terms and conditions, including any applicable schedule of concessions previously accepted by the metropolitan government on its behalf (854). For this reason, some newly independent states that were eligible to succeed to contracting-party status under Article XXVI:5(c) have opted instead for accession under Article XXXIII. For instance, Cambodia chose to accede under Article XXXIII in order not to assume the former schedule of concessions of France for Indochina (950).

Who may apply and what conditions must be fulfilled, as well as the terms and decision-making process for accession stipulated in
Article XXVI:5(c), clearly are quite different from those in Article XXXIII. The following table delineates the distinction.

**Comparison between Article XXXIII and Article XXVI:5(c)**

<table>
<thead>
<tr>
<th>Subject</th>
<th>Article XXXIII</th>
<th>Article XXVI:5(c)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligible to Apply</td>
<td>(a) A government not party to the Agreement</td>
<td>A customs territory in respect of which a contracting party has accepted the Agreement</td>
</tr>
<tr>
<td>(b) A government acting on behalf of a separate customs territory</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conditions</td>
<td>(b) Possesses full autonomy in the conduct of its external commercial relations</td>
<td>Possesses or acquires full autonomy in the conduct of its external commercial relations</td>
</tr>
<tr>
<td>Application</td>
<td>(a) On its own behalf</td>
<td>Upon sponsorship through a declaration by the responsible contracting party establishing the fact of autonomy</td>
</tr>
<tr>
<td>(b) On behalf of that territory</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Terms of Accession</td>
<td>Terms to be agreed between such government and the CONTRACTING PARTIES</td>
<td>Terms and conditions previously accepted by the metropolitan government on behalf of the territory in question</td>
</tr>
<tr>
<td>Decision of Accession</td>
<td>Two-thirds majority of the CONTRACTING PARTIES</td>
<td>Succession</td>
</tr>
<tr>
<td>Number of Contracting Parties*</td>
<td>40</td>
<td>42</td>
</tr>
<tr>
<td>(as of 1990)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: There are also 18 governments (excluding four, the Republic of China, Czechoslovakia, Lebanon, and Syria, which have since withdrawn from GATT) that became contracting parties by accepting the Protocol of Provisional Application.

The PRC obtained its GATT observer status in December 1984 and formally sought “resumption of its status as a contracting party” on July 14, 1986 (Jacobson and Oksenberg 1990, 88, 92). The negotiations have been delayed by disagreements over such issues as whether Beijing was resuming its contracting-party status or

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6. Beijing's position is that the establishment of the PRC on October 1, 1949, represented the replacement of KMT rule by CPC rule of the mainland. Thus, in its view, the KMT government's withdrawal from GATT in 1950 was illegal and null.
acceding to GATT as a new contracting party,\textsuperscript{7} whether it should be
treated as a developing or a developed economy, and many other
stumbling blocks in bilateral negotiations. Then the bloody crack-
down on pro-democracy demonstrators in Tienanmen Square in
June 1989 caused such adverse world reaction that negotiations
were suspended for more than half a year (South China Morning
Post 1989).

Beijing argues, however, that Taiwan is a province of China
and thus has no right to accede to GATT by itself (Xinhua 1989). It
maintains that Hong Kong acceded to GATT under Article
XXVI:5(c) in 1986 with its consent given in the 1984 Joint Declar-
ation of the Government of the United Kingdom and the Govern-
ment of China (Lardy 1994, 47),\textsuperscript{8} and that Taiwan has to follow
similar steps — join GATT under Article XXVI:5(c) with its ap-
proval (Xinhua 1989). At the time of its succession, Hong Kong
was still under British rule, so its sponsorship was provided by a
United Kingdom declaration. After the PRC joins GATT, Beijing
can consider providing the declaration for Taipei. So said Beijing.

