Chapter 8

Mapping the Law of WTO Accession*

This chapter explores the looming and potentially controversial legal issues surrounding the law of accession in the World Trade Organization (WTO). Many of the recent accession negotiations have been quite detailed with WTO members nailing down numerous commitments asked of the applicant government (e.g., China) seeking to join the WTO.[1] If these commitments are not implemented, the governments that insisted upon them may invoke WTO dispute settlement. Dispute settlement in the WTO has proven to be more legalized than many in the trade community anticipated

*This article appears with the permission of Juris Publishing, Inc., Huntington, New York 11743, www.jurispub.com from The WTO: Governance, Dispute Settlement & Developing Countries, edited by Merit E. Janow, Victoria Donaldson, and Alan Yanovich, Chapter 46, "Mapping the Law of WTO Accession" by Steve Charnovitz, pp. 855–920. That article went to press on 10 November 2006. Chapter 8 presents the complete version of my accession paper that was shortened for publication in the conference volume published by Juris in 2008.

[1]As used in this chapter, an "applicant" government is the state or separate customs territory that is seeking to join the WTO pursuant to Article XII (Accession) of the Marrakesh Agreement Establishing the WTO ("WTO Agreement"). An "acceding" government or "acceded" member is an applicant that has succeeded in joining the WTO. An "original member" is a government that joined the WTO under Article XI (Original Membership) of the *WTO Agreement*. An "incumbent member" is a member that joined under either Article XI or XII and is a member at the time that a new accession protocol is approved. The use of the term "acceding governments" goes back to the Annecy Protocol of Terms of Accession to the General Agreement on Tariffs and Trade, October 1949, BISD I/79.

during the Uruguay Round of trade negotiations that established the WTO.[2] The WTO panel system has been described as "judicial" by the Appellate Body, which has supported this observation by making it clear that first-level panels "necessarily" have to consider its views, and "rely" on its reasoning and rulings. The Appellate Body's decisions are meant to provide, "interpretive guidance for future panels".[3] During the past decade, the dispute settlement system has successfully grappled with many difficult legal issues, and seems prepared to continue doing so alongside the languishing Doha Development Round negotiations. In September 2006, the first case alleging a violation of an accession commitment commenced at the WTO: the case of *China-Auto Parts*.[4] The three complainants, Canada, the European Communities, and the United States, alleged a number of violations of WTO multilateral agreements,[5] and violations of particular accession commitments by China on auto parts. In those proceedings, there may be pleadings on and consideration by the panel as to (whether and) why an accession agreement is enforceable in WTO law.[6]

[2] *See* Steinberg (2004); Van den Bossche (2005).

[3] Appellate Body Report, *India-Quantitative Restrictions,* para. 149, noting the "judicial function" of panels; Appellate Body Report, *U.S. — Shrimp*, para. 107, discussing the precedential weight of Appellate Body decisions. *See also* Appellate Body Report, *U.S. — Oil Country Tubular Goods Sunset Reviews*, para. 188: "Indeed following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".

[4] *China — Measures Affecting Imports of Automobile Parts,* Request for the Establishment of a Panel by the United States, WT/DS340/8, 19 September 2006; Request by Canada, WT/DS342/8, 18 September 2006; and Request by the European Communities, WT/DS339/8, 18 September 2006. An issue regarding one of China's accession protocol commitments was also raised in 2004 in *China-Taxes on Integrated Circuits*. In that episode, China and the complaining country (the United States) reached a mutually satisfactory solution in October 2005.

[5] The WTO covered agreements invoked by one or more of the plaintiffs include the GATT 1994, the *TRIMs Agreement*, and the *SCM Agreement*.

[6] By "enforceable", I mean that a WTO member is legally entitled to lodge a complaint about a lack of implementation of an accession commitment. If China does

The reason may seem obvious, and yet when one delves into the matter, the justification is hardly clear. Developing a coherent legal explanation as to why a commitment in an accession protocol is enforceable is a necessary first step for thinking through other questions, such as the proper approach for interpreting accession commitments. This chapter maps out the key questions, and offers answers.

The analysis proceeds as follows: Section I provides a background on the WTO rules and practices regarding accession. Section II presents a new taxonomy of the provisions in WTO accession agreements that deviate from ordinary WTO rules. The existing literature on analyzing accession commitment is examined and critiqued, and this chapter offers significant refinements of the often used "WTO-plus" and "WTO-minus" concepts. Section II also illustrates the new taxonomy with specific provisions from accession agreements. Section III addresses the challenge of finding a legal explanation of why WTO accession protocols are enforceable. This section identifies several existing explanations and discusses why they cannot justify enforceability. Section III also offers a new explanation that does not presuppose that accession agreements are "covered agreements".[7] Section IV discusses some difficult issues that may arise in the interpretation of WTO accession commitments when disputes occur regarding implementation. Section V draws conclusions and takes note of some disturbing transparency gaps regarding the new accession of Vietnam.

Any consideration of the position of accession agreements in the WTO law will lead to questions about the legitimacy of the accession process. This chapter does not deal with those governance questions in a detailed way, but rather seeks to provide better analytical foundations for understanding the nature of accession commitments and

---

not contest that its commitments are enforceable, then the question of why an accession commitment is enforceable may not be directly addressed by this panel.

[7]Article 3.2 of the DSU states that "The Members recognize that [the DSU] serves to preserve the faiths and obligations of Members under the covered agreements … ".

why they are enforceable. In order to do that, however, the chapter will need to give some attention to the power context in which accession is negotiated and to the critiques of accession agreements that may arise in dispute proceedings.

With regard to the enforceability of accession commitments, future panels may articulate a rationale for where accession commitments fit into WTO law and why they are enforceable.[8] This chapter seeks to inform the pleadings that will be made by governments and the ultimate resolution of these difficult questions. Ultimately, predicating enforcement on the wrong reason will have negative repercussions for future cases and for the WTO political process.

I. Background on WTO Accession

Most WTO members are states, and the remaining few are separate customs territories (e.g., Hong Kong, China). Membership is obtained either by being an original member or through accession.[9] As time goes on, the percent of WTO members that join through accession will increase. Today, the WTO has 149 members, 21 of which (14%) entered via accession since the WTO treaty went into effect in 1995.[10] Currently, the WTO has 28 candidate countries being vetted. If universal membership[11] is ever achieved, the percent

[8]The issue would arise if a party raised it, but could arise even if no party raised it. As the Appellate Body has noted, a panel may raise an issue on its own that goes to the root of its jurisdiction to deal with the matter before it. Appellate Body Report, *Mexico — Corn Syrup (Article 21.5-U.S.)*, para. 36.

[9] *See* Marrakesh Agreement Establishing the WTO ("WTO Agreement"), arts. XI, XII.

[10]The number of accessions approved by the WTO per year have been: 1995 (1), 1996 (3), 1997 (0), 1998 (2), 1999 (3), 2000 (4), 2001 (3), 2002 (2), 2003 (2), 2004 (0), 2005 (2), and 2006 to date (1). The numbers add up to 23 and include Tonga and Vietnam, which have been given final membership approval by the WTO General Council, but have not yet joined at the time of writing.

[11]The WTO leadership often says that the WTO aspires to universal membership. *See, e.g.*, the speech given by former Director-General (D-G) of the WTO Renato

of the WTO membership entering via accession would be 35% (or more).

A government seeking to join the WTO market faces significant barriers to entry. Governments have to laboriously negotiate their way in.[12] This political hurdle is much greater now than it was in the GATT era (1947–1994). Back in 1965, Gerald Curzon, a leading commentator on the General Agreement on Tariffs and Trade (GATT), wrote:

> On the whole, this [the GATT's accession] arrangement is biased in favour of newcomers. Established members of GATT do not normally try to drive too hard a bargain in payment of concessions which they made to third countries many years before.[13]

Nowadays established members of the WTO often do drive a hard bargain. For example, the Russian Federation has been trying to join since June 1993, but the process is far from over.[14] As countries get close to the finish line, some final momentum may come from favorable geo-political winds.

Ruggiero, "The Multilateral Trading System at Fifty", 16 January 1998: "A third priority is to continue the momentum towards universal membership of the system. And this means completing the 32 accession negotiations currently underway without compromising the system's basic rules, rights and obligations", *available at* <http://www.wto.org/English/news_e?sprr_e/wash_e/htm>.

[12] Matsushita, Schoenbaum, and Mavroidis (2006): "Accession to the WTO is a difficult and time-consuming process".

[13] Curzon (1965).

[14] *Bush Hangs Tough as Impasse Blocks Moscow's Efforts to Join WTO*, Australian, 17 July 2006, at 12 (noting the sticking point of the Russian concern about the safety of U.S. beef and pork). In July 2006, the G8 adopted a Summit Statement on Trade that, among other points, underlined "support [for] Russia's expeditious accession to the WTO in accordance with the rules that apply to all of its members". *See* <http://en.g8russia.ru/docs/16.html>.

Unlike most other multilateral organizations where the membership process for states is fairly routine, rapid, and transparent,[15] the WTO accession process is Byzantine, drawn out, and opaque. Incumbent members use the lure of membership to induce economic policy changes in applicant countries. Such linkage appears to be driven by both normative and procedural reasons. The normative reason is the conventional wisdom in and around the WTO that locking in economic changes in an applicant country will redound to the benefit of that country and will also help exporters and investors of incumbent members. The procedural reason is that a consensus of incumbent members is required in order to admit an applicant government.[16]

Consensus decision-making is not mentioned in the text of Article XII (Accession) of the *WTO Agreement*, which states:

1. 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

[15]Of course, international organizations may have qualifications for membership and treaties may have conditions for accession. *See, e.g.*, Klabbers (2002); Aust (2000). The closest analogy to the WTO Accession process is the accession process in the OECD. Joining the OECD requires the unanimous agreement within the OECD Council, which is composed of all Members. *See* "Becoming a Member of the OECD: the Accession Process", September 2002, available on the OECD website. An applicant country is vetted to see whether it is ready to assume responsibilities of OECD membership. In one episode, the accession of Korea was completed in 1996 when it agreed to make changes in its labor laws as the price for membership. Salzman (2000). The commitments obtained from Korea were arguably OECD-plus.

[16]An incumbent member might join the consensus yet nonetheless decide to withhold its own application of the *WTO Agreement* to the new member. This one-time opportunity is provided for in Article XIII (Non-Application) of the *WTO Agreement*. The United States has utilized this procedure on several occasions.

this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.[17]
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.[18]

Nevertheless, consensus is needed as a practical matter because before an accession protocol can reach the Ministerial Conference (or General Council acting for it),[19] the accession package will need approval by consensus in the Working Party that negotiates with the applicant government and draws up the formal negotiating terms (moreover, the Working Party itself has to be established by consensus). In addition (with one exception), the practice has been for the Ministerial Conference or General Council to approve accession

[17]Presumably this means two-thirds of the entire WTO membership. *Compare WTO Agreement*, art. IX:1, which provides for a simple majority "of the votes cast".

[18]Article XII of the *WTO Agreement* is based on the text of Article XXXIII (Accession) of the GATT 1947, which states that a government may accede to the GATT on terms to be agreed between such government and the GATT CONTRACTING PARTIES (that is, acting jointly) based on a two-thirds vote. Back in 1947, the GATT was intended to be absorbed into the planned ITO and the ITO's membership rule pointed to majority voting without any mention of negotiated terms. *See* Articles 17.2 and 75.2 of the Charter of the International Trade Organization (not in force), *available at* <http://www.WTO.org/english/docs_e/legal_e/preWTO_legal_e.htm>.

[19]The WTO practice is that the General Council has inter-sessional authority under *WTO Agreement*, Article IV:2 to approve accession agreements. One could question whether this is proper because Article IV:2 does not expressly apply to accession agreements. Recall that the *WTO Agreement* states that both "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations … ". *Id.* art. IX:2. If it is always the case that the General Council may stand in for the Ministerial Conference, then what is the meaning of the words that specifically mention the General Council in Article IX:2?

protocols by consensus.[20] Indeed, consensus is the normal approach to all decision-making within the WTO.[21]

An even more important characteristic of the accession process, not evident from the text of Article XII, is the high degree of decentralization in accession negotiations. Instead of one negotiation between the WTO and the applicant, there are multiple, simultaneous negotiations between the applicant and each incumbent member hoping to demand "terms". Only after each incumbent member is satisfied do all of these bilateral negotiating results get folded together into the overall accession package.[22] At that point, all of the bilateral commitments are multilateralized.[23]

Article XII of the *WTO Agreement* is based on the text of Article XXXIII (Accession) of the GATT, which states that a government may accede to the GATT on terms agreed between such government and the GATT Contracting Parties (i.e., acting jointly) based on a two-thirds vote. Back in 1947, the GATT was intended to be absorbed into the planned International Trade Organization (ITO) and the ITO's membership rule pointed to majority voting without any mention of negotiated terms.[24]

---

[20] Ehlermann and Ehring (2005). The exception was Ecuador whose accession was approved through a postal ballot after an agreement to do so was reached by consensus.

[21] Steger (2005).

[22] *See* WTO, "How to Become a Member of the WTO", *available at* <http://www.WTO.org/english/theWTO_e/acc_e/acces_e.htm>, (explaining that "Because each accession Working Party takes decisions by consensus, all interested WTO Members must be in agreement that their individual concerns have been met and that outstanding issues have been resolved in the course of their bilateral and multilateral negotiations".) That said, not everything that an incumbent member demands is necessarily intended to be memorialized in the accession protocol. In other words, there can be side payments on issues unrelated to the WTO.

[23] If the terms that one incumbent has extracted from the applicant prove unacceptable to other incumbent members, then those terms could be omitted from the protocol due to the consensus rule.

[24] *See* Charter of the International Trade Organization (not in force), arts. 71.2, 75.2, *available at* <http://www.WTO.org/english/docs_e/legal_e/preWTO_legal_e.htm>.

Article XII does not state any principles for accession negotiations and does not include any parameters for what "terms" may be "agreed" between the WTO and the applicant country.[25] In late 1994, just before the WTO came into existence, there was a principle put forward in the GATT Council that "accession negotiations should be limited to issues related to GATT rights and obligations including market access to the applicant country or territory".[26] That principle was not implanted into WTO practice however.

In view of the asymmetric bargaining position of the applicant v. the incumbent members, the terms agreed upon will typically center on commitments made by the applicant.[27] Nevertheless because the Preamble to the *WTO Agreement* heralds "reciprocal and mutually advantageous arrangements" among parties, one can also imagine that an accession negotiation could lead to liberalization commitments being extracted from incumbent WTO members. But the reality in the WTO has been that incumbents have not offered, during accession negotiations, to liberalize their own markets.[28]

When the WTO agrees to admit an applicant country, it does so through the adoption of an Article XII decision that approves the accession protocol. The WTO Secretariat has identified terms that are common to all accession protocols.[29] That text can be considered the "Standard Protocol", and is reprinted below in excerpted form:

---

[25] Qin (2003). My article builds upon Qin's pioneering study.

[26] WTO, Guide to GATT Law and Practice 1020 (1995). This principle was stated by the Chairman of the Council and said to arise out of consultations with delegations. It was listed as one of 10 "points" of "an indicative nature".

[27] Michalopoulos (2002): "Incumbent members can ask the applicant to reduce the level of protection in its markets, but the reverse does not usually occur".

[28] During the early GATT era, there was apparently a more generous attitude by incumbent governments to make reciprocal concessions in favor of acceding governments. Dam (1970). The accession negotiations in that early period were sometimes held in conjunction with trade rounds.

[29] The Standard Protocol appears on page 42 of "Technical Note on the Accession Process", Note by the Secretariat, WT/ACC/10/Rev.3 (28 November 2005) [hereinafter "Secretariat Note"].

PROTOCOL ON THE ACCESSION OF THE REPUBLIC OF [Name of Applicant]

Preamble

The World Trade Organization (hereinafter referred to as the "WTO"), pursuant to the approval of the General Council of the WTO accorded under Article XII of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as "WTO Agreement"), and the Republic of … [name of applicant]… (hereinafter referred to as "[short form of name]").

Taking note of the Report of the Working Party on the Accession of … [name of applicant] … to the WTO in document WT/ACC/[…] (hereinafter referred to as the "Working Party Report").

…

Agree as follows:

PART I — GENERAL

1. Upon entry into force of this Protocol, … [name of applicant] … accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.
2. The WTO Agreement to which … [name of applicant] … accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of entry into force of this Protocol. This Protocol, which shall comprise the commitments referred to in paragraph … [list of relevant commitment paragraph numbers] … of the Working Party Report, shall be an integral part of the WTO Agreement.
3. Except as otherwise provided for in the paragraphs referred to in paragraph … [list of relevant paragraphs numbers] … of the Working Party Report, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are

(*Continued*)

to be implemented over a period of time starting with the entry into force of that Agreement shall be implemented by … [name of applicant] … as if it had accepted that Agreement on the date of its entry into force.

PART II — SCHEDULES

4. The Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as the "GATT 1994") and the Schedule of Specific Commitments annexed to the General Agreement on Trade in Services (hereinafter referred to as "GATS") relating to … [name of applicant] …

…

PART III — FINAL PROVISIONS

6. This Protocol shall be open for acceptance, by signature or otherwise, by … [name of applicant] … until … [date] …

7. This Protocol shall enter into force on the 30th day following the day of its acceptance.

…

9. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Typically, WTO Accession Protocols resemble this Standard Protocol, sometimes with minor variations. The one major outlier so far is China's Accession Protocol. It is a detailed agreement running just over 100 pages that teems with specific commitments.[30] Whether the

[30]Protocol on the Accession of the People's Republic of China, WT/L/432 (23 November 2001) [hereinafter "China Protocol"].

approach used with China will be used in future complex accessions (e.g., Vietnam and Russia) remains to be seen. Note that although there has been a Standard Protocol, the terms of each particular accession are far from standard. Each negotiation is separate and has led to a discrete package of terms detailed in the Working Party report and Goods and Services schedules.

After the WTO Ministerial Conference (or General Council) approves the accession protocol, the acceding government must complete its "acceptance" process within the time limits prescribed in the Accession Protocol. The amount of time provided in a Protocol for national acceptance varies considerably. The shortest was 22 days for Oman and the longest was just under nine months for Panama.[31] Three countries were given less than three months, but the typical grant of time is three to six months. In all but one instance, the acceding country has acted in time.[32] The data suggest that the time limits are individualized with appreciation for domestic parliamentary hurdles in the applicant country.

Although each new WTO Member is obliged to follow all the rules in the *WTO Agreement*, such Member is also presumably obliged to follow the rules embedded in its own Accession Protocol. "Presumably" is due to the fact that there is no holding in international trade law jurisprudence on precisely that point. Yet, that seems to be the expectation of WTO stakeholders.

Many observers have criticized these features of the accession process. For example, Roman Grynberg and Roy Mickey Joy contend:

> While it remains one of the enduring clichés of the multilateral trading system that the WTO is a 'rules-based system,' the actuality is that accession is inherently power based and hence the very antithesis of the WTO's credo.[33]

[31] Oman acted on the first day.

[32] The one exception was Tonga, which was approved by the WTO for membership on 15 December 2005 but did not act by the required deadline of 31 July 2006.

[33] Grynberg and Joy (2000).

Maxim Medvedkov argues that:

> Acceding countries are required to make bigger commitments than the original members were. This creates a two-tiered system of rights and obligations for different members, thus substantially damaging the main principles of the WTO: non-discrimination, equal rights and transparency.[34]

Many commentators, however, have argued that WTO accession disciplines are enforceable.[35] For example:

> "All the obligations in this [accession] package are enforceable through the Dispute Settlement Understanding of the WTO".[36] — *WTO Secretariat*
>
> "As such, the [Accession] Protocol becomes part of a 'covered agreement' for the purpose of the Dispute Settlement Understanding, and its provisions are fully enforceable through the WTO dispute settlement procedure".[37] — *Julia Ya Qin*
>
> "The commitments listed in the Protocol of Accession would be legally binding and enforceable via the WTO Dispute Settlement Understanding".[38] — *Anna Lanoszka*

---

[34]Medvedkov (2001).

