

An Entity Sui Generis in the WTO: Taiwan's WTO Membership and Its Trade Law Regime

Liu, Han-Wei

hanweiliu@gmail.com

Abstract. As one of the founding members of the General Agreement on Tariffs and Trade (GATT), Taiwan (the Republic of China or ROC) – the 17th largest economy, was granted accession to the World Trade Organization (WTO) in November 2001 after its observer status of eleven years. Taiwan, classified by most commentators as an “unrecognized state” or an “entity *sui generis*”, has been excluded from most of the major international organizations. Taiwan's accession to the WTO, therefore, is considered to be an important breakthrough in diplomacy for the past decades. Notwithstanding its WTO membership, the Taiwanese Government has employed numerous trade barriers vis-à-vis imports from Mainland China due to cross-strait tension. Some of these barriers have been criticized and may be disputed under WTO's dispute settlement mechanism. In addition, given the diplomatic considerations, Taiwan is the only major trade partner within East Asia being excluded from the negotiations of the formation of ASEAN Plus 3 (China, Japan and South Korea) for years. While the issues of trade diversion and trade creation of preferential trade agreements (PTAs) remain hotly debated, the envisaged trade diversion effects resulting from being excluded from East Asian economic integration may become one of the striking examples demonstrating the negative impact of PTAs. The trade diversion would not only conceivably seriously undermines Taiwan's economy, but renders Taiwan's WTO membership much less useful.

In the light of Taiwan's special bilateral relation with China and its significant impact on the East Asia region, Taiwan's trade policy and relevant legislation present a special case under the WTO affairs. Most existing literature, however, focuses on the implications of Taiwan's WTO membership under public international law. This article address an important pragmatic issue- what are Taiwan's main trade law instruments and how does WTO law effective in Taiwan's municipal courts. While the cross-strait dialogue has been resumed since President Ma Ying-jeou took office in May 2008, the measures that deviate from the WTO rules may nevertheless remain in place due to political reality. Yet the issues of whether and to what extent those measures may be disputed within the WTO regime are far from clear. Taiwan's trade law framework this article has sought to explore thus far presents a starting point for future examination of cross-strait interaction under the WTO.

I. Introduction

As one of the founding members of the General Agreement on Tariffs and Trade (GATT), Taiwan (the Republic of China or ROC) – the 17th largest economy,¹ was granted accession to the World Trade Organization (WTO) in November 2001 after its observer status of eleven years. Taiwan, classified by most commentators as an “unrecognized state” or an “entity *sui generis*”,² has been excluded from most of the major international organizations. Taiwan's accession to the WTO, therefore, is considered to be an important breakthrough in diplomacy for the past decades.

Notwithstanding its WTO membership, the Taiwanese Government has employed numerous trade barriers vis-à-vis imports from Mainland China due to cross-strait tension. Some of these barriers have been criticized³

¹See World Trade Organization, International Trade Statistics (2008), available at: http://www.wto.org/english/res_e/statis_e/its2008_e/its2008_e.pdf. (reporting Taiwan ranks 16th and 17th in terms of export and import, respectively.)

² See e.g. VAUGHAN LOWE, INTERNATIONAL LAW 165 (2007) (“There are also converse cases: entities that objectively appear to meet all the criteria of Statehood, but which seem not to wish to be a State. Taiwan is the classic example...Nonetheless, Taiwan has dealings with foreign States and international organizations very much like those of an independent State, and is represented abroad by (non-diplomatic missions)); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 64-65 (6th ed. 2003); LORI F. DAMROSCH ET. AL., INTERNATIONAL LAW: CASES AND MATERIALS 287-290 (4th ed. 2001) For detailed consideration of Taiwan's legal status under public international law, see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 196-221 (2006).

³ Amongst others, European Chamber of Commerce Taipei (ECCT) has been one of the most important organizations to urge the Taiwanese Government to lift its trade barriers vis-à-vis China.

and may be disputed under WTO's dispute settlement mechanism. In addition, given the diplomatic considerations, Taiwan is the only major trade partner within East Asia being excluded from the negotiations of the formation of ASEAN Plus 3 (China, Japan and South Korea) for years. While the issues of trade diversion and trade creation of preferential trade agreements (PTAs) remain hotly debated, the envisaged trade diversion effects resulting from being excluded from East Asian economic integration may become one of the striking examples demonstrating the negative impact of PTAs. The trade diversion would not only conceivably seriously undermines Taiwan's economy, but renders Taiwan's WTO membership much less useful.⁴ In light of Taiwan's special bilateral relation with China and its significant impact on the East Asia region, Taiwan's trade policy and relevant legislation present a special case under the WTO affairs.

