

# “One China, Four WTO Memberships”: Legal Grounds, Relations and Significance

ZENG Huaqun \*

On 11 December 2001 and 1 January 2002, China and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (referred to as “Chinese Taipei”) became members of the World Trade Organization (hereinafter WTO) one after another, and together with Hong Kong and Macao, the two WTO original members on 1 January 1995, the situation of “One China four WTO memberships” in the WTO regime has emerged. It is not only the new phenomenon in the history of the WTO, but also the most important issue of China’s accession to the WTO. What are the legal grounds for “one China four WTO memberships”? What are the relations among the four WTO members? What is the significance of the unique situation? The paper will discuss these questions.

## I. LEGAL GROUNDS AND FORMATION OF “ONE CHINA FOUR WTO MEMBERSHIPS”

The formation of “one China four WTO memberships” is the product of provisions of Marrakesh Agreement Establishing the World Trade Organization (hereinafter WTO Agreement), the unique development of Chinese history and the successful practice of China’s policy of “one country two systems”.

### 1. PROVISIONS ON MEMBERSHIP IN WTO AGREEMENT

According to Articles 26, 32, 33 of the General Agreement on Tariffs and Trade (hereinafter GATT), sovereignty is not a precondition of a GATT contracting party. Any entity, being a separate customs territory (hereinafter SCT), may become a contracting party, if it meets certain conditions by related procedures. On contrary, even a sovereign State, if not a SCT, cannot become a contracting party.

WTO Agreement follows the modes of the GATT on a contracting party in general and narrows the GATT procedures for membership to two modes, namely the original members and the members by accession.<sup>1</sup>

\* Dr. ZENG Huaqun is a Law Professor and Director of International Economic Law Institute, Member of the Initiative for Taiwan Research (Project 985-II), Xiamen University, China; Executive Vice President, Chinese Society of International Economic Law; Member, Standing Council, Chinese Society of International Law; Visiting Research Fellow in East Asian Institute (EAI), National University of Singapore, Singapore (1998–1999); Visiting Scholar in School of Oriental and African Studies (SOAS), University of London, UK (1996, 1998), Swiss Institute of Comparative Law, Switzerland (1995–1996), Faculty of Law, Hong Kong University (1993) and College of Law, Willamette University, USA (1987–1988). He may be contacted at hqzeng@xmu.edu.cn.

<sup>1</sup> The GATT had several different modes for accepting a contracting party status, including the provision that allowed colonial mother countries to “sponsor” GATT status for a colonial entity with independent customs territory status. See John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, Cambridge University Press, 2006, p. 108.

According to Article 11 of WTO Agreement, the original membership is conferred on any GATT contracting party and the European Communities (hereinafter the EC) that accepted both Uruguay Round treaties and negotiated schedules of concessions for goods and services.<sup>2</sup> For the members by accession, Article 12 of WTO Agreement reads as: "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 annexed thereto." For this mode, practice considerably embellishes the procedure, so that sometimes the accession process is very arduous.<sup>3</sup>

There are some other provisions relating to membership in WTO Agreement. The main characteristics on WTO membership might be summarized as follows:

First, as to the name of participants of the organization, different from a "contracting party" in the GATT, the WTO uses a "member" instead. It is important mark that the WTO has become a *de jure* international organization from the GATT, a *de facto* international organization.

Second, the EC becomes a formal member of the WTO from its position of a *de facto* contracting party in the GATT. It is noticeable that the EC is currently the only WTO member from international organizations. For the long period of time, the EC was a *de facto* contracting party while its member States were *de jure* contracting parties in the GATT. According to Article 11 of WTO Agreement, the EC takes up the new position of a *de jure* and original member in the WTO.

Third, it seems that the WTO follows the tradition of the GATT, continues to adopt the concept of a SCT. In order to use the legal concept of a SCT to the whole multilateral trade rules, the explanatory note of WTO Agreement particularly indicates:

"the terms 'country or countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any SCT member of the WTO. In the case of a SCT member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term 'national', and such expression shall be read as pertaining to that customs territory, unless otherwise specified."<sup>4</sup>

Four, the developing country members,<sup>5</sup> especially the least-developed country (hereinafter LDC)<sup>6</sup> members may be granted extensive special and differential treatment.

<sup>2</sup> Article 11 of WTO Agreement provides that "The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Specific Commitment and annexed to GATT 1994 and for which Schedules of Specific Commitment and annexed to GATS shall become original Member of the WTO."

<sup>3</sup> John H. Jackson, *supra* note 1, p. 109.

<sup>4</sup> ZHAO Weitian, *Legal Systems of the WTO* (in Chinese), Jilin People's Press, 2000, pp.42-44.

<sup>5</sup> Although the term "developing" is generally used as opposed to "developed", which represents the status of an industrialized economy generating high levels of income, there is no clear definition of "developing" status that is universally applicable. In the WTO, a developing status is self-declared, and there is no clear cut-off standard. See Yong-Shik Lee, *Reclaiming Development in the World Trading System*, Cambridge University Press, 2006, pp.3-4, footnote 11.

<sup>6</sup> The WTO recognized the LDCs as designated by the United Nations (UN) based on multiple criteria such as a low-income criterion (under \$750 for inclusion, above \$900 for graduation), a human resource weakness criterion, and an economic vulnerability criterion. Fifty LDCs are on the UN list. See Yong-Shik Lee, *supra* note 5, p.26, footnote 94.