[35]For example, WTO Secretariat, "Technical Note on the Accession Process", at 2: "All the obligations in this [accession] package are enforceable through the Dispute Settlement Understanding of the WTO;" Qin, "WTO-Plus", at 509: "the [Accession] Protocol becomes part of a 'covered agreement' for the purpose of the Dispute Settlement Understanding, and its provisions are fully enforceable through the WTO dispute settlement procedure;" Lanoszka (2001): "[t]he commitments listed in the Protocol of Accession would be legally binding and enforceable via the WTO Dispute Settlement Understanding;" and (2006): "the combined Working Party Report and Protocol … are binding international law cognizable by the WTO's dispute resolution bodies".

[36]Secretariat Note, at 2.

[37]Qin, at 509.

[38]Lanoszka (2001).

> "[T]he combined Working Party Report and Protocol … are binding international law cognizable by the WTO's dispute resolution bodies".[39] — *Thomas P. Holt*

Yet there is very little explanation by commentators as to why accession agreements are enforceable as a whole.

The schedules of an accession agreement are clearly enforceable *because* they are annexed to the GATT 1994 or to the GATS as indicated in the fourth paragraph of the Standard Protocol.[40] In other words, WTO law extrinsic to the Protocol itself mandates the enforceability of the schedules. The status of the rest of the accession agreement is not so clear, particularly the new disciplines for acceding governments. For example, recorded in the Working Party Report for Moldova is the State's commitment to reduce the use of price controls in its economy.[41] One reason why rules-based accession commitments are typically not placed in schedules may be the principle that schedules cannot be used by parties to derogate from an obligation.[42]

In my view, the textual location of accession commitments, that is, whether in the Protocol or the referenced working party report, does not make any difference. Except for China, the individualized commitments are not spelled out in detail in the accession protocol, but rather are incorporated by reference to the working party report.[43] These are the commitments to be discussed in this chapter.

---

[39] Holt (2006).

[40] Standard Protocol, para. 4. Under Article II:7 of the GATT 1994 and Article XXIX of the GATS, the schedules on goods and services are considered an integral part of those agreements.

[41] Report of the Working Party on the Accession of Moldova, WT/ACC/MOL/37, 11 January 2001, para. 34. Compare Articles III:9 and XVII:1(b) of the GATT 1994.

[42] *See* Appellate Body Report, *EC-Export Subsidies on Sugar,* paras. 219–220, discussing agriculture schedules.

[43] *See* Standard Protocol, para. 2. This incorporation clause in WTO-era protocols did not exist in GATT-era protocols. Rather, the GATT Council adopted the report of the working party in a separate action.

II. A New Framework for WTO-Plus and WTO-Minus Commitments

Although there has been some scholarship on the accession process, no widely accepted framework exists for the rules-oriented accession provisions. Part II proposes a new accession vocabulary and introduces a taxonomy for accession by dividing the universe of commitments into conceptual categories that turn on whether the protocol adds to or diminishes the obligations of the acceding party, the incumbent parties, or the WTO itself. In addition to giving analytical leverage to legal argument, this taxonomy can help economists and social scientists conduct empirical studies of WTO accession.

The terms "WTO-plus" and "WTO-minus" are often used by analysts to describe accession terms that do not match regular WTO rules.[44] For example, one commentary defines "WTO-plus" as commitments by the applicant in areas not addressed by rules in WTO agreements.[45] That definition fits practice. Furthermore, commentators define "WTO-minus" to be the "non-application of the rights under WTO Agreements available to acceding WTO members such as transition periods, and tariffication and special safeguards for agricultural products".[46] That usage is comprehensible, but seems inexact because it presumes that the transition periods made available to original WTO members in 1995 have become "rights" of applicant countries several years later. Yet as the third paragraph in the Standard Protocol makes clear, the WTO has insisted that the transition period clock start on the date of the entry into force of the *WTO Agreement* (i.e., January 1995), not the date of the entry into force of individual accessions.[47] One might perceive that treatment

[44] *See* Qin (2004); Secretariat Note, at 37–38.

[45] *See* Butkeviciene, Hayashi, Ognivtsev, and Yamaoka (2001).

[46] *Id.*

[47] *See* Secretariat Note, at 2 ("The transition periods granted to original WTO Members during the Uruguay Round are not automatic to governments acceding under Article XII".). During the GATT era (1947–1994), accession protocols typically had a provision substituting the date of each Protocol for the date of the GATT

as unfair to the applicant, but such unfairness is quite different from saying that the applicant government is being denied its "rights".

In thinking about whether that treatment is unfair, one should recall that the transition periods in the *WTO Agreement*[48] presumably reflected the fact that in 1994, many of the new WTO disciplines were novel. More than a decade later, there is no reason to reset the transition clock for each acceding country because that country will have had time to assimilate to WTO requirements, particularly given the fact that the applicant country will have spent several years as a WTO observer.[49]

A Sidebar on WTO "Rights"

The pervasive reference in WTO discourse to the "rights" of WTO members calls for a brief discussion. The general concept of WTO "rights" is difficult to comprehend.[50] The text of the *WTO Agreement* and its annexes refer to "rights and obligations" of members or to a "balance of rights and obligations".[51] Moreover, the Appellate Body

for the purpose of listed GATT obligations. *See* GUIDE TO GATT LAW AND PRACTICE, at 1021–1022 & n. 18. Thus, the more deferential accession practice of the GATT *acquis* was not brought forward into the WTO.

[48]For example, Article 14 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) provided a two-year transition to developing countries for most disciplines. In my view, a country joining the WTO in 2006 should not need such a transition as the country does not have to join until it is ready to comply.

[49]On the other hand, one could argue that the laggards in joining the WTO are precisely those countries that will have the greatest legal and structural impediments at home, and therefore are most in need of extra time for domestic implementation of WTO obligations.

[50]The usage is comprehensible when it refers to a right held by a particular member to the exclusion of others. *See, e.g.*, Understanding on the Interpretation of Article XXVIII of GATT 1994, para. 1 (regarding a "redistribution of negotiating rights"). Furthermore, I am not denying that the traditional Hohfeldian construct may be useful in private law contexts.

[51]For example, *See WTO Agreement*, art. X:3, 4; Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) arts. 1.1, 3.2, 3.3, 3.4, 19.2;

has held that within the WTO single undertaking, "all WTO Members are bound by all the rights and obligations in the *WTO Agreement* and its Annexes 1, 2 and 3".[52] The Appellate Body has also suggested that the right of one Member can be limited by the right of another.[53]

Nevertheless, a WTO "right" is sometimes a meaningless term. If by a WTO "right", one means the procedural right to invoke dispute settlement, then that usage is unobjectionable. If by WTO "right", one means that a WTO member has a right to expect other WTO members to adhere to their obligations under WTO law, then that usage is comprehensible, but would seem to be merely noting an intended beneficiary of the obligation.[54] If by WTO "right", one means a retained opportunity to exercise national autonomy not given up when joining the WTO (i.e., a "reserved" right), then that usage is comprehensible, but then such rights stand outside WTO law. But if by WTO "right", one means that a WTO member has a substantive right to a defined *trade* benefit or result like an export, then that usage seems unjustified under WTO law because most rules are qualified by exceptions. In my view, the *WTO Agreement* should be read only as conveying obligations, not as granting rights.

GATS art. XIX:1; TRIPS Agreement, art. 7; Marrakesh Protocol to GATT 1994, para. 3. *See also* GATT ad. art. XXVIII, para. 1(4) (referring to a "contractual right").

[52] Appellate Body Report, *Brazil — Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997: I, 167, p. 13.

[53] *See, e.g.*, Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS286/AB/R, adopted 20 April 2005, para. 231, n. 271 (associating itself with the panel's observation that Members have a right to regulate trade in services provided that they respect the rights of other Members under the GATS).

[54] For example, in a recent study of *inter se* agreements between WTO members in connection with Article 41 of the Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, 1155 UNTS 331 [hereinafter "VCLT"], one commentator suggests that if such an agreement has a provision allowing parties to derogate from WTO rules on subsidies, then that provision "would clearly affect the rights of all WTO Members, such as the right of not having the market distorted by subsidies that are considered particularly pernicious and have been outlawed". Pagani (2006). My position is that the "right of not having the market distorted by subsidies" has no self-evident or independent content as a WTO "right". Instead, its meaning can only be understood as the implication of a WTO rule.

To analyze an accession agreement, one should focus on the obligations that the agreement contains for the acceding government and the obligations it postpones or terminates for incumbent governments. For example, with regard to a transition period for acceding WTO governments, the specification of such a period is not itself a "right", but rather a temporal limitation on the extent of the obligation. Moreover, before it joins the WTO, an acceding government could not possibly have any WTO rights.

I have yet to see any way of imparting meaning to the term "rights" that is not circular or tautologous.[55] Some WTO provisions purport to grant rights, but a close reading of them shows that they do not.[56] Even after a country joins the WTO the provisions of its accession agreement may not give it the rights expected, as Mongolia learned not long after its accession. In 2002, Mongolia sought the WTO's help in keeping a tariff on cashmere that was legal under Mongolia's accession bindings, yet was nevertheless opposed by the International Monetary Fund (IMF). Mongolia asserted its "legal rights protected by the WTO", but yielded to the IMF after the WTO failed to speak up for Mongolia at the IMF in defense of the principle of a WTO right.[57]

Furthermore, the "rights" talk in reference to WTO members distracts attentions from the inchoate rights truly at issue in the trading

[55] If the WTO "right" of A is merely the benefit that A derives from B's obligation to A under WTO rules, then how are the rights of A and the obligations of B to be balanced?

[56] *But see* Pauwelyn (2003) (suggesting that the Agreement on Technical Barriers to Trade provides for explicit rights or permissions to restrict trade). For example, para. 1 of Article 2 (Basic Rights and Obligations) of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) states that "Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement". To see if that statement really reflects a "right" of a nation or a people, consider whether the statement would ever be chiseled in stone.

[57] Tsogtbaaar (2005).

system — that is, the rights of individual economic actors. Although a treaty cannot extend a substantive right to *all* governments, that such governments would not otherwise have — a treaty can accord rights to individuals in member countries, which an individual might not otherwise have. In any event, whatever the intellectual merits of this brief digression into the nature of "rights" in WTO law, it is clear that an acceding WTO member does not *yet* have any "rights" in WTO law before it joins.

Using a Baseline to Delineate Plus and Minus Conditions

The starting point for analyzing accession protocols is the specification of the legal baseline of obligations owed by a WTO member. In my view, the proper baseline is the set of obligations that would devolve upon an applicant if it joined the WTO using a clean Protocol of Accession. By a clean protocol, I mean the Standard Protocol and the market access granted in the annexed Schedules, but no other conditions. Thus, the baseline for an acceding member should be the rules that exist for members in that development class (i.e., developed, developing, or least developed) that were *original* members of the WTO. For example, for a member-to-be that is a developed country, a good comparator would be Japan. For a member-to-be that is a developing country, a good comparator would be India. For a member-to-be that is a least developed country (LDC), a good comparator would be Bangladesh. Pursuant to the *WTO Agreement*, the original members had the benefit of various transition rules that depended on their development class. In many instances, those transition periods have now expired, but in some instances, they have not. Therefore, the proper baseline for acceding members is the counterfactual that the applicant country joined the WTO on the date that the WTO went into force, and hence enjoys only the transition period still remaining for others in its class. Under my hypothesis of the proper baseline, one should not

start a transition period clock for each new member based on its individual date of entry.[58]

If an applicant country is not given the transition period that it would have enjoyed if it were an original WTO member in that development class, then I would agree with the team of Butkeviciene *et al.* that such an accession term departs from the WTO baseline. But I would disagree with them that such a situation should be called "WTO-minus".[59] Rather, I would call it "WTO-plus" because the applicant country takes on greater obligations than incumbent members have. I would reserve the term "WTO-minus" for situations when an applicant (or an incumbent) government takes on fewer obligations than called for in the otherwise applicable WTO rule.[60]

In late 2002, the WTO General Council approved a decision on the Accession of Least Developed Countries which set out "guidelines" for future accession negotiations.[61] The guidelines state that "transition periods/transitional arrangements foreseen under specific WTO Agreements … shall be granted in accession negotiations taking into account individual development, financial and trade needs".[62] Moreover, the guidelines state that "Special and Differential Treatment" for applicant countries shall be applicable "from the date of entry into force of their respective Protocols of Accession".[63] Nevertheless, in the two accessions of LDCs that have occurred since late 2002, Nepal and Cambodia, both Protocols utilized the standard

[58] Note that the countries that came into the WTO as "original" members after January 1995 had their transition period clocks set back to January 1995. *WTO Agreement*, art. XIV:2.

[59] *See* text accompanying *supra* note 46.

[60] Here I mean the rules set out in the *WTO Agreement* and its annexes. Sometimes WTO members are granted special waivers that allow them to break a rule for a limited number of years. For instance, in 2001 the European Communities (EC) was permitted to continue WTO-illegal practices regarding bananas through 2005. In effect, that was a legalized WTO-minus condition for an incumbent.

[61] WTO, Accession of LDCs, *Decision of 10 December 2002*, WT/L/508.

[62] *Id.* para. 1. II.

[63] *Id.*

provision to the effect that "except as otherwise provided … those obligations in the Multilateral Trade Agreements annexed to the *WTO Agreement* that are to be implemented over a period of time starting with the entry into force of that Agreement shall be implemented … [by the applicant] as if it had accepted that Agreement on the date of its entry into force".[64] This confirms that notwithstanding the 2002 guidelines, the transition period clock for applicant countries continues to be set to January 1995, except insofar as lengthier periods are granted in the accession negotiation.[65] If an applicant country gains a longer transition period, that should be called a WTO-minus obligation.

A New Taxonomy of Accession

A taxonomy is needed for distinguishing various provisions in accession protocols. WTO-plus and WTO-minus obligations should be understood as obligations that are either greater than or less than what is required by regular WTO law. A WTO-minus obligation imposes less discipline than does the relevant WTO rule. A WTO-plus obligation is the opposite of that; it imposes greater discipline. In contemporary practice, some WTO-plus disciplines go well beyond the boundaries of the WTO to introduce new obligations not addressed in the *WTO Agreement*.

Surveying the GATT in 1965, Gerald Curzon commented that upon a successful accession negotiation to the GATT, "a protocol of accession is drawn up whereby the acceding government becomes a contracting party and accepts the same rights and obligations as other governments".[66] That was true 40 years ago, but today, applicant

[64] *See, e.g.*, Accession of the Kingdom of Nepal, WT/MIN (03)/19, 11 September 2003 at Annex, para. 3. The "multilateral trade agreements" are defined as Annexes I–III of the *WTO Agreement*. *WTO Agreement* art. II:1.

[65] The decision to start Nepal's transition clock in 1995 has been criticized. *See, e.g.*, Karky (2004).

[66] Curzon, at 36.

governments no longer step into the same rights and obligations that incumbent members have.[67]

A useful taxonomy of accession has to take account of the distinctive situations of both applicants and incumbents. Start with the applicant: As Table 1 shows, a WTO-plus obligation for the applicant exceeds the obligations required in the WTO baseline, and a WTO-minus obligation diminishes those obligations.

Table 1 WTO-Plus and WTO-Minus for the Applicant

Nature of Obligation	Example
WTO-Plus: Above Baseline	Greater transparency requirements than incumbent members have
WTO-Minus: Below Baseline	Longer transition periods than available to original members

Today, applicants to the WTO routinely sign on to permanent WTO-plus provisions and temporary WTO-minus provisions. In the GATT-era, applicant GATT-minus[68] treatment regularly occurred through the practice of joining the GATT through provisional accession that grandfathered in certain pre-existing violations, and then the later practice of inscribing specific reservations into accession protocols.[69] In contrast, applicant GATT-plus commitments, in pre-WTO days, did not occur frequently.

In addition to detailing legal commitments by the acceded member, an accession agreement may also detail special rules regarding trade remedies by incumbent WTO members directed at trade from the acceded member. A prime example of this are the unusual safeguards

[67] *See* Gallagher (2005) ("Once an economy is a Member, however, it is on the same footing as all other Members *vis-à-vis* the WTO agreements, *except for any special conditions negotiated as part of its acceptance into the WTO*".) (Emphasis added).

[68] This chapter uses the terms "GATT-minus" and "GATT-plus" in an informal way because under the GATT practice of provisional application, there was not one baseline applicable to all parties.

[69] *See* WTO, Guide to GATT, Vol. 2, at 1023.

agreed to by China in its WTO accession.[70] Some analysts characterize them as "WTO-plus" while others tag them "WTO-minus". For example, Will Martin (the World Bank's expert on WTO accession) calls the product-specific transitional safeguard a WTO-minus.[71] Julia Qin also calls it a WTO-minus, and also applies the term to the transitional textile safeguard mechanism.[72] On the other hand, Dongli Huang calls the textile safeguard a WTO-plus, as does Nicholas Lardy.[73] When the same provision is given opposite appellations by WTO experts, the need for more carefully defined categories becomes evident.

In my view, both characterizations are inexact. Instead, I would taxonomize such safeguards as a reduced obligation of *incumbent* WTO members regarding implementation of trade barriers against unwelcome trade from China. Accession agreements refer to this euphemistically as a "selective" provision, but I would call it what it is discrimination authorized by the WTO. When some countries join the WTO, the WTO may insist that incumbent members be allowed to bar trade from the acceding economy in specified ways. I would characterize that deal as a reduced obligation on incumbent members and denote such unfavored-nation treatment as "incumbent WTO-minus".

Table 2 provides a Taxonomy of Accession Disciplines for Applicants and Incumbents and illustrates three of the four cells.

Table 2 Taxonomy of WTO Accession Disciplines for Applicants and Incumbents

	WTO-Minus	**WTO-Plus**
Incumbent	Discriminatory safeguard	Occurs rarely
Applicant	Phase out of WTO-illegal measures	Numerous non-trade commitments by China

Note: The categories below are about obligations, not rights.

[70] *See, e.g.*, Lee (2002).

[71] Will Martin, "WTO Accession: What's Involved?" *available at* <http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/288464-1152217173757/Session5_WillMartin.pdf>, at 18.

[72] Qin, at 409 & n. 31.

[73] Huang (2006) (stating that it is "sterner than normal"); Lardy (2002).

So far, incumbent WTO-plus obligations are not significant features of accession agreements. Craig VanGrasstek has written:

> The process of acceding to the WTO is a deliberately one-sided affair, with all of the requests and demands coming from the existing members and the full burden of adjustment falling on the acceding country. The applicant is not entitled to request additional benefits or concessions in excess of those stipulated in the WTO Agreements … .[74]

VanGrasstek is mostly right. Nevertheless, incumbent WTO-plus lawmaking has occurred at least once. In Taiwan's[75] Protocol, there is a provision which states:

> Exchange contracts which involve the currency of any Member or Chinese Taipei and which are contrary to the exchange control regulations of that Member or Chinese Taipei maintained or imposed consistently with the Articles of Agreement of the Fund or with the provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV of the General Agreement 1994 or this Special Exchange Agreement, shall be unenforceable in the territories of Chinese Taipei *or in the territories of any Member.*[76]

---

[74]Van Grasstek (2001). *See also* Bacchetta and Drabek (2002) ("As any member of a 'club' has to abide by the rules of the club he/she wants to join, countries acceding into the WTO must accept the terms and conditions of the WTO as they stand".).