While most existing literature, however, focuses on the implications of Taiwan's WTO membership under public international law,⁵ this article address an important pragmatic issue that what are Taiwan's main trade law instruments and how does WTO law effective in Taiwan's municipal courts. This article provides a comparative analysis of Taiwan's trade law framework and the rules of the WTO as well as an overview of relevant Taiwan's jurisprudence as regards WTO laws. The rest of the article is structured as follows. Section 2 explores the background of Taiwan's accession into the WTO. This article, in particular, points to the fact that Taiwan's participation in the WTO differs from that of Hong Kong, China's Special Administrative Region (SAR). Section 3 and 4 outline Taiwan's international trade authority and trade remedies whereas Section 5 examines how WTO law is effective under Taiwan's legal regime. Section 6 is the conclusion.

2. Background on Taiwan's accession to the WTO

In 1947, the ROC—then the only government on Mainland China became one of the 23 Contracting Parties of GATT by signing the Final Act of the GATT on 30 October 1947. Subsequently, the ROC became the party to the Protocol of Provisional Application (PPA) which came into force on 21 May 1948. After Chinese civil war, the ROC Government led by the Nationalist Party (Kuomintang or KMT) fled to Taiwan in 1949. In 1950, in order to keep the People's Republic of China (PRC) from making use of the GATT, the ROC Government notified the United Nation Secretary-General of its decision to withdraw from the GATT.⁶ In general, this decision was based on the following concerns. First, the ROC Government was informed that GATT CONTRACTING PARTIES would not adopt the favorable tax rate for Taiwan.⁷ Second, most of the products benefited from GATT tariff reductions came from Mainland China, while only few were from Taiwan.⁸ Some commentators also suggest that Taiwan's trade volume in the 1950s was small and even without GATT membership; Taiwan still was able to obtain preferential tariff reduction through bilateral trade agreement.⁹ Above all, the ROC Government on Taiwan could no longer fulfill its GATT obligations on behalf of the mainland so it would be a big disadvantage for it to assume the responsibility for the territory which out of its control.¹⁰ It is worth noting that Czechoslovakia challenged the legality of ROC's withdrawal on China's behalf during ROC's withdrawal procedure.¹¹

In light of the importance of the membership of GATT, the ROC applied for observer status in 1965. The ROC's application was granted since it remained the only representative on behalf of China in the UN. In 1971, however, the ROC was deprived of its observer status following the UN Resolution 2758, which expelled the ROC Government from its UN seat.¹²

⁴ See Y.F.Low, *Taiwan Would Benefit From Cross-Strait Common Market: Ex-premier*, CENTRAL NEWS AGENCY (Taiwan), May 24, 2005. ("the formation of a free trade zone between China and the Association of Southeast Asian Nations (ASEAN) will decrease Taiwan's GDP by 0.025 per cent, lower Taiwan's exports by 0.21 per cent and reduce imports by 0.64 per cent")

⁵ See e.g., Steve Charnovitz, *Taiwan's WTO Membership and Its International Implications*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 401, 401-431 (2006); Pasha L. Hsieh, *An Unrecognized State*, 28 MICH. J. INT'L L 765, 765-814 (2008); Pasha L. Hsieh, *An Unrecognized State*, 28 MICH. J. INT'L L 765, 765-814 (2008); Sigrid Winkler, *Can Trade Make a Sovereign? Taiwan-China-EU relations in the WTO*, 6 ASIA EUR. J. 467, 467-485 (2008)

⁶ Yang Guohua & Cheng Fin, *The Process of China's Accession to the WTO*, 14 J. INT'L ECON. L. 298 (2001).

⁷ *Id.*

⁸ *Id.*

⁹ Ying-jeou Ma, *The ROC (Taiwan)'s Entry into the WTO: Progress, Problems and Prospects*, 15 CHINESE Y.B. OF INT'L LAW & AFF. (1996-97) at 36, cited in Pasha L. Hsieh, *Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization*, 39 J. WORLD TRADE 1195, 1197 (2005), note 17.

¹⁰ *Id.*

¹¹ Chung-chou Li, *Resumption of China's GATT Membership*, 21 J. WORLD TRADE 25, 26 (1987) In fact, the PRC consistently asserted that China was one of the original CONTRACTING PARTIES to the GATT and the withdrawal from the GATT in 1950 by the ROC was illegal and invalid. Hence, the PRC insisted on "resumption" approach to acquire its membership to the GATT rather than a new member. Guohua & Fin, *supra* note 4, at 302.

¹² G.A. Res. 2758 (XXVI), ¶ 2, U.N. Doc A/8429 (Oct. 25, 1971). (stating that "Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council...Decides to restore all its rights to

In 1990, Taiwan sought to rejoin the GATT.¹³ Taiwan's application was based on Article XXXIII of the GATT under the name of "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" (TPKM) on 1 January 1990. Here, there is an important distinction between accession to the GATT of Taiwan and Hong Kong. Three articles under the WTO regime govern the acquisition of the membership: Article XII:1 of Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) coupled with Article XXVI and Article XXXIII of GATT.