Does Beijing’s argument hold up within the framework of
GATT? Hong Kong was under the \textit{de jure} and \textit{de facto} rule of the
United Kingdom until 1997. No doubt it needed the consent and
declaration from its metropolitan governments, the United King-
dom, for its autonomy in external commercial relations in acceding
to GATT.\textsuperscript{9} However, Beijing’s \textit{de facto} jurisdiction has never ex-
tended to TPKM since the establishment of the PRC in 1949. Since
1949 TPKM has always had its separate tariffs and commercial reg-
ulations distinct from those on the Chinese mainland, and it has
always been under the jurisdiction of the government in Taipei. Be-

\textsuperscript{7} The concept of resumption poses difficulties for contracting parties such as Aus-
tralia, Japan, and the United States, because if the PRC “resumes” its membership in
GATT, the legal status of certain actions taken in the interim in these countries will be
problematic. It poses problems for the PRC as well. Would it be liable for the mem-
bership dues to GATT during “these years of absence”? Could it continue to forbid
trade with Israel and other countries without recourse to Article XXXV of non-appli-
cance (Jacobson and Oksenberg 1990, 95)?

\textsuperscript{8} According to “the Basic Law of the Hong Kong Special Administrative Region
of the People’s Republic of China,” Hong Kong is a “special administrative region”
enjoying autonomy in its external commercial relations.

\textsuperscript{9} Hong Kong’s sovereignty was turn over to the PRC in July 1997. However, “the
Basic Law of the Hong Kong Special Administrative Region of the People’s Republic
of China” stipulates that Hong Kong is a “special administrative region” enjoying au-
tonomy in its external commercial relations, hence Hong Kong continues to be a mem-
ber of WTO.
cause GATT is concerned only with the trading arrangements of the customs territory in question (852), and the territorial application of the Agreements (Article XXIV); yet the PRC has no say over TPKM on these GATT issues. Beijing does not have a case here. De facto jurisdiction is what counts in GATT.

IV. CONCLUSION

At the end of 1989, Taiwan was the 15th largest trader in the world (GATT 1992a, 3), and it had liberalized its trade regulations to the point that they were largely compatible with GATT rules. It thus was in a strong position, both economically and in terms of GATT rules, to be admitted as a contracting party.

The major obstruction came from Beijing, which claims sovereignty over Taiwan and maintains that Taiwan cannot join GATT by itself. It is no small obstacle, since a majority, including all the leading contracting parties of GATT, officially recognizes the PRC as the sole legal government of China. Beijing set “three no’s” to Taipei’s wish to join GATT: no use of the name “Republic of China,” no use of any other name that implies the existence of “two Chinas” or “one China, one Taiwan” (Financial Times 1990), and no accession before Beijing’s (Xinhua 1989).

Taipei’s flexible attitude has produced an alternative. Referring to Article XXXIII, it applied for a GATT membership on behalf of the Customs Territory of Taiwan, Penghu, Kinmen and Matsu on January 1, 1990. In so doing, Taipei avoided Beijing’s first two no’s and made its application totally distinct from Beijing’s.

Because of the history of agreement making, the contracting parties were intentionally defined as “governments” instead of “states,” so that governments with less than complete sovereignty could be contracting parties. Article XXXIII specifically stipulates that “a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement may accede to this Agreement . . . on behalf of that territory . . . .” The Agreement places no further requirements on such a government.

10. Interview with Fredrick Chien, speaker of the ROC National Assembly on November 15, 1996. Chien was vice foreign minister from 1975-1982, top ROC representative to the United States 1983-1988, chairman of the Council for Economic Planning and Development 1988-1990, and foreign minister 1990-1996. He commented that to voluntarily take up a name besides the official national name in the application for GATT membership was the greatest compromise that the ROC government made.
The Customs Territory of Taiwan, Penghu, Kinmen and Matsu has separate tariffs and other commercial regulations, and these have been effectively maintained by the government in Taipei since 1949. This fact verifies TPKM's qualification as a separate customs territory as understood in Article XXIV.