[75]Taiwan acceded to the WTO under the name "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" and calls itself that at the WTO. In this chapter, I will use the shorter and universally recognized name, "Taiwan". At China's insistence, the WTO refers to Taiwan as "Chinese Taipei".

[76]Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/L/433 (23 November 2001), Annex II, Special Exchange Agreement, art II (3) (emphasis added) [hereinafter "Taiwan Special Exchange Agreement"]. The rationale for having the Special Exchange Agreement is that Taiwan is not a member of the IMF. *See* GATT arts. XV:6 (providing for special exchange agreements with non-IMF members and stating that such agreement with a GATT party "shall thereupon become part of its obligations" under the GATT), XV:9(a). In the GATT regime, the GATT negotiated special exchange agreements with Haiti, Indonesia, Sri Lanka, and Germany. Guide to GATT Law and Practice, at 437. The WTO

This provision is definitely WTO-plus because it imposes a new obligation on incumbents not to enforce such contracts in their own territory.[77]

In the course of WTO accessions, several applicants have made commitments to join (or seek to join) one or both of the WTO plurilateral agreements — the *Agreement on Government Procurement* and the *Agreement on Trade in Civil Aircraft*. For example, Georgia committed to signing up for the plurilateral agreement on *Trade in Civil Aircraft*[78] and Estonia set a target date for completing its negotiations to join the *Agreement on Government Procurement*.[79] Because joining plurilateral agreements is optional, some analysts call these accession commitments WTO-plus. But I am not calling them so here, because joining the plurilateral agreement is an appropriate activity at any time and because the applicant who joins receives reciprocal benefits.[80]

Although the 2×2 cell taxonomy in Table 2 covers all of the rule-like provisions in accession agreements that apply to WTO members and applicants, accession agreements can also contain another species of commitment — obligations of the WTO itself. Because the WTO is a party to an accession agreement, it is possible for the WTO to take on greater or fewer obligations than the WTO otherwise has to its existing members. An example of a greater obligation is the

---

needed to obtain the Agreement with Taiwan because the IMF does not permit Taiwan to join.

[77] *Compare* GATT art. XVI (Exchange Arrangements). The origin of this accession provision goes back to the model Special Exchange Agreement drafted by the GATT Committee on Special Exchange Agreements in 1949. GATT, BISD II/11, Annex, art. VII:3.

[78] Report of the Working Party on the Accession of Georgia to the World Trade Organization, WT/ACC/GEO/31, 31 August 1999, para. 125. Georgia did so.

[79] Report of the Working Party on the Accession of Estonia to the World Trade Organization, WT/ACC/EST/28, 9 April 1999, para. 107. Estonia joined the Agreement.

[80] Recall that back in the GATT-era, the issue of becoming a party to the optional Tokyo Round Codes was sometimes discussed during GATT accessions. *See, e.g.*, Report of the Working Party on the Accession of Venezuela, GATT Doc. L/6696, 29 June 1990, para. 89.

Taiwan Special Exchange Agreement in which the WTO agreed that whenever it consults with the IMF … on exchange matters or in other appropriate cases particularly affecting Chinese Taipei, the WTO shall take measures, as are satisfactory to the Fund, to ensure effective presentation of Chinese Taipei's case to the Fund, including, without limitation, the transmission to the Fund of any views communicated by Chinese Taipei to the WTO.[81]

This is WTO-plus for the WTO, because the WTO obligates itself to take measures satisfactory to the IMF.[82] Another example can be found in China's Accession Protocol, which establishes special monitoring obligations over ten years for the WTO General Council and 16 subsidiary bodies.[83]

Table 3 addresses WTO responsibility with a Taxonomy of Accession Obligations for the WTO as an organization.

Table 3 Taxonomy of the WTO's Accession Obligations

Nature of Obligation	Example
WTO-Plus	Taiwan Special Exchange Agreement
WTO-Minus	None so far

Most of what is contained in accession agreements involves commitments made within market access negotiations on agriculture, non-agricultural market access, services, and (in some circumstances) government procurement. Such commitments, memorialized in accession schedules, address matters such as tariff levels and bindings, quantitative restrictions, amount of domestic agricultural support, and agricultural export subsidies.[84] Notionally, the applicant WTO

[81] Taiwan Special Exchange Agreement, art. VI (3).

[82] The issue of Special Exchange Agreements is not specifically addressed in the 1996 Agreement between the IMF and the WTO. *See* W/L/195, Annexes I, III and Chart I.

[83] China Protocol, Section I.18. The Protocol also notes that the Transitional Review Mechanism is not a precondition to recourse to other provisions of the Protocol. *Id.* Section I.18 (3).

[84] In the GATT-era, at least one Protocol of Accession contained quantitative commitments by the acceding country as to how much it would expand its imports.

member has to agree to market access commitments that are equivalent[85] to commitments that incumbent members have made in prior years.[86] But this is only an informal understanding. Article XII of the *WTO Agreement* does not contain a norm of equivalence between the market access commitments of the applicant and the prior market access commitments of incumbent members. Moreover, as John Jackson once noted with regard to GATT accessions, ascertaining the equivalence in value of past concessions may be an unsolvable problem.[87]

Because of their inherent relativity, market access negotiations cannot be characterized as WTO-plus or WTO-minus. Take the example of export subsidies for agriculture. In accession negotiations, some governments have agreed to refrain from providing any export subsidies for agriculture. Indeed, the Government of Australia now has a public position that "Australia expects new Members to eliminate agricultural export subsidies".[88] While it is true that the *Agreement on Agriculture* does not require such abstinence, a zero-level commitment is a possible outcome to a negotiation under Article 3.1 of the *Agriculture Agreement*.[89] Another example comes from the market access negotiations on services. The result of these negotiations for a

---

In 1967, Poland agreed to increase the total value of its imports from GATT parties by not less than 7% per annum. *See* Protocol for the Accession of Poland, GATT, BISD 15S/46, paras. 5, 9 & Annex B, para. 1.

[85] Dam, at 109–111, 345–347 (1970).

[86] Nevertheless, market access accession negotiations are not always perceived as exclusively retrospective. Newly acceded WTO members tend to argue that they should be able to sit out new tariff negotiations because they have already given to the cause. *See, e.g.*, Pruzin (2006).

[87] Jackson (1969).

[88] Australian Department of Foreign Affairs and Trade, "WTO Accessions and How Australia Stands to Benefit", 2006, *available at* <http://www.dfat.gov.au/trade/negotiations/accession/index.html>.

[89] Given the excessive use of agricultural export subsidies by high-income WTO members, particularly in the European Community, one could argue that asking applicant WTO members to commit not to use such subsidies is a hypocritical WTO-plus demand.

particular service sector is not WTO-plus or minus because there is no presumptively right level of market access indicated by WTO rules.

A Survey of WTO-Plus and WTO-Minus Provisions

No comprehensive study exists of the rule-like provisions in WTO accession agreements. Although the WTO Secretariat undertakes numerous studies on a variety of topics, they have not yet gotten around to launching a research project on WTO-plus and minus demands. The WTO Secretariat does publish a study of accession agreements that is periodically updated,[90] but that study does not explicitly catalog the national commitments that supersede ordinary WTO law.[91] Indeed, in its public educational materials, the Secretariat offers an unrealistic portrayal of the accession process that fails even to mention the WTO-plus phenomenon.[92]

Many provisions in Working Party reports are elaborate restatements of the *WTO Agreement's* conformity clause. That clause, in Article XVI:4, declares that "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". When an applicant country agrees to conform to WTO rules, such a commitment is neither WTO-plus nor WTO-minus. Rather, it is WTO-mirroring. An applicant will be asked to commit to take the steps needed to bring its domestic laws and practices into compliance.[93]

---

[90]WTO Secretariat, "Technical Note on the Accession Process", WT/ACC/10 and subsequent revisions.

[91] *See id.* at 14 (calling them "terms defined by the commitment paragraph and not contained in WTO Multilateral Agreements … ".). Qin suggests that the WTO Secretariat compile and publish the special obligations "in a centralized and systematic manner rather than being left in the obscure text of the working party report". Qin, at 521.

[92]WTO, "How to Become a Member of the WTO", stating that accession "Terms and conditions include commitments to observe WTO rules and disciplines upon accession and transitional periods required to make any legislative or structural changes where necessary to implement these commitments".

[93]Weeks (2004).

The trend in WTO accession negotiations seems to be to demand that more of the key commitments be completed by applicants prior to accession (in other words, a down payment). Whenever a pledge to conform sets a date different from the otherwise applicable baseline date, such a provision is either WTO-plus or WTO-minus.

Detecting the existence of a WTO-plus commitment is sometimes difficult and requires expertise in trade law. The term "WTO-plus" is never used, nor does the working party report state that the applicant has agreed to a new WTO rule. Rather, the language used in the report states what the applicant government says it will do, and seems to lock that in with the phrase: "The Working Party took note of this commitment". That phrase made its first appearance in the WTO era in the first WTO accession protocol, the agreement with Ecuador, but the commitments listed there are WTO-mirroring only, not WTO-plus.[94]

The phraseology used in the WTO of taking note of an applicant's commitment goes back to the late GATT era. The earliest accession documentation I could find that used it, was Bolivia's accession protocol in 1989.[95] During most decades of the GATT era, accession working party reports did not refer to such statements by the applicant as a "commitment". Rather, the GATT working party reports employed the phrase: "The Working Party took note of the assurances".[96] An assurance may be less than a commitment. Typically this phrase referred only to an assurance about conforming to GATT rules, not to a GATT-plus undertaking.

---

[94] Report of the Working Party on the Accession of Ecuador, WT/L/77, 14 July 1995, para. 53. The closest to a WTO-plus is Ecuador's statement that it "did not intend" to extend its price setting policy beyond the pharmaceutical sector. Because Ecuador has only stated its intention, the provision is not sufficiently legalized to be enforceable.

[95] Report of the Working Party on the Accession of Bolivia, adopted 19 July 1989, BISD 36S/9, para. 38. This was not a GATT-plus commitment. Bolivia pledged to comply "in the same manner as other contracting parties".

[96] *See, e.g.*, Accession of the United Arab Republic, Report of the Working Party, adopted 27 February 1970, GATT, BISD 17S/33, para. 14. This commitment was to conform fully to the GATT.

Applicant WTO-Plus

A review of WTO accession agreements shows many applicant WTO-plus commitments made to the WTO and indirectly to its membership. To be considered here as WTO-plus, the working party must have taken note of the commitment. In addition, the commitment has to be phrased in a manner suggesting that its drafters intended it to be legalized.[97] The listing below is illustrative of WTO-plus commitments agreed to by applicants. The listing below is not intended to be exhaustive, but contains examples of the most far-reaching commitments.[98] Some examples are:

Industrial Policy

— Saudi Arabia committed that its government's pricing policy was that economic operators supplying natural gas liquids to industrial users would fully recover their costs *and make a profit*.[99]
— Moldova committed to reduce the use of price controls in its economy.[100]
— China committed to removing the 50% foreign equity limit for joint ventures in the motor vehicle engine industry.[101]
— China committed that within three years, "all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A

[97] *See* Bell (2006) (stating that imprecise language can decrease the normative compliance pull, even of obligations framed in legally binding forms).
[98] WTO-plus provisions appear in nearly all accession agreements.
[99] Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, WT/ACC/SAU/61, 1 November 2005, para. 33 (emphasis added).
[100] Report of the Working Party on the Accession of Moldova, WT/ACC/MOL/37, 11 January 2001, para. 34. *Compare* GATT arts. III:9, XVII:1(b).
[101] Report of the Working Party on the Accession of China, WT/ACC/CHN/39, 1 October 2001, para. 207. Note that a foreign equity limitation regarding commercial presence of a service provider would normally be included in a GATS schedule and thus would not be WTO-plus as defined here.

[of the Protocol] which continue to be subject to state trading in accordance with the Protocol. Such right to trade shall be the right to import and export goods".[102]

— China committed to giving national treatment to foreign direct investors in China with respect to the purchase of goods and services and with respect to pricing of goods and services provided by public enterprises (e.g., energy).[103]
— China committed that state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations.[104]

Health and Environmental Regulation

— China committed to provide six years of exclusivity for the use of data to obtain product approval of pharmaceutical and agricultural products which utilize new chemical entities irrespective of whether they are patent-protected.[105]
— The Kyrgyz Republic committed not to require additional certification for products which have been certified as safe for human use by recognized foreign or international bodies.[106]
— Taiwan committed to permit advertising for alcoholic beverages in all media subject to regulation in relation to the content and timing of advertising.[107]

---

[102] China Protocol, Section I.5.1 (Right to Trade). What makes this discipline especially interesting is that it appears to be the first time that the WTO has wrenched a basic economic human right out of national sovereignty. China is asked to report on the progress it makes to "granting the right to trade to all individuals … ". China Protocol, *id.* Annex 1A, Section IV, para. 9(a). *See* Petersmann (2005).

[103] China Protocol, Section I.3.

[104] Report of the China Working Party, paras. 46, 172.

[105] *Id.* para. 284. *Compare* TRIPS art. 39.3.

[106] Report of the Working Party on the Accession of the Kyrgyz Republic, WT/ACC/KGZ/26, 31 July 1998, para. 103. *Compare* SPS Agreement art. 3.3 & Agreement on Technical Barriers to Trade (TBT Agreement), art. 2.4.

[107] Report of the Working Party on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/TPKM/18, 5 October 2001, para. 21.

— Jordan committed to applying the SPS Agreement "in a least trade distortive manner from the date of accession without recourse to any transition period".[108]

Tax Policy

— Estonia committed to apply national treatment with respect to *direct* taxation.[109]

Financial Policy

— Taiwan committed: (1) to endeavour to direct its economic and financial policies toward the objective of fostering sustained, non-inflationary economic growth with macroeconomic stability, and (2) to permit exchange rates to reflect underlying economic and financial conditions.[110]
— Taiwan committed not to impose restrictions on the making of payments and transfers related to current account transactions "without the approval of the WTO".[111]
— Saudi Arabia committed that with regard to regulation of the insurance sector, it would undertake regulatory reforms by May 2006 that would be consistent with internationally recognized insurance industry standards and principles, including the standards of the

[108] Report of the Working Party on the Accession of the Hashemite Kingdom of Jordan, WT/ACC/JOR/33, 3 December 1999, para. 151. This is a double WTO-plus provision which adds a least-trade-distortive requirement to all SPS rules and which denies Jordan whatever transition period is available in the ambiguous SPS Agreement Article 14. The SPS Agreement does not contain such a least-trade-distortive requirement (*See* SPS Article 5.6, footnote 3).

[109] Report of the Estonia Working Party, para. 15. *Compare* GATT art. III.

[110] Taiwan Special Exchange Agreement, art. I (2) (i) and (ii). Not only is this an applicant WTO-plus discipline, but it also appears to be IMF-plus. *Compare* Articles of Agreement of the IMF, 22 July 1944, 2 UNTS 39, art. IV (1) (i), as amended, *available at* <http://www.imf.org/external/about.htm>.

[111] Taiwan Special Exchange Agreement, art. II (1). This is an example of a situation in which a decision of a WTO body might be scrutinized by a panel to see whether the WTO has in fact given approval. If there is an implied obligation of the WTO to decide whether to approve, that constitutes a WTO-plus obligation for the WTO itself.

International Association of Insurance Supervisors, the financial services transparency code of the IMF, and the OECD's "Detailed Principles for the Regulation and Supervision of Insurance Markets in Emerging Economies".[112]

Foreign Policy

— Saudi Arabia "confirmed"[113] that "the application of secondary and tertiary boycotts" (i.e., directed against firms that do business with Israel) "had been terminated in practice and in law".[114]

Trade Policy

— Latvia committed to nullify measures taken by subnational authorities that are in conflict with the *WTO Agreement*.[115]
— China committed to apply to all imports of wood and paper products the same rates of duty that it applies in a free trade area.[116]
— China committed to not invoking three provisions applying to developing countries in the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that provide for "special and differential treatment".[117]

[112]Report of the Saudi Arabia Working Party, para. 296. The OECD is the Organisation for Economic Co-operation and Development.
[113]Although this information is not couched as a commitment by Saudi Arabia, the sentence that follows in the Report of the Working Party states that "The Working Party took note of this commitment". Report of the Saudi Arabia Working Party, para. 103. Thus, one can reasonably infer that Saudi Arabia recognized that WTO members would perceive its statement as a legal commitment to not reinstate the boycott.
[114]Report of the Saudi Arabia Working Party, para. 103. If the boycott is a WTO violation, then this commitment is not WTO-plus. For a discussion of the WTO legality of the boycott, *see* Kontorovich (2003).
[115]Report of the Working Party on the Accession of Latvia to the World Trade Organization, WT/ACC/LVA/32, 30 September 1998, para. 30. *Compare to* GATT art. XXIV:12 and GATS art. I:3(a) which do not contain an obligation to nullify.
[116]Report of the China Working Party, para. 91. This is more than a GATT binding because it cannot be renegotiated under GATT Article XXVIII.
[117]Report of the China Working Party, para. 171.

— China committed that "Once the international harmonization of non-preferential rules of origin was concluded, China would fully adopt and apply the internationally harmonized non-preferential rules of origin".[118]

Transparency and Due Process

— Armenia committed to publish all laws, regulations or other measures relating to trade in goods and services *at least two weeks* prior to implementation.[119]
— China committed that it would maintain tribunals for the prompt review of all administrative actions relating to trade in services and that such tribunals would be impartial and independent of the administering agency.[120] China also guaranteed a right of individuals or enterprises to appeal to a judicial body.[121]
— China committed to having an official journal dedicated to the publication of laws and regulations pertaining to or affecting trade in goods, services, Trade-Related Aspects of Intellectual Property Rights (TRIPS) or the control of foreign exchange and, after publication committed to provide a reasonable period for comment before such measures are implemented.[122]

---

[118] *Id.* para. 100. The reference is to the international negotiations spawned by Article 9 of the *WTO Agreement* on Rules of Origin. Article 9.4 further states that after the negotiations are completed, the results shall be established in an Annex to the Agreement "as an integral part" of this Agreement and that a timeframe for the entry into force shall be established. China would not benefit from whatever phase-outs are negotiated under that timeframe and might have to comply upon signing rather than the entry into force.

[119] Report of the Working Party on the Accession of Armenia, WT/ACC/ARM/23, 26 November 2002, para. 215. *Compare* GATS, art. III:1 and TBT Agreement, art. 2.9.1.

[120] China Protocol, Section I.2.D.1. *Compare* GATS art. VI:2.

[121] China Protocol, Section I.2.D.2. *Compare* GATS art. VI:2 and GATT art. X:3(a), (b).

[122] China Protocol, Section I.2.C.2. Note that China agreed to a pre-implementation comment period for its laws something that many countries, like the United States, do not have.

Legal Status of WTO Agreement in National Courts

— Estonia committed that if its laws were found to "contradict" international treaties, including the *WTO Agreement*, the provision of the international treaty "would apply".[123]
— Jordan committed to the same.[124]

In a few instances, a WTO-plus commitment is exclusively a commitment to the WTO, rather than a bilateral commitment to other WTO Members (individually or collectively). For example, Bulgaria agreed to notify the WTO Secretariat annually regarding progress in the implementation of its accession commitments and then to identify any delays in implementation and give the reasons for such delay.[125] This is a significant legal development that goes beyond anything in the *WTO Agreement*.[126]

The WTO-plus topics most often addressed are: taxation and regulation of investment, regulation of prices, energy regulation, currency controls, transparency, and administrative and judicial review. Note that unlike recent U.S. free trade agreements, which contain many intellectual property rights commitments that go beyond WTO rules,[127] WTO accession agreements generally do not add obligations

[123]Report of the Estonia Working Party, para. 43. This is forward commitment not just for the WTO treaty, but for all international treaties, including presumably human rights treaties.