Article XII WTO Agreement provides that

"[a]ny 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"

Apparently, WTO membership is not based upon statehood. While most of the WTO Members are "states", Taiwan is nevertheless eligible for the membership insofar as it is a "separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters" provided for under the WTO Agreement.

Hong Kong, on the other hand, acquired its membership by virtue of Article XXVI: 5 (a) and XXVI: 5(c) of the GATT. Article XXVI:5 (a) provides that

"[e]ach government accepting the Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility...", while Article XXVI 5 (C) stipulates that: "[I]f 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."

Under the above provisions, Hong Kong, the former British colony until the PRC's takeover in 1997 acceded to the GATT under the sponsorship of the United Kingdom on 23 April 1986.¹⁴

By contrast, as Article XXXIII GATT reads, Taiwan, being "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" under the GATT, shall and is entitled to the application for the membership on its own behalf or on behalf of its territory without the sponsorship of the PRC.¹⁵

Upon the request of the application for the GATT membership, a working party on "Chinese Taipei" was established in 1992 and Taiwan re-acquired its observer status.¹⁶ Meanwhile, the Chairman of the GATT Council declared that all parties had agreed that there was only one China and then Chairman's proposal that Taiwan's accession should not be finalized until after China's entry was accepted by other members.¹⁷ Because of this decision, therefore, Taiwan's accession was delayed for 11 years until China's accession could be negotiated.¹⁸ China underwent a very difficult process to complete the negotiations in part because it was requested to accept special rules different from the normal WTO rules applying to all the member states generally.¹⁹ With the end of the Uruguay Round negotiations, WTO was created to embrace the GATT and other covered agreements on 1 January 1995. Since then, Taiwan changed its legal basis from Article XXXIII of the GATT to Article XII of the WTO Agreement.²⁰ Eventually, on 11 November 2001, the WTO Ministerial Meeting approved Taiwan's application. The effective date of Taiwan's accession was 1 January 2002, 21 days after China's entry.

the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.") See Hsieh, *supra* note 9, at 1198.

¹³ 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).

¹⁴ Li, *supra* note 11, at 43.

¹⁵ Hsieh, *supra* note 9, at 1201. For European perspectives, see e.g., Winkler, *supra* note 2.

¹⁶ Lei Wang, *Separate Customs Territory in GATT and Taiwan's Request for GATT Membership* 25 J. WORLD TRADE 5 (1991)

¹⁷ ANALYTICAL INDEX, GUIDE TO GATT LAW AND PRACTICE 944 (6th ed.1994)

¹⁸ Charnovitz, *supra* note 5, at 404-405 (2006).

¹⁹ Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System- An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483 (2003)

²⁰ Hsieh, *supra* note 9, at 1202.

In short, the reason why Taiwan was admitted into the WTO is that the WTO membership is not based upon statehood. Any separate customs territory satisfying the criteria provided for under Article XII: 1 of the WTO Agreement would be eligible for the application for the WTO membership. Taiwan is apparently the only “customs territory” ever admitted to the multilateral trading system from 1947 onward without direct sponsorship by a state exercising diplomatic relations for it.²¹

3. Where does international trade authority lie in Taiwan?

Article 107 of the Constitution of the R.O.C provides that Central Government shall have the competence to govern “foreign affairs”, “foreign trade policies” as well as “financial and economic matters affecting foreigners and foreign countries”.²² In Taiwan, thus, the Central Government, rather than the Local Governments, has competence to regulate international trade affairs. Notwithstanding such a constitutional designation, there was no regulation governing international trade until the Legislative Yuan–Taiwan’s supreme national legislature–promulgated Foreign Trade Act (FTA) in 1993 in preparation for the accession to the GATT. It is worth noting that, though WTO covers both trade in goods and services, only trade in goods comes under the purview of the FTA.

Nowadays, the FTA is the main legal instrument governing the international trade authority in Taiwan. According to Article 4.1 of the FTA, the Ministry of Economic Affairs (MOEA) shall have the competence to regulate the matters under this FTA. In cases where any matter involving the competence of other ministries, however, the MOEA shall consult the authorities concerned. Amongst all other authorities concerned, the Ministry of Finance (MOF) and the Council of Agriculture (COA) are the most relevant: the MOF is in charge of antidumping (AD) and countervailing (CVD) measures, tariffs, internal taxes and customs affairs²³ while the COA is responsible for agricultural, forestry, fishery, animal husbandry and food affairs.²⁴

Within the MOEA, the core authorities with respect to the WTO affairs includes: the Bureau of Foreign Trade (BOFT), the International Trade Commission (ITC), the Department of Investment Services (DOIS), the Bureau of Standards, the Metrology & Inspection (BSMI) as well as the Intellectual Property Office (TIPO).

