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ARTICLE

# The Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy

JULIA YA QIN*

*Accession to the World Trade Organization differs from that of other international organizations in one major aspect: The WTO may prescribe more stringent rules of conduct for acceded members, based on individual accession negotiations. These country-specific rules are set out in the protocols of accession and now form a significant part of WTO law. However, questions concerning the legality and legitimacy of such rules remain unanswered. Legally, accession protocols effectively modify the rules of conduct contained in the WTO multilateral trade agreements, but the legal basis for so doing remains unclear and the relationship between accession protocols and the WTO agreements undefined. Normatively, differential treatment of acceded members derogates from the WTO principle of nondiscrimination, but does so without proper justification. Confusion over the legal nature of accession protocols and a lack of clear rationale for the country-specific rules have led to problematic jurisprudence, creating uncertainty in the rights and obligations of acceded members vis-à-vis other members of the WTO.*

*This Article aims to resolve the conundrum of WTO accession protocols by systemically and comprehensively addressing these questions. Building upon existing literature, the author takes a broader comparative and historical approach to an examination of the legality and legitimacy of WTO accession practice. On the question of legality, the Article proposes that WTO accession protocols be best characterized as subsequent practice of an international organization modifying its underlying treaties, and on that basis defines the relationship between accession protocols and the WTO agreements. On the question of legitimacy, the Article identifies the lack of reason and transparency in the accession rules as the main issues, and critiques the "entry fee" theory offered by a WTO panel as justification for all accession rules. The Article then*

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I am grateful to Milan Hejtmanek, Matthew Kennedy, Joost Pauwelyn, Qing Ren, and Ruosi Zhang for their insightful comments on the earlier versions of this Article, and for the valuable input of James Li, Xiaojie Lu, Mitali Tyagi, and other participants at the Conference on WTO Accession Protocols, held at Tsinghua University School of Law, Beijing, in June 2013.

*makes suggestions on what should and can be done to mitigate the deficit of legitimacy created by WTO accession practice.*

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## INTRODUCTION

Since its inception in 1995, the World Trade Organization (WTO) has expanded its membership by twenty-five percent. Of the 161 current members, 33 are acceded members, including major trading powers such

as China, Russia, Saudi Arabia, Taiwan, and Vietnam.[1] Another 22 countries are presently in the process of negotiating for accession.[2] When these negotiations are completed, acceded members will comprise nearly one-third of the entire WTO membership.

Compared to other major international organizations, the WTO has a unique feature: Its acceded members can be required to abide by additional and more stringent rules of conduct than its original members. The scope and content of such rules are country-specific, depending on the result of accession negotiations between the acceding country and the incumbent members. The country-specific rules are set out in the protocol of accession, which is a bilateral agreement between the acceding country and the WTO. Cumulatively, accession protocols have formed a significant part of WTO law. Some of the accession rules, those for China in particular, have given rise to major WTO disputes, generating new case law on accession.

Despite the prevalence of WTO accession practice, important questions concerning its legality and legitimacy remain unanswered. Substantively, the accession protocols expand and modify the rules of conduct contained in the WTO multilateral trade agreements when applied to the acceded members. Yet, it is unclear on what legal basis the accession protocols have acquired this authority. The constituent treaty of the WTO — the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement)[3] — merely provides that a state may accede to the WTO on "terms to be agreed between it and the WTO,"[4] and does not specify the status of accession agreements within the WTO treaty framework. The WTO Agreement prohibits reservations to its provisions and permits reservations to its annexes only to the extent provided therein,[5] and any amendment to the WTO multilateral treaties must follow a set of strict procedures.[6] Accordingly, accession terms modifying WTO provisions cannot fall into the category of either reservation or amendment.

Textually, each of the accession protocols contains a clause stating that it is an "integral part" of the WTO Agreement.[7] As a matter of treaty law,

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1. For a complete list of WTO accessions completed, see *Accessions*, WORLD TRADE ORG., www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited May 18, 2015).

2. For the list of these countries, see *id.*

3. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

4. *Id.* art. XII:1.

5. *Id.* art. XVI:5.

6. *Id.* art. X.

7. *See* WTO Secretariat, *Technical Note on the Accession Process, Addendum*, at 4, para. 2, WT/ACC/10/Rev.4/Add.1 (May 25, 2010) [hereinafter 2010 Secretariat Note] (identifying the text

however, it is puzzling how a bilateral agreement between a state and an international organization could integrate itself into a multilateral agreement among the member states. Furthermore, it remains unclear what this purported integration entails. In practice, the integration clause of the accession protocol has been accepted as the legal basis for adjudicating disputes arising from it through the WTO dispute settlement mechanism. Yet, the WTO dispute settlement mechanism is available only to disputes brought pursuant to the dispute settlement provisions in the "covered agreements" listed in the WTO Dispute Settlement Understanding (DSU),[8] and accession protocols are not among them. The integration clause clearly has important implications for the interpretation of the accession protocols. But how to "integrate" a specific accession term into the WTO Agreement through treaty interpretation has proven highly controversial.[9]

It may seem strange that there should be unanswered questions at such a foundational level of WTO law. One explanation is that the WTO largely followed the accession practice of its predecessor, the General Agreement on Tariffs and Trade (GATT).[10] Indeed, the accession provision in the WTO Agreement is modeled after the GATT accession provision, and WTO accession negotiations have followed the same format of GATT accession negotiations. However, as will be explained below, fundamental differences exist in the treaty structure between the GATT and the WTO. As a result, what worked for the GATT may not work properly for the WTO.

The absence of a cogent theory on the legality of WTO accession protocols has practical consequences. As demonstrated by the increasing number of WTO disputes over accession rules, the unclear status of accession protocols within the WTO treaty framework creates uncertainties over the rights and obligations of acceded members *vis-à-vis* those of other members. The large gaps left in the WTO treaty structure on accession present a major challenge to the treaty interpreters. Thus far, the WTO Appellate Body has not articulated a coherent theory about accession protocols, and the lack of a proper understanding on issues raised by country-specific rules has led to some problematic jurisprudence.

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common to all protocols of accession to date).

8. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

9. *See infra* Part III.D.

10. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

Questions about the legality of accession protocols cannot be answered satisfactorily without considering the legitimacy of WTO accession practice. Insofar as the accession protocols impose different and more stringent rules of conduct on acceded members than the requirements of WTO multilateral agreements, they result in less favorable treatment of the acceded members in derogation of the WTO principle of nondiscrimination.[11] What are the justifications for such derogation? Unfortunately, individual accession protocols rarely articulate any rationale for their country-specific rules. At the systemic level, the WTO has never provided a reason for holding its acceded members to different legal standards from those prevailing for its original members. In fact, it is not even clear how many accession rules departing from the WTO multilateral provisions exist and what their exact content is, as most of the accession rules are couched in non-standard legal language and scattered in lengthy reports of the accession working parties and there is no catalogue of these rules at the WTO. The lack of reasons and transparency in this body of WTO law raises serious questions about the legitimacy of the WTO practice.

To date, only a few authors have systematically identified and addressed the legal questions arising from WTO accession protocols.[12] Each of them has offered valuable insights. But satisfactory explanations have been elusive. Building upon the extant literature, this Article aims to resolve the conundrum of WTO accession protocols by examining both the legality and legitimacy issues. The rest of the Article will proceed as follows. Part I will introduce accession practices of other major international organizations so as to shed a comparative light on the WTO accession regime. Part II will trace the origin and evolution of the accession practice from the GATT to the WTO, and will explain the fundamental differences in treaty structure between the two regimes. Part III will address the legality of WTO's country-specific rules under public international law. It will consider alternative characterizations of the country-specific rules, and

11. *See Principles of the Trading System*, WORLD TRADE ORG., www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 28, 2015).

12. *See* Steve Charnovitz, *Mapping the Law of WTO Accession*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 855 (Merit E. Janow et al. eds., 2008) (raising issues about the legality of WTO accession protocols and addressing them in a comprehensive manner); Mitali Tyagi, *Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols*, 15 J. INT'L ECON. L. 391 (2012) (challenging the legality and legitimacy of the accession protocols under public international law); Matthew Kennedy, *The Integration of Accession Protocols into the WTO Agreement*, 47 J. WORLD TRADE 45 (2013) (providing careful legal analysis of the relations between accession protocols and the WTO multilateral agreements); Julia Ya Qin, *The Challenge of Interpreting 'WTO-Plus' Provisions*, 44 J. WORLD TRADE 127, 132–38 (2010) (exploring the legal nature of WTO accession obligations and their implications for treaty interpretation).

will identify the legal basis for integrating these rules into the WTO treaty framework and for enforcing them in WTO dispute settlement. Part IV will contend that serious legitimacy deficits exist in the country-specific rules of the WTO, and will make suggestions on what should and can be done to remedy such deficits.

## I. ACCESSION UNDER INTERNATIONAL LAW: GENERAL RULES AND PRACTICE

Accession to the WTO is achieved through accession to the WTO Agreement,[13] a multilateral treaty constituting the WTO. In order to understand the legal issues in WTO accession, it is useful to review briefly the general rules and practice concerning accession to multilateral treaties, especially those serving as the constituting documents of international organizations.

### *A. Accession to Multilateral Treaties*

In accordance with the Vienna Convention on the Law of Treaties (VCLT),[14] "accession" is an international act "whereby a State establishes on the international plane its consent to be bound by a treaty."[15] A state's consent to be bound by a treaty may be expressed in one of three ways: (a) pursuant to the treaty provisions, (b) as otherwise established by the negotiating states, or (c) as subsequently agreed by all the parties.[16]

In the case of a multilateral treaty open to accession, the conditions and procedure for accession can be found in the treaty provisions. Typically, accession is effected by the deposit of an instrument of accession by the acceding country with the Secretary-General of the United Nations.[17] The instrument of accession is normally a simple document executed by the acceding country, expressing its consent to be bound by the treaty in question. The instrument may contain additional substantive content, such as interpretive declarations and reservations to specific provisions of the treaty.[18] A state is free to formulate a reservation, unless the reservation is

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13. WTO Agreement art. XII:1.

14. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

15. *Id.* art. 2.1(b).

16. *Id.* art. 15.

17. *See, e.g.*, Vienna Convention on Diplomatic Relations arts. 50, 51, Apr. 18, 1961, 500 U.N.T.S. 95; International Covenant on Civil and Political Rights art. 48, Dec. 19, 1966, 999 U.N.T.S. 171; United Nations Convention on the Law of the Sea arts. 307, 308, Dec. 10, 1982, 1833 U.N.T.S. 396.

18. *See* Int'l Law Comm'n, *Guide to Practice on Reservations to Treaties, adopted by Report of the International Law Commission to the General Assembly*, U.N. GAOR, 66th Sess., Supp. No. 10, para. 75, U.N. Doc. A/66/10 (2011) [hereinafter Int'l Law Comm'n, *Treaty Guidelines*], *available at*

prohibited by the treaty or is incompatible with the object and purpose of the treaty.[19]

### B. *Accession to Treaties Constituting International Organizations*

Accession to a treaty constituting an international organization means the admission of an acceding country to membership in that organization. In contrast to many multilateral treaties that are open to accession by any willing party, admission to membership in an international organization is not automatic, and instead is subject to qualifications and conditions prescribed by the constituting treaty. Procedurally, admission of new members requires approval by the competent organ of the international organization, in accordance with the rules of the organization. Also in contrast to multilateral treaties open to accession, the acceding country may not be able to make reservations unilaterally to the constituting treaty of an international organization.[20]

To illustrate these special features, below is a brief description of the accession rules and practice of the United Nations and the International Monetary Fund, the two international organizations with a universal membership similar to that of the WTO, and of the European Union, whose membership criteria also provide a good reference to the WTO.

#### 1. *The United Nations (UN)*

Admission to the United Nations is subject to both substantive criteria and procedural conditions. Pursuant to Article 4(1) of the Charter of the United Nations,

> Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.[21]

Whether an applicant meets such criteria, and is therefore eligible for admission, is a matter to be decided by the General Assembly upon the

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http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf; *see also, e.g.*, Accession by China to the Vienna Convention on Diplomatic Relations, Nov. 25, 1975, 1975 U.N.T.S. 423, 423–24 (containing one political declaration and one statement on the reservations of three treaty provisions).

19. VCLT, *supra* note 14, art. 19.

20. *Id.* art. 20.3 ("When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."); *see also* Int'l Law Comm'n, *Treaty Guidelines*, *supra* note 18, §§ 2.8.8–2.8.12.