[124]Report of the Jordan Working Party, para. 43. It is interesting to note that the United States has never given this commitment in international negotiations and instead follows the later-in-time rule with respect to conflicts between a treaty and a federal statute. *See Head Money Cases*, 112 U.S. 580, 599 (1884) in general and 19 U.S.C.A. § 3512(a)(1) for the WTO.

[125]Report of the Working Party on the Accession of Bulgaria, WT/ACC/BGR/23, 20 September 1996, para. 90. This obligation applies only to accession commitments for which there are definitive dates for compliance. Similar commitments were extracted from Ecuador, Mongolia, and Panama.

[126]To be sure, the *WTO Agreement* contains many requirements to notify organs of the WTO, but these rules were established by the "Parties" to the *WTO Agreement* and are written in the form of commitments between members.

[127]This practice is discussed and criticized in the 2005 U.N. Human Development Report at 137.

on top of the *TRIPS Agreement* (i.e., the *WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights*) beyond transparency and judicial enforcement. Instead, incumbents seem to be focusing their bargaining leverage on trade and investment. So far, this leverage has not been used to seek WTO-plus commitments regarding development, environment or other domestic policies. Yet such linkage may have occurred informally.[128]

Applicants agree to WTO-plus demands as part of the price for being allowed to join the WTO. As the WTO Secretariat points out, no country is forced to join the WTO.[129] Yet the reality is that because membership in international organizations is essential to modern sovereignty,[130] a country wanting to gain a seat at the WTO has to consent to WTO-plus obligations. Sometimes the applicant government may consent wholeheartedly because its policymakers are eager to lock in policies favored by the regime and elites in power. Because WTO entry negotiations are always carried out by national authorities, WTO-plus provisions can be an effective way to diminish federalism and enhance the centralization of economic policymaking authority.[131]

Governments applying to join the WTO, sometimes protest the demands for WTO-plus provisions, but the applicants almost always cave in. If a government resists, the accession process can be put on indefinite hold. This was apparently what happened in 2001 with Vanuatu's negotiation.[132] Governments can also use their voice in

[128] *See, e.g.*, Filipov (2004). This was a rather public side deal that Russia fulfilled.

[129] WTO Secretariat, "Weaker countries do have a choice, they are NOT forced to join the WTO", *available at* <http://www.WTO.org/english/theWTO_e/whatis_e/10mis_e/10m09_e.htm>.

[130] Alvarez (2005) (noting the "new sovereignty" conferred by membership).

[131] Langhammer and Lücke (1999).

[132] Because of the lack of transparency at the WTO, it is hard for outsiders to know whether the market access demands that Vanuatu resisted were WTO-plus. An independent study commissioned by the WTO Secretariat came to the conclusion that "Vanuatu officials were forced to make concessions that politicians were not prepared to sustain in the long run and which were greater than many developed and developing members". Daniel Gay, "Vanuatu's Suspended Accession Bid: Second

protests. For example, in 1996, Bulgaria affirmed its intention to insure transparency, but then went on to bravely declare:

> This was not to be regarded as a basis for the imposition of specific obligations under the Agreements or as a basis for the adoption of new special policy commitments. Bulgaria could not undertake commitments exceeding the regular membership obligations.[133]

In general, however, governments are so eager to join the WTO that they do not protest the admission standards. One wonders how the political dynamics of accession might have been different if all acceding countries had united in solidarity on the principle of not undertaking commitments exceeding the regular membership obligations.

Unfortunately, the WTO has erected a barrier to the free flow of information about accession negotiations. The barrier is that the WTO fails to disclose documentation and make it available to the public.[134] For example, the ongoing WTO accession negotiation with the Russian Federation is of interest to people around the planet. Nevertheless, the most recent Russian accession documentation

---

Thoughts?", undated, *available at* <http://www.wto.org/english/res_e/booksp_e/casestudies_e/case43_e.htm>.

[133]Report of the Bulgaria Working Party, para. 24. On the other hand, when the WTO General Council approved Bulgaria's accession, Bulgaria stoically confessed that it had agreed to implement all WTO agreements "without any transition period notwithstanding its financial and structural difficulties … ". WTO General Council, Minutes, WT/GC/M/14, at 3.

[134]In that regard, it is interesting to recall a famous speech by then WTO D-G Renato Ruggiero who declared in 1998:

> "To characterize the WTO — as we have read recently — as an organization that "refuses to reveal its deliberations to the public, or be held responsible for the social, political and environmental costs of its decisions" is a false representation. No one can claim it".

Ruggiero (1998).

available on the WTO website is dated December 1997.[135] This provides further evidence of John Jackson's observation that "there is still a 'transparency deficit' in the WTO".[136]

The cloak over WTO accession negotiations hinders possible cooperative efforts between governments and civil society to achieve more optimal outcomes for applicant countries and the world community. The secrecy in accession negotiations is not mandated by Article XII. Given the slothful pace of accession talks in the WTO, any argument that secrecy is essential to the efficiency of the accession process would seem implausible.

Applicant WTO-Minus[137]

Applicant WTO-minus provisions are less frequent than applicant WTO-plus. With WTO-minus, the applicant country is permitted to join the WTO without having to immediately conform to an inconvenient WTO discipline. In WTO accessions, such derogations are time-limited. For example:

— Lithuania began its WTO membership on 31 May 2001, but was given until 31 December 2005 to bring its excise taxes on beer and mead into conformity with GATT Article III.[138]
— Taiwan was given two years after accession to eliminate the import ban on passenger cars equipped with diesel engines.[139]

[135] Based on the author's search of the WTO website. A document on the website lists some later documents on Russia's accession dated as recently at 2005, but they are not available for download. *See* Technical Note on the Accession Process. Note by the Secretariat: State of Play and Information on Current Accessions. Revision. WT/ACC/11/Rev.6, 23 November 2005, at 25–27.
[136] Jackson (2006).
[137] Applicant treaty-minus provisions are known in other areas of international law, but are not common. *See* Stone (2004) ("it is curious that negotiators have not responded more regularly by offering different 'products' in the form of tailored terms").
[138] Report of the Working Party on the Accession of Lithuania to the World Trade Organization, WT/ACC/LTU/52, 7 November 2000, para. 66.
[139] Report of the Taiwan Working Party, para. 71.

— Ecuador was given seven years to phase out its "price band system" in order to comply with the WTO *Agreement on Agriculture.*[140]

Note that applicant WTO-minus is a derogation applying to a solitary WTO member. Acceding WTO governments also enjoy the benefit of the numerous provisions in WTO law that can reduce obligations of developing countries and LDCs.[141]

Incumbent WTO-Minus

As explained above, accessions can generate new WTO-minus obligations for incumbents.[142] Recall that incumbent WTO-minus provisions are those that reduce obligations below the obligations contained in the WTO's multilateral trade agreements.[143] Such provisions are used to assuage protectionist fears by incumbent governments and their rent-seeking economic actors. In effect, such

[140] Report of the Ecuador Working Party, paras. 47–48. In *Chile — Price Band System*, the complainant Argentina pointed to this accession term as showing by parallel inference that Chile's price band system was a WTO violation. The panel held that it did not have enough information to take this argument into account. Panel Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report, WT/DS207/AB/R, DSR 2002: VIII, 3127, para. 7.79 & n. 655.

[141] *See, e.g.*, "Special and Differential Treatment for Least-Developed Countries", Note by the Secretariat, WT/COMTD/W/135, 5 October 2004.

[142] It is interesting to note that in presenting the China accession to the public, the European Commission glossed over the fact that the accession agreement reduces obligations of the European Union below the baseline. The Commission called China's Protocol as "A one-way market opening process" and explains that "the process consisted in the WTO Membership securing 'concessions' or market opening improvements from China, without themselves altering their obligations within the WTO". European Commission, "Overview of the Terms of China's Accession to WTO", *available at* <http://trade.ec.europa.eu/doclib/html/111955.htm> (last visited 1 November 2006) and on file with author.

[143] They are reduced obligations to acceding members below the baseline obligations to members generally. They are not reduced in the sense that the acceding country is put in a worse position than it was before its accession. Accession agreements are presumably Pareto optimal for both applicants and incumbents.

provisions give *least-favored-nation* treatment to applicants when they enter the WTO.[144] Some examples are:

— China's Accession Protocol contains a number of "reservations by WTO Members"[145] which grandfather ongoing trade discrimination against China.[146] For example, the accession terms state that listed Mexican antidumping measures against China may persist for six years and "shall not be subject to the provisions of either the *WTO Agreement* or the anti-dumping provisions of this Protocol".[147]
— China's Accession Protocol establishes the possibility of imposing product-specific safeguards against China in response to market disruption.[148] This provision contains a weaker discipline than the normal rules that apply under the Agreement on Safeguards.
— China's Accession Protocol provides laxer rules that supersede the normal WTO disciplines regarding price comparability in detecting and measuring subsidies and dumping in exports from China.[149] Some of these dispensations expire after 15 years and some appear to be permanent.[150]

[144] Note that incumbent WTO-minus provisions cannot be justified as a partial non-application of the *WTO Agreement* because the options available under Article XIII (Non-Application) are binary (either application or non-application) as between an applicant and a particular incumbent.

[145] China Protocol, Section I.17 & Annex 7.

[146] It is interesting to recall that Article XVI:5 of the *WTO Agreement* states that "No reservations may be made in respect of any provision of this Agreement". The Reservations in the China Protocol are not typical unilateral treaty reservations, however, but rather a list of opt-outs agreed by the parties to the China Accession Protocol.

[147] China Protocol. In other words, the WTO gave six years of immunity to Mexico for its ongoing antidumping actions.

[148] *Id.* Section I.16. This protectionist opportunity lasts for 12 years and is already in use.

[149] *Id.* Section I.15.

[150] Qin (2004) (suggesting that the Protocol be amended to institute a time limit). The legal basis for amending an improvident provision in an accession protocol is unclear. Is it Article X or XII of the *WTO Agreement*, or perhaps both?

— The China Working Party report provides special rules regarding trade in textiles and clothing wherein an incumbent WTO member may impose specified quantitative restrictions on China if: (1) the member believes that Chinese products "threaten the orderly development of trade" in such products and (2) China has not agreed to impose comparable export restraints to those specified.[151]

Note that incumbent WTO-minus provisions cannot be justified as a partial non-application of the *WTO Agreement* because the options available under Article XIII (Non-Application) are binary — either application or non-application is between an applicant and a particular incumbent.

Although this chapter separates out the different categories of obligation, the effects of the commitments above and below the baseline are cumulative for an applicant country. If data were available, it would be possible to develop a Plus & Minus Ratio (PMR) for each applicant, which would be a measurement of how much of its gross domestic product (GDP) is covered by extraordinary accession commitments.[152] PMRs could range from zero to one. A higher PMR

[151] Report of the China Working Party, para. 242. This protectionist opportunity lasts for seven years. In addition to being a WTO-minus opportunity for incumbents, it is also notionally WTO-minus for China in permitting it to yield to foreign demands by adopting export restraints that would otherwise be a WTO violation. At this time, China has agreed to restrain certain textile and apparel exports to Brazil, the EC, South Africa, and the United States. If any other WTO member did this, it would be a violation of the *Agreement on Safeguards*, art. 11.1(b). But for China, its accession obligations may override its obligations under the *Agreement on Safeguards*. In addition, one could argue that any special safeguard provided for in an accession protocol does not come within the scope of the *Agreement on Safeguards*, and therefore does not give rise to a WTO-minus. *See* Agreement on Safeguards, art. 11.1(c) stating that this Agreement does not apply to measures taken pursuant to protocols and agreements or arrangements concluded "within the framework of GATT 1994". Whether a WTO Accession Protocol qualifies as a protocol within the GATT framework presents an interesting question.

[152] This can be expressed mathematically as PMR = ((applicant GDP affected by applicant WTO-plus) + (applicant GDP affected by incumbent WTO-minus) − (applicant

is not necessarily bad for the acceded country, but is an indicator of how far the accession agreement diverges from the baseline.

III. The Legal Basis for Enforcing WTO-Plus and WTO-Minus Provisions

At the commencement of Section III, it may be useful to reiterate a point made earlier: the focus of this chapter is the legality and enforceability of WTO-plus and WTO-minus commitments. The other commitments in an accession agreement, which are included in the various schedules, are clearly enforceable because they are annexed to the GATT or GATS.[153] If all commitments in an accession protocol were included in these schedules there would not be any legal puzzle left to solve.[154] The reason why there is a puzzle is that many accession terms are not scheduled, but rather are written into the text of an accession protocol or are commitments made in the report of the working party that are incorporated by reference into the protocol.[155]

The taxonomy in Section II shows the several types of plus and minus commitments that could be at issue in WTO dispute settlements. The most likely procedural posture in litigation would be for an incumbent WTO member to use the defendant's accession provision as a sword. In other words, the incumbent would claim that the acceded member has not implemented its applicant WTO-plus commitment. This has happened in the new *Auto Parts* case brought against China by Canada, the EC, and the United States. A second procedural posture is for the acceded WTO member to use one of

GDP affected by applicant WTO-minus))/applicant GDP. An adjustment would also be needed for double-counting.

[153] *See* GATT art. II:5; GATS art. XX:3; Agreement on Agriculture art. 3.1.

[154] One reason why key accession commitments are not placed in schedules may be the principle that schedules cannot be used by parties to derogate from an obligation. *See* Appellate Body Report, *European Communities — Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, paras. 219–220 (discussing agriculture schedules).

[155] *See* Standard Protocol, para. 2.

its WTO-minus provisions as a shield (i.e., defense) against a claim of violation. A third procedural posture is for the acceded member to claim that a measure of an incumbent member violates the *WTO Agreement* and is not justified by the incumbent WTO-minus provisions in the plaintiff's accession agreement. Such a dispute would probably center on the contested WTO-minus language. The incumbent would use it as a shield and the acceded member would use it as a sword.[156] Additional procedural postures are imaginable, but the WTO itself could not be a complainant.[157]

The assumption within the trading system is that the DSU (Settlement of Disputes) will be available in such situations. The best explanation for the enforceability of accession protocols is that the WTO has used its treaty making power to establish new rules that are superior or equal to rules in multilateral trade agreements. This chapter comes to the conclusion that this explanation is correct, but for a different and narrower reason than other analysts have assumed.

The only commentator I am aware of who may have questioned enforceability is Antonio Parenti, and his position, written in the early years of the WTO, is imprecise. On the one hand, he says unqualifiedly that an accession protocol "will be subject to the discipline of the Dispute Settlement Understanding".[158] On the other hand, he asserts that *WTO Agreement* Article XII "needs to be interpreted in a teleological way", and that "the terms of accession of one country cannot go beyond the requirements imposed by the

[156] *See* Huang, at 139–140 (footnote omitted) who discusses the tension between "the right of a WTO Member under paragraph 242 [the selective safeguard in the China accession] to impose quantitative restrictions … [and] the corresponding right of China under paragraph 242 … to prevent abuse of this paragraph". Huang's portrayal of the clash of rights shows the conceptual entrapment that can result from perceiving WTO accession obligations as rights.

[157] Because an accession protocol is an agreement between the WTO and the acceding member, the WTO itself would have an interest in lodging a case if an agreement made with it were not fulfilled. But the WTO would not be able to bring the case in the DSB because there is no provision in the DSU for a WTO complaint against a member.

[158] Parenti (2000).

[WTO] Agreement itself, which is the scheduling of commitments in the market access sphere and the assurance of the respect of the various parts that form the *WTO Agreement*".[159] Furthermore, he states that "[a]ny alteration to the obligations of a WTO Member" is possible only through a WTO amendment or other specified procedures, and thus "An alteration occurring in case of an accession would therefore not be consistent with WTO rules".[160] Parenti's interesting analysis ends there and he does not draw any conclusions about what should happen when an accession agreement is inconsistent with WTO rules as he sees them.[161] Parenti does not specifically argue that an incumbent WTO member would lack a cause of action regarding extra-WTO accession commitments.

Protocols of Accession do not state that they are enforceable in WTO dispute settlement.[162] Given the centrality of dispute settlement in the WTO, one should assume that the drafters of accession protocols were attentive to whether there would be dispute settlement available regarding the provisions in that agreement.[163] Therefore,

[159] *Id.* at 152.

[160] *Id.* at 156.

[161] Parenti also argues that international law imposes limits on the freedom of incumbent WTO members to oppose an accession request for reasons unrelated to the conditions for membership set by the *WTO Agreement. Id.* at 142–144.

[162] *See* Standard Protocol, and China Protocol. Two tiny aberrations should be noted however. First, the Annex to Taiwan's Protocol contains the Special Exchange Agreement, and that Agreement states that the DSU shall apply to disputes under that Agreement. Taiwan Special Exchange Agreement, art. VI:4. An analyst could infer that the mention of enforceability there but not in the Taiwan Protocol itself implies that the Protocol is unenforceable. I do not draw that inference however. Second, the China Working Party Report committed that "WTO Members would have recourse to WTO dispute settlement to ensure implementation of all commitments in China's GATS schedule". China Working Party, para. 320. I would not infer that without this commitment, dispute settlement would have been unavailable regarding GATS.

[163] Note that the drafters of the WTO Information Technology Agreement were attentive to the possible need for dispute settlement and stated that participants understood that GATT Article XXIII would be available. Ministerial Declaration on Trade in Information Technology Products, WT/MIN (96)/16, Annex, para. 6 (13 December 1996).

I would guess either that the authors thought that enforceability was too obvious to state, or thought that it would be dangerous to attempt to include such a statement because one or more incumbent WTO Members might oppose it.

Suppose, however, that the Standard Protocol had included language stating that the DSU applied. In my view, that would not solve the problem. The mere inclusion of a statement in a protocol that the DSU applies is insufficient in itself to confer jurisdiction under the DSU.

Although the WTO General Council may have competence to conclude an international agreement with another subject of international law,[164] the General Council does not have competence to expand the jurisdiction of WTO panels. To see this point, consider the following example: Suppose that the WTO General Council were to consider an Agreement with the International Labour Organization (ILO)[165] on "Worker Rights in Trade", and this Agreement is to state that disputes between WTO members on worker rights can be brought to the DSU. I would guess that most analysts of WTO law would object

[164] Kuijper (2002) (averring that there is no doubt that the WTO has treaty-making power).

[165] Some authority exists for this in Article V:1 of the *WTO Agreement* which authorizes the General Council to make appropriate arrangements for effective cooperation with other intergovernmental organizations "that have responsibilities related to those of the WTO". The WTO has numerous agreements with other international organizations — for example, the Agreement between the International Bank for Reconstruction and Development, the International Development Association and the WTO, W/L/195, Annexes II, IV (18 November 1996) and the Agreement between the World Intellectual Property Organization (WIPO) and the WTO, 22 December 1995, 35 ILM 754 (1996). Neither of these Agreements provide for dispute settlement. As far as I know, none of the WTO Agreements or Memoranda of Understanding with other organizations provide for dispute settlement. The WTO also has a Headquarters Agreement with Switzerland (WT/GC/1) pursuant to *WTO Agreement* Article VIII:5, but the dispute settlement tribunal is *ad hoc* binding arbitration, not the DSB. *See* Headquarters Agreement, WT/GC/1, WTO, BISD 1995, art. 48, at 59. (The President of the International Court of Justice is to appoint the third member of the tribunal in the event of a disagreement.) The Headquarters Agreement contains secret Appendixes and Annexes not published by the WTO.

to this, and argue that the General Council cannot use an agreement with another international organization to add to the rules enforceable through the DSU (absent a WTO amendment). Yet if that argument is justified, how can the WTO General Council (or Ministerial Conference) give the DSB (Dispute Settlement Body) jurisdiction over an Accession Protocol merely by writing a jurisdictional provision in the Protocol? Put it another way, the parties to an international agreement are not necessarily free to opt into the DSU because there are mandatory structural limits on the *WTO Agreement* as to when the DSU can apply. I am unaware of any evidence that the Members of the WTO intended to exempt WTO decision-making bodies from these structural limits.