The BOFT is the main competent authority regulating the import and export trade under the FTA.²⁵ The ITC, together with the MOF, act as gatekeepers to govern the trade remedy instruments, namely, AD, CVD and safeguard (SG) measures. The ITC assumes the responsibility of injury investigations for safeguard, countervailing and antidumping cases under Article 18 and 19 of the RTA.²⁶ The DOIS, on the one hand, serves to promote the investment of Taiwanese overseas and to create a sound investment climate for foreign investors, on the other.²⁷ The BSMI develops national standards, verifies weights and measuring instruments, inspects the commodities and deals with the provision of other certification or testing services, which relates to the TBT and SPS Agreements. The TIPO tackles the promotion and protection of intellectual property rights.²⁸ It is worth noting that with the TIPO’s strenuous efforts in the past 8 years, Taiwan was removed from the annual Special 301 Watch List by the Office of the United States Trade Representative (USTR) on 16 January 2009.²⁹

Recently, one of the most striking developments in trade negotiation authority is the advent of Office of Trade Negotiations (OTN). To facilitate the efficiency of trade negotiations, the supreme national administrative organ in Taiwan—the Executive Yuan—decided to establish the OTN under the MOEA on 30 July 2007.³⁰ OTN was modeled on the USTR in response to the rapidly changing international trade climate. The OTN carries out

²¹ Charnovitz, *supra* note 5, at 405. Likewise, in addition to the WTO, any “fishing entity” is eligible for the membership under the Convention for the Conservation of Southern Bluefin Tuna of 1993. Taiwan participated in that Agreement in the capacity of a “fishing entity.” See CRAWFORD, *supra* note 2, at 220.

²² The Constitution of the Republic of China art. 107 (promulgated by the Nat’l Assembly, Jan. 1, 1947, effective Dec. 25, 1947), translated in Law & Regulation Database of the R.O.C (last visited July 10, 2009) (R.O.C)

²³ Ministry of Finance, Home Page, <http://www.mof.gov.tw/>.

²⁴ The Council of Agriculture, Home Page, <http://www.coa.gov.tw/>.

²⁵ Bureau of Foreign Trade, Home Page, <http://www.trade.gov.tw/>.

²⁶ International Trade Commission, Home Page, <http://www.moeaitc.gov.tw/>.

²⁷ Department of Investment Services, Home Page, <http://www.dois.moea.gov.tw/>.

²⁸ Intellectual Property Office, Home Page, <http://www.tipo.gov.tw/>.

²⁹ USTR News, available at:

http://www.ustr.gov/assets/Document_Library/Press_Releases/2009/January/asset_upload_file824_15293.pdf. (which states that: “Taiwan has come a long way on this issue over the last eight years,” said USTR spokesperson Sean Spicer. “In 2001, USTR called Taiwan ‘a haven for pirates.’ Today, Taiwan has strengthened its enforcement, strengthened its laws, and demonstrated a commitment to becoming a haven for innovation and creativity. This is a credit to the hard work done by Taiwan as well as to our close bilateral cooperation. We hope that this progress can continue and be duplicated in other areas of our trade relationship.”)

³⁰ Office of Trade Negotiations, Home Page, <http://www.moea.gov.tw/~meco/otn/index.htm>.

the trade negotiations— bilateral, regional or multilateral, and coordinate the communications with other relevant authorities concerned.

4. Taiwan's main trade instruments

Trade remedies in Taiwan are provided for under Article 18 and Article 19 of the FTA: the former governs the safeguard measures while the latter deals with antidumping and countervailing duties, both of which come under the auspices of the ITC of the MOEA as well as the Customs Tariff Commission (CTC) of the MOF.³¹

The CTC deals with the determination of dumping margins, the existence and the degree of subsidization and the surge of imports pursuant to the SG measures. The CTC consists of seven members who are government officials as well as four to six outside members. The seven government officials include the Vice Minister of the MOF, Vice Minister of the MOEA, the Deputy Director of the Council for Economic Planning and Development (CEPD), the Deputy Director of the COA, and the Chiefs of the four agencies including: the BOFT, the Industrial Development Bureau, the Bureau of Customs Revenue, and the Bureau of Customs Administration. Outside members, on the other hand, are usually the trade and legal experts from academia and shall not exceed six members— this is to ensure that officials have the final say on the decision of the CTC.³² The CTC is chaired by Vice Minister of the MOF and its decisions are made by virtue of majority voting.

By contrast, the ITC has five official members and eight to ten are outside members. The five officials include the Minister of the MOEA, the Deputy Minister of the MOF, and Deputy Director of the three agencies, namely, the CEPD, the COA and the Council of Labor Affairs (CLA). Outside members include trade, industry, legal and tax experts from academia. It is worth noting that, no industry-related persons could join the commission.³³ The ITC is chaired by the Minister of the MOEA and its decisions are made by qualified majority voting (two-thirds majority). It is observed that, judging from its members, the ITC is meant to be of independent government opinion in determining whether there has been industry injury to initiate the trade remedies.³⁴

4.1 Safeguards

4.1.1 Overview of legal discipline

Generally speaking, in Taiwan, SG measures, or in the FTA's term, "import relief" are governed under the FTA as well as Rules for Handling Import Relief Cases—the rules directed by the FTA to implement the SG investigations and impositions.