Yes, there are competing territorial claims over TPKM put forth by the governments in Taipei and Beijing, but GATT is not concerned about the issue of sovereignty.\(^{11}\) It was made clear as early as 1961 that "contracting parties were concerned only with what was relevant to the General Agreement, which were the trading arrangements proposed with respect to these territories and not their status in international law" (GATT SR 19/12, 196). Pursuant to Article XXXIII, the government in Taipei, acting on behalf of a separate, autonomous customs territory, has a standing of its own in the Agreement.

Beijing's argument that Taiwan should join GATT only with its sponsorship under Article XXIV: 5(c) does not hold. TPKM is not a customs territory "in respect to which a contracting party has accepted the Agreement." Even after Beijing joins GATT, the fact that Beijing's \textit{de facto} jurisdiction, including that of its external commercial relations, has never extended to TPKM disqualifies it to include TPKM in its customs territory within the framework of GATT, since the \textit{de facto} ability to apply the Agreement to the territory is what contracting parties demand.

By adopting a title that carried a factual, geographic statement of a separate customs territory, Taipei skillfully avoided the political sensitivities of a majority of the contracting parties who will decide on its accession. Taipei also made history in the Agreement by becoming the first government to apply for accession to GATT under Article XXXIII "on behalf of a separate customs territory," without any reference to the sovereignty claims.\(^{12}\)

The World Trade Organization (WTO) succeeded GATT on January 1, 1995. Taiwan requested that the GATT working party

\(^{11}\) The GATT Council of Representatives confirmed this point in 1992. In establishing a working party on Chinese Taipei's ("Chinese Taipei" is the short name for "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" in GATT) accession to the Agreement under Article XXXIII, Chairman Zutshi of the Council noted that the titles carried by the representative of Chinese Taipei "would not have any implication on the issue of sovereignty" (GATT C/M/259, 4).

\(^{12}\) All other governments acceding or applying under Article XXXIII have been sovereign states. Burma, Ceylon, and Southern Rhodesia became contracting parties in 1948 by accepting the Protocol of Provisional Application.
for its accession be transformed into a WTO accession working party.\textsuperscript{13} WTO Article XII on "accession" provides that "any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto." Since there is no longer a distinction between "a government acting on behalf of a separate customs territory" (under GATT Article XXXIII) and "a customs territory in respect of which a contracting party has accepted the Agreement" [under GATT Article XXVI:5(c)], the debate about which of the two GATT articles is applicable to TPKM has become a moot question. The discussion in this article, however, is as valuable as ever. Not only was the legal eligibility critical at the time of Taipei's application to GATT; the discussion also has clarified all possible legal questions and has established a solid legal standing for "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" in the framework of WTO. The PRC's claim that TPKM is "a separate customs territory of China" (Reuters 2000) is not in agreement with GATT, nor with the WTO, thus will never be accepted by WTO members.

\textsuperscript{13} Letter from Steve R. L. Chen, representative of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in GATT, to Renato Ruggiero, director-general of the World Trade Organization, dated December 1, 1995.
REFERENCES


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Appendix A. CHEN Li-an’s Letter to Arthur Dunkel*

MINISTRY OF ECONOMIC AFFAIRS

L. A. CHEN
MINISTER

15, FOOGHOW STREET
TAIPEI, TAIWAN

H. E. Arthur Dunkel
Director General
General Agreement on Tariffs and Trade
Centre William Rappard
Rue de Lausanne 154
CH-1211 Geneve 21

1st January 1990

Dear Mr. Director General,

I have the pleasure to inform you that my government has decided to apply, on behalf of Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter referred to as the Territory) for accession to the General Agreement on Tariffs and Trade (GATT).

This decision is taken after a long and painful process of domestic consensus building.