21. U.N. Charter art. 4, para. 1.

recommendation of the Security Council, each voting in accordance with its decision-making rules.[22]

The broad wording of Article 4(1) affords existing UN members wide latitude in judging the eligibility of an applicant for membership. But such latitude is not without limit. According to the International Court of Justice (ICJ), when an existing UN member is called upon to vote on the admission of a state, it "is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by [Article 4(1)]."[23] "[T]he spirit as well as the terms of the paragraph preclude the idea that considerations extraneous to these principles and obligations can prevent the admission of a state which complies with them."[24] Thus, the ICJ has limited the conditions for UN membership to the express terms of the UN Charter.[25]

*2. The International Monetary Fund (IMF)*

In contrast to the UN Charter, the Articles of Agreement of the International Monetary Fund[26] does not contain any substantive conditions for new membership. Instead, it allows such conditions to be set solely by the competent organ of the IMF. In accordance with Article II, Section 2, of the Articles of Agreement,

> Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors. These terms, including the terms for subscriptions, shall be based on principles consistent with those applied to other countries that are already members.[27]

Unlike the UN General Assembly where each member has one vote, each member of the IMF is assigned a quota that determines its financial contribution to the IMF, as well as its voting power.[28] This quota-based voting system also applies to the decision on the admission of new members.[29]

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22. *Id.* art. 4, paras. 2, 18, 27.

23. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, at 65 (May 28).

24. *Id.* at 63.

25. "To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution." *Id.* at 64.

26. Articles of Agreement of the International Monetary Fund, *adopted* July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 [hereinafter IMF Articles of Agreement].

27. *Id.* art. II.2.

28. *See IMF Members' Quotas and Voting Power, and IMF Board of Governors*, INT'L MONETARY FUND, *available at* http://www.imf.org/external/np/sec/memdir/members.aspx (last updated Feb. 28, 2015).

29. Procedurally, applications for IMF membership must first be considered by the Executive

Although the competent organ of the IMF has power to prescribe terms for new membership, such power is subject to the basic principle set by Article II, Section 2, of the Articles of Agreement: The terms for new members shall be based on principles consistent with those applied to the existing members.[30] This provision is critically important, as it mandates consistency in IMF membership criteria between the existing and acceding members, a quality that is a corollary of the principle of sovereign equality.[31]

*3. The European Union (EU)*

The EU is an integrated political and economic union, but technically it is also an international organization of sovereign nations. The EU membership is open to any European state that is committed to the values of respect for human dignity, freedom, democracy, equality, the rule of law, and human rights.[32] Accession to the EU is subject to elaborate approval procedures and to the conditions of admission set out in the agreement between the member states and the applicant country.[33]

In practice, the EU applies political, economic, and legislative criteria for the admission of new members. These criteria, defined by the European Council in Copenhagen in 1993, require that the applicant state have institutions that guarantee democracy and a functioning market economy, and accept established EU law in its entirety (the *acquis*).[34] The candidate must negotiate with the EU on concrete steps to adopt EU law and to implement institutional reforms necessary to meet the EU criteria. When the candidate is considered ready to join, an accession treaty will be concluded to provide the terms and conditions of membership, the

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Board. After its consideration, the Executive Board submits a report to the Board of Governors with recommendations for admission. These recommendations cover the amount of quota in the IMF, the form of payment of the subscription, and such other conditions as, in the opinion of the Executive Board, the Board of Governors may wish to prescribe. *See* Int'l Monetary Fund [IMF], *By-Laws of the International Monetary Fund: Section 21. Applications for Membership* (Mar. 16, 1946, amended June 13, 1978), *available at* www.imf.org/external/pubs/ft/bl/bl21.htm.

30. *See* IMF Articles of Agreement, *supra* note 26, art. II.2.

31. *See* U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

32. *See* Consolidated Version of the Treaty on European Union art. 49, Oct. 26, 2012, 2012 O.J. (C 326) 13, 43 [hereinafter TEU] ("Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.").

33. *See id.* art. 49.

34. *Conditions for Membership*, EUR. COMMISSION, http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm (last updated Nov. 19, 2014). While these criteria are inherently vague and general, they have been applied rather consistently throughout the several rounds of EU enlargement. Dimitry Kochenov, *EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?*, EUR. INTEGRATION ONLINE PAPERS, Apr. 14, 2005, at 1, http://eiop.or.at/eiop/pdf/2005-006.pdf.

transitional arrangements and deadlines, as well as the details of financial arrangements and safeguard clauses.[35]

Historically, EU membership has been enlarged through several rounds.[36] In each round, a single accession treaty was concluded to cover the accession of multiple countries.[37] The accession treaty also contains specific conditions with respect to each acceding country, which may include specific commitments of the country to fully comply with EU law by a certain date, and special transitional measures in temporary derogation of EU law. All country-specific conditions are transitional in nature and are set out under the "Temporary Provisions" of the accession treaty.[38]

As a formal matter, the EU accession differs from that of the UN and the IMF in one major respect: The accession treaty is a treaty among individual states, ratified by each member state as well as each applicant state in accordance with their respective constitutional requirements.[39] The accession treaty also contains necessary "adjustments" to the constituent Treaties of the Union.[40] In other words, each accession treaty formally amends the constituent Treaties of the EU to reflect the enlargement of the Union.

#### 4. *Commonality in Membership Criteria: Equality Between New and Existing Members*

The three major international organizations examined above all differ in their purpose, functions, and institutional arrangements. The UN is primarily a political organization, the IMF an economic and financial institution, and the EU a regional union of sovereign nations. Their membership criteria and accession procedures also differ widely. Yet, there is one thing in common in their membership criteria: New members shall have the same rights and obligations as existing members under the laws of the organization. Thus, a new UN member must accept and be able

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35. *Steps Towards Joining*, EUR. COMMISSION, http://ec.europa.eu/enlargement/policy/steps-towards-joining/index_en.htm (last updated June 27, 2013).

36. *From 6 to 28 Members*, EUR. COMMISSION, http://ec.europa.eu/enlargement/policy/from-6-to-28-members/index_en.htm (last updated June 27, 2013).

37. *See, e.g.*, Documents Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, 2003 O.J. (L 236).

38. *See, e.g.*, *id.* at annexes V–XIV.

39. TEU, *supra* note 32, art. 49.

40. *Id.* The adjustments pertain to the procedural and institutional matters, such as the reallocation of seats to the EU government institutions, as well as the designation of new official languages of the Union.

and willing to carry out the same obligations under the UN Charter that bind the existing members. While the IMF Board of Governors may prescribe any terms as membership conditions for an applicant, such terms must be based on principles consistent with those applied to existing members. In the case of the EU, country-specific terms may be prescribed for new members, but they are all temporary measures designed to help new members to meet the standards of existing EU law and to facilitate the transition to an enlarged Union. In short, all three organizations treat their acceded members and existing members equally.

## II. ACCESSION TO THE WORLD TRADE ORGANIZATION

Unlike other international organizations, the WTO has developed a practice of requiring its acceded members to make "commitments" on rules of conduct that are not required of its original members. These commitments form part of the terms of accession and are set out in the accession protocol of the acceding country. The scope and content of the commitments vary from country to country. Many go beyond the obligations contained in the WTO agreements ("WTO-plus" provisions), examples of which include commitments on domestic economic reform, foreign direct investment, tax policy, health and environmental regulation, protection of intellectual property, transparency and due process, and foreign policy.[41] Some others require the acceding country to give up its rights under the WTO agreements ("WTO-minus" provisions). The most prominent examples are the special antidumping, anti-subsidy, and safeguard measures that can be used against the products of the acceding country in derogation of the requirements of the WTO agreements.[42] With a few exceptions, all accession commitments are permanent obligations of acceded members.

This WTO practice is made legally possible by the particular wording of the accession provision in the WTO Agreement, which is modeled after the accession provision of GATT 1947. In order to address the issues arising from this practice, it is necessary to understand its origin and evolution from the GATT regime.

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41. *See* Charnovitz, *supra* note 12, at 917–20 (listing "examples of the most-far-reaching commitments for WTO accession through 2006" in a Compendium of Applicant WTO-Plus Commitments); Qin, *supra* note 12 (listing examples of major WTO-plus obligations of China). For an incomplete summary of accession terms, see 2010 Secretariat Note, *supra* note 7.

42. *See, e.g.*, World Trade Organization, Ministerial Decision of 10 November 2001, Protocol on the Accession of the People's Republic of China, paras. 10.2, 15, 16, WT/L/432 (Nov. 23, 2001) [hereinafter China Accession Protocol]; Report of the Working Party on the Accession of Viet Nam, para. 255, WT/ACC/VNM/48 (Oct. 27, 2006) [hereinafter the Vietnam Working Party Report].

### *A. GATT Accession: A Unique Situation*

The GATT, the predecessor of the WTO, had certain unique legal features.[43] As an international institution, the GATT suffered from certain "birth defects"[44] that also affected its accession regime.

#### *1. GATT: An Institution that Had No Formal Legal Personality*

The contracting parties to the General Agreement on Tariffs and Trade (GATT 1947)[45] did not intend to establish a full-fledged international organization. GATT 1947 was negotiated in partial parallel to the negotiations of the Havana Charter of the International Trade Organization (ITO).[46] Pending the establishment of a comprehensive international trade organization, a number of countries concluded GATT 1947 in order to secure the benefits of tariff reductions immediately.[47] Against this background, GATT 1947 contained few institutional provisions. After the ITO was aborted, the GATT gradually developed its institutional framework and evolved into a *de facto* international organization.

Despite the fact that the GATT had effectively functioned as an international organization for decades, it never acquired independent legal personality.[48] It was not until the establishment of the WTO that the institution acquired the formal status of an international organization.[49]

#### *2. GATT 1947: A Treaty Never Entered into Force*

As a treaty, GATT 1947 never entered into force.[50] Instead, its provisions were brought into effect through a web of multilateral

43. *See generally* JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 17–57 (2000) (discussing GATT and its "troubled origins").

44. *Id.* at 15 (internal quotation marks omitted).

45. GATT 1947.

46. WORLD TRADE ORG., GATT ANALYTICAL INDEX 3 (2012), *available at* www.wto.org/english/res_e/booksp_e/gatt_ai_e/gatt_ai_e.htm.

47. *See id.* at 4–6.

48. In its external legal relations, the GATT was represented by the Interim Commission for the International Trade Organization (ICITO), established by the United Nations Conference on Trade and Employment in 1948. The GATT Secretariat was technically staffed by the Secretariat of the ICITO. *See* WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 1119–32.

49. *See* WTO Agreement art. VIII:1 ("The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.").

50. Pursuant to Article XXVI:6, the General Agreement shall enter into force after governments representing a certain percentage of world trade have accepted it. As only Liberia and Haiti have ever definitely accepted the General Agreement, it has never come into force. WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 6.

agreements. The first of such agreements was the Protocol of Provisional Application (PPA) among 23 countries, which became the original contracting parties.[51] Subsequent agreements were concluded in the form of "protocols of accession" between existing contracting parties and acceding countries. The PPA and each of the accession protocols accepted the application of GATT 1947 on a "provisional" basis and subject to the specific conditions contained therein.[52] In other words, GATT 1947 was applied by its contracting parties only to the extent of individual protocols, each of which was an independent treaty under international law.

### *3. The GATT Accession Regime*

Although GATT 1947 never entered into force itself, the GATT was open to accession pursuant to its provisions. In accordance with Article XXXIII of GATT 1947, accession was subject to two pre-conditions: (i) an agreement on the "terms" of accession between the acceding government and the "CONTRACTING PARTIES" (the contracting parties acting in their joint capacity), and (ii) a decision of the CONTRACTING PARTIES approving the accession.[53] Since the CONTRACTING PARTIES lacked legal personality, accession protocols were formally concluded between the acceding government and the governments of existing contracting parties.[54]

The provisions of GATT 1947 did not specify what types of "terms" of accession should be agreed upon, but it was generally understood that the terms refer to tariff and nontariff concessions by the acceding country, also known as the "ticket of admission."[55] Since the existing contracting parties had undertaken to reduce their tariff and nontariff barriers, the acceding country was expected to do the same based on the principle of reciprocity.[56] In GATT practice, therefore, accession was always preceded by negotiations of tariff and nontariff concessions. Just as each existing

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51. *Id.* at 4 n.1.

52. *Id.* at 6.

53. GATT 1947 Article XXXIII "Accession" provides as follows: "A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONRACTING PARTIES under this paragraph shall be taken by a two-thirds majority." In practice, accession decisions were reached through consensus.

54. *See* WORLD TRADE ORG., GATT ANALYTICAL INDEX *supra* note 46, at 1021.

55. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 92 (1969) [hereinafter JACKSON, WORLD TRADE].