Under the FTA, the ITC is empowered to invoke safeguard measures upon the conditions have been met. Article 18.1 of the FTA provides that: "[w]here the increase in import volume of a good causing or threatening to cause serious injury to the domestic industry which produces like or directly competitive products, the authority in charge of the said industry, the said industry, its associations, or related organizations may apply to the competent authority for investigation of the injury and for import relief."

Hence, the cumulative conditions have to be met in order to initiate the investigation procedure:

- increase in import volume of a good;
- so as to cause or threaten to cause;
- serious injury to the domestic industry which produces like or directly competitive products.

It is the settled case-law in the WTO Appellate Body that meeting the three conditions mentioned in Article 2 of SG does not suffice for safeguards to be lawfully imposed.³⁵ A WTO Member must further demonstrate that imports increased as a result of unforeseen developments.³⁶ Evidently, there seems to be a missing requirement under Article 18 of the FTA as opposed to Article 19 of the GATT and WTO jurisprudence, namely, unforeseen

³¹ For further consideration of the trade remedy practice in Taiwan, *see generally*, Ming-Tse We & Tain-Jy Chen, *The Trade Remedy System in Taiwan*, in *THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES* 193, 194-196 (MITSUO MATSUSHITA ET AL., eds, 2006)

³² *Id.*, at 195.

³³ *Id.*

³⁴ *Id.*

³⁵ *See e.g.*, Appellate Body Report, *Argentina--Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999) (adopted Jan. 12 2000).

³⁶ For further discussion on SG measures, *see* Petros C. Mavroidis, *TRADE IN GOODS: THE GATT AND OTHER AGREEMENTS REGULATING TRADE IN GOODS* 370-371 (2008); Alan O. Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 *J. INT'L ECON. L.* 523, 523-564 (2004).

development.³⁷ Despite this “gap”, in practice, unforeseen development element has been discussed by the ITC during its first and the only SG investigation (*see infra* D.I.5.).³⁸

4.1.2 *Initiation of investigations*

According to Article 18 of the FTA and Article 6 of the RHIRC, the MOEA may, upon the petition by the relevant industry, the injured domestic industry, the association representing the injured domestic industry or the relevant entities, direct the ITC to initiate the investigations.

Upon receipt of the petition, the MOEA shall, within 30 days, refer the case to the ITC for review and decide whether to initiate an investigation, unless otherwise the petitioner is not qualified under Article 6 of the RHIRC or the petitioner fails to provide the required documents within the period notified by the MOEA.

4.1.3 *The duration of safeguards and mid-term review*

In general, according to Article 23 of Rules for Handling Import Relief Cases (RHIRC), the period of implementation of SG measures shall not exceed 4 years. Article 25 of the RHIRC further states that: “[I]f the petitioner considers that there is a need to extend the period of implementation of the import relief measures, it may petition to the Ministry of Economic Affairs within 120 days prior to the expiration of the period of implementation of the measures at the latest, for extending the relief measures... The extent of relief of the extended measures referred to in Paragraph 1 shall not exceed that of the original measures. The period of extension shall not exceed four years, and the extension shall be limited to one time.”

Also, Article 24 of the RHIRC provides that, if there is a change in circumstances after the implementation of the measures, the petitioners or interested parties may request the MOEA to terminate or modify the SG measures.

Following the same line of Article 7.4 SG Agreement, Article 25 of the RHIRC provides for a mid-term review: “[t]he Commission shall prepare an annual review report on the results and effects of the implementation of the relief measures adopted. If it believes that the cause for implementing the said measures has extinguished or that there is a change in circumstances, it shall recommend the Ministry of Economic Affairs to terminate or modify the measures. If the Ministry of Economic Affairs finds its recommendation acceptable, the Ministry of Economic Affairs shall promptly give a public notice of termination or modification of the measures.”

4.1.4 *Overview of SG cases*

So far, the ITC has initiated only one safeguard investigations filed by Yunlin Towel Industrial Technology and Development Association on 24 August 2005. The latter alleged that certain toweling products from Mainland China are being imported into Taiwan in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of the like or directly competitive products and requested for the initiation of safeguard measures. During this process, the ITC *ex officio* launched the AD investigations on March 2006 and decided to impose provisional AD duties from June 1, 2006. In September 2006, after the establishment of dumping and injury by the MOF and the ITC respectively, the Taiwanese Government decided to impose the AD duties of 204.1% on the relevant Chinese towel makers.³⁹ Sooner after the imposition of AD duties, the ITC suspended the SG investigations in October 2006.⁴⁰

4.2 **Antidumping**

4.2.1 *Overview of legal disciplines*

Generally speaking, the AD investigation is governed by Article 19 of the FTA, Article 68 of the Customs Act (CA) as well as The Regulations Governing the Implementation of the Imposition of Countervailing and Antidumping Dumping (RGIICAD).