My Government has adopted "liberalisation" and "multilateralisation" as two guiding objectives of its trade policy. Our trading system, in many ways, is already consistent with the basic principles of the GATT. The attached Memorandum on our trade regime gives ample evidence in this regard. My government, which is fully autonomous in the conduct of the external commercial relations of the separate customs territory of Taiwan, Penghu, Kinmen and Matsu, is now prepared to take up further obligations and responsibilities under the multilateral trading system of which GATT is the cornerstone. Therefore my government is confident that the GATT Contracting Parties will agree to take the necessary steps to integrate the Territory which is ranked today as the 13th trading partner in the world.

* CHEN Li-an’s letter to Authur Dunkel dated January 1, 1990, formally applying for a GATT membership on behalf of TPKM. Xerox copy provided by the Board of Foreign Trade, ROC Ministry of Economic Affairs.
Our request for accession should be understood as a proof of our confidence in the GATT. It comes at a time when the GATT is being strengthened and extended, through the Uruguay Round, towards a more stable, and predictable multilateral trading system. Our accession is also designed to help resist protectionist pressures and facilitate the adjustment of our economy. To this end, and conscious of the obligations and rights under the General Agreement, my Government is prepared to follow the normal procedures on the basis of which the CONTRACTING PARTIES consider and establish the terms of accession.

I should be obliged if the relevant procedures could be initiated, in accordance with Article XXXIII of the General Agreement, as soon as convenient to permit their completion before the end of the Uruguay Round. I would also appreciate if this communication along with the enclosed Memorandum on our trade regime would be circulated to all contracting parties for their consideration.

I would like to assure you, Mr. Director General, of my highest considerations.

Yours sincerely

CHEN Li-an PhD.
Minister of Economic Affairs
Appendix B. Minutes of GATT Council Meeting

GENERAL AGREEMENT ON
TARIFFS AND TRADE

RESTRICTED
C/M/259
27 October 1992
Limited Distribution

COUNCIL
29 September-1 October 1992

MINUTES OF MEETING

Held in the Centre William Rees-Mogg
on 29 September-1 October 1992

Chairman: Mr. B.K. Zutshi (India)

Subjects discussed:

1. Requests for observer status
   (a) Latvia
   (b) Lithuania
   (c) Kazakhstan

2. Accession of Chinese Taipei
   - Statement by the Chairman

3. Accession of Ecuador
   - Communication from Ecuador

4. United States and European Economic Community wheat export subsidies
   - Communication from Australia

5. EEC - Import regime for bananas
   - Statement by the Latin American banana-exporting countries

6. Canada - Import, distribution and sale of certain alcoholic drinks by provincial marketing agencies
   - Follow-up on the Panel report
   - Communication from Canada
   - Communication from the United States

7. Negotiations under Article XXVIII:1 referring to the modification of certain concessions included in the European Communities' Schedule LXXX-EC

8. European Economic Community - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins
   - Follow-up on the Panel report (DS28/8)
   - Status of related negotiations authorized by the CONTRACTING PARTIES pursuant to Article XXVIII:1
   - Communication from the United States

92-1569

* Minutes of GATT Council meeting dated October 27, 1992, establishing an accession working party on Chinese Taipei. Photocopy made available by the University of Virginia Alderman Library through interlibrary loan.
Prior to adoption of the Agenda, representatives rose and observed a minute of silence in memory of Mr. Janos Nyerges, former Special Representative of Hungary, who had passed away on 31 August.

Also prior to adoption of the Agenda, the Chairman, on behalf of the Council, welcomed Mozambique and Namibia as the 104th and 105th contracting parties, respectively.

1. Requests for observer status
   (a) Latvia (L/7050)
   (b) Lithuania (L/7046)
   (c) Kazakhstan (L/7080)

   The Chairman proposed, on the basis of earlier informal consultations on the requests for observer status by the governments concerned, that the understandings regarding observers that had been noted at the May 1990 Council meeting, and to which he had referred at length at the Council meeting in June, should also apply to the governments of Latvia, Lithuania and Kazakhstan if the Council approved their requests for observer status at the present meeting. He then proposed that the Council take note of his statement, agree to his suggestion and agree to grant Latvia, Lithuania and Kazakhstan observer status.