Integral Clause

Having worked through that hypothetical, one can now turn to the language actually used in accession protocols. As seen in the Standard Protocol, the key language states: "The Protocol … shall be an integral part of the *WTO Agreement*".[166] That sentence, herein, the "integral clause" has been offered by several commentators as the explanation for why commitments in a Protocol are enforceable. In my view, however, that explanation cannot be right, as it demonstrates the classic *petitio principii* fallacy — assuming what one seeks to prove.

The integral clause alone cannot justify enforceability for the reasons noted above regarding the hypothetical WTO–ILO Agreement. That is, neither the WTO Ministerial Conference nor the General Council has a general competence to conclude an agreement with another subject of international law and then to incorporate it into the WTO using an integral clause,[167] and, of course, the General Council cannot increase its own competence

[166] Standard Protocol, para. 2.

[167] This statement is a logical conclusion from legal hierarchy. One should not assume that an entity created by positive law would have inherent authority to revise the positive law that created it. For example, the World Health Organization (WHO) cannot rewrite its treaty mandate. Prescinding the theory of constitutional

merely by referring to such an agreement as a "protocol". In my view, any change in the *WTO Agreement* sought by the Ministerial Conference has to be effectuated through the procedures in WTO Agreement Article X (Amendments). One should also note that the DSU does not have an open-ended clause in DSU Article 1 (Coverage and Application), stating that the DSU can be applied to any future agreement that the General Council characterizes as an "integral part" of the *WTO Agreement.*

The inclusion of the integral clause in every Accession Protocol must have been for a reason, and I would guess that it was done with the aim of achieving enforceability. No WTO public records have come to my attention that shed light on the intended meaning of the integral clause. Early accession negotiators may have been seeking a clever way to make a Protocol a self-enacting amendment to the WTO. The *New Shorter Oxford English Dictionary* defines "integral" as "necessary to the completeness or integrity of the whole, not attached".[168] Note that the Standard Accession Protocol in the GATT era did not include an integral clause.[169]

The purpose behind positioning the accession protocol within the *WTO Agreement* was perhaps that the protocol would thereby be entitled to the hierarchical status of the *WTO Agreement* which is superior to all of the Multilateral Trade Agreements in Annexes 1–3 of the *WTO Agreement.*[170] In other words, in the event of a conflict between the *Agreement on Safeguards* and an accession protocol, the latter would prevail. Whether such superiority for accession protocols has been achieved is far from clear, and, in any event, multilateral trade agreements are also "integral parts" of the *WTO Agreement.*[171]

Some commentators, such as Julia Qin, have suggested that the integral clause transforms an accession protocol into one of the

---

moments, higher law in general can only be amended through the means prescribed in the higher law.

[168] The New Shorter Oxford English Dictionary on Historical Principles 1386 (Lesley Brown ed., 1993). This is the most suitable of several definitions.

[169] Guide to GATT Law and Practice, at 1021.

[170] WTO Agreement art. XVI:3; Preamble to the Standard Protocol.

[171] WTO Agreement, art. II:2.

WTO's "covered agreements",[172] and thereby confers jurisdiction of the DSB over accession protocols.[173] The use of the integral clause certainly suggests that the WTO decision-making bodies intended to make an accession protocol a central aspect of the *WTO Agreement*, and I suppose one could argue that if an accession protocol is "part" of the *WTO Agreement*, which is itself "covered", then the protocol itself is covered.

Nevertheless, the same concerns offered above about bootstrapping apply with equal force to this flexible view of the term "covered agreement". The Ministerial Conference lacks competence to add a new covered agreement, or new covered language in a covered agreement, without using the WTO amendment process.[174] Article 1.1 of the DSU states that the "covered agreements" are those listed in Appendix 1 of the DSU, and Appendix 1 does not list any accession protocols. Nor does Appendix 1 say that the covered agreements will also include any additional "part" of the WTO deemed "integral" by the Ministerial Conference. It is interesting to note that several accession working party reports contain comments by the *applicant* positing that the accession protocol will be a "provision" of the *WTO Agreement*.[175] This may show an expectation of that

[172]The DSU defines the covered agreements as the agreements listed in DSU Appendix 1.

[173]Qin, at 508–509.

[174]The same issue of adding covered language arises with waivers provided under WTO Agreement Article IX:3. In the *EC — Bananas III* case, the Appellate Body engaged in interpretation of the Lomé Waiver without discussing whether it is a "covered agreement". Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/AB/R, adopted 25 September 1997, DSR 1997: II, 591, para. 168. During the GATT era dispute settlement, there were cases in which a waiver was invoked as a defense. Guide to GATT Law and Practice, at 709–712.

[175]For example, the Saudi Arabia Working Party report, states that "The representative of Saudi Arabia confirmed that the provisions of the WTO Agreement, including Saudi Arabia's Protocol, would be applied uniformly throughout Saudi Arabia's customs territory … ". *Id.* para. 88. Similar statements are included in the working party reports for Albania, Croatia, Georgia, Jordan, Lithuania, and Moldova.

result by applicant countries, but I doubt that expectations of applicant governments can add to or diminish the obligations provided in the covered agreements.

The term "integral part" has antecedents in the trading system. That word appears in GATT Article II:7 (of GATT 1947), which states that schedules "are hereby made an integral part of Part I of this Agreement", and in GATT Article XXXIV, which states that "The annexes to this Agreement are hereby made an integral part of this Agreement". That term also exists in GATS Article XX:3 and XXIX in analogous contexts. Note that the plurilateral *Agreement on Government Procurement* has its own provision for accession in Article XXIV:2 which states that WTO member governments "may accede to this Agreement on terms to be agreed between that government and the Parties". The terms agreed upon are inscribed in Appendixes, which are defined in the Agreement as being an "integral part" of the Agreement itself.[176]

Regardless of the impressive lineage of "integral part", there is a big difference between a provision of a treaty stating that its own annexes will be an integral part of the treaty, and a negotiation held long after the treaty goes into force that purports to make the results an integral part of a pre-existing treaty. An analogy to GATT Article II (of GATT 1994) would be relevant only if Article XII of the *WTO Agreement* stated that any accession terms will be an "integral part" of the WTO. But Article XII does not state this. So it seems clear that simply importing the language "integral part" from the other WTO contexts does not justify using the integral clause to transform the contents of an accession protocol into a discipline enforceable in the WTO dispute settlement system.

Furthermore, the idea that an integral clause achieves enforceability is undermined by the fact that Taiwan's Accession Protocol says that the Special Exchange Agreement "forms an integral part of this Protocol", and yet the Exchange Agreement nonetheless

[176]Agreement on Government Procurement, art. XXIV:12. *See, e.g.*, Accession of Iceland, GPA/43 (9 October 2000).

includes a statement that the DSU shall apply to disputes under the Agreement.[177] This wording in the Taiwan Special Exchange Agreement may appear because the drafters thought that merely making it an integral part of the Protocol (which is said to be an integral part of the *WTO Agreement*) was not enough to achieve enforceability.

Recall that when special exchange agreements were adopted in the GATT era, the language in those agreements stated that, "the Agreement, entered into pursuant to Article XV of the [GATT 1947], shall be deemed to be included within that Article".[178] This status matched and followed from the text of Article XV:6 of the GATT 1947, which states:

> Any contracting party which is not a member of the Fund shall … become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES … . Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.

In retrospect, the Uruguay Round drafters of the *WTO Agreement* missed an opportunity to include a similar sentence stating that every accession agreement is an integral part of Article XII of the *WTO Agreement*. The drafters could also have created an Article XII annex for accession protocols.

Some commentators have argued that an accession protocol is an amendment or modification to the *WTO Agreement*, and being an amendment would be enforceable like any other amendment. For example, Claus-Dieter Ehlermann and Lothar Ehring have characterized accession protocols as "an amendment of the *WTO Agreement* because this Agreement is modified so as to cover an additional subject of international law".[179] Although their analysis contains a great deal of insight, suggesting that an accession protocol, in principle,

[177] Taiwan Protocol, para. 4; Taiwan Special Exchange Agreement, art. VI:4.
[178] *See* Article XIV:4 of the Model Special Exchange Agreement.
[179] Ehlermann and Ehring, at 57.

amends the *WTO Agreement* does not answer the question of whether the integral clause itself is valid.

In any event, an accession protocol is not an amendment to the *WTO Agreement*. Aside from the fact that the provisions for amending the WTO are in Article X not Article XII, one should also recall that Article X states detailed rules as to how particular kinds of amendments are to be accepted by members, rules that would be evaded if Article XII could be used to amend the WTO. It is true that in current WTO practice, accession agreements are approved by consensus rather than a two-thirds vote, and consensus would be equally sufficient for the Ministerial Conference to approve an amendment to the *WTO Agreement*. But for an accession agreement to be fully interchangeable with a formal WTO amendment, the decision rules for each have to be equivalent not only in practice, but also *de jure* (i.e., the fallback voting rule). That is not the case because an accession protocol need only be approved within the WTO Ministerial Conference by a two-thirds majority of WTO members.[180] In contrast, many types of amendments to the *WTO Agreement* have to go through a two-step process of: (1) approval in the Ministerial Conference by a two-thirds vote, and (2) acceptance by two-thirds of the members.[181] For some amendments, the acceptance requirement is higher, with either a specific acceptance by each member to be bound or full acceptance by all members.

The use of the term "protocol" in "Accession Protocol" could, on first glance, appear to support the idea that an accession protocol is an amendment. After all, protocols exist in other bodies of international law and can be used for amending purposes.[182] Indeed, the first multilateral trade treaty, the *Prohibitions Convention* of 1927, had

[180] *See* WTO Agreement art. XII:1.

[181] *Id.* art. X.

[182] Several types of protocols are known to international law — for example, a protocol of signature providing for interpretation of particular provision, an optional protocol, a protocol based on a framework treaty that implements the convention's objectives in a discrete area, a protocol of amendment, and a protocol providing supplementary obligations.

a protocol which substantially amended the Convention.[183] Nevertheless, for the reasons outlined above, one cannot accept the idea that any time the WTO Ministerial Conference adopts something that they designate as a "protocol" that the *WTO Agreement* is thereby amended. For instance, I do not believe that an accession protocol could validly be used to fix the sequencing problem of DSU Articles 21 and 22[184] even though an applicant government might rationally want this problem to be solved before it consented to joining the WTO. Fixing sequencing requires an amendment to the DSU.[185]

The term "protocol" has a venerable history in the GATT. Protocols were used to implement the results of trade negotiations, to amend the GATT, and to effectuate accession through a Protocol of Accession.[186] Unlike other treaties,[187] the GATT did not authorize the use of the protocol instrument. Similarly, the *WTO Agreement* does not specifically authorize protocols. WTO Agreement Article IX (Decision-Making) does not do so, nor does Article XII do so explicitly.

Nevertheless, given the long history of the use of protocols to implement GATT accession, there could be authority to continue that GATT-era customary practice pursuant to WTO Agreement Article XVI:1. As I see it, the WTO uses a protocol to implement accession because that is how the GATT Contracting Parties did so. But GATT accession protocols did not regularly contain GATT-plus obligations, so one cannot validly argue that GATT-era practice alone justifies accepting any WTO accession protocol as an amendment to the *WTO Agreement* that can establish wholly new enforceable obligations.

The fact that the WTO Standard Protocol provides for registration at the United Nations might also connote an amendment, but

[183] International Convention for the Abolition of Import and Export Prohibitions and Restrictions, with Protocol and Annexed Declaration, 8 November 1927, 97 LNTS 391 (not in force).

[184] The sequencing problem is explained in Van den Bossche (2005).

[185] An accession protocol for China might be able to fix the sequencing problem for dispute settlement when China is a party, and not fix it for other disputes.

[186] Guide to GATT Law and Practice, at 1002–1003, 1140–1141.

[187] For example, Article 6.2(h) of the *Vienna Convention for the Protection of the Ozone Layer* provides authority to the Conference of the Parties to adopt protocols to the Convention.

such a conclusion would be unjustified. The very first free-standing accession protocol in the GATT, the Protocol with Japan of 1955, provided for registration at the United Nations,[188] and yet that Protocol certainly did not contain any language that could have been viewed as amending the GATT. By contrast, contemporary WTO accession protocols contain language (e.g., WTO-plus disciplines) that look amendment-like.

So far, the only formal amendment to an annex of the *WTO Agreement* adopted since the Marrakesh Ministerial is the addition of the new Article 31 *bis* to the *TRIPS Agreement*.[189] This amendment was approved by consensus in 2005 by the WTO General Council and submitted to WTO members for acceptance pursuant to Article X of the *WTO Agreement*. The General Council Decision contains a "Protocol Amending the *TRIPS Agreement*" which states that it shall be registered under the provisions of the Charter of the United Nations.[190] Although one can expect that a formal Article X amendment to the *WTO Agreement* would always provide for registration at the U.N. Secretariat, not everything that the WTO registers is necessarily a WTO amendment.

If the WTO-plus and -minus terms are not an amendment to the *WTO Agreement*, then what are they? In my view, accession agreements are a legal instrument that modifies the *WTO Agreement* without being an actual amendment to it.[191] The term "modified" appears

[188] Protocol of Terms of Accession of Japan to the General Agreement on Tariffs and Trade, 7 June 1955, 220 UNTS 164, para. 9(c).

[189] Amendment of the TRIPS Agreement, WT/L/641, 8 December 2005. In addition, an interesting practice has occurred regarding specific commitments for trade in services. Groups of "Members concerned" have adopted four "Protocols" to the GATS, which were open for "acceptance" by individual members. WTO Docs. S/L/11, 24 July 1995; S/L/12, 24 July 1995; S/L/20, 30 April 1996; S/L/45, 3 December 1997. These Protocols were to be registered with the U.N. Secretariat. The Protocols cover "Financial Services", the "Movement of Natural Persons", "Basic Telecommunications", and "Financial Services" again. The Protocols purport to replace and/or supplement particular member schedules annexed to the GATS.

[190] TRIPS Agreement, Protocol, para. 6.

[191] *See* Footer (2006) ("The accession of a new Member is not usually thought of as an amendment but the *WTO Agreement* is modified … ".).

in the GATT 1994 Agreement which defines "GATT 1994" to be "GATT 1947" as "rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the *WTO Agreement*".[192] "Modified" also appears in the Standard Protocol, which states:

> The *WTO Agreement* to which … [name of applicant] … accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of entry into force of this Protocol.[193]

An accession protocol is certainly a legal instrument that enters into force. It modifies the *WTO Agreement* prospectively by specifying the exact legal relationship between the acceded member and the incumbent members, and these obligations may well be different than exist in baseline WTO rules. An accession protocol may also establish reciprocal obligations between the applicant and the WTO.

Some analysts might object to my use of the word "modification". Because no WTO law exists for a non-member, one might argue that the specialized obligations of the acceded member do not alter or modify the *WTO Agreement* because there was no pre-existing law for that member. That is true, but the analysis is too static. As the percentage of members who join by accession grows, the *WTO Legal Texts*[194] become increasingly out of date in specifying the legal relationships that exist because with each new accession, specialized law

[192] GATT 1994, para. 1(a). This has particular reference to GATT Article XXVIII (Modification of Schedules) and to the Understanding on the Interpretation of GATT Article XXVIII.

[193] Standard Protocol, para. 2. Similar language appeared in Japan's Protocol of Accession to GATT and in subsequent accession protocols of other countries. Note that the WTO Standard Protocol language is backward looking and does not say that the accession protocol is modifying the WTO.

[194] By this I mean The Legal Texts. The Results of the Uruguay Round of Multilateral Trade Negotiations (1999), which includes the Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations.

is created.[195] Consider the situation of Saudi Arabia, which joined the WTO after China. To find China's obligations toward it, Saudi Arabia has to also look beyond the four corners of the *WTO Legal Texts*. Saudi Arabia must also look at China's Accession Protocol. Saudi Arabia will step into the same legal position toward China that incumbent members got when China joined (e.g., the WTO-minus).[196] Thus for Saudi Arabia, the *WTO Legal Texts* were modified by China's earlier entry.

Another way to describe accession law, without using the term "modified", is to say that with each new accession, an additional set of country-specific law is layered on top of the *WTO Agreement* and the previous accession protocols. This new layer has overwritten (or has conditioned[197]) the rules that would exist between two WTO members if they were incumbents. Eventually, the *WTO Analytical Index* will need to codify the new layers of accession law and to systematize the related dispute settlement holdings regarding each particular accession protocols.

Based on the analysis above, the overall conclusion reached here is that if Accession Protocols are enforceable in the DSU, which I believe they are, they are enforceable for a reason that is *extrinsic* to whatever language is included in the Accession Protocol. The phrase "integral part of the WTO agreement" is not a set of magic words

[195] Note that the WTO website includes accession documentation on the page entitled "WTO legal texts".

[196] This conclusion seems reinforced by the fact that China, as a WTO member, is presumptively aware of the opportunities Saudi Arabia will gain, and that China could have vetoed Saudi Arabia's membership or invoked non-application against Saudi Arabia pursuant to Article XIII of the *WTO Agreement*. Thus, if China lets Saudi Arabia join, then China does so knowing that Saudi Arabia will gain the benefits of China's plus and minus commitments.

[197] According to the Appellate Body, "the legal character of the rights and obligations of the contracting parties under the GATT 1994 is not fully reflected by the text of the GATT 1994 because those rights and obligations are conditioned by the 'protocols', 'decisions' and other 'legal instruments' to which paragraph 1(b) [of the GATT 1994 incorporation language] refers". Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000: III, 1619, para. 107.

that transforms a Protocol that would otherwise be unenforceable into one that is enforceable.[198] Instead, the justification for enforceability has to originate elsewhere than the terms of an agreement that the WTO concludes with a country.

Explicating Article XII

The key to explaining the nature of accession protocols and their enforceability lies not in the protocols themselves, but rather in the language of the *WTO Agreement*, and in particular Article XII:1. It provides: "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations … may accede to this Agreement, on terms to be agreed between it and the WTO". To parse this provision, one should focus on the words "terms", "agreed", and "it and the WTO".

The key term is "terms". In my view, "terms" has what the U.S. Supreme Court has called "iceberg quality"[199] in that most of the meaning lies below the surface. Looking above and below the surface, one can see the following: First, according to the *New Shorter Oxford English Dictionary,* "terms" are "limiting conditions".[200] Second, the word "terms" suggests that there is an individual negotiation between the applicant and the WTO, and that the results of the negotiation — that is, the detailed terms — will be tailored to the applicant's situation.[201] Third, because the applicant agreed to the terms, the applicant consents to be bound as an exercise of its autonomy. Fourth, because the WTO agreed to the terms, the WTO consents to be bound by the terms. Fifth, the "terms" of accession will have continuing relevance after accession is completed, at least

[198] Furthermore, for the reasons noted above, the phrase "integral part" cannot transform an otherwise uncovered agreement into a "covered agreement". Perhaps the phrase "integral part" confirms that the Protocol fits somewhere in WTO law, but that phrase cannot do the heavy lifting of making an accession protocol enforceable.

[199] *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

[200] The New Shorter Oxford English Dictionary on Historical Principles, at 3253. This is the most suitable of several definitions.