³⁷ Neither could we find this requirement in Rules for Handling Import Relief Cases.

³⁸ See ITC Report, *Certain Towelling Products from China* (17 March 2006), available at: <http://www.moeaitc.gov.tw/itcweb/ic/wFrmIcReport.aspx?Type=4&programid=151> (last visited Feb. 20, 2009)

³⁹ ITC Gazette, http://portal.moeaitc.gov.tw/icweb/webform/wFrmWeb0103.aspx?news_id=752. (last visited Feb. 20, 2009)

⁴⁰ ITC Gazette, http://portal.moeaitc.gov.tw/icweb/webform/wFrmWeb0103.aspx?news_id=806. (last visited Feb. 20, 2009)

Article 19 of the FTA authorizes the MOF to impose antidumping duties if it considers “a foreign country exports any goods to this country by way of...dumping thereby causing or threatening to cause substantial injury to domestically produced products competing with the said goods or creating substantial hindrance to the establishment of the domestic industry concerned, and the injury has been verified after the investigation by the MOEA, the Ministry of Finance may impose, by law...antidumping duties.”. Article 68 of the CA states that:

“[i]mported goods that are found to have been dumped at a price less than the normal value of its like product, thereby causing injury to industry in the Republic of China, may be subject to the imposition of an appropriate antidumping duty in addition to the customs duty leviable under the Customs Import Tariff.” In addition, Article 69 of the CA provides that the term “causing injury to the industry” refers to “material injury, threat of material injury to the industry, or material retardation of the establishment of such an industry in the Republic of China.”

In brief, the conditions that have to be met cumulatively for the MOF to lawfully impose AD duties are: it must be shown that the dumping has caused material injury to the domestic market producing the like products. As such, it follows the same vein of Article VI of GATT and AD Agreement.

4.2.2 *Initiations of investigations*

First of all, the competent authorities govern AD investigations are the MOF and the ITC: the former is in charge of the investigation of existence of the dumping margin, while the latter deals with whether the dumped imported products cause the injury to the domestic industry.

According to Article 2 of the RGIICAD, the investigation of AD may be initiated *ex officio*, by a petition or by referral of other government agencies. The producers of a domestic like products or related commercial, industrial, labor, agricultural associations or other legal entities, by virtue of Article 6 of the RGIICAD, may apply for the application of AD duties insofar as their application are supported by “those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product produced by the portion of the domestic industry expressing either support for or opposition to the application; and the production of domestic producers expressing support for the application shall account for more than 25 percent of the total production of the like product produced by the domestic industry.”

In cases where individual firms or industry associations file the petition, it shall be subject to the review of the CTC, which examines the documents, evidence and checks whether the requirements have been met.⁴¹ According to Article 8 of the RGIICAD, the CTC shall make decisions as to whether to initiate the investigations within 40 days upon the receipt of the petition. If the petition is accepted, then the case shall be moved to the ITC for the injury investigation. In general, the ITC shall conduct the investigations and make a preliminary decision within 40 days, which could be extended by 20 days, if necessary. (Article 12 and Article 18 of RGIICAD) A public hearing for interested parties is mandated in the investigation process. If a positive decision is made, the ITC shall decide whether to recommend a provisional measure and then the case moves back to the CTC to decide the dumping margin. If, on the other hand, a negative decision is reached by the ITC, the case is closed.

Subsequent to the preliminary positive determination of industry injury, the CTC shall investigate and decide the dumping margin within 70 days. The process could be divided into two parts: a preliminary determination of the dumping allows the CTC to decide whether to impose temporary duties based on the recommendation of the ITC; meanwhile, the case shall be sent to the second-stage investigation.⁴² If the CTC makes a negative preliminary determination, however, the case is still subject to the review of the second stage for final determination. If CTC finds no evidence of dumping in its final determination, the case is closed.

Again, when the CTC concludes the final determination, the case shall move back to the review of the ITC for its final determination of injury. The ITC shall make its final determination within 40 days. If the ITC makes a negative decision, then the case is closed; if the positive decision is maintained by the ITC, this would provide grounds for the CTC to impose AD duties. Prior to the imposition of AD duties, the case shall be subject to the final review of the Executive Yuan for approval. The Executive Yuan has the power to lower or eliminate the AD duties for the sake of “public interest”, yet so far it has not done so.⁴³

4.2.3 *Duration of AD duties and Sunset Review*

Following the same vein of Article 11.3 of AD Agreement, Article 44 of the RGIICAD provides, the application of the AD duties, in general, shall be terminated within five years from its imposition unless the competent

⁴¹ Ming-Tse We & Tain-Jy Chen, *supra* note 31, at 195.

⁴² *Id.*, at 196.