56. Reciprocity as the basis for negotiations on the reduction of trade barriers was expressly recognized in the GATT preamble and Article XXVIII bis: Tariff Negotiations. GATT 1947 ("reciprocal and mutually advantageous" language).

contracting party had a Schedule of Concessions under GATT 1947, the result of accession negotiations would be recorded in the Schedule of Concessions for the acceding country.[57]

Procedurally, the accession was conducted through the work of a working party, the membership of which was open to all existing contracting parties. The working party would examine the application for accession, and its discussions would be reflected in the working party report. When the accession negotiations were completed, a protocol of accession would be prepared, setting out the procedural provisions and the qualifications on the application of GATT 1947 by the acceding country. Then, a decision would be taken by the CONTRACTING PARTIES to approve the accession in accordance with Article XXXIII. Thereafter, the protocol would be open for signatures by all contracting parties.[58]

The protocol of accession would enter into force thirty days after the acceptance by the acceding government, rather than contingent upon acceptance by the existing contracting parties.[59] This practice made sense since the CONTRACTING PARTIES had already approved the terms of accession internally, but it also rendered the signing by the existing contracting parties "superfluous."[60] Nonetheless, given that the protocol was an agreement between individual contracting parties, signatures of the existing contracting parties remained legally necessary.

#### 4. *Rule Obligations of Acceding Countries: Varied but Within Limits*

GATT obligations consisted of two basic types: (i) the tariff and nontariff concessions set out in the Schedules of the contracting parties (the market accession obligations), and (ii) the rules of conduct contained in the text of GATT 1947 (the rule obligations). By design, the market access obligations were country-specific. That is, the level of concessions varied from country to country, depending on the result of their trade negotiations.[61] The rule obligations, on the other hand, were supposed to be uniform: In principle, all contracting parties should abide by the same set of rules prescribed by GATT 1947. However, because GATT 1947 was applied through the PPA and protocols of accession, its application in the

57. While the accession schedule contained mostly concessions by the acceding country, it may also include concessions of other governments. WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 1019.

58. *See id.* at 1018–23.

59. *Id.*

60. JACKSON, WORLD TRADE, *supra* note 55, at 93.

61. Each contracting party, however, must provide the same market access to all other contracting parties in accordance with the requirement of most-favored nation (MFN) treatment. *See* GATT 1947 art. I.

territory of a particular contracting party could be modified by the terms of the relevant protocol.

In practice, the PPA and protocols of accession each contained a "grandfather clause," permitting the contracting parties to apply Part II of GATT 1947 (rules restricting the use of nontariff barriers) only "to the fullest extent not inconsistent with" the contracting parties' existing legislation.[62] In addition, the protocols of accession may provide specific reservations. For example, the accession protocol of Switzerland contained a reservation to the application of GATT Article XI, permitting Switzerland to maintain certain import restrictions, pursuant to its domestic law, in derogation of Article XI.[63]

The most salient deviations from the standard provisions of GATT 1947 occurred in the case of Poland, Romania, and Hungary. Due to the nature of their centrally planned economy at the time of their respective accessions, the protocols of these three countries contained certain special terms not provided in GATT 1947. These included specific import commitments, which were deemed a form of reciprocity since the centrally planned economy did not maintain a system of customs tariffs, and special safeguard provisions that differed from the safeguard provisions in GATT 1947.[64]

In terms of drafting, the accession protocols all contained standard language defining the scope of application of GATT 1947. This language was typically set out in paragraph 2(a) of the GATT accession protocols:

> The provisions of the General Agreement to be applied to contracting parties by [the acceding country] shall, *except as otherwise provided in this Protocol*, be the provisions [of the GATT as adopted in 1947], as rectified, amended or otherwise modified by such instruments as may have become effective on the day on which [the acceding country] becomes a contracting party.[65]

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62. *E.g.*, Protocol for the Accession of Switzerland para. 4 (Apr. 1, 1966), GATT B.I.S.D. (14th Supp.) at 6, 7 (1966); *see* WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 909–12.

63. Protocol for the Accession of Switzerland, *supra* note 62, at 8. For examples of other reservations, see WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 1023.

64. *See* Protocol for the Accession of Poland (June 30, 1967), GATT B.I.S.D. (15th Supp.) at 46, 52 (1968); Protocol for the Accession of Romania to the General Agreement on Tariffs and Trade (Oct. 15, 1971), GATT B.I.S.D. (18th Supp.) at 5, 10 (1972); Protocol for the Accession of Hungary to the General Agreement on Tariffs and Trade (Aug. 8, 1973), GATT B.I.S.D. (20th Supp.) at 3, 4 (1974). For comprehensive treatment of GATT accession negotiations for these three countries, see M. M. KOSTECKI, EAST-WEST TRADE AND THE GATT SYSTEM 27–32 (1978).

65. This standard language is found in paragraph 2(a) of the accession protocols. *See* WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 1021 (emphasis added).

The clause of "except as otherwise provided in this Protocol" (the exception clause) in paragraph 2(a) began to expand in the mid 1980s. In some of the protocols, the exception clause included additional reference to certain paragraphs of the relevant working party report, which set out specific "assurances" or "commitments" by the acceding country.[66] For example, the exception clause in paragraph 2(a) of the Mexico accession protocol was phrased as "except as otherwise provided in this Protocol, and in accordance with paragraph 83 of L/6010."[67] Document L/6010, the working party report on the accession of Mexico, stated in paragraph 83: "The Working Party took note of the assurances given by Mexico in relation to certain specific matters which are reproduced in paragraphs 19, 23, 25, 29, 35, 62, 66 and 68 of this report."[68]

Generally, the specific assurances or commitments referenced in the accession protocols were limited to matters within the coverage of GATT 1947 or other GATT legal instruments, such as the Tokyo Round agreements.[69] One exception was a commitment by Slovenia in the 1990s relating to state-owned enterprises and privatization, which was set out in paragraph 11 of its working party report and referenced in its accession protocol.[70] Interestingly, the Slovenia Working Party Report also recorded the objection of some members to the reference of this commitment. In the view of these members, "accession of any applicant country should not be made contingent upon undertakings relating to areas not covered by any provisions of the General Agreement such as transformation of the economy, including ownership structure or privatization."[71] However, while "paragraph 11 was irrelevant in the context of the negotiations on Slovenia's terms of accession and therefore should not form part of the accession instruments, these members did not wish to obstruct the adoption of the present Report."[72]

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66. The Mexico Accession Protocol in 1986 appeared to be the first such case. Other accession protocols in this category include those of El Salvador, Venezuela, Guatemala, Paraguay, and Slovenia. *See id.* at 1023 n.32; Protocol for the Accession of Paraguay to the General Agreement on Tariffs and Trade para. 2, L/7260 (June 30, 1993), GATT B.I.S.D. (40th Supp.) at 29, 30 (1995); Report of the Working Party on Accession of Slovenia, para. 48, L/7492 (July 20, 1994), GATT B.I.S.D. (41st Supp. Vol. I) at 58, 80 (1997) [hereinafter Slovenia Working Party Report].

67. Protocol for the Accession of Mexico to the General Agreement on Tariffs and Trade (July 17, 1986), GATT B.I.S.D. (33d Supp.) at 3, 4, 86 (1987).

68. Report of the Working Party on the Accession of Mexico, L/6010 (July 15, 1986), GATT B.I.S.D. (33d Supp.) at 57, 86 (1987).

69. For subjects of such additional commitments, see WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 1023.

70. Slovenia Working Party Report, *supra* note 66, paras. 11, 48.

71. *Id.* para. 12, at 63.

72. *Id.* para. 12, at 63–64.

#### *5. Summary*

The treaty of GATT 1947 was applied through a web of protocols, which were multilateral agreements among GATT contracting parties. In theory, this unique treaty structure would allow the original contracting parties to negotiate any term to modify the scope of application of GATT 1947 in respect of a particular acceding country. In practice, the terms of accession did vary, but only to a very limited extent. Except in the three cases where the economy of the acceding country was completely centrally planned, the type of country-specific terms of accession was limited to reservations for existing domestic legislation.

Towards the end of the GATT era, a new practice emerged where the existing contracting parties sought from the acceding country specific commitments on matters that are not covered by the provisions of GATT 1947. Such practice, however, remained controversial within the organization, as demonstrated in the case of Slovenia. In this respect, one should also keep in mind that, since each accession protocol was an independent treaty, the contracting parties were legally free to contract any terms with respect to the application of GATT 1947. In other words, there was no legal obstacle to the creation of "GATT-plus" or "-minus" types of obligations in GATT accession protocols.

### *B. WTO Accession*

#### *1. The WTO Adopted a Unified and Integrated Treaty Structure*

The conclusion of the WTO Agreement put an end to the unusual situation of the GATT. For the first time, the world trade regime acquired the formal status of an international organization.[73] Its contracting parties are now "Members" of the organization. As the constituting treaty of the organization, the WTO Agreement provides a common institutional framework for the conduct of trade relations among its members.

In terms of treaty structure, the WTO adopted "a single undertaking" approach, which replaced GATT's fragmented rule structure with a unified and integrated one. By design, the WTO Agreement serves as an umbrella agreement that holds together all other agreements adopted in the Uruguay Round in its four annexes.[74] Annexes 1, 2, and 3 are designated as "Multilateral Trade Agreements" that constitute "integral parts" of the WTO Agreement and are "binding on all Members."[75] Annex 4 contains

73. WTO Agreement art. VIII.

74. *Id.* art. II.

75. *Id.* art. II:2. The Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Intellectual Property Rights (TRIPS)

"Plurilateral Trade Agreements," which are also "part" of the WTO Agreement, but binding only on "those Members that have accepted them."[76]

To unify the rules on trade in goods, the WTO Agreement renames the General Agreement on Tariffs and Trade as "GATT 1947," and creates "GATT 1994" as a legally distinct new treaty. The content of GATT 1994 includes the provisions of GATT 1947 and some of its related legal instruments.[77] Among those incorporated into GATT 1994 are GATT protocols of accession, excluding the provisions concerning the "provisional" application of GATT and the grandfather clause for existing legislation.[78] Also excluded from GATT 1994 is the PPA. GATT 1994 becomes part of Annex 1A to the WTO Agreement.

To ensure the uniformity of its rules, the WTO Agreement does not permit reservations to be made to any of its provisions. Reservations to any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided in those agreements.[79] Insofar as GATT 1994 is concerned, the only reservation permitted is the exemption for "mandatory legislation, enacted by [a] Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone."[80]

That the WTO has a unified and integrated treaty structure is also reflected in the common rules dealing with amendments to the WTO Agreement and the Multilateral Trade Agreements, the non-application of the Multilateral Trade Agreements between particular members, and the acceptance of and withdrawal from these agreements.[81] As the WTO Appellate Body put it, "[i]t is important to understand that the WTO

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are included in Annex 1 (as Annex 1A, 1B, and 1C, respectively); the Dispute Settlement Understanding (DSU) is set out in Annex 2; and the agreement on Trade Policy Review Mechanism (TPRM) in Annex 3.

76. WTO Agreement art. II:3.

77. *Id.* art. II:4.

78. *See* General Agreement on Tariffs and Trade 1994 art. 1(b)(ii), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

79. WTO Agreement art. XVI:5.

80. GATT 1994 art. 3. The United States appears to be the only member that maintains such a reservation. *See* WORLD TRADE ORG., WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE 109 nn. 16–17 (3d ed. 2012) [hereinafter WORLD TRADE ORG., WTO ANALYTICAL INDEX], *available at* www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm (citing, e.g., Communication from the United States, Five-Year Review of the Exemption Provided Under Paragraph 3 of the GATT 1994, WT/GC/W/228 (July 2, 1999)).

81. WTO Agreement arts. X (Amendments), XIII (Non-Application), XIV (Acceptance), XV (Withdrawal).

Agreement is one treaty," and "the provisions of the WTO Agreement and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole."[82]

*2. A Major Loophole in the Treaty Structure: Accession Protocols*

The new treaty structure, however, is not perfect. In retrospect, it seems clear that the Uruguay Round negotiators overlooked one area: future accession agreements. They apparently did not anticipate that a large number of substantive rules would develop under the accession protocols that would challenge the unity and integrity of the WTO legal system.

At this juncture, it is instructive to compare the provisions of the WTO Agreement setting out the criteria for original membership and accession:

> Article XI Original Membership
>
> 1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.
>
> 2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.
>
> Article XII Accession
>
> 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 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.

82. Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, paras. 75, 81, WT/DS98/AB/R (Dec. 14, 1999) (emphasis omitted).