[201] So far in accessions, the terms agreed have related directly to the applicant.

insofar as a term is executory in nature and not just a one-time commitment to be consummated before entry into the WTO. Sixth, the applicant understands that the limiting conditions of its accession will be enforceable. Because if they are not enforceable, what would be the point of having to expend years in accession negotiations?[202] Seventh, in consummating a treaty with the Organization and in voluntarily joining the Organization, the applicant understands that its agreed terms are subject to enforcement (*pacta sunt servanda*) within the Organization.[203]

Adding up these points provides the solution to the puzzle of accession protocol enforceability. The solution is that by using the ordinary meaning of Article XII in its context and in the light of its object and purpose, one can deduce that a "term" agreed to in an Article XII treaty is enforceable through the DSU.[204]

Agreements "entered into pursuant"[205] to Article XII are enforceable even though they are not one of the "covered agreements" listed in Appendix 1 of the DSU. This assertion may seem surprising, yet it is fully consistent with the text of DSU Article 1 (Coverage and Application), paragraph 1 which states:

> The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute

[202] China's negotiation took over 15 years.

[203] It might be possible for the WTO and the applicant to choose a different forum than the DSB, for example, the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States, and that decision would override DSU art. 23.1 regarding forum exclusivity. Yet in the absence of a different choice of forum, one can reasonably conclude that the WTO and the applicant recognized that the terms of accession would be enforceable through the DSU.

[204] A further argument would be that the use of ever more detailed accession terms demonstrates a VCLT Article 31(3)(b) "subsequent practice in the application of the treaty" by WTO members demonstrating that accession agreements are meant to have legal consequences.

[205] I borrow this phraseology from the Model Special Exchange Agreement, referenced in *supra* note 77. The Model was still in use in 1994, when the GATT Secretariat drafted a Special Exchange Agreement with Taiwan which stated that the Agreement was "entered into pursuant to Article XV" of the GATT. GATT, Accession of Chinese Taipei, Spec (94)31 (22 August 1994), at 4–5.

> settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements'). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations *under* the provisions of the [*WTO Agreement*] … and of this Understanding taken *in isolation* or in combination with any other covered agreement.[206]

Therefore, when a WTO member has a dispute with another WTO member concerning "rights and obligations" under Article XII of the *WTO Agreement*, the complaining member can lodge a dispute solely under Article XII "in isolation" from a specific discipline in a covered agreement. In other words, the cause of action for an accession compliance dispute should be Article XII informed by any relevant commitment in the accession protocol. Viewing an accession compliance dispute as arising *under*[207] Article XII deals with the practical problem of securing terms of reference for a panel.[208] In addition, centering a claim on a violation of Article XII will trigger the rebuttable presumption provided for in DSU Article 3.8 that a breach in the rules constitutes a nullification or impairment.

Article XII is one of several provisions in the *WTO Agreement* that give authority to WTO political bodies to take decisions that can potentially be sources of law. Table 4 contains a list of such provisions:

Amendment to the *WTO Agreement* under Article X will alter WTO law and establish new covered agreements or covered

---

[206] Emphasis added.

[207] According to the Appellate Body, "The *DSU* provides an integrated dispute settlement mechanism applicable to disputes arising under any of the "covered agreements". Appellate Body Report, *Brazil — Desiccated Coconut,* p. 13.

[208] *See* DSU art. 7.1. Whether parties may by mutual consent extend the DSU Article 7.1 terms of reference for a panel beyond covered agreements is an issue that has not yet been litigated.

Table 4 Decision-making Authorities in WTO Agreement that may Generate Law

WTO Agreement	Nature of Authority
Art. III:5	Cooperation with the IMF and the World Bank
Art. IV:1	Decisions on all matters under any of the Multilateral Trade Agreements
Art. V:1	Arrangements for cooperation with intergovernmental organizations
Art. V:2	Arrangements for cooperation with non-governmental organizations
Art. VIII:5	Headquarters agreement
Art. IX:2	Interpretations
Art. IX:3	Waivers
Art. X	Amendments
Art. XII:1	Accession agreements

disciplines. The other provisions listed cannot amend covered agreements or add new covered agreements,[209] but they can generate norms that may be invocable in WTO dispute settlement.[210] For each of these provisions, there is, in effect, a horizontal shelf extending outward from the *WTO Agreement* on which any legislation approved is deposited. Each accession protocol adds additional and unique strata of law to the *WTO Agreement*. In the first DSU panel request regarding accession disciplines, the three complainants (Canada, the EC, and the United States), alleged a number of

[209] Hunter Nottage and Thomas Sebastian have suggested that provisions like these may be able to generate decisions that should be "deemed" to be an integral part of a covered agreement. Nottage and Sebastian (2006).

[210] In *Mexico — Taxes on Soft Drinks*, the Appellate Body implied that the DSU could not be used to determine rights and obligations outside the covered agreements. Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 56. While this holding is cryptic, I do not read it as declaring that the texts of the covered agreements provide the only source of claims and defenses.

violations of WTO multilateral agreements[211] plus violations of specific accession commitments by China[212] on auto parts.[213]

Other Explanations for Enforcement

As noted above, this study suggests that accession commitments are enforceable because they are Article XII international agreements. Is there any competing explanation? One that I can think of is that an accession agreement is merely an annex to a decision adopted by the General Council that is not directly enforceable in the DSU, but may nonetheless be invoked by a party to the dispute as a means of interpreting WTO covered agreements. The legal rationale would be that the decision to adopt an accession protocol is a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" pursuant to Article 31(3)(a) of the *Vienna Convention on the Law of Treaties*.

While this solution is imaginable, it could only work for accession commitments that specifically refer to particular provisions in covered agreements. Yet many accession commitments do not, particularly the applicant WTO-pluses on new issues, but also some of the incumbent WTO-minuses. Furthermore, using this approach would require a lot of bending and twisting of the *Vienna Convention* because the applicant is not technically a party to the WTO at the

[211] The WTO covered agreements invoked by one or more of the plaintiffs include the GATT, the Agreement on Trade-Related Investment Measures, and the Agreement on Subsidies and Countervailing Measures. *China — Measures Affecting Imports of Automobile Parts,* Request for the Establishment of a Panel by the United States, WT/DS340/8 (18 September 2006); *Id.* Request by Canada, WT/DS342/8 (18 September 2006); *Id.* Request by the EC, WT/DS339/8 (18 September 2006).

[212] In particular, the China Protocol, Sections I.7.2 and I.7.3 and the Report of the China Working Party, paras. 93, 203. All of these are WTO-plus commitments. Canada also pointed to another commitment in the Protocol as a violation. In addition, the EC lodged a non-violation complaint.

[213] In addition, Canada and the EC alleged a violation of the *WTO Agreement*, but they did not list any particular provision as being violated, and so this allegation will not be specific enough to come within the terms of reference for the panel.

time of the "subsequent agreement" (i.e., the accession decision) and because the treaty party WTO would not be a participant in any DSU proceeding. Perhaps a panel might have recourse to the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (which is not yet in force),[214] and then be among the first international adjudicators to explore the interplay between the two Vienna Conventions. But even the two Viennas together might not be enough to climb out of the interpretive thickets a panel would find itself in, such as the need to apply the first Vienna Convention to the covered agreement and the second Vienna Convention to the Protocol. Another dilemma would be the legal position of the WTO member that joins after an acceded defendant member because the new entrant[215] might not be a "party" under the Article 31(3) treaty interpretation rules.

An even more serious problem is that if an accession commitment itself is not enforceable, then a panel would need to take the contents of an accession commitment and integrate them into whatever provisions of a covered agreement are available.[216] This would lead to major disparities in interpreting basic WTO rules depending on what acceded party is involved.[217]

---

[214]Vienna Convention on the Law of Treaties between States and International organizations or between International Organizations, 21 March 1986, 15 ILM 543 (not yet in force). Note that one WTO member, Taiwan, is not a state. The rules for treaty interpretation in this Vienna Convention and the VCLT are identical.

[215]Recall that when WTO member N_{150} joins the WTO by accession, N_{150} can take on a set of WTO-plus obligations to the 149 incumbent members. Then after N_{151} accedes to the WTO, N_{150} will gain a new WTO-plus obligation to N_{151}. Conversely, newly acceded member N_{151} joins the WTO with whatever incumbent WTO-minus obligations toward N_{150} exist in the N_{150} Protocol.

[216]To be sure, any enforcement of accession agreements means will lead to different rules for different members, but the question is whether a panel applies an accession protocol itself (which will have a limited number of variations equal to the number of accessions), or a panel instead seeks to infiltrate (or integrate) accession protocols into covered agreements (which would lead to endless variations).

[217]It is true that even now, WTO rules can mean different things for different members, but that does not happen very often. (One example of where it does occur is the Appellate Body's definition of "government revenue that is otherwise due" in

Imagining Non-Enforcement

I believe that panels will declare accession commitments enforceable, but the contrary position is worth considering. Could it be that certain accession commitments are beyond the WTO's jurisdiction to prescribe (and hence to enforce)? Consider a hypothetical panel considering an applicant WTO-plus commitment regarding a domestic regulatory issue. The acceded defendant demurs that the commitment is not truly WTO law. To support its position, the defendant might offer arguments along the following lines.

The textual argument could be that an accession protocol is not a covered agreement, but rather merely a political decision of a WTO body that is not amenable to dispute settlement. The acceded defendant could acknowledge that *demandeur* governments insisted upon special accession terms that deviate considerably from the normal rules applying to incumbents, but then hold that the terms were only best-effort commitments, not legal obligations. Another argument might be that WTO-plus terms are contrary to the object and purpose of the WTO. One could point to the Preamble to the *WTO Agreement* as support because its text suggests that a major purpose of the WTO is "the elimination of discriminatory treatment in international trade relations".

A better argument might be that WTO members enjoy *de jure* equality in the WTO regardless of how long they have been members of the WTO.[218] In a recent address to the European Society of

---

the definition of a subsidy.) Moreover, if two parties to the WTO were to agree to an *inter se* modification, that modification would normally be reciprocal between the parties in the dispute, whereas in an accession-related complaint, because of the asymmetry of accession commitments, the panel would be holding the defendant to a different standard than would apply to the plaintiff.

[218] *See* Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization, *reprinted in* The Legal Texts, at 409 ("*Recognizing* that the *WTO Agreement* does not distinguish in any way between WTO Members which accepted the Agreement in accordance with its Article XI and XIV and WTO Members which acceded to it in accordance with its Article XII … ".). WTO Agreement Article XIV is "Acceptance, Entry into Force and Deposit".

International Law, WTO D-G Pascal Lamy extolled the "sovereign equality of States" as a principle of international law, and declared that "This principle is fully respected in the WTO" and is "also reflected concretely in the substantial rules of the WTO".[219] When he was WTO D-G, Mike Moore opined: "The WTO system is built upon the rule of law and respect for the sovereign equality of nations".[220] The WTO Secretariat, too, seems convinced, and currently tells the public that "In short, in the WTO trading system, everyone has to follow the same rules".[221]

Perhaps a panel might be inspired by such lofty thoughts and hold that WTO law does not permit second-class citizens. A panel could also be influenced by the critical views of publicists, such as:

> "While it remains one of the enduring clichés of the multilateral trading system that the WTO is a 'rule-based system,' the actuality is that accession is inherently power based and hence the very antithesis of the WTO's credo".[222]
>
> — *Roman Grynberg & Roy Mickey Joy*

> "Furthermore, acceding countries are required to make bigger commitments than the original members were. This creates a two-tiered system of rights and obligations for different members,

[219] Lamy (2006). To his credit, Lamy tries to explain how sovereign equality can be reconciled with reverse discrimination in favor of developing countries, such as the generalized system of preferences. Lamy says that such mechanisms "ensure effective equality among Members" because "this adaptation of applicable rules to the real situation of States is a way of ensuring more genuine equality". This explanation, however convincing it may be regarding developing countries, would not be helpful in reconciling "sovereign equality" with the disproportionate accession commitments being demanded of many countries that join the WTO, including developing countries.

[220] Moore (2002).

[221] WTO Secretariat, "Small countries are NOT powerless in the WTO", *available at* <http://www.WTO.org/english/theWTO_e/whatis_e/10mis_e/10m07_e.htm>.

[222] Grynberg and Joy (2000).

> thus substantially damaging the main principles of the WTO: non-discrimination, equal rights and transparency".[223]
>
> — *Maxim Medvedkov*

> "These obligations [in the China Protocol] are the first WTO rules to shatter the uniformity of the trading system and thus significantly impair the rule of the law under the WTO Agreements".[224]
>
> — *Thomas P. Holt*

In the run-up to the 2006 G8 Summit in St. Petersburg, the Civil G8 (a group of over 300 civil society organizations from around the globe) issued a statement on "Trade, Finance for Development and Africa" which, among several points, urged the G8 to "declare that all countries, when negotiating their WTO membership, should not be charged with WTO-plus obligations or other non-favorable [ones] for national development conditions".[225] The G8 governments had no use for that advice.

Although I have acknowledged non-enforcement as a possibility, I do not see it happening in any instance where the commitment to act in an accession provision is clear. As noted in Section II, however, some statements in accession documentation are ambiguous as to whether they state a commitment and if one of those were to arise in dispute settlement, I could well imagine a panel calling it precatory rather than contractual.

Comparison of Accession Obligations

Table 5 shows the various types of existing accession obligations that are WTO-minus or WTO-plus, and distinguishes several key features:

One feature identified in Table 5 is whether this practice had antecedents in the GATT era. The two types of WTO-minus did. Applicant GATT-minus was accomplished most notably through grandfathering

[223] Medvedkov (2001).
[224] Holt, at 477 (footnote omitted).
[225] Civil G8 — 2006 (9–10 March 2006), *available at* <http://en.civilg8.ru/>.

Table 5 Types of Accession Obligations

	Done in GATT Era?	Discriminatory?	Protectionist?	Ultra Vires?
Applicant WTO-minus	Yes	Yes	Yes	No
Incumbent WTO-minus	Yes	Yes	Yes	No
Applicant WTO-plus	Rarely[226]	Yes	No	No
Incumbent WTO-plus	No	No	No	Possibly
WTO WTO-plus	No	No	No	Possibly

in the Protocols of Provisional Application,[227] and also through specific accession terms. Incumbent GATT-minus was uncommon, but some existed. Some examples of incumbent GATT-minus provisions are the GATT Accession Protocols of Poland, Romania, and Hungary[228] which allowed incumbents to continue imposing discriminatory import restrictions against acceding countries.[229] The Accession

[226] An applicant GATT-plus was Poland's commitment to a quantitative increase in imports discussed in *supra* footnote 84.

[227] The issue of whether the Protocol of Provisional Application would serve as a defense to a measure being challenged was litigated in several GATT cases with the matter often turning on whether the pre-accession measure was mandatory. *See, e.g.*, GATT Panel Report, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted 7 November 1990, GATT, BISD 37S/200, para. 83.

[228] In a major address delivered in 1995, then WTO D-G Renato Ruggiero recalled:

> In the old days, centrally-planned economies such as Poland, Romania and Hungary were allowed to join the GATT in the absence of any serious economic reform effort. Special accession protocols were drawn up. These protocols recognized that trading opportunities would not be created by market forces, so they were based on import expansion commitments while allowing discriminatory trading arrangements to persist. But the political expediency and limited economic relevance of those arrangements *have no place in the WTO today*.

Ruggiero (1995) (emphasis added).

[229] Poland Accession Protocol Poland, para. 3(a); Protocol for the Accession of Romania to the General Agreement on Tariffs and Trade, GATT, BISD 18S5, para. 3;

Protocol of Hungary also contains an incumbent GATT-minus safeguard, but with the twist of being reciprocal; in other words, the applicant Hungary was given the same GATT-minus opportunity.[230]

Another feature set out in Table 5 is whether the accession obligation is discriminatory. Such discrimination occurs in three different contexts. One is the reverse discrimination in the applicant WTO-minus. A second is the discrimination against acceded members requiring that they accept applicant WTO-plus. Neither of those contexts engenders a violation of the most-favored-nation ("MFN") norm. The third context is the incumbent WTO-minus, and such provisions do violate the MFN norm because only the acceded member is treated unfavorably.

In addition, Table 5 displays two other features: One feature is whether the accession obligation is protectionist. That occurs in the two WTO-minus situations. The other feature is whether the WTO-minus or plus are *ultra vires* to the WTO's competence. Given the lack of any legal standard in Article XII regarding the content of accession agreements,[231] there may not be any accession terms that are *ultra vires*.[232]

Protocol for the Accession of Hungary to the General Agreement on Tariffs and Trade, GATT, BISD 20S/3, para. 4. This treatment did not have a fixed termination date but was to be removed progressively.

[230] Hungary Accession Protocol, *id.* para. 5. The Working Party Report explains that "Hungary could agree to the inclusion of a safeguard clause provided it operated on a reciprocal basis". Accession of Hungary, Report of the Working Party, GATT, BISD 20S/34, para. 9. The Romania Protocol contains a similar provision. Romania Accession Protocol, para. 4.

[231] Beyond the text of Article XII of the *WTO Agreement*, there is a WTO legal discipline for Special Exchange Agreements negotiated in connection with accession. GATT Article XV:7(b) states that the terms of a Special Exchange Agreement "shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed" by IMF Articles on members of the Fund. *See* Jackson, at 486 (suggesting that this sets a maximum of restrictiveness). This GATT discipline is not in conflict with Article XII of the *WTO Agreement* and so is not trumped by Article XII. In my view, this Article XV:7(b) rule should guide WTO accession negotiations.

[232] If some terms are ultra vires, it seems doubtful that an acceding member can challenge them after it joins the WTO because the member would be challenging the

The WTO-plus obligations for the WTO are surprising indeed, and their enforceability is questionable.[233] For example, suppose the WTO fails to meet its commitment to Taiwan under the Special Exchange Agreement to "take measures, as are satisfactory to the [International Monetary] Fund, to ensure effective presentation of Chinese Taipei's case to the Fund, including, without limitation, the transmission to the Fund of any views communicated by Chinese Taipei to the WTO".[234] Could Taiwan bring a case against the WTO?

The instinctive answer of any trade lawyer might be no, but a more careful answer to justiciability is called for. Recall that the DSU states that it will "apply to disputes brought pursuant to the consultation and dispute settlement provisions" of the covered agreements,[235] and no requirement exists in this head of jurisdiction for a member-to-member dispute.[236] One of those covered agreements is the GATT and its Article XXIII provides for dispute settlement in three circumstances. The first two circumstances in GATT Article XXIII are a violation or non-violation by another Member. The third circumstance occurs when any Member should consider that any benefit accruing to it directly or indirectly under the GATT is being nullified or impaired as the result of "the existence of any other situation".[237]

---

legitimacy of an agreement it reached with the WTO and on which the applicant specifically agreed to be bound in joining the WTO. *See* Standard Protocol, para. 6 and the Vienna Convention on the Law of Treaties between States and International organizations or between International Organizations, *supra* note 214, 21, art 15. Perhaps estoppel could be invoked as a general principle of law. More gravely, is an illegal accession commitment separable from the Accession Protocol, or would an illegal accession provision invalidate the applicant's WTO membership?

[233] As Dan Sarooshi has noted, lawful measures available to states to challenge the way an international organization exercises conferred powers are often inadequate. Sarooshi (2005).

[234] *See* text accompanying *supra* note 81.

[235] *See* DSU art. 1.1 first sentence.

[236] *See* DSU arts. 6.1 (containing no requirement that the defendant be a Member); 7.1, 8.6, 12.1, 14.2, 16.3 (using the term "parties to" rather than "Members in"). *But see* DSU art. 3.3 (referring to benefits impaired by a member), 19.1 (referring to the member concerned).

[237] Article XXIII:1(c) of the GATT 1994; Article 23.1 of the DSU.

This third does *not* require that another Member be the object of the complaint. Invoking the GATT would be appropriate for Taiwan to invoke because the Taiwan-WTO Special Exchange Agreement refers to GATT Article XV:6. Thus, in my view, Taiwan would be able to use the DSU to lodge a case against the WTO regarding the WTO's failure. This would be a "situation" complaint under Article XXIII:1(c) of the GATT 1994.