⁴³ *Id.*

authorities determine that the expiry of the duties would likely lead to continuation or recurrence of dumping and of injury.

4.2.4 Overview of AD cases

Taiwan has imposed AD duties on 11 cases out of 48 AD investigations from 1984 through 2004.⁴⁴ From 2005 through 2008, there have been six AD investigations — some of which are new cases while some are sunset review. Amongst others, *Certain Toweling Products from China* case is the most well-known in that it was for the first time that Taiwanese Government was requested to initiate the SG measures against the products from Mainland China. At the end of the day, the ITC and the MOF *ex officio* initiated the AD investigations and suspended the SG investigations. (*see supra* D.I.4)

4.3 Countervailing Duties

4.3.1 Overview of legal disciplines

CVD can be imposed against both actionable and prohibited subsidies. In general, for CVD measures to be lawfully imposed, a WTO Member must meet the substantive requirement to demonstrate that:⁴⁵

- (1) the existence of a subsidy scheme;
- (2) injury to its domestic industry producing the like products; and
- (3) a causal link between (1) and (2)

In Taiwan, the relevant provisions governing CVD, in general, follow the line of the CVD Agreement. First of all, Article 19 of the FTA empowers the MOF to impose CVD duties in cases where “a foreign country exports any goods to this country by way of subsidizing...thereby causing or threatening to cause substantial injury to domestically produced competing with the said goods or creating substantial hindrance to the establishment of the domestic industry concerned...”. Article 67 of the CA further provides that: “[i]mported goods that have directly or indirectly received a financial subsidy or any other form of allowance during the process of manufacture, production, sale, or transportation in the country of exportation or origin, thereby causing injury to any industry in the Republic of China, may be subject to the imposition of appropriate countervailing duty in addition to the customs duty leviable under the Customs Import Tariff.” As in the case of AD duties, the details of imposition of CVD measures are principally governed under the RGIICAD as well.

4.3.2 Initiations of investigations

The procedural and substantive requirements of initiation of CVD investigation are identical to that of the AD. (*see supra* D.II.2)

4.3.3 Duration of CVD duties and sunset review

The duration and the review process of CVD measures are, according to Article 44 of the RGIICAD, the same with those of AD duties. (*see supra* D.II.3)

4.3.4 Overview of CVD cases

So far, the MOF has not yet initiated CVD investigation nor imposed CVD measures.

5. How is WTO law effective in Taiwan?

Whether WTO law has direct effect in Taiwan lies in the core issue—the enforceability and legal order of international treaties. In this section, we examine the relevant provisions and cases to analyze the status of treaties in Taiwan’s legal order at the outset, and then explore the existing case-law referring to WTO law.

Article 38 of the Constitution provides that: “[t]he President shall, in accordance with the provision of this Constitution, exercise the power of concluding treaties...”. According to Article 58 of the Constitution, the

⁴⁴ Press Release of Department of Customs Administration, <http://doca.mof.gov.tw/ct.asp?xItem=85&CtNode=55> (last visited Feb. 25, 2009)

⁴⁵ MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 375 (2nd ed. 2006)

conclusion of treaties shall be presented to the Executive Yuan Council before sending to the Legislative Yuan for rectification. The Legislative Yuan, pursuant to Article 63 of the Constitution, shall have the competence to decide by resolution upon the conclusion of treaties. The Judicial Interpretation No. 329 of the Constitutional Court states that: “[w]ithin the Constitution, ‘treaty’ means an international agreement concluded between the R.O.C and other nations or international organizations...Its content involves important issues of the Nation or rights and duties of the people and its legality is sustained. Such agreements, which employ the title of ‘treaty’, ‘convention’ or ‘agreement’ and have ratification clauses, should be sent to the Legislative Yuan for ratification. Other international agreements, except those authorized by laws or pre-determined by the Legislative Yuan, shall also be sent to the Legislative Yuan for ratification.” and those concluded by virtue of Article 38, Article 58 and Article 63 of the Constitution, “hold the same status as laws.” In addition, Article 141 of the Constitution follows “*pacta sunt servanda*” in international law and states that: “[t]he foreign policy of the Republic of China shall...respect treaties...” As such, WTO Agreement and its covered agreements that have been ratified by the Legislative Yuan shall be respected by the Government and have the same status as domestic law in Taiwan’s legal order.

Notwithstanding the above, the issues whether the WTO laws have the direct effect and could be invoked by individuals in national courts are still obscure. At the outset, we examine the relevant case-law dealing with the direct effect of other treaties.