> 3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.[83]

Pursuant to Article XI, to qualify as an original member, a state must (i) be a contracting party to GATT 1947, (ii) accept the WTO Agreement and the Multilateral Trade Agreements, and (iii) have its schedules of concessions and commitments for goods and services annexed to GATT 1994 and the General Agreement on Trade in Services (GATS), respectively. In comparison, Article XII prescribes two general pre-conditions for accession: (i) an agreement on the "terms" of accession between the acceding government and the WTO, and (ii) a decision of the WTO approving such agreement. Instead of specifying the condition that the acceding member must have its own GATT and GATS schedules, Article XII:1 merely states that accession shall be on "terms" to be agreed between it and the WTO and does not place any limit on the "terms" to be agreed. This loose wording has allowed the WTO to demand accession terms that go well beyond the concessions and commitments set out in GATT and GATS schedules.

The provision of Article XII:1 is modeled after GATT 1947 Article XXXIII.[84] Unlike the GATT, however, the WTO has adopted a unified and integrated treaty structure. This feature of the WTO system dictates that all accession agreements should also be integrated into the WTO Agreement. Yet, neither Article XII nor any other provision of the WTO Agreement addresses this issue. The absence of a mechanism in the WTO Agreement to integrate accession agreements is therefore a major loophole in the system.

### *3. The Ministerial Decision of April 15, 1994*[85]

Despite the lack of a mechanism in the WTO Agreement to integrate accession agreements, when adopting the Uruguay Round agreements in April 1994, the Ministers issued the *Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization* (Ministerial Decision),[86] which shed light on the criteria for WTO accession. The Ministerial Decision aimed to clarify several situations during the transition period from the adoption of the Uruguay Round agreements to the entry

83. WTO Agreement arts. XI, XII (emphasis added).

84. *See* WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 1017.

85. Full credit to Xiaojie Lu who called attention to this Decision at the Tsinghua conference on WTO accession protocols in June 2013.

86. WORLD TRADE ORG., Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization, *in* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 409 (1999).

into force of the WTO Agreement.[87] It states in the preamble that the Ministers:

> *Recogniz[e] that the WTO Agreement does not distinguish in any way between WTO Members which accepted that Agreement in accordance with its Articles XI and XIV [i.e., the original members] and WTO Members which acceded to it in accordance with its Article XII* and wish[ ] to ensure that the procedures for accession of the States and separate customs territories which have not become contracting parties to the GATT 1947 as of the date of entry into force of the WTO Agreement are such as to avoid any unnecessary disadvantage or delay for these States and separate customs territories . . . .[88]

Although the Decision purported to address some procedural arrangements during the transition period, the official recognition by the Ministers that the WTO Agreement "does not distinguish in any way" between the original members and acceded members is highly significant. It reflects how the Uruguay Round negotiators envisioned the WTO membership: equal treatment between the original and acceded members.

In light of this official statement, we may conclude that the "terms" of accession to be agreed between the WTO and an acceding country under Article XII of the WTO Agreement were *not* intended to be qualitatively different from that of the original membership. That is, the terms of accession were expected to be the same as the terms set out in Article XI for the original membership: (i) accepting the WTO Agreement and the Multilateral Trade Agreements and (ii) having goods and services schedules annexed to GATT 1994 and GATS, respectively.

The Ministerial Decision is one of more than two dozen Ministerial Decisions and Declarations that were adopted, together with the WTO Agreement, as "an integral part" of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.[89] For the purpose of treaty interpretation, the Decision constitutes an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" within the meaning of VCLT Article

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87. These situations include: (i) countries that were participants of the Uruguay Round but not GATT contracting parties as of 15 April 1994, (ii) GATT contracting parties that were least-developed countries, (iii) countries that became GATT contracting parties under GATT Article XXVI:5(c) and did not have separate schedules, and (iv) countries that might become a GATT contracting party between 15 April 1994 and the date of entry into force of the WTO Agreement. *Id.* at 409–10.

88. *Id.* at 409 (emphasis added).

89. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations para. 1, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 9.

31(2)(a). As such, it must be taken into account as part of the treaty "context" in the interpretation of Article XII of the WTO Agreement.[90]

*4. Early WTO Practice: The Integration Clause*

In practice, the WTO accession process has closely followed the GATT model.[91] A working party is established to examine the application for accession, and the discussion in the working party is summarized in the working party report. The applicant negotiates its "entry ticket" on the reduction of trade barriers, the results of which are then recorded in its goods and services schedules. When the examination and negotiations have been completed, a protocol of accession is drafted, which sets out standard provisions on procedural matters and incorporates the goods and services schedules of the acceding country. Following the trend in the late GATT era, the WTO accession protocol also incorporates certain specific commitments of the applicant set out in the working party report.

As a formal matter, the WTO accession protocol differs from its GATT counterpart in two major aspects. First, the WTO accession protocol is a bilateral agreement concluded between the acceding government and the WTO, whereas the GATT accession protocol was a multilateral agreement between the acceding government and individual GATT contracting parties. This difference in treaty structure explains why it is legally problematic for the WTO to simply copy the GATT model of accession. A diagram depicting the two treaty structures may be found in the Appendix.[92]

Second, the WTO accession protocol contains a new clause that states: "This Protocol, which shall comprise the commitments referred to in . . . the Working Party Report, shall be an integral part of the WTO Agreement."[93] This new clause appears to be an attempt to plug the loophole in the WTO Agreement. It is questionable, however, whether an

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90. The Appellate Body has referred to one of the 1994 Ministerial Decisions and Declarations in the interpretation of GATT 1994. *See* Appellate Body Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R (Mar. 27, 1998). It is also instructive that the Appellate Body has interpreted the Doha Ministerial Decision as a "subsequent agreement" between the parties regarding the interpretation of the Agreement on Technical Barriers to Trade (TBT) within the meaning of VCLT Article 31(3)(a), equating the Ministerial Decision to the agreement by the parties to the treaty. *See* Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, paras. 257–68, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter Appellate Body Report, *United States — Clove Cigarettes*].

91. For a detailed description of WTO accession process, see WTO Secretariat, *Technical Note on the Accession Process*, WT/ACC/10/Rev.4 (Jan. 11, 2010).

92. *See* Appendix: Difference in Treaty Structure Between the GATT and the WTO.

93. This clause appears in Part I, paragraph 2, of accession protocols. *See* 2010 Secretariat Note, *supra* note 7, at 4.

accession agreement can effectively make itself an integral part of the WTO Agreement, an issue to be further discussed below.

Problematic as it is, the loophole in the WTO Agreement did not give rise to major issues in the early years of the WTO. Before China's accession in 2001, fourteen countries had completed their accession processes, and the texts of their accession protocols followed a standard format with minimal variations.[94] Although each of these protocols incorporated by reference specific commitments of the acceding country contained in the working party report, the types of commitments exceeding the requirements of the Multilateral Trade Agreements are rather limited. Such commitments pertain mostly to the Plurilateral Trade Agreements, privatization, sub-central governments, and transparency.[95] Nonetheless, some members expressed concerns over the creation of such "WTO-plus" obligations. They were of the view that requiring an acceding government to undertake "more stringent obligations" than the existing members was "an abuse of economic power," and that the WTO should take care "not to introduce two classes of Members."[96] Some other members felt that there was "no easy answer" to the question of "WTO-plus," as members continued to add to their commitments under the WTO, and "some order of reciprocity" should be applicable.[97]

*5. The China Accession Protocol: Opening the Floodgates*

This relatively innocuous state of affairs, however, changed dramatically with China's accession in 2001. Unlike any prior accession protocols, the China Accession Protocol is not a standardized document. Instead, the text of that protocol contains seventeen sections of substantive provisions with seven annexes, excluding the goods and services schedules.[98] In addition, the protocol incorporates by reference 143 paragraphs of specific commitments from the China Working Party Report.[99] These provisions prescribe a large number of China-specific rules that expand, modify, or

94. The fourteen countries are: Ecuador, Mongolia, Bulgaria, Panama, Kyrgyz Republic, Latvia, Estonia, Jordan, Georgia, Croatia, Albania, Oman, Lithuania, and Moldova. For the minor variations in some of these countries' accession protocols, see *id.* at 5.

95. WTO Secretariat, *Technical Note on Accession Process*, at 22, 73–74, WT/ACC/7/Rev.2 (Nov. 1, 2000) [hereinafter 2000 Secretariat Note].

96. *Id.* at 5–7 (summarizing members' comments on the terms of accession during the Ministerial Conferences in Singapore in December 1996 and in Geneva in May 1998).

97. *Id.* at 7.

98. China Accession Protocol, *supra* note 42.

99. *See* Report of the Working Party on the Accession of China, para. 342, WT/ACC/CHN/49 (Oct. 1, 2001) [hereinafter China Working Party Report]; *see also* China Accession Protocol, *supra* note 42, para. 1.2 (citing China Working Party Report, *supra*, para. 342).

deviate from the provisions of the WTO agreements.[100] The majority of these rules are "WTO-plus," i.e., rules that prescribe more stringent obligations than required by the WTO agreements. They cover a wide range of subjects, ranging from specific commitments on the reform of China's economic system, to those on the norms of domestic governance, to the treatment of foreign direct investment and other commercial concessions that do not fit into the GATT or GATS schedules.[101] A number of the China-specific rules are "WTO-minus," in the sense that they permit the members to depart from existing WTO disciplines in the conduct of their trade relations with China. These include special trade-remedy rules that allow other members to treat China as a "nonmarket economy" in antidumping and anti-subsidy measures, and to apply safeguards against Chinese products on a discriminatory basis. While a few of them have a built-in expiration date, most of the China-specific rules are permanent in duration.[102]

Thus, the China accession agreement has significantly revised WTO rules of conduct with respect to China trade. Despite being such a major departure from the norm, the China Accession Protocol still declares itself to be "an integral part" of the WTO Agreement.[103] Yet, how exactly country-specific rules of the protocol are supposed to be integrated into the WTO Agreement remains unclear, as little explanation is provided in the accession documents.

Subsequent to China's accession, the WTO has reverted back to using the standardized text of accession protocols,[104] but the practice of requiring acceding countries to undertake additional rule commitments has continued. Instead of putting them in the main text of the accession protocol, the standard practice now is to prescribe all the country-specific rules in the working party report and incorporate them into the accession protocol by reference. Take Russia's accession in 2012 as an example. The main text of the Russia Accession Protocol consists of only ten standard paragraphs, but it incorporates by reference additional commitments set

100. Julia Ya Qin, *"WTO-Plus" Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol*, 37 J. WORLD TRADE 483 (2003). In fact, the China-specific rules are so numerous, and many of which are couched in such obscure language in the Working Party Report, that to date there has not been a complete tally of them.

101. *See id.*

102. The WTO-minus rules with limited durations are: "nonmarket economy" antidumping measures (fifteen years), product-specific safeguard mechanism (twelve years), and special textile safeguard (seven years). China Accession Protocol, *supra* note 42, paras. 15, 16; China Working Party Report, *supra* note 99, para. 242. The only WTO-plus rule with a built-in expiration date is the transitional review mechanism (ten years). China Accession Protocol, *supra* note 42, para. 18.

103. China Accession Protocol, *supra* note 42, para. 1.2.

104. Since China's accession, eighteen countries have acceded to the WTO. *See Accessions*, *supra* note 1 (containing all accession documents of the acceding members).

out in 163 paragraphs of the Russia Working Party Report.[105] The Russia Working Party Report is 612 pages in length and contains a total of 1,451 paragraphs;[106] in comparison, the China Working Party Report has only 180 pages and 343 paragraphs.[107]

In sum, the norm of WTO accession has dramatically changed since China's accession. It is now a standard practice of the WTO to require acceding countries to undertake various commitments on rules that are not part of the Multilateral Trade Agreements. The appropriateness of such practice is no longer questioned by the members.[108]

### *C. Disputes over WTO Accession Commitments*

#### *1. General Overview*

To date, accession commitments have given rise to claims in more than twenty WTO disputes, most of which concern China.[109] The first such claims were brought in 2006 in *China — Auto Parts*,[110] in which the complainants accused China of breaching a specific commitment on auto parts contained in the Working Party Report. The Panel accepted the enforceability of the accession commitment in WTO dispute settlement, even though the accession protocol is not a "covered agreement" under the DSU.[111] Since then, a whole slew of disputes brought against China have made claims on the basis of China's additional rule commitments. They include: (i) *China — Publications and Audiovisual Products*,[112] a central claim of which was that China violated its accession commitments on

105. World Trade Organization, Ministerial Decision of 16 December 2011, Protocol on the Accession of the Russian Federation, para. 2, WT/MIN(11)/24, WT/L/839 (Dec. 17, 2011) [hereinafter Russia Accession Protocol] (stating that the Protocol "shall include the commitments referred to in paragraph 1450 of the Working Party Report").

106. Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70, WT/MIN(11)/2 (Nov. 17, 2011) [hereinafter Russia Working Party Report].

107. China Working Party Report, *supra* note 99.

108. Comments questioning the appropriateness of such practice contained in the 2000 Secretariat Note no longer appear in its later versions. *Compare* 2000 Secretariat Note, *supra* note 95, at 5–7, *with, e.g.*, 2010 Secretariat Note, *supra* note 7.

109. For a list of WTO disputes involving accession protocols, see *Disputes by Agreement*, WORLD TRADE ORG., www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A30 (last visited Feb. 10, 2014).

110. Appellate Body Report, *China — Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008) [hereinafter Appellate Body Report, *China — Auto Parts*].

111. *See infra* Part III.C.

112. Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter Appellate Body Report, *China — Publications and Audiovisual Products*].

trading rights; (ii) *China — Financial Information Service*,[113] which contains a claim regarding China's specific commitment on regulatory independence in the service sectors; (iii) *China — Taxes*,[114] which includes claims concerning China's specific commitments on subsidies and internal measures; (iv) *China — Grants, Loans and Other Incentives*,[115] which includes a claim on China's commitment not to maintain any export subsidy on agricultural products; (v) *China — Raw Materials*[116] and *China — Rare Earths*,[117] which are two high-profile cases built on claims concerning China's special commitments on export duties; (vi) *China — Wind Power*[118] and *China — Auto Parts Subsidies*,[119] each of which includes claims regarding China's special commitments on transparency; and (vii) *China — Textile*,[120] a dispute brought by Mexico that claims, *inter alia*, that China

113. Request for Consultations by the European Communities, *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS372/1 (Mar. 5, 2008); Request for Consultations by the United States, *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS373/1 (Mar. 5, 2008); Request for Consultations by Canada, *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS/378/1 (June 23, 2008). The case was settled with China's agreement to withdraw the measures at issue. *See* Qin, *supra* note 12, at 152–55.

114. Request for Consultations by Mexico, *China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS359/1 (Feb. 28, 2007) [hereinafter *China — Taxes*]; Request for Consultations by the United States, *China — Taxes*, WT/DS358/1 (Feb. 7, 2007). The case was settled. *See* Communication from China and Mexico, *China — Taxes*, WT/DS359/14 (Feb. 13, 2008); Communication from China and the United States, *China — Taxes*, WT/DS358/14 (Jan. 4, 2008).

115. Request for Consultations by Guatemala, *China — Grants, Loans and Other Incentives*, WT/DS390/1 (Jan. 22, 2009); Request for Consultations by Mexico, *China — Grants, Loans and Other Incentives*, WT/DS388/1 (Jan. 8, 2009); Request for Consultations by the United States, *China — Grants, Loans and Other Incentives*, WT/DS387/1 (Jan. 7, 2009). The case was settled with China withdrawing all measures in question. *See* Press Release, U.S. Trade Representative, United States Wins End to China's "Famous Brand" Subsidies After Challenge at WTO; Agreement Levels Playing Field for American Workers in Every Manufacturing Sector (Dec. 2009), *available at* www.ustr.gov/about-us/press-office/press-releases/2009/december/united-states-wins-end-china's-"famous-brand"-sub.

116. Appellate Body Reports, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) [hereinafter Appellate Body Reports, *China — Raw Materials*].

117. Appellate Body Report, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014) [hereinafter Appellate Body Report, *China — Rare Earths*].

118. Request for Consultations by the United States, *China — Measures Concerning Wind Power Equipment*, WT/DS419/1 (Jan. 6, 2011) (claiming, *inter alia*, that China failed to make available a translation of the measures at issue into one or more of the official languages of the WTO).

119. Request for Consultations by the United States, *China — Certain Measures Affecting the Automobile and Automobile Parts Industries*, WT/DS450/1 (Sept. 20, 2012) (claiming that China breached several special commitments on the publication, notification, and translation of its trade measures).

120. Request for Consultations by Mexico, *China — Measures Relating to the Production and Exportation of Apparel and Textile Products*, WT/DS451/1 (Oct. 18, 2012).

breached thirty-eight of its accession commitments contained in the China Working Party Report.

In addition, China has launched a number of complaints of its own involving WTO-minus rules in its accession protocol. They include: (i) four separate cases against the United States concerning its antidumping and countervailing measures on products from China,[121] (ii) one case against U.S. special safeguards taken under the China Accession Protocol,[122] and (iii) two complaints against the EU concerning its antidumping measures on products from China.[123] In all these cases, China claims that the respondent acted inconsistently with the special trade-remedy rules of its accession protocol.

Besides China, at least two other acceded members have been involved in WTO disputes over their accession protocols. One is Vietnam, which has brought two separate cases against the United States that include claims that the United States antidumping measures on shrimp from Vietnam were inconsistent with the antidumping provisions in Vietnam's Accession Protocol.[124] The other is Armenia, whose specific accession commitments on customs duties and internal taxes have become the legal basis for claims in a dispute brought by Ukraine.[125]

### 2. *Interpretive Challenges*

Accession protocols have presented special interpretive challenges to the WTO judiciary. Such challenges stem primarily from the lack of clear textual guidance as to the relation between the country-specific rules and the provisions of the WTO agreements. Ideally, such systemic issues should be addressed by the "legislative" body of the WTO — the

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121. Appellate Body Report, *United States — Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (Dec. 18, 2014); Appellate Body Report, *United States — Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R (July 7, 2014); Appellate Body Report, *United States —Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011); Request for Consultations by China, *United States — Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WT/DS368/1 (Sept. 18, 2007).

122. Appellate Body Report, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R (Sept. 5, 2011) [hereinafter Appellate Body Report, *United States — Tyres*].

123. Request for Consultations by China, *European Communities —Antidumping Measures on Certain Footwear from China*, WT/DS405/1 (Feb. 8, 2010); Request for Consultations by China, *European Communities — Definitive Antidumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/1 (Aug. 4, 2009).

124. *See* Panel Report, *United States — Antidumping Measures on Certain Shrimp from Viet Nam*, paras. 7.170–7.192, WT/DS429/R (Nov. 17, 2014); Panel Report, *United States — Antidumping Measures on Certain Shrimp from Viet Nam*, paras. 7.246–7.255, WT/DS404/R (July 11, 2011).

125. Request for the Establishment of a Panel by Ukraine, *Armenia — Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages*, WT/DS411/2/Rev.1 (Oct. 8, 2010).

Ministerial Conference and the General Council — through their exclusive authority to adopt multilateral interpretations.[126] In practice, however, the WTO judiciary has decided to fill the large gaps in the treaty texts on its own.

"WTO-plus" and "WTO-minus" provisions have given rise to different interpretive issues. With respect to "WTO-plus" obligations, a major issue is the availability of public policy exceptions. The accession protocols contain numerous rule commitments that go beyond the requirements of the WTO agreements, but do not provide any generally applicable exceptions similar to those in GATT Articles XX (General Exceptions) and XXI (Security Exceptions) or GATS Articles XIV (General Exceptions) and XIV *Bis* (Security Exceptions).[127] The question then is whether the additional obligations under WTO accession protocols are entitled to any public policy exceptions at all, and if so, on what legal basis. The issue has come up in several disputes. Taking a narrow textualist approach, the Appellate Body has accepted the applicability of GATT Article XX to the trading-rights obligations under the China Accession Protocol,[128] but denied such applicability to the export-duty obligations under the same.[129] The Appellate Body's approach has met with much criticism.[130] In the recent case of *China — Rare Earths*, the majority of the Panel again denied the applicability of GATT Article XX to the export-duty obligations of China, but one dissenting Panelist disagreed with the majority opinion.[131] On appeal, the Appellate Body upheld the decision by

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126. WTO Agreement art. IX:2.

127. GATT 1947 arts. XX, XXI; General Agreement on Trade in Services arts. XIV, XIV *bis*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

128. Appellate Body Report, *China — Publications and Audiovisual Products*, *supra* note 112, paras. 229–33.

129. Appellate Body Reports, *China — Raw Materials*, *supra* note 116, para. 291.

130. For critiques of the Appellate Body decisions, see, e.g., Marco Bronckers & Keith E. Maskus, China — Raw Materials*: A Controversial Step Towards Evenhanded Exploitation of Natural Resources*, 13 WORLD TRADE REV. 393 (2014); Julia Ya Qin, Editorial Comments, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the* China — Raw Materials *Case*, 11 CHINESE J. INT'L L. 237 (2012); Julia Ya Qin, *Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence — A Commentary on the* China — Publications *Case*, 10 CHINESE J. INT'L L. 271 (2011); Joost Pauwelyn, Case Note, *Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on* China — Audiovisuals, 11 MELBOURNE J. INT'L L. 1 (2010); Frieder Roessler, Comment, *Appellate Body Ruling in* China — Publications and Audiovisual Products, 10 WORLD TRADE REV. 119 (2011); Elisa Baroncini, *An Impossible Relationship? Article XX GATT and China's Accession Protocol in the* China — Raw Materials *Case*, BIORES, May 2012, at 18, http://www.ictsd.org/sites/default/files/review/bioresreview/biores6-1.pdf.

131. Panel Report, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, paras. 7.49–7.117, WT/DS431/R, WT/DS432/R, WT/DS433/R (Mar. 26, 2014) [hereinafter Panel Report, *China — Rare Earths*]; *id.* paras. 7.118–138 (dissenting opinion).

the majority of the Panel, and reaffirmed all of its previous rulings on the issue.[132]

With respect to "WTO-minus" provisions, the main issues of interpretation concern either the legality or the scope of their derogations from the principle of most favored nation treatment (MFN). Thus far, China has launched a number of cases challenging trade-remedy measures taken by other members under the "WTO-minus" rules of its accession protocol.[133] Of these cases, the one that best demonstrates the interpretive challenges is *United States — Tyres*.[134] The case concerns the special tariffs levied on certain Chinese tires by the United States under Paragraph 16 of the China Accession Protocol, which allows members to impose special safeguard measures on Chinese products during the first twelve years after accession.[135] The provisions of Paragraph 16 directly contravene the MFN requirement in GATT Article I:1[136] and Article 2.2 of the Agreement on Safeguards;[137] yet, the China Accession Protocol does not explain the relationship between Paragraph 16 and the WTO safeguard disciplines, nor does it provide any rationale for the derogation.

In its complaint in *United States — Tyres*, China made a primary claim that the U.S. safeguard measures taken under Paragraph 16 of the China protocol are inconsistent with GATT Article I:1 which sets out the general principle of MFN.[138] This claim effectively challenged the legality of the China-specific safeguards.[139] Surprisingly, the Panel found a way to avoid addressing the MFN issue altogether. Instead of taking up the claim under GATT Article I, the Panel chose to first address China's other claims on

132. Appellate Body Report, *China — Rare Earths*, *supra* note 117, paras. 5.58–5.65. It should be noted that China did not appeal the Panel's finding on the non-applicability of GATT Article XX to its export duty obligations; instead, it appealed the Panel's assessment of the relationship of its accession protocol with the WTO Agreement and its annexes, seeking from the Appellate Body "coherent guidance on the precise legal nature" of the WTO accession protocols and "clarification as to the systemic relationship between, on the one hand, specific provisions of China's Accession Protocol, and, on the other hand, the [WTO] Agreement and [its annexes]." *Id.* para. 2.10 (citation omitted) (internal quotation marks omitted).

133. *See supra* notes 121–23.

134. Appellate Body Report, *United States — Tyres*, *supra* note 122.

135. China Accession Protocol, *supra* note 42, para. 16.

136. GATT 1947 art. I:1.

137. Agreement on Safeguards art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 ("Safeguard measures shall be applied to a product being imported irrespective of its source.").

138. Request for the Establishment of a Panel by China, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, at 2, WT/DS399/2 (Dec. 11, 2009) [hereinafter Panel Request, *United States — Tyres*]. China did not claim the U.S. measures as inconsistent with Article 2.2 of the Agreement on Safeguards since the United States did not cite the Agreement on Safeguards as the basis for its measures.

139. The China-specific safeguards appear to be modeled after similar mechanisms in the accession protocols of Poland, Romania, and Hungary during the GATT era. *See supra* note 64.

the inconsistency of U.S. measures with Paragraph 16 of the accession protocol. After rejecting those claims under Paragraph 16, the Panel summarily dismissed China's Article I:1 claim on the ground that such claim is "entirely dependent on its claims under Paragraph 16 of the Protocol."[140] The reason for the dismissal was explained in a footnote: "The dependent nature of China's GATT 1994 claims is shown by China's argument that there is 'also' a GATT 1994 violation . . . (*See* China's First Written Submission, paras. 417 and 421)."[141] Thus, the Panel based its ruling on the MFN claim solely on the word "also" in a written submission, despite the fact that violation of GATT Article I:1 had been clearly listed as the primary claim in both China's consultation request and panel request.[142] By summarily dismissing the MFN claim, the Panel managed to shun all the issues concerning the legality and rationale of the China-specific safeguards. While politically savvy, the Panel's approach contrasted sharply with previous jurisprudence in cases such as *European Communities — Tariff Preferences*, where the Appellate Body went to great lengths to clarify the relationship between GATT Article I:1 and the Enabling Clause,[143] and *United States — Shirts and Blouses*, where the Appellate Body carefully distinguished, for the purpose of allocating the burden of proof, between the nature of the transitional safeguard mechanism provided in the Agreement on Textiles and Clothing and that of GATT exceptions.[144]

In sum, the interpretation of accession terms has proven a considerable challenge. Substantively, accession commitments cannot be understood outside the context of the WTO multilateral agreements; yet, accession protocols typically do not take care to specify the relationship between their provisions and the provisions of the WTO agreements relating to the same subject matter.[145] Moreover, accession documents rarely explain the

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140. Panel Report, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, para. 7.418, WT/DS399/R (Dec. 13, 2010).

141. *Id.* at 113 n.557.

142. *See* Request for Consultations by China, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/1 (Sept. 16, 2009); Panel Request, *United States — Tyres*, *supra* note 138. Interestingly, China did not appeal the Panel ruling on the issue.

143. Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, paras. 79–125, WT/DS246/AB/R (Apr. 7, 2004).

144. Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 16, WT/DS33/AB/R (Apr. 25, 1997).

145. There are some exceptions. *See, e.g.*, China Accession Protocol, *supra* note 42, para. 15 (stating explicitly that GATT Article VI, the Antidumping Agreement, and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) "shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with" its provisions); Vietnam Working Party Report, *supra* note 42, para. 255 (using similar language).

rationale or justification for the country-specific rules.[146] Absent textual guidance, WTO judges are compelled to paper over the fundamental issues concerning the legality of such rules, and have struggled to fill the large gaps left in the treaty texts. The result has been some problematic jurisprudence.

## III. THE LEGALITY OF ACCESSION RULES

By now, country-specific rulemaking through accession agreements has become a standard practice of the WTO, and accession commitments have been accepted as part of WTO law, enforceable through the WTO dispute settlement proceedings. Yet, what is the legal status of the accession rules within the WTO treaty framework? How are the accession rules integrated into the WTO Agreement? And what is the legal basis for enforcing such rules through WTO dispute settlement? Surprisingly, these foundational questions remain to be answered.

### *A. Legal Nature of Accession Protocols*

The accession protocol is formally a bilateral treaty entered into between the WTO and the acceding country. That much is clear. What remains unclear is the relationship between the accession protocol and the WTO Agreement and its annexes. Because accession protocols create additional rules of conduct for trade between acceded members and all other members of the WTO, they alter the rights and obligations of all members under the WTO agreements, albeit the extent of such alteration depends on the specific rules of a specific accession protocol. In order to define the relationship between accession protocols and the WTO agreements, it is necessary to reach a clear understanding on the legal nature or characterization of accession terms.

A few clarifications are worth mentioning. First, it is legally incorrect to characterize the accession terms as the "conditions" of accession. If the terms were truly conditions of accession, then they would have to be met before the accession could take place; alternatively, the accession would have to be declared invalid if any of the terms were found to have been breached after the accession takes place.[147]

Second, it is necessary to keep in mind the distinction between the accession terms that are incorporated into the GATT and GATS

146. For a detailed discussion, see Qin, *supra* note 12.

147. By comparison, the conditions of accession prescribed by Article XII of the WTO Agreement are: (i) that an agreement on the terms of accession is reached between the acceding country and the WTO, and (ii) that the agreement is approved by the decision of the Ministerial Conference. *See* WTO Agreement art. XII.

schedules, on the one hand, and the accession terms that are provisions of the accession protocol, on the other. This study concerns only the latter category, because it is these terms that differentiate the treatment of the acceded members from that of the original members.

Third, it is important to recognize that all country-specific rules that alter the rights or obligations under the WTO agreements are derogations from the MFN principle. When a protocol provision is "WTO-plus," it imposes on the acceded member an obligation not required by the WTO agreements, and correspondingly gives other members the right to demand compliance with the additional obligation.[148] When a protocol provision is "WTO-minus," it reduces the rights of the acceded member and correspondingly the obligations of other members under the WTO multilateral agreements. Either way, the accession protocols allow members to treat the acceded members less favorably than the original members with respect to matters subject to the accession rules, hence derogating from the general MFN provisions of the WTO agreements. Unlike the various MFN exceptions provided in the WTO agreements, the MFN derogations by the accession protocols are neither acknowledged nor explained. And it remains unclear on what legal basis the accession protocols have acquired this authority.

### *1. Accession Rules as "Reservations" to the WTO Agreements*

One possibility is to view accession rules as "reservations" to the WTO Agreement and its annexes. This is the approach proposed by Mitali Tyagi.[149] Historically, the GATT Secretariat did characterize the limited number of specific commitments contained in GATT accession protocols as "reservations."[150] In principle, a state is free to formulate a reservation in its accession to a treaty unless the reservation is prohibited by the treaty or is incompatible with the object and purpose of the treaty.[151] When the

148. Under the general MFN clause of GATT Article I:1, "with respect to all rules and formalities in connection with importation and exportation," a member must accord "any advantage, favour, privilege or immunity" granted to any product of any other country to the like product of all other members "immediately and unconditionally." GATT 1947 art. I:1. Being free from a WTO-plus obligation is an advantage that is denied of the acceded member subject to the obligation. By comparison, the MFN clause of GATS Article II simply provides that "[w]ith respect to any measure covered by [the GATS], each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." GATS art. II.

149. *See* Tyagi, *supra* note 12 (applying international law on treaty reservations and concluding that certain provisions in the accession protocols are "impermissible reservations" to the WTO agreements).

150. *See* WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46 (reservations in accession protocols).

151. *See* VCLT, *supra* note 14, art. 19.

treaty is a constituting instrument of an international organization, unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.[152] This latter requirement can be easily satisfied in the context of WTO accession, since all terms of accession must be approved by the Ministerial Conference.[153]

There are, however, procedural and substantive obstacles in characterizing accession rules as "reservations" to the WTO Agreement. Procedurally, the WTO Agreement explicitly prohibits reservations to any of its provisions and permits reservations to the provisions of its annexed agreements only to the extent provided for in those agreements.[154] To characterize the accession terms as "reservations" would be inconsistent with this mandate. Substantively, reservations are purported "to exclude or to modify the legal effects of certain provisions of the treaty" in their application to the reserving state.[155] Although the way in which legal effects of treaty provisions may be excluded or modified by reservations remains controversial,[156] it is generally understood that reservations are used to lessen the burden of the reserving state under the treaty provisions. Since the accession rules increase, rather than lessen, the burden on the acceding country under the WTO agreements, it is difficult to deem their provisions as "reservations."[157] Moreover, as Tyagi notes, reservations cannot cover accession terms that impose obligations beyond the scope of the WTO agreements, which would include all the WTO-plus provisions.[158]

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152. VCLT, *supra* note 14, art. 20.3; Int'l Law Comm'n, *Treaty Guidelines*, *supra* note 18, §§ 2.8.8–2.8.12.

153. WTO Agreement art. XII:2.

154. *Id.* art. XVI:5; *see supra* notes 79–80 and accompanying text.

155. VCLT, *supra* note 14, art. 2(1)(d); Tyagi, *supra* note 12, at 432.

156. The legal effects and validity of reservations are dealt with in the VCLT, but reservations remain among the most controversial and perplexing issues in the law of treaties. *See* Alain Pellet & Daniel Müller, *Reservations to Treaties: An Objection to a Reservation Is Definitely Not an Acceptance*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 37 (Enzo Cannizzaro ed., 2011); Bruno Simma & Gleider I. Hernandez, *Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION, *supra*, at 60.

157. *Cf.* Tyagi, *supra* note 12, at 418–40 (arguing that the member-specific rules of accession should be characterized as reservations to the WTO agreements, but those that discriminate against acceded members are "impermissible reservations," null and void, and without legal effect under the ILC Guide on Treaty Reservations).

158. *Id.* at 434–36 (giving examples of additive provisions including China's commitments to practice market economy).

*2. Accession Rules as "Amendments" to the WTO Agreements*

Another possibility is to view the accession terms as "amendments" to the WTO agreements.[159] Technically, the concept of "amendment" includes both revisions and additions to the existing provisions. Thus, when the accession terms supplement, modify, or derogate from the provisions of the WTO agreements, they effectively amend the WTO agreements as between the acceded and incumbent members.

However, formal amendment to the WTO agreements must be made in accordance with the detailed and stringent requirements set out in Article X of the WTO Agreement. Under Article X, amendments to the general MFN provisions of GATT 1994, GATS, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) require unanimous acceptance by all members; amendments to other provisions of WTO multilateral agreements "of a nature that would alter the rights and obligations of the Members" require acceptance by two-thirds of the members and will take effect only for those members that have accepted them; and amendments to all other provisions of WTO multilateral agreements will take effect for all members upon acceptance by two-thirds of the members.[160] Any member accepting an amendment to any of the WTO agreements must deposit an instrument of acceptance with the Director-General of the WTO within a specific period of acceptance.[161] Depending on the domestic legal system of individual members, acceptance of amendments to a WTO treaty may require approval of domestic legislatures, thus making WTO treaty amendments an extremely difficult process.

To date, only two amendments to the WTO multilateral agreements have ever been adopted by the WTO, and neither has entered into force. The first is the 2005 amendment to TRIPS,[162] which has not yet received acceptance by two-thirds of the members.[163] The second is the 2014 amendment to add the Agreement on Trade Facilitation to Annex 1A of the WTO Agreement, which opened for acceptance by individual

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159. *See id.* at 418–19 (citing Charnovitz, *supra* note 12; Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8 J. INT'L ECON. L. 51, 57 (2005)).

160. WTO Agreement art. X:2–4.

161. *Id.* art. X:7.

162. World Trade Organization, Ministerial Decision of 6 December 2005, Amendment of the TRIPS Agreement, WT/L/641 (Dec. 8, 2005).

163. The deadline for acceptance of the TRIPS amendment by two thirds of the members was originally set for December 1, 2007. It has been extended more than once, and the current deadline is set for December 31, 2015. *See Members Accepting Amendment of the TRIPS Agreement*, WORLD TRADE ORG., www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last updated Sept. 10, 2014).

members in late November 2014.[164] It remains to be seen how long it will take for either of the two amendments to take effect.

Given the stringent requirements of Article X, it would be inappropriate to characterize the accession protocols as amendments to the WTO agreements.[165] In this regard, it is instructive that the Appellate Body has rejected the characterization of a waiver decision by the Ministerial Conference, which alters the rights and obligations of the members, as an amendment to the WTO agreements. According to the Appellate Body, the waiver "did not require formal acceptance by the Membership as foreseen under Article X:7" of the WTO Agreement.[166] The same reasoning ought to apply to the accession decisions of the Ministerial Conference.

*3. Accession Rules as "Subsequent Agreement" Modifying the WTO Agreements*

Compared to "reservations" and "amendments," a legally much sounder approach is to characterize the accession protocol as a "subsequent agreement" that modifies the WTO agreements with respect to their application to the acceded member. Previous commentators hinted at this possibility, but did not reach a conclusion on this characterization.[167]

It is uncontroversial that the parties to a treaty can modify or amend the treaty by concluding a subsequent agreement. Such a subsequent agreement may take the form of a formal amendment, as contemplated by VCLT Articles 39 and 40, a new annex or protocol to a treaty, or an agreement that expressly or implicitly supersedes or terminates an earlier treaty, as contemplated by VCLT Articles 30 and 59.[168] A multilateral treaty may also be modified by subsequent agreement between certain of the

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164. World Trade Organization, General Council Decision of 27 November 2014, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940 (Nov. 28, 2014). No deadline was set for acceptance by two thirds of the members. *See How to Accept the Protocol of Amendment to Insert the WTO Trade Facilitation Agreement into Annex 1A of the WTO Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreement_e.htm (last visited Feb. 10, 2015) (providing additional information regarding the acceptances of member countries).

165. *See* Charnovitz, *supra* note 12, at 890; Tyagi, *supra* note 12, at 418–19.

166. Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador*, para. 394, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA (Nov. 26, 2008) [hereinafter Appellate Body Report, *EC — Bananas III*].

167. *See* Charnovitz, *supra* note 12, at 893 (describing an accession protocol as a "legal instrument" that modifies the WTO Agreement); Tyagi, *supra* note 12, at 420 (considering accession protocols as "subsequent agreement," but limiting that consideration for the purpose of treaty interpretation within the meaning of VCLT Article 31, rather than for the purpose of treaty modification).

168. VCLT, *supra* note 14, arts. 30, 39, 40, 59; Sean Murphy, *The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties*, *in* TREATIES AND SUBSEQUENT PRACTICE 82, 88 (Georg Nolte ed., 2013).

parties only.[169] Given the normal cumbersome process of ratifying formal amendments, creative mechanisms have developed for modifying treaty regimes through decisions by the organs of an international organization or a conference of parties, including tacit consent and opt-out procedures.[170] When a subsequent agreement modifies a treaty but does not take the form of a formal amendment, it constitutes a *de facto* amendment to the treaty.[171]

Conceptually, a subsequent agreement used to *modify* a treaty must be distinguished from a subsequent agreement used to *interpret* a treaty, which is provided for in VCLT Article 31(3)(a).[172] Although the boundary between modification and interpretation is often blurred — since interpretation, especially an evolutionary interpretation, can also have the effect of modification[173] — there is a point where the change effected by a subsequent agreement to the treaty text is so substantial that it becomes impossible to characterize the subsequent agreement as merely an interpretation of the text.

Are WTO accession protocols such "subsequent agreements"? An accession protocol is concluded after the entry into force of the WTO Agreement, hence it is certainly a "subsequent agreement" with respect to the WTO Agreement. To the extent its provisions alter the rights and obligations under the WTO Agreement, the accession protocol modifies the WTO Agreement between the acceded member and all other members. There is, however, one problem concerning the form: Neither party to the accession protocol — the WTO and the acceding country — is a party to the WTO Agreement.[174] Thus, in order to qualify the

169. VCLT, *supra* note 14, art. 41.

170. Murphy, *supra* note 168, at 89 (citing Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT'L L. 231 (2009); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293).

171. Modification and amendment both effect changes to the content of a treaty. While "amendment" is normally used to indicate changes made through formal amendment procedures, "modification" can denote changes made by both formal and informal means.

172. VCLT Article 31(3)(a) requires a treaty interpreter to take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." VCLT, *supra* note 14, art. 31(3)(a).

173. *See* Georg Nolte, *Reports for the ILC Study Group on Treaties over Time*, *in* TREATIES AND SUBSEQUENT PRACTICE, *supra* note 168, at 169, 207 (discussing the distinction between treaty interpretation and treaty modification by way of "subsequent conduct," a term used in the Report to encompass both subsequent agreement and subsequent practice).

174. Technically, the VCLT does not govern the WTO accession protocols, as it applies to treaties between states only. VCLT, *supra* note 14, art. 1. Rules governing agreements between a state and an international organization are set out in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543 [hereinafter VCLTIO]. VCLTIO has not entered into force. Since VCLTIO contains rules nearly identical to VCLT, including the provisions on the application of successive treaties relating to the same subject matter in VCLTIO Article 30, and to the extent the VCLT rules

accession protocol as a subsequent agreement modifying the WTO Agreement, it has to be deemed as the equivalent of agreement entered by all members of the WTO.

From a functionalist perspective, it is not difficult to pierce the institutional veil and treat the accession protocol as a multilateral agreement among WTO members.[175] Due to its consensus-based decision-making,[176] the WTO is known as a "member-driven" institution, as compared to other more centralized international organizations. In the context of WTO accession, all incumbent members would have the opportunity to negotiate with the acceding country bilaterally as well as multilaterally; the Ministerial Conference approves the accession terms through consensus despite the formal requirement of voting; and an incumbent member also has the right to opt-out of the WTO relationship with the acceding country.[177] Moreover, as a matter of WTO law, the Appellate Body has more than once equated the decision of the Ministerial Conference with that of the members, including interpreting a provision of the Doha Ministerial Decision as "a subsequent agreement" between the parties to the Agreement on Technical Barriers to Trade[178] within the meaning of VCLT Article 31(3)(a).[179] The main concern for treating the accession protocol as a multilateral agreement would be that national decision-makers in the member countries are excluded from the treaty-amendment process for the WTO agreements.[180] However, since the accession provisions typically increase the rights of, and rarely impose any

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have attained the status of customary international law, these rules apply to all subjects of international law, including international organizations.

175. Functionalism sees international organizations as merely functional vehicles of its member states, which exist to serve certain functional needs of the international community and possess only such powers as would be functionally necessary. *See generally* Jan Klabbers, *Contending Approaches to International Organizations: Between Functionalism and Constitutionalism*, *in* RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 3, 4 (Jan Klabbers & Åsa Wallendahl eds., 2011).

176. WTO Agreement art. IX:1 ("The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting." (footnote omitted)).

177. *See id.* art. XIII. It should be noted, however, that a subsequent acceding member would not have the chance to participate in the negotiation and approval of the accession protocols of previously acceded members. But for the latecomer, the prior accession protocols have become part of the WTO Agreement, to which it accedes.

178. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.

179. Appellate Body Report, *United States — Clove Cigarettes*, *supra* note 90, paras. 267–68; *see also* Appellate Body Report, *EC — Bananas III*, *supra* note 166, para. 388 (agreeing with the Panel that a waiver granted by the Ministerial Conference under Article IX of the WTO Agreement "was adopted by the same parties that approved the European Communities' Schedule," i.e., the parties to the WTO Agreement).

180. *See* Murphy, *supra* note 168, at 89; *see generally* José E. Alvarez, *Limits of Change by Way of Subsequent Agreements and Practice*, *in* TREATIES AND SUBSEQUENT PRACTICE, *supra* note 168, at 123.

additional obligation on, the incumbent members, such concern is unlikely to arise in practice.

If an accession protocol can be properly characterized as an agreement between the acceding country and the parties to the WTO Agreement, then VCLT Article 30 becomes applicable to the relationship between the WTO Agreement and the accession protocol. This is a separate topic to be discussed below.[181]

#### 4. *Accession Rules as "Subsequent Practice" Modifying the WTO Agreements*

In addition to subsequent agreement, a treaty may also be modified by subsequent practice of the parties. This method of treaty modification was recognized by the International Law Commission (ILC) when it proposed the following provision as draft Article 38 of the VCLT: "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions."[182] Ultimately, however, this draft article was rejected by states due to various concerns including the uncertain impact of subsequent practice on the principle of consent.[183] Short of codification in the VCLT, the issues concerning modification of a treaty by subsequent practice are left to customary international law.

The world trade regime has a particularly rich tradition of developing law through subsequent practice.[184] As previously noted, the GATT was not intended to be an international organization, but it functioned as one for decades without a proper constituent treaty. GATT 1947, which was only applied provisionally through the PPA and accession protocols, had few institutional provisions. As a result, nearly the entire GATT institutional apparatus, including its Council and dispute settlement mechanism, was built up through the subsequent practice of the contracting parties. In addition to creating new rules, the GATT subsequent practice has sanctioned serious derogations from the provisions of GATT 1947. Prominent examples include the adoption of the Enabling Clause by the CONTRACTING PARTIES in 1979, which creates a permanent exception to the MFN clause in Article I:1;[185] and the

181. *See infra* Part III.D.1.

182. Rep. of the Int'l Law Comm'n, 2d Part of its 17th Sess., Jan. 3–28, 1966, & 18th Sess., May 4–July 19, 1966, at 182, U.N. Doc. A/6309/Rev.1; GAOR, 21st Sess., Supp. No. 9 (Pt. 2) (1966).

183. *See generally* Nolte, *supra* note 173, at 169, 200–01 (summarizing the debate on draft Article 38).

184. *See generally* Georg M. Berrisch, *The Establishment of New Law Through Subsequent Practice in GATT*, 16 N.C. J. INT'L L. & COM. REG. 497 (1991).

185. Decision of the Contracting Parties, *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980)

decisions of the CONTRACTING PARTIES not to require formal acceptance of modifications of tariff schedules, contrary to the provisions of Articles II:7 and XXX.[186] These GATT decisions have led to major modifications of GATT 1947 without going through the procedures for treaty amendment.[187]

It appears that WTO's practice of using accession protocols to modify the WTO agreements is in keeping with the GATT tradition. There are, however, two major differences to bear in mind. First, unlike the WTO, GATT did not have a unified treaty structure; what evolved in GATT was more of a "common law" system. Second, even with its flexible treaty structure, GATT did not engage in expansive country-specific rulemaking as the WTO has done, a point to be further elaborated below.

To date, the WTO judiciary has only examined the role of subsequent practice in treaty interpretation within the meaning of VCLT Article 31(3)(b).[188] And the Appellate Body has adopted a rather restrictive approach to "subsequent practice" as a means of treaty interpretation.[189] In contrast, the ICJ has taken a much more liberal approach, effectively recognizing the role of subsequent practice as a tool for treaty modification.[190] The two well-known cases are ICJ advisory opinions in *Namibia*[191] and *Wall*,[192] both involving provisions of the UN Charter. In *Namibia*, the question concerned the validity of a Security Council resolution that was adopted with the abstention of two permanent

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[hereinafter Decision of the Contracting Parties, *Differential Treatment*].

186. Pursuant to Article II:7, tariff schedules are an integral part of Part I of GATT 1947; and amendments to Part I require acceptance of all contracting parties pursuant to Article XXX. The cumbersome procedures for amendment under Article XXX led to several decisions of the CONTRACTING PARTIES not to treat modifications of schedules as amendments. *See* WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 1005–06.

187. These decisions have since attained the treaty status by becoming part of GATT 1994. *See* GATT 1994 art. 1(a) & 1(b)(iv). For more examples, see Berrisch, *supra* note 184.

188. VCLT Article 31(3)(b) requires a treaty interpreter to take into account "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." VCLT, *supra* note 14, art. 31(3)(b). For relevant WTO jurisprudence, see *Repertory of Appellate Body Reports: Interpretation*, WORLD TRADE ORG., www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm#I.3.5 (last visited Mar. 10, 2015) (§ I.3.5 Legitimate Expectations).

189. Nolte, *supra* note 173, at 210, 224 (stating that the Appellate Body's approach towards subsequent practice is more restrictive than the ICJ's, and probably more restrictive than what was contemplated by the ILC when drafting the VCLT).

190. *See id.* at 169, 201–02 (referring to several leading cases decided by the ICJ as well as by other international tribunals).

191. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21) [hereinafter *Namibia*].

192. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Wall*].

members. In accordance with Article 27(3) of the UN Charter, decisions of the Security Council on non-procedural matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." Yet, because the Soviet Union failed to attend the Security Council meetings after the Korean War, making it impossible to obtain its concurring vote, the Security Council had long considered votes to be affirmative so long as no permanent member objected to a measure.[193] The Court upheld the validity of this practice, stating: "This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."[194]

In *Wall*, the question was whether the UN General Assembly encroached upon the Security Council's competence by requesting an advisory opinion from the ICJ on the legality of Israel's construction of a wall in the Occupied Palestinian Territory.[195] According to Article 12(1) of the UN Charter, "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." Israel contended that the General Assembly acted *ultra vires* in violation of Article 12(1) as the Security Council was actively engaged with the situation in the Middle East. In interpreting Article 12(1), the Court examined the practice of the United Nations. It found that such practice had changed over time and that "there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security."[196] Thus, the Court found that "the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter," and concluded that the General Assembly did not exceed its competence.[197]

In both *Namibia* and *Wall*, the ICJ relied on subsequent practice of the United Nations, rather than that of its member states, to justify modifications of the UN Charter.[198] While in *Namibia* the Court referred

193. Alexander M. Feldman, *Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement*, 41 N.Y.U. J. INT'L L. & POL. 655, 673 (2009).

194. *Namibia*, *supra* note 191, para. 22.

195. *Wall*, *supra* note 192.

196. *Id.* para. 27.

197. *Id.* para. 28.