Such a complaint would be unusual.[238] The panel would not be able to issue a DSU Article 19.1 recommendation, but could investigate the matter and make "findings" pursuant to the panel's authority in DSU Articles 7.1 and 11, and perhaps could also make a "ruling" pursuant to the panel's authority in DSU Article 26.2. Whatever ruling the panel issues would have to be adopted by consensus in the DSB.

The foundation of consensus has sustained the creation of WTO plus and minus terms, but one wonders what would happen if that consensus fractured and the WTO practice reverted to voting on accession. In that environment, could one WTO member lodge a complaint about the "excessive demands"[239] of another in accession negotiations? Although WTO Article XII does not contain any legal standard for what terms are appropriate, the General Council, as noted above, did act in 2003 to approve a Decision on the Accession of Least Developed Countries that includes, *inter alia*, the following "guidelines":

> … WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding

[238] To clarify, the unusual right of action discussed here applies only to Taiwan. For that plaintiff, my conclusion is reinforced by the language in the WTO's Special Exchange Agreement with Taiwan that provides "The Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO shall apply to disputes arising under this Agreement". Special Exchange Agreement, art. VI:4.

[239] At the General Council meeting that approved the accession of Saudi Arabia, the Chairman of the Working Party (Munir Akram from Pakistan) took note of the challenge of "sometimes excessive demands made on acceding countries to accept obligations beyond those required by WTO agreements". Minutes of Meeting held on 11 November 2005, WT/GS/M/99, para. 3.

> LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDCs' Members.
>
> … commitments to accede to any of the Plurilateral Trade Agreements or to participate in other optional sectoral market access initiatives shall not be a precondition for accession to the Multilateral Trade Agreements of the WTO.[240]

Are the guidelines enforceable? On first reading, this provision looks sufficiently legalized. On the other hand, the Decision does not say that it is enforceable in dispute settlement and instead states that the implementation of these guidelines shall be reviewed regularly in the Subcommittee on Least Developed Countries (LDCs) of the Committee on Trade and Development, and that Ministers shall take stock of the situation. This might imply that the General Council committed the guidelines to the political venues at the WTO rather than the judicial venue. On the other hand, when the General Council has wanted to clarify that a Decision it adopted would not be enforceable in dispute settlement, the Council has used specific language to say that. For example, in the August 2004 decision on the post-Cancún negotiating package, the decision stated: "The General Council agrees that this Decision and its Annexes shall not be used in any dispute settlement proceeding under the DSU and shall not be used for interpreting the existing WTO Agreements".[241] Yet such language does not appear in the LDC Accession Guidelines.

Even though the General Council's Decision is not a covered agreement, is it possible that something in that decision could be enforceable? Perhaps yes, as long as one member seeks to bring a case against another. Recall that the jurisdiction of the DSB extends to "consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization" … and of the DSU "taken in isolation or in combination with any other covered

[240] Accession of LDCs, para. 1.

[241] General Council Decision, WT/L/579, 2 August 2004, para. 2.

agreement".[242] No requirement explicitly exists that the legal provision being invoked be part of the text of a covered agreement so long as it has become an obligation "under" the *WTO Agreement*. Jurisdiction could then be founded on Article XII of the WTO Agreement or Article IV:1[243] on decision-making. Of course, the most obvious plaintiffs regarding onerous accession terms are the countries that do not have standing to lodge complaints against the WTO — that is, the applicant countries that are not yet WTO members.[244] At present, most of the risk of harmful accession terms is allocated by the WTO to the applicant.

Having justified enforceability of accession commitments in Section III, this chapter now turns to challenges for panels and arbitrators in interpreting accession commitments.

IV. Some Challenges of Interpretation

In any dispute regarding an accession provision, a threshold question will be whether the provision is stated in a manner suggesting that it was meant to be a legal commitment. A reader can get the impression that the working party reports were not subjected to much legal scrubbing, and therefore contain statements that span a broad spectrum of bindingness. Section IV considers some challenges of interpretation that may arise on the provisions whose language is ostensibly binding. Four sections follow covering points regarding hierarchy, harmony, custom, and suspension of concessions.

---

[242] DSU art. 1.1 second sentence.

[243] Article IV:1 states, in part, that "The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement". *See* Kuijper, at 82 (discussing Article IV:1).

[244] Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998: VII, 2755, para. 101 ("It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO".).

Legal Interpretation — Hierarchy

A central problem of interpretation of accession agreements is where they fit in the hierarchy of WTO law. In the event of a conflict, the *WTO Agreement* is superior to the multilateral trade agreements on goods, services, and intellectual property.[245] Had there been an Article XII annex for accession agreements, those agreements would have enjoyed a place in the WTO legal hierarchy at the same level of the current annexes in the *WTO Agreement*. That would have made accession agreements at least equal to the multilateral trade agreements (like GATS). Because the Article XII annex does not exist, the status of accession agreements is unclear.

This question of hierarchy will not arise in every WTO case about accession obligations. Hierarchy seems most likely to arise in a complaint by an acceding government against an incumbent exercising its WTO-minus prerogatives.[246] Hierarchy seems unlikely to be a central question in a complaint arising out of an applicant WTO-plus provision because there would be no WTO law to conflict with. The question of hierarchy may also arise in situations where accession provisions are written to build out existing WTO provisions. Hierarchy might not be a central question in a complaint arising out of an applicant WTO-plus provision because covered agreements would not lead to a direct conflict of law. Yet, issues of legal hierarchy would arise if a defendant-acceded government sought to invoke General Exceptions or Security Exceptions to either the GATT or the GATS.

China's Accession Protocol contains language that seems intended to assert that the Protocol term is hierarchically superior to the related multilateral agreements. Specifically, China's Protocol introduces some of its GATT-minus provisions by stating that GATT

[245] WTO Agreement, art. XVI: 3.

[246] One can imagine a panel avoiding the issue of hierarchy by suggesting that accession commitments are *lex specialis* to a multilateral agreement (e.g., the *Agreement on Safeguards*). But before a panel should denote an accession commitment as specialized law, the panel logically ought to explain why the accession commitment is WTO law in the first place.

Article VI, the *Antidumping Agreement*, and the *SCM Agreement* "shall apply in proceedings involving imports of Chinese origin into a WTO Member *consistent with* the following" provisions.[247] This language was probably intended to declare that the listed WTO agreements will only be binding insofar as they are consistent with the Protocol. But one cannot know for sure because the language is ambiguous.

Perhaps the clearest looming problem is that several accession agreements make commitments with reference to specific WTO provisions without referring to exceptions that might be available.[248] For example, Albania committed that its laws and regulations relating to trade in goods would be in conformity with GATT Articles III:2 and III:4.[249] If an accession protocol is superior to the GATT, then any accession obligation would trump the exceptions in GATT Article XX and XXI in the event of a conflict.[250] This reading might be reinforced by a negative inference drawn from a similar commitment in Cambodia's accession documentation that refers to a statement by Cambodia's representative that the commitment is "without prejudice to requirements that might be placed on distributors of domestic and imported products to preserve, plant, animal or human health, life or safety".[251] This provision might show that when the

[247] China Protocol, Section I.15 (emphasis added).

[248] Qin, at 518.

[249] Report of the Working Party on the Accession of Albania to the World Trade Organization, WT/ACC/AL/51, 13 July 2000, para. 46. Similar statements are included in the working party reports for Armenia, Croatia, Estonia, the Former Yugoslav Republic of Macedonia, Georgia, Jordan, the Kyrgyz Republic, Latvia, Lithuania, Moldova, Nepal, Oman, and Saudi Arabia.

[250] In recent discussions in the WTO Committee on Market Access, the U.S. government has questioned whether China is keeping its trading rights commitment regarding the importation of publications. After the Chinese representative averred that China had a "right" under GATT Article XX to protect its public morals and public interest, the U.S. government asked China to explain the relevance of GATT Article XX to the Accession Protocol. WTO. Doc. G/MA/78, 18 September 2006, para. 1.

[251] Report of the Working Party on the Accession of Cambodia, WT/ACC/KHM/21, 15 August 2003, para. 50. The reference to "safety" may make this provision applicant WTO-minus because "safety" is not specifically included in GATT Article XX.

WTO and the applicant intended for one of the GATT's exceptions to remain relevant, the two accession parties specifically referenced that exception. A strict reading of Albania's commitment might also be suggested by the many commitments in accession protocols that do reference GATT Articles XX and XXI. For example, Panama agreed that the authority of its government to suspend imports and exports or to impose licensing requirements would be applied "in conformity with the requirements of the WTO, in particular Articles XI, XIII, XVIII, XIX, XX, and XXI of the GATT 1994 … ".[252]

Are there any other hierarchical choices available for a panel other than creating a legal fiction that accession agreements are located in an implied annex to the Article XII of the *WTO Agreement*? The most obvious option is the opposite position — that accession agreements are *inferior* to all other WTO law. This option would not seem attractive, however, because it would dignify the applicant WTO-plus provisions (that are not in conflict with specific provisions in pre-existing WTO law) while toppling the applicant WTO-minus and incumbent WTO-minus provisions that are in conflict with WTO law.

Legal Interpretation — Harmony

The question of harmony relates to the resolution of the question of hierarchy. If the accession protocol is thought to be law itself, then a panel would probably begin by interpreting the protocol and its working party report, and then use any analog provision in a

[252]Report of the Working Party on the Accession of Panama to the World Trade Organization, WT/ACC/PAN/19, 20 September 1996, para. 42. Similar statements are included in the working party reports for Bulgaria, Croatia, Estonia, Jordan, the Kyrgyz Republic, Latvia, Lithuania, and Mongolia. It is interesting to note that Mongolia further stated that it would apply licensing only when necessary to protect human, animal and plant life and "the environment". Report of the Working Party on the Accession of Mongolia, WT/ACC/MNG/9, 27 June 1996, para. 20. The reference to the environment may make this provision applicant WTO-minus because the Agreement on Import Licensing Procedures does not seem to allow the GATT Article XX exception. *See* Agreement on Import Licensing Procedures, art. 1.10.

multilateral trade agreement merely as a gap filler. On the other hand, if the accession protocol is not thought to be law, a panel could anchor its analysis in the covered agreement and then perhaps use the accession protocol as a gap filler. However a panel proceeds, there will be an effort to read the various WTO agreements together with each other, and that will presumably include reading them with accession protocols too. Striving for such harmony would enhance the overall coherence of WTO rules and the predictability of adjudicative outcomes.[253]

A typical provision in accession agreements is for an accession term to refer to an analog rule in the annexes to the *WTO Agreement*. As noted above, this reference may be intended to alter the meaning of a normal WTO rule. Alternatively, the reference may be intended simply to illustrate the expected implementation of the normal rule. It will not always be clear to the treaty interpreter what the intentions of the WTO and the applicant were. For example, if an accession agreement makes no mention of an obvious analog provision, should that omission be construed as meaningful? Consider China's Protocol's terms for the product-specific safeguard which do not refer to the *WTO Agreement on Safeguards*.[254] In that situation, uncertainty exists as to whether the extensive procedural disciplines in the *Safeguards Agreement* should apply.[255]

For questions like this, a treaty interpreter would consider the object and purpose of the WTO-plus and minus provisions. Having a rationale stated in the accession documentation would facilitate doing so. Yet Julia Qin has pointed out that no rationale exists in the China Accession Protocol and working party report for the differential treatment of China,[256] and her observation seems valid with regard to other accession protocols.

---

[253]For a general discussion of harmonious interpretation of WTO agreements, *See* Weiss (2003).

[254]Fabio Spadi has argued that "a substantial change from the 1997 version [of the draft Protocol] lies in the virtual disappearance of any direct reference to the *Agreement on Safeguards* as a sort of residual normative framework". Spadi (2002).

[255]Lee, at 228–230.

[256]Qin, at 510. Qin may be a bit hasty in dismissing the China Working Party report.

For WTO-plus situations, the accession discipline may or may not have an analog in the *WTO Agreement*. If there is no analog, then the panel presumably could consider the discipline to be self-contained. This might be the case, for example, with Saudi Arabia's industrial policy commitment regarding profits for liquid natural gas producers.[257]

With many accession agreements, a question will surely arise as to whether one accession agreement is valid "context" for the purpose of interpreting another accession agreement. At least formally, no accession agreement has the same two parties as another. But in the *EC — Computer Equipment* case, the Appellate Body suggested that "the prior practice of only *one* of the parties may be relevant …",[258] so perhaps previous accession agreements can be useful as interpretative aids.

Another type of legal inconsistency that could arise comes from the provisions in accession agreements about export restrictions. For example, Lithuania agreed to impose export restrictions in conformity with GATT Article XI,[259] while Oman agreed that its export control requirements "would be fully consistent with WTO provisions, including those contained in Article XI, XVII, XX and XXI of the GATT 1994".[260] Are these differences intentional or inadvertent?

One possible rule of interpretation is that given the importance of the GATT exceptions, the continued availability of them should be presumed unless the accession protocol language explicitly states otherwise. That would be attractive to me, but I wonder if it is consistent with the way in which the Appellate Body dealt with GATT Article XI in the *U.S. — Shrimp* dispute in deciding whether the contested U.S. measure qualified for an exception under GATT Article XX (g). Recall that having pointed to a regional convention on sea turtles (which had the United States as a party) that reaffirmed GATT

[257] *See* text accompanying *supra* note 99.

[258] Appellate Body Report, *European Communities — Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998: V, 1851, para. 93.

[259] Report of the Lithuania Working Party, para. 97.

[260] Report of the Working Party on the Accession of Oman to the World Trade Organization, WT/ACC/OMN/26, 28 September 2000, para. 77.

Article XI (without specifically mentioning the Article XX exception), the Appellate Body saw that convention as relevant in showing "the continuing validity and significance of Article XI of the GATT 1994, and the obligations of the *WTO Agreement* generally, in maintaining the balance of rights and obligations … ".[261] The inference one might draw from the *U.S. — Shrimp* decision is that a specific commitment by a member to follow one GATT obligation will have weight in determining whether the member qualifies for a GATT exception to a violation of that obligation. I found the Appellate Body's *Shrimp* decision surprising because I had always assumed that a reference to GATT Article XI in an environmental treaty would not be relevant in determining whether a party to that treaty qualifies for the Article XX exception in the WTO.

Another problem is how to interpret exceptions in accession agreements that are reflected in a working body report that served as an analogous exception in a WTO covered Agreement. For example, in the Cambodia Working Body Report discussed above,[262] should the chapeau to GATT Article XX be read into Cambodia's reference to measures for plant, animal or human health, life and safety? Another interesting example is Mexico's 1986 GATT Accession Protocol, and this episode has some additional wrinkles. Mexico's Protocol states that Mexico will exercise its sovereignty over natural resources and that Mexico "may maintain certain export restrictions related to the conservation of natural resources, particularly in the energy sector, on the basis of its social and development needs if those export restrictions are made effective in conjunction with restrictions on domestic production or consumption".[263] This provision appears to be applicant GATT-minus on two counts: first, the explicit reference to "social" needs, and second, the lack of a reference to the requirements in the GATT Article XX chapeau. An interpretive question would be whether in a dispute against Mexico about an

[261] Appellate Body Report, *U.S. — Shrimp*, paras. 169, 170.

[262] *See* text accompanying *supra* note 251.

[263] Protocol for the Accession of Mexico to the General Agreement on Tariffs and Trade, GATT, BISD 33S/3, para. 5. *Compare* GATT art. XX(g).

export restriction, Mexico could rely upon this provision as a broader defense than GATT Article XX of GATT 1994.

For GATT-era accession protocols like this and others, a prior question would be whether the old GATT-minus or GATT-plus provisions in the protocol of original WTO members were jettisoned upon accepting[264] the *WTO Agreement* and joining the WTO. In my view, the GATT accession protocols have continuing vitality in the WTO. They are part of GATT 1994.[265]

Another issue that may arise is the legal relationship between accession agreements and subsequent WTO acts. Consider for example the WTO practice regarding the transition period available to LDCs for applying the *TRIPS Agreement*. Two LDCs (Cambodia and Nepal) joined the WTO by accession in 2003. At that time, Article 66.1 of the *Trips Agreement* provided for a transition period until 1 January 2006. In their accession agreements, both countries were given until 1 January 2007.[266] I would call those commitments applicant WTO-minus. In November 2005, however, a Decisions of the TRIPS Council extended the transition period for LDCs to 1 July 2013.[267] This change could raise the question of whether the November 2005 Decision supersedes the accession agreements. If that Decision does not apply to Cambodia and Nepal, then it

[264] WTO Agreement, arts. XIV:1, XIV:2.

[265] *See* General Agreement on Tariffs and Trade 1994, para. 1(b) (ii) which defines GATT 1994 to include the GATT 1947 protocols of accession except for provisions concerning provisional application and grandfathering of prior inconsistent legislation. In the *U.S. — FSC* case, the Appellate Body held that the GATT-era legal instruments "are, in themselves, 'integral parts' of the *WTO Agreement* and are "binding on all Members". Appellate Body Report, *U.S. — FSC*, para. 107. *See also* the Uruguay Round Decision on Notification Procedures, which recalls "obligations assumed under the terms of specific protocols of accession, waivers, and other agreements entered into by Members", *reprinted in* The Legal Texts, at 388.

[266] Cambodia Working Party report, para. 206; Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization, WT/ACC/NPL/16, 28 August 2003, para. 138.

[267] Extension of the Transition Period under Article 66.1 for LDC Members, Decision of the Council for TRIPS of 29 November 2005, IP/C/40, 30 November 2005.

retroactively renders what were applicant WTO-minus commitments into WTO-plus commitments.

One interpretive issue regarding accession agreements that has been litigated is whether the acceding government accepts the WTO as it is. In the *EC — Bananas III* dispute, the EC offered the astonishing argument that as a new member entering the WTO through accession, Ecuador "fully accepted" the WTO, including the existing discriminatory quota allocations in the EC's schedule, and was therefore stopped from challenging their legality.[268] Quite rightly, the panel dismissed the notion that incumbents are automatically immunized, and held that a "new" member of the WTO would "have the same rights as those Complainants" who were parties when the quotas were allocated because "all Members benefit from all WTO rights".[269]

Accession Commitments as Custom

In view of the WTO norms in favor of member equality, another question that may arise in future dispute settlement is whether WTO-plus provisions can elevate to customary international trade law for which all WTO members are obliged to follow.[270] I would guess that the U.S. government — which is the most demanding of applicant WTO-plus provisions — would be the first to deny that it could ever have an obligation to follow the same rules that acceded members have to

[268] Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, paras. IV.191– IV.194, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997: II, 695. The EC unsuccessfully made a similar argument in the *Bananas I* case. GATT Panel Report, *EEC-Member States' Import Regimes for Bananas*, DS/32/R (unadopted), paras. 128, 132, 361 (circulated 3 June 1993).

[269] Panel Report, *EC — Bananas III (Guatemala and Honduras), id.* paras. 7.92–7.93. Presumably, what the panel meant is that all members benefit from all WTO rights unless the acceding member specifically gives up a right during accession.

[270] At present, little, if any, WTO law is customary international law. It is all conventional law.

follow. After all, WTO-plus accession disciplines are binding because they were consented to by applicants, and no parallel consent is given by incumbents to such a self-application.

Such a position is comprehensible, but one wonders how long it would stay tenable if a situation developed in which many acceded governments had committed to the same WTO-plus provision that was being actively enforced in dispute settlement. Even in the WTO, there may be a limit to how much of a double standard can be tolerated. If a recurrent obligation in accession protocols were ever viewed by a panel as a generally applicable WTO obligation, the logic might be that under the *Vienna Convention*, the Protocol provision approved repeatedly by the WTO had become one of the "relevant rules of international law applicable in the relations between the parties".[271]

Is there any possible solution to the contradiction between the principle of member equality and the imposition of applicant WTO-plus? In my view, the practice of making WTO-plus demands is unlikely to be reined in by WTO judicial or political bodies. Assuming that the WTO-plus norms are desirable for the trading system, perhaps the best solution would be to level all members up to that standard through new negotiations so that all members have to obey all prior WTO-plus provisions.