Amongst others, “ROC-US Treaty of Friendship, Commerce and Navigation” (1946) is one of the most well-known treaties frequently cited by national courts. Judgment of (72) Tai-Shan-Tze-1412 of Supreme Court asserted that since the “R.O.C-U.S Treaty of Friendship, Commerce and Navigation” was ratified by the Legislative Yuan and Article 141 of the Constitution mandated the Government to “respect treaties”, therefore, this Treaty had the same effect as national laws and shall be applied by the national courts. The judgment of (73) Tai-Fei-Tze-69 of Supreme Court, followed the same vein and applied the “ROC-US Treaty of Friendship, Commerce and Navigation” directly. As such, it is observed that treaties shall have direct effect and be applied by national courts in Taiwan.⁴⁶

We now turn to the effect of WTO laws. Following the same vein, we may consider that the WTO law shall have the direct effect in the national courts as well. In practice, WTO laws have been applied in national courts. In its judgment of (92) Pan-Tze-1649, for instance, the Supreme Administrative Court has referred to the relevant provisions as to the protection of geographical indication under the TRIPS in its reasoning. (93) Shan-Shu-Tze-2940 judgment of the Criminal Division of the High Court explicitly held that according to the Article 9.1 of TRIPS and Article 3 of Berne Convention, Taiwan, as a WTO Member, shall afford the protection of copyrights to the nationals of other WTO Members. At the level of trial court, WTO law has been invoked too. In the judgment of (93) Yi-Tze-1747, for example, Taipei District Court opined that Warner Bros. and 20th Century Fox etc., were entitled to the protection of copyrights under Article 4.2 of Copyright Act and TRIPS Agreement.

While a majority of case-laws invoke WTO laws—in particular TRIPS— some case-laws seem to decline WTO laws’ direct effect. In the judgment of (95) Tze-156 of Criminal Division of Taipei District Court, it was held that MFN clause and NT clause provided for under TRIPS Agreement do not have direct effect even though Taiwan is a member of the WTO. In the present case, a Korean company initiated a private prosecution (as opposed to the public prosecution by prosecutor) against two Taiwanese citizens for offence of trade secret. The Korea company was challenged by the defendants in that it is an “unrecognized” legal person and thus has no legal standing to initiate this proceeding. This argument was accepted by Taipei District Court and this charge was dismissed.

On appeal, the High Court in its (96) Shan-Yi-1177 judgment upheld the finding of the first trial. By invoking the “ROC-US Treaty of Friendship, Commerce and Navigation” and the MFN provision under the TRIPS, the Korea company argued that since Article 6.4 of “ROC-US Treaty of Friendship, Commerce and Navigation” granted the US citizens, legal entities and organizations the rights to litigate in terms of protection of intellectual property, it shall be entitled to the same right under the MFN clause of TRIPS. Again, this argument was dismissed by the High Court and the finding became final and binding. Some commentators seem to support this minority view because of Article 7.4 of the FTA. Article 7.4 of the FTA states that

[a] pact or an agreement with contents involving amendment of any existing law or enactment of a new law shall become effective only after completion of legislative procedures”. Thus, it is suggested that in Taiwan the agreements or treaties involving foreign trade are not “self-executing” in nature and shall be effective only upon the completion of legislative procedures.⁴⁷

⁴⁶ See Hungdah Chiu, XIANDIAN GUO JI FA (MODERN INTERNATIONAL LAW) 123-124 (1995)

⁴⁷ See Chang-Fa Lo, GATT/WTO YU WO GOU MO YI (GATT/WTO AND TAIWAN’S FOREIGN TRADE) 16-17 (1996)

To sum up, while the jurisprudence in the 80's upheld the direct effect of treaty in Taiwan's legal system, it is not always the case in terms of WTO laws. At this point, it suffices to say that relative majority of case-laws incline to apply to WTO laws directly, whereas some case-laws are nevertheless reluctant to do so.

6. Conclusion

As an entity *sui generis*, Taiwan's accession into the WTO is a milestone after the diplomatic block from Mainland China for decades. Under the WTO regime, both Taiwan and Mainland China shall be subject to the rules of the WTO and treat the other in the same way as they do to other WTO members. However, the Taiwanese Government has so far employed various trade restrictions on the imports and exports from China. Likewise, despite its economic power, Taiwan is nevertheless isolated in the recent movement of preferential trade agreements (PTAs) amongst WTO members because of political pressure from China. Yet the cross-strait dialogue has been resumed since President Ma Ying-jeou took office in May 2008,⁴⁸ the measures that deviate from the WTO rules may remain in place due to political reality. Yet whether and to what extent those measures may be disputed within the WTO regime are far from clear, Taiwan's trade law framework this article has sought to explore thus far presents a starting point for future examination of cross-strait interaction under the WTO.

⁴⁸ Jane Rickards, *Chinese Envoy Visits Taiwan: Historic Talks Set to Conclude Packs*, WASH. POST. Nov. 4, 2008, at A08, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/03/AR2008110302641.html> ("The visit, which ends Friday, has enormous political significance. Chen is the highest-ranking Chinese official to visit the democratic self-ruled island since China's civil war ended in 1949. It is also the first time Taipei and Beijing have held talks at this level on Taiwanese soil.")