198. One may argue that the ICJ opinions should be characterized as re-interpretation, rather than modification, of the Charter provisions. While the line between interpretation and modification is blurred, the effect of ICJ interpretations in these cases is such that they are considered by the ILC

to the "continued unchanged" practice of the Security Council and the "general acceptance" of such practice by the UN members, in *Wall* the Court accepted the treaty-modifying value of an evolving practice of the General Assembly that was under challenge by a member state.[199]

In accord with *Namibia* and *Wall*, we may find that (i) WTO accession practice has evolved over time, (ii) using accession protocols to modify the WTO agreements has been a continued and unchanged practice of the WTO since China's accession in 2001, and (iii) such practice has been generally accepted by the members of the WTO. There are, of course, some major differences between the situations at the UN and the WTO. For one thing, the Charter provisions modified by the UN practice concern essentially procedural and institutional matters, whereas WTO accession protocols have modified a large number of WTO provisions that affect the substantive rights and obligations of the members. While the modifications of the UN Charter were relatively minor, arguably still within the margin of reinterpretation,[200] the modifications effected by WTO accession protocols constitute major departures from the MFN provisions of the WTO agreements, hence they cannot possibly be characterized as reinterpretation. Despite these differences, it would be very difficult to challenge the legality of the WTO practice under general international law, as there are no clear rules limiting the effect of a generally accepted practice of an international organization.

Compared to "subsequent agreement," "subsequent practice" is a broader and more flexible concept that can encompass not only subsequent practice of states regarding a treaty concluded between them, but also potentially subsequent practice of an international organization regarding a treaty concluded among its members. As a method of treaty modification, "subsequent practice" of an international organization does not give rise to the problem of mismatching parties to the treaty being modified, a problem that the "subsequent agreement" theory has to overcome in the context of WTO accession.[201] The "subsequent practice" explanation is more consistent with the constitutionalist approach, as opposed to the traditional functionalist approach, towards international organizations.[202] Although the WTO remains largely a member-driven

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as the leading cases for subsequent conduct as a means of treaty modification. *See* Nolte, *supra* note 173, at 169, 201–02.

199. For a detailed treatment, see Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 289 (2013).

200. *See supra* note 198.

201. *See supra* text accompanying note 174.

202. Functionalism has long been the dominant approach towards international organizations. An alternative approach is constitutionalism, which sees international organizations as independent and mature regimes. *See* Klabbers, *supra* note 175, at 4.

institution, it is undeniable that the Organization has acquired independent power and authority over its members through its highly effective dispute settlement mechanism. The trend of expanding global governance, of which the WTO plays an important part, comports more with a constitutionalist perspective on the Organization.[203] For these reasons, it is submitted here that "subsequent practice" of the WTO offers a better explanation for the phenomenon of modifications of WTO agreements through accession protocols.

Using accession agreement between a state and an international organization to modify the underlying treaty of the organization outside its formal amendment procedures is a significant development in contemporary treaty practice. Whether the WTO accession protocol can be properly characterized as "subsequent agreement" among WTO members or "subsequent practice" of the WTO institution modifying the underlying WTO agreements, the phenomenon should (but has yet to) attract the attention of the International Law Commission in its ongoing study of "Treaties over Time."[204]

### 5. *The Issue of* Ultra Vires

While the legality of the WTO accession practice can be explained under general international law (external legality), questions remain as to the legality of such practice within the WTO system (internal legality). As a formal international organization, the WTO has its institutional structure and authorities specifically provided in the WTO Agreement. While the Ministerial Conference has extensive decision-making powers, including those to adopt authoritative interpretations of the WTO provisions and to waive a WTO obligation imposed on a member,[205] the power to amend the WTO Agreement and its annexes is reserved exclusively to the members of the WTO.[206] Recognizing that authoritative interpretations can have the effect of modifying a WTO provision, Article IX:2 of the WTO

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203. It is beyond the scope of this Article to discuss the rich literature on constitutional discourse and global governance relating to the WTO. For background, see, e.g., DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM (2005); RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

204. *See* Nolte, *supra* note 173, at 307, 353–56, 385 (providing examples of international organizations and international conferences that have adopted decisions modifying the underlying treaty outside or in parallel with formal amendment procedures, and concluding that "[s]ubsequent agreements of the parties to a treaty have in rare cases led to a modification of a treaty provision" but such effect is "not to be presumed").

205. WTO Agreement art. IX:2–4.

206. *Id.* art. X.

Agreement explicitly provides that the authority of the Ministerial Conference to adopt interpretations "shall not be used in a manner that would undermine the amendment provisions in Article X." If the Ministerial Conference is explicitly prohibited from undermining the amendment provisions of Article X through treaty interpretations, it is difficult to imagine that it would be implicitly permitted to undermine the same through its authority to approve accession agreements.

Thus, as a matter of the institutional law of the WTO, a strong argument can be made that the Ministerial Conference has acted *ultra vires* in approving accession terms that *de facto* amend the provisions of the WTO agreements.[207] Under the general principles of law, an *ultra vires* act is invalid.[208] Arguably, however, such invalidity should attach only to the accession terms that modify the WTO agreements, and not to the terms that do not have such modifying effect or to the approval of accession in general since the Ministerial Conference is completely within its competence in making the latter decisions.[209]

The question then is what consequences an *ultra vires* act of the Ministerial Conference might entail. Theoretically, as suggested by Tyagi, it is possible for the Appellate Body to entertain an argument from the respondent that a term of accession modifying the provisions of the WTO agreements is invalid, hence unenforceable, on the ground that such term was approved *ultra vires* under the WTO Agreement.[210] As a practical matter, however, such "constitutional" review is highly unlikely. To begin with, the acceding country, as a potential challenger, has no standing in WTO dispute settlement proceedings before it becomes a member of the WTO; after it becomes a member, the acceded country would face major hurdles in denying the validity of the terms of its accession protocol to which it had consented voluntarily.[211] Among other things, a member may

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207. *See* Charnovitz, *supra* note 12, at 900–01 (concluding that "[g]iven the lack of any legal standard in Article XII regarding the content of accession agreements, there may not be any accession terms that are *ultra vires*" (footnotes omitted)); Tyagi, *supra* note 12, at 412–14 (claiming that the Ministerial Conference has exceeded its authority in approving the rule-modifying provisions of the accession protocols).

208. For detailed treatment of the doctrine of *ultra vires* and international organizations, see C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 193–216 (2d ed. 2005); Enzo Cannizzaro & Paolo Palchetti, Ultra Vires *Acts of International Organizations*, *in* RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS, *supra* note 175, at 365.

209. *See* VCLT, *supra* note 14, art. 44(3) (noting that invalidity may be invoked only with respect to certain clauses of a treaty if (i) such "clauses are separable from the remainder of the treaty"; (ii) "acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty"; and (iii) "[c]ontinued performance of the remainder of the treaty would not be unjust").

210. Tyagi, *supra* note 12, at 418.

211. *See* Charnovitz, *supra* note 12, n.190. The grounds for claiming invalidity of a treaty by a state

be prevented from challenging the legality of the act if it has failed to raise its objection within a reasonable time.[212] In the unlikely event that such an *ultra vires* claim is advanced, it is doubtful that the WTO judiciary would be willing to judge the competence of the Ministerial Conference.[213] Indeed, it has been observed that "the doctrine [of *ultra vires*] does not work very well in the decentralized international legal order," for "[i]f all member states agree that a certain course of action is the right thing to do, even if difficult to reconcile with the constituent document, then who is to say differently?"[214] Moreover, "the limits of the *ultra vires* doctrine can easily be circumvented."[215] And it would not be hard for WTO judges to avoid ruling directly on the "constitutionality" of an alleged *ultra vires* act.[216]

*B. The Legal Basis for Integrating Accession Protocols with the WTO Agreement*

As noted above, Article XII of the WTO Agreement authorizes the WTO to enter into agreements with acceding governments, but neglects to address how such agreements should fit into the WTO legal framework; to make up this deficiency, a standard clause is included in every WTO accession protocol that declares the protocol to be an "integral part" of the WTO Agreement.[217] The legal effect of this integration clause, however, is questionable. As a matter of treaty law, it is unclear how an accession protocol, which is a bilateral treaty between an acceding country and the WTO, can transform itself into a multilateral one among the members of the WTO. As a matter of legal logic, one treaty cannot make

are limited under the VCLT. *See* VCLT, *supra* note 14, arts. 42, 46–53 (identifying four broad types of grounds: improper (domestic) procedures, error or fraud, coercion, and *jus cogens*). Under Article 46, *ultra vires* in internal law is not a ground for a treaty party to invalidate the treaty unless the *ultra vires* act was "manifest" and "concerned a rule . . . of fundamental importance." A similar rule exists with respect to *ultra vires* acts of an international organization under VCLTIO. VCLTIO, *supra* note 174, art. 46.2.

212. *See* Cannizzaro & Palchetti, *supra* note 208, at 365, 379–80 (suggesting that states' acquiescence may have the effect of validating an *ultra vires* act of an international organization).

213. In such a case, the WTO judiciary would be forced to answer the question of whether the Ministerial Conference had exceeded its competence under Article XII of the WTO Agreement by approving a term of accession that effectively amends Article I:1 of GATT 1994, since such an amendment can only be made by unanimous consent of the members under Article X of the WTO Agreement. Institutionally, the prevailing concern at the WTO has been with "judicial activism." Tyagi, *supra* note 12, at 412–17.

214. Klabbers, *supra* note 175, at 10.

215. *Id.* (citing examples of ICJ cases). The ICJ has been "reluctant to subject the activities of the leading political institutions of global governance to strict legal scrutiny" and "has offered no consistent or coherent view on the validity of international institutional law." Jan Klabbers, *The Validity and Invalidity of Treaties*, *in* THE OXFORD GUIDE TO TREATIES 551, 556–57 (Duncan B. Hollis ed., 2012).

216. *See, e.g.*, *supra* text accompanying notes 140–41 (describing the way the Panel avoided judging the legality of the special safeguard provision of the China Accession Protocol).

217. *See* 2010 Secretariat Note, *supra* note 7, at 4 para. 2.

itself part of another treaty without express authorization of the latter.[218] Indeed, it is common to find within the WTO treaty framework that one instrument designates another as its integral part, but each of such designations is made through explicit provision in the primary instrument, not the other way around.[219]

Thus, it seems clear that the proclamation of the accession protocol that it shall form an integral part of the WTO Agreement is legally ineffective. This conclusion, of course, has some serious implications. The lack of effective integration between accession protocols and the WTO Agreement affects the legal status of the additional commitments contained in the protocols.[220]

However, there should be no doubt that the Members intended all the accession agreements to be "integral parts" of the WTO Agreement. This intention is not only explicitly expressed in the integration clause of each accession protocol, but is also consistent with the single-undertaking design of the WTO treaty system. In essence, the integration clause is another example of subsequent practice of the WTO that effectively amends the WTO Agreement.

### *C. The Legal Basis for Enforcing Accession Protocols*

WTO accession protocols do not contain any provisions on dispute settlement,[221] which is in contrast with the presence of specific dispute settlement provisions in each of the substantive WTO agreements.[222] In retrospect, this seems a glaring omission in treaty design. Yet it is understandable given the GATT pedigree of accession protocols. During the GATT era, dispute settlement was not mandatory, and the party that lost a case could block the adoption of an unfavorable decision by a

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218. Credit to Qing Ren who was the first to raise this argument of legal logic to this author. *See also* Charnovitz, *supra* note 12, at 888 (describing the integration clause as "bootstrapping"); Tyagi, *supra* note 12, at 400 (describing the "external" integration from an accession protocol to the WTO Agreement as "implausible").

219. Tyagi, *supra* note 12, at 400.

220. It also throws into question the legal basis for annexing the schedules of acceded members to GATT 1994 and GATS, since the schedules only take effect as part of the accession protocols. As Kennedy points out, "the use of protocols to annex schedules after the entry into force of GATT 1994 and GATS *in general* lacks a clear treaty basis." Kennedy, *supra* note 12, at 47 (emphasis original).

221. The only mention of dispute settlement in the China Accession Protocol is a commitment by China that "WTO Members would have recourse to WTO dispute settlement to ensure implementation of all commitments in China's GATS schedule." China Working Party Report, *supra* note 99, para. 320. Since China's GATS schedule would be incorporated into GATS, which is a covered agreement under the DSU, this mention is redundant and says nothing about dispute settlement for the accession protocol generally.

222. Under DSU, disputes concerning these substantive agreements are brought pursuant to their specific dispute settlement provisions. DSU art. 1.1.

dispute settlement panel.[223] More importantly, those were the "innocent times" when the terms of accession did not routinely include extensive rule commitments that went beyond the standard GATT provisions.[224]

Technically speaking, because the WTO accession protocol is a bilateral agreement, the only party entitled to sue the acceding country for a breach of protocol provisions is the WTO. The WTO, however