   The Council so agreed.

2. Accession of Chinese Taipei
   - Statement by the Chairman

   The Chairman said that in recent months he had carried out extensive consultations on the subject of establishing a working party to consider the possible accession of Chinese Taipei, known in the GATT as the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. All contracting parties had acknowledged the view that there was only one China, as expressed in the United Nations General Assembly Resolution 2758 of 25 October 1971. Many contracting parties, therefore, had agreed with the view of the People's Republic of China (PRC) that Chinese Taipei, as a separate customs territory, should not accede to the GATT before the PRC itself. Some contracting parties had not shared this view. There had been, however, a general desire to establish a working party for Chinese Taipei. Taking account of all the views expressed, he had concluded that there was a consensus among contracting parties on the following terms, which also met the PRC's concerns:

   First, the Working Party on China's status as a contracting party should continue its work expeditiously, taking account of the pace of China's economic reforms, and report to the Council as soon as possible.

   Second, a Working Party on Chinese Taipei should be established at the present meeting, and should report to the Council expeditiously, with the following terms of reference and composition:
Terms of reference

"To examine the application of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (referred to as 'Chinese Taipei') to accede to the General Agreement under Article XXIII and to submit to the Council recommendations which may include a draft Protocol of Accession."

Membership

Membership would be open to all contracting parties indicating their wish to serve on the Working Party.

Chairman

Mr. Martin R. Morland (United Kingdom)

Third, the Council should give full consideration to all views expressed, in particular that the Council should examine the report of the Working Party on China and adopt the Protocol for the PRC's accession before examining the report and adopting the Protocol for Chinese Taipei, while noting that the working party reports should be examined independently.

The Chairman then proposed that the Council take note of his statement and agree to establish a working party on the basis of the understanding and the terms of reference and composition he had mentioned.

The Council so agreed.

The Chairman then stated that as a part of the understanding, the representation of Chinese Taipei in GATT would be along the same lines as that of Hong Kong and Macau during the course of its status as an observer and subsequently as a contracting-party delegation, and that the titles carried by its representative would not have any implication on the issue of sovereignty.

He then invited the delegation of Chinese Taipei, on behalf of the Council, to attend future meetings of the Council and of other GATT bodies as an observer during the period when the Working Party was carrying out its work. The Secretariat would also ask the Chinese Taipei authorities to submit the necessary information and documentation to facilitate the deliberations of the Working Party.

The Council took note of the statement.

3. Accession of Ecuador
   - Communication from Ecuador (L/7086)

The Chairman drew attention to the communication from Ecuador in document L/7086 concerning its request for accession to the General Agreement.
Appendix C. Steve CHEN's Letter to Renato Ruggiero*

Representation of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in GATT

'H. E. Mr. Renato Ruggiero
Director-General
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
1211 Genève 21

December 1, 1995

Mr. Director-General,

On behalf of my government, I have the honor to inform you that the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu has decided to accede to the World Trade Organization in accordance with Article XII of the Marrakesh Agreement Establishing the World Trade Organization.

In this regard, my government wishes to request that the current Working Party established for our accession to the General Agreement on Tariffs and Trade (GATT 1947) be transformed into a WTO Accession Working Party pursuant to the decision is adopted by the WTO General Council on 31 January 1995.

Please accept, Mr. Director-General, the assurances of my highest consideration.

Yours sincerely,

[Signature]

Steve R. L. Chen
Representative

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* Steve CHEN's letter to Renato Ruggiero dated December 1, 1995, requesting the transformation of Chinese Taipei GATT Working Party into a WTO Working Party. Xerox copy provided by the Board of Foreign Trade, ROC Ministry of Economic Affairs.
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