Yet, that answer ignores the power relationships that engender WTO-plus provisions in the first place. One analyst has alleged that LDCs, like Vanuatu and Samoa, were facing demands in WTO negotiations that exceeded commitments made by developed country incumbent members of the WTO.[272] The explanation posited by that analyst is that the least developed countries are "pawns in a global chess game" that are being used to establish "precedents" for more important future negotiations.[273]

The possibility that the WTO-plus norms might someday lead to calls for upward harmonization of WTO law seems to have been recognized by the negotiators in the China accession. For that reason,

[271] *See* VCLT art. 31(3)(c).
[272] Kelsey (2005).
[273] *Id.*

they included an "Introductory Statement" in the China Working Party Report stating that "Members reiterated that all commitments taken by China in her accession process were solely those of China and would prejudice neither existing rights nor obligations of Members under the *WTO Agreement* nor on-going and future WTO negotiations and any other process of accession".[274] The obvious retort is that China's commitments are hardly just unilateral. They are terms specifically agreed through consensus by the WTO. So the barrier to a multilateralization of WTO-plus accession commitments is political, not normative.[275]

SCOOing Accession Violators

Suppose one WTO member complains about the violation of an accession protocol and a panel finds a violation, and then the acceded member fails to implement the obligation within the reasonable period of time allowed. In that situation, the next step would be for the complaining member to seek a SCOO, an acronym for a suspension of concessions or other obligations, the remedy for non-implementation provided in Article 22 of the DSU.[276] I prefer to use the term "SCOO" because it reflects the language in the DSU and because it does not have bellicose connotations of the alternative terms that commentators sometimes use like "retaliation" and "sanction".[277]

Would the complaining party be able to SCOO the acceded member? The answer is surely yes, but the usual procedures under Article 22.3 of the DSU might have to be adjusted because the Accession Protocol is not an "agreement" as defined in DSU Article 22.3(g). Thus, the SCOO would not have to be limited to a

[274] Report of the China Working Party, para. 9.

[275] Of course, some of the accession commitments written for transition economies will not have much meaning in market-oriented economies.

[276] DSU arts. 22.1, 22.6.

[277] *See e.g.*, Lawrence (2003); Sacerdoti (2006) (noting the "trade sanctions" in the DSU).

"concession" or "other obligation" given by the complaining member in the Accession Protocol. Since any WTO dispute at its essence is about goods, services or intellectual property, a winning complainant should be able to fashion a SCOO even if no covered agreement has been violated other than Article XII of the *WTO Agreement*.

V. Conclusion

This chapter explores an emerging field — the Law of WTO Accession — and lays out the fascinating puzzles that arise due to the unique nature of accession protocols. I have tried to solve some of the puzzles, but I am acutely aware that I have opened up more questions than I have answered. I hope that my chapter offers a useful foundation for future analysts.

Unlike many other international organizations, the WTO does not keep an open door for new members. Instead, joining the WTO through accession takes several years because each applicant must first haggle its way in by reaching a deal with powerful WTO members, and must then secure official WTO approval of the multilateralized package. During the first decade of the WTO, its judicial bodies did not have to grapple with cases about a failure to obey an obligation of accession. During the next ten years, such cases will occur and have already begun.

The first and main target will be China which made many accession commitments about matters that go beyond the boundaries of the Uruguay Round single undertaking. China and other acceding members also made many accession commitments to conform to WTO law. Some of those commitments will probably also engender WTO disputes, but in those instances, the claim of violation need be based solely on the *WTO Agreement* and its annexes, not the applicable accession protocol.

Scholarship on WTO accession is still in its infancy and has been impeded by the lack of a framework for distinguishing the various types of commitments being made and how they relate to general WTO law. The terms "WTO-plus" and "WTO-minus" are valuable descriptors, but they only make sense when attached to obligations,

not to so-called "WTO rights". Many analysts have suggested that China's accession protocol entails a loss of "WTO rights" regarding safeguards, but the right lost is the right to expect other WTO members to adhere to the obligations in the WTO *Agreement on Safeguards*.

A more parsimonious and more exact way of describing that situation is not that China has lost its rights, but rather that incumbent members have succeeded in reducing their obligations toward China lower than would have occurred if the rules for trade with China were set at the normal WTO legal baseline. In my view, the common reference to a substantive "right" of WTO members is meaningless in itself because there is no way to delineate the content of such a right without circling back to a WTO obligation.

Previous analysts of accession have attempted to characterize all accession commitments as plus and minus for the applicant, but that simplistic approach does not work. The effect of WTO accession on incumbents needs to be explicitly considered. My chapter has mapped out the logic of WTO accession law by offering a taxonomy of WTO-plus and minus commitments. Using the taxonomy allows analysts to think beyond the applicant and to consider the changed circumstances of incumbents and the WTO itself. The invention of the new categories of incumbent "WTO-plus" and incumbent "WTO-minus" (see Tables 2, 3, and 5) should make it easier for future scholars on accession to clarify the legal developments and their implications.

The possibility of WTO-plus and WTO-minus provisions only exists because applicant countries are eager to join the WTO. That is because for all its faults, the WTO is an effective and valuable international organization. Membership generates positive benefits to transition economies, both in legal security and in market confidence. Thus, applicant governments are willing to pay the price of WTO-plus and minus in order to join.

The admission of new members is also good for the WTO as an institution by expanding its range of influence and by validating its importance in the world community. For the past several years at the WTO, successful accession negotiations have been one of the few positive political developments. Because accessions are so important,

one is justified in demanding accountability from the WTO regarding the accession process.

The package of negotiated changes that an applicant government offers the WTO is in some sense an international public good as its benefits will be shared by all countries (or at least all WTO member countries). At present, no debate exists within the WTO on how to achieve optimality in accession negotiations. Instead, the accession negotiations are decentralized with any interested WTO member demanding what *it* wants. This has led to a dynamic where the demands are driven by exporter interests rather than an overall global community interest in promoting the most essential reforms in applicant countries, such as Russia.[278]

The most troubling legal development has been the orgy of demands for applicant WTO-plus obligations. By assigning to each new WTO member its own solitary set of WTO obligations, the WTO undermines the rule of law in two ways — first, by treating some members more favorably than others, and second, by fragmenting the unity of WTO law. Although the idea of fostering greater experimentation in the WTO is a good one,[279] it is unethical to conduct such experiments only on the newest members who are likely to have vulnerable economies.

That said, the last thing that acceded members of the WTO probably want is for dispute panels to declare WTO-plus commitments (or all accession commitments) unenforceable. Although I am unaware of any studies on this point, I would guess that China's accession to the WTO has generated an economic benefit to China that would be undermined if the market's expectations were to change about the willingness of the WTO to enforce China's terms of accession.

The appearance of new incumbent WTO-minus provisions is troubling but hardly surprising. These provisions delineate obligations of incumbent members toward the acceding member and water down the normal disciplines that would otherwise apply. That sort of

[278] *See, e.g.*, Yerkey (2006) (noting U.S. demands on intellectual property and agriculture).
[279] *See* Lamy (2006).

incumbent WTO-minus provision was an occasional GATT-era practice, and such authorized protectionism is sometimes the political price necessary to get incumbent governments to go along with opening up the multilateral trading system to new members. Unfortunately, such economic nationalism is the essence of the hegemonic, turbulent world trading system of the early 21st century.

Ongoing or future litigation in the WTO will raise the issue of why accession agreements are enforceable through the DSU. I anticipate that WTO panels will find an accession commitment to constitute a legitimate cause of action, but the way in which they rationalize the enforcement of such agreements will be important. This chapter offers a blueprint for how to do so.

The WTO judicature should justify enforceability in a way that does not have negative consequences for the WTO. For some analysts, the Standard Protocol explains enforceability by stating that the Protocol "shall be an integral part of the *WTO Agreement*". But that argument leads to the breathtaking conclusion that the WTO Ministerial Conference has the competence to approve other international agreements, and then make them an integral part of the WTO. If the WTO Ministerial Conference does not have the competence, then how can one rationalize the legal valence of the phrase "integral part" when plunked into an accession accord, yet not when plunked into other decisions of the Ministerial Conference? In my view, the phrase "integral part" is an imposter. Furthermore, that phrase distracts from the real reason why accession pacts are enforceable, namely that Article XII of the *WTO Agreement* empowers the Ministerial Conference to negotiate accession agreement terms. The terms included in each accession agreement add a new layer to WTO law.

In closing, this chapter should note one additional anomaly in WTO accession practice. A few days before the research project contained in this chapter was completed, the WTO General Council approved the accession of Vietnam. The General Council acted only 12 days after negotiations were concluded but nearly 12 years after Vietnam applied for membership.[280] On the day that the General

[280] Beattie, Kazmin, and Williams (2006).

Council took its vote (in a meeting not open to the public), the accession documentation had not yet been posted on the WTO website.[281] This means that the WTO process entailed approval of the treaty before the public in any country (including Vietnam) had an opportunity to understand and evaluate the accession terms. The lack of transparency in this process is below the practice prevailing in most international negotiations today.

Just as fungus may grow better in the dark, WTO-plus and -minus provisions incubate well in the non-transparent environment of the WTO. By keeping the documents out of view of individual traders and consumers, the WTO prevents general-interest non-governmental organizations from having an opportunity to evaluate the results wrought by *demandeur* governments who may be influenced at home by special interest groups. Whatever need for secrecy exists during the many years of accession negotiations surely dissolves *after* a negotiation is finished and the accession agreement comes to the General Council for legislative action under Article XII. This lack of transparency and disclosure does not undermine the legal status of accession agreements, but it does contribute to the WTO's poor image around the world and adds yet another disturbing feature to the curious law of WTO accession.

References

Alvarez, José E., International Organizations as Law-makers (2005) at 362.

Aust, Anthony, Modern Treaty Practice and Law (Cambridge University Press, 2000) at 89–90.

Bacchetta, Marc and Drabek, Zdenek, *Effects of WTO Accession on Policy-Making in Sovereign States*, WTO Staff Working Paper DERD-2002, 2 April 2002, at 6–7.

[281] Upon an inquiry, this author was told by an Information Officer in the WTO Secretariat that it is normal practice for a protocol and working party report to remain confidential for some time. So it appears that the transparency gap for Vietnam is no different than for previous accessions.

Beattie, A., Kazmin, A., and Williams, F., *Vietnam Clears Ever-Higher Hurdles to join Club World Trade Organization*, Fin. Times, 8 November 2006, at 13.

Bell, Christine, *Peace Agreements: Their Nature and Legal Status*, 100 American Journal of International Law 373, 395 (2006).

Butkeviciene, Jolita, Hayashi, Michiko, Ognivtsev, Victor, and Yamaoka, Tokio, *Terms of WTO Accession*, *in* WTO Accessions and Development Policies, UNCTAD, DITC/TNCD/11 (UNCTAD, 2001), 155, at 156.

Curzon, Gerald, Multilateral Commercial Diplomacy (1965) at 35–36.

Dam, Kenneth W., The GATT. Law and International Economic Organization 110 (1970).

Ehlermann, Claus-Dieter and Ehring, Lothar, *Decision-Making in the World Trade Organization*, 8 Journal of International Economic Law 51, 63–64 (2005).

Filipov, David, *Putin Promises to Ratify Kyoto Treaty Moves Paves the Way for Russia to Join World Trade Group*, Boston Globe, 22 May 2004, at A6.

Footer, Mary E., An Institutional and Normative Analysis of the World Trade Organization (2006) at 241.

Gallagher, Peter, The First Ten Years of the WTO 1995–2005, (2005)at 20.

Grynberg, Roman and Joy, Roy Mickey, *The Accession of Vanuatu to the WTO*, 34 Journal of World Trade 159, at 159 (2000).

Holt, Thomas P., *CNOOC-UNOCAL and the WTO: Discriminatory Rules in the China Protocol are a Latent Threat to the Rule of Law in the Dispute Settlement Understanding*, 15 Pacific Rim Law & Policy 457, 457, 468 (2006).

Huang, Dongli, *Legal Interpretation of Paragraph 242 of the Report of the Working Party on the Accession of China Under the World Trade Organization Legal Framework*, 40 Journal of World Trade 137 (2006).

Jackson, John H., Sovereignty, the WTO, and Changing Fundamentals of International Law 119 (2006).

Jackson, John H., World Trade and the Law of GATT 95 (1969).

Karky, Ramesh Bikram, *Nepal's Accession to the World Trade Organization*, 7 Journal of World Intellectual Property 891, 915 (2004).

Kelsey, Jane, *World Trade and Small Nations in the South Pacific Region*, 14 Kansas Journal of Law and Policy 247, 265 (2005).

Klabbers, Jan, An Introduction to International Institutional Law (Cambridge University Press, 2002) at 104–111.

Kontorovich, Eugene, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 Chicago Journal of International Law 283 (2003).

Kuijper, Pieter Jan, *Some Institutional Issues Presently Before the WTO*, *in* The Political Economy of International Trade Law 81, 108 (Daniel L.M. Kennedy and James D. Southwick eds., 2002).

Lamy, Pascal, The Place and Role of the WTO (WTO Law) in the International Legal Order, Address before the European Society of International Law (16 May 2006) *available at* <http://www.WTO.org/english/news_e/sppl_e/sppl26_e.htm>.

Lamy, Pascal, The World Trade Organization: A Laboratory for Harnessing Globalization, Malcolm Wiener Lecture at Harvard University (1 November 2006) *available at* <http://www.wto.org/english/news_e/sppl_e/sppl47_e.htm>.

Langhammer, Rolf J. and Lücke, Matthias, *WTO Accession Issues*, 22 The World Economy 837, 866 (1999).

Lanoszka, Anna, *The World Trade Organization Accession Process*, 35 Journal of World Trade 575, 583 (2001).

Lardy, Nicholas, *China and the World Trade Organization*, Fin. Times, 15 May 2002, at 2.

Lawrence, Robert Z., Crimes & Punishments. Retaliation Under the WTO (2003).

Lee, Yong-Shik, *The Special Safeguard Mechanism of China's Accession to the WTO. A Serious Step Backward from the Achievement of the Uruguay Round*, 5 Journal of World Intellectual Property 219 (2002).

Matsushita, Mitsuo, Schoenbaum, Thomas J., and Mavroidis, Petros C., The World Trade Organization (Oxford University Press, 2nd edn., 2006) at 11.

Medvedkov, M., *WTO Accession: The Russian Perspective*, *in* WTO Accessions and Development Policies, UNCTAD/DITC/TNCD/11 (UNCTAD, 2001), at 47–48.

Medvedkov, Maxim, *WTO Accession: The Russian Perspective*, *in* WTO Accessions and Development Policies, UNCTAD, DITC/TNCD/11 (UNCTAD, 2001), at 47, 48.

Michalopoulos, Constantine, *WTO Accession*, *in* Development, Trade, and the WTO: A Handbook (B. Hoekman, A. Mattoo, and P. English eds., World Bank Publications, 2002), 61, at 62.

Moore, Mike, Democracy, Development and the WTO, Qatar Conference on Democracy and Free Trade (26 March 2002) *available at* <http://www.WTO.org/english/news_e/spmm_e/spmm82_e.htm>.

Nottage, H. and Sebastian, T., *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law*, 9 Journal of International Economic Law 989, 997 (2006).

Pagani, Fabrizio, *Are Plurilateral Trade Agreements Possible Outside of the World Trade Organization?*, 40 Journal of World Trade 797, 805 (2006).

Parenti, Antonio, *Accession to the World Trade Organisation: A Legal Analysis*, 27 Legal Issues of International Economic Integration 141, 155 (2000).

Pauwelyn, Joost, Conflict of Norms in Public International Law (2003) at 398.

Petersmann, Ernst-Ulrich, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, *in* Human Rights and International Trade (Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi eds., 2005) at 29, 42–43, 55–56.

Pruzin, Daniel, *Saudis Rule Out Further Market Access Concessions on Manufactured Goods*, BNA Daily Report for Executives, 14 September 2006, at A-1.

Qin, Julia Ya, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) — A Critical Appraisal of the China Accession Protocol*, 7 Journal of International Economic Law 863, 903–904, 907, 918 (2004).

Qin, Julia Ya, *WTO-Plus Obligations and their Implications for the World Trade Organization Legal System*, 37 Journal of World Trade 483, 487 (2003).

Qin, Rebecca Povarchuk, *Cambodia's WTO Accession: A Strenuous but Necessary Step for a Poor Nation Seeking Economic Prosperity*, 13 Pacific Rim Law & Policy 634 (2004).

Ruggiero, Renato, A Global System for the Next Fifty Years, 30 October 1998, *available at* <http://www.WTO.org/english/news_e/sprr_e/chat_e.htm>.

Ruggiero, Renato, The Global Challenge: Opportunities and Choices in the Multilateral Trading, 16 October 1995, *available at* http://www.WTO.org/english/news_e/sprr_e/harvar_e.htm.

Sacerdoti, Giorgio, *The Dispute Settlement System of the WTO in Action: A Perspective on the First Ten Years*, *in* The WTO at Ten: The Contribution of the Dispute Settlement System (Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes eds., 2006) at 35, 52.

Salzman, J., *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 Michigan Journal of International Law 769, 800–804 (2000).

Sarooshi, Dan, International Organizations and Their Exercise of Sovereign Powers (2005), 119.

Spadi, Fabio, *Discriminatory Safeguards in the Light of the Admission of the People's Republic of China to the World Trade Organization*, 5 Journal of International Economic Law 421, 442 (2002).

Steger, Debra P., *Challenges to the Legitimacy of the WTO, in* Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano (Steve Charnovitz, Debra P. Steger, and Peter van den Bossche eds., 2005) 202, at 215–216.

Steinberg, Richard H., *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 American Journal of International Law 247 (2004).

Stone, Christopher D., *Common but Differentiated Responsibilities in International Law*, 98 American Journal of International Law 276, 282 (2004).

Tsogtbaaar, D., *Mongolia's WTO Accession: Expectations and Realities of WTO Membership, in* Managing the Challenges of WTO Participation: 45 Case Studies (P. Gallagher, P. Low, and A.L. Stoler eds., Cambridge University Press, 2005), case study 29, 409, at 416.

Van den Bossche, P., *The Making of the "World Trade Court": The Origins and Development of the Appellate Body of the World Trade Organization, in* Key Issues in WTO Dispute Settlement: The First Ten Years (R. Yerxa and B. Wilson eds., Cambridge University Press, 2005), 63, at 79.

Van den Bossche, Peter, The Law and Policy of the World Trade Organization (2005) at 280–281.

VanGrasstek, Craig, *Why Demands on Acceding Countries Increase Over Time: A Three-Dimensional Analysis of Multilateral Trade Diplomacy, in* WTO Accessions and Development Policies, UNCTAD, DITC/TNCD/11 (UNCTAD, 2001), at 78, 79.

Weeks, John, *The External Dynamics of the WTO Dispute Settlement Understanding: An Initial Analysis of its Impact on Trade Relations and Trade Negotiations, in* Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches (Julio Lacarte and Jaime Granados eds., 2004) at 75, 96.

Weiss, Wolfgang, *Security and Predictability under WTO Law*, 2 World Trade Review 183, 205–206 (2003).

WTO, Guide to GATT Law and Practice 1020 (1995).

Yerkey, Gary G., *Veroneau Says Russia Must Do 'Much More' for U.S. to Favor WTO Accession Agreement*, BNA Daily Report for Executives, 22 September 2006, at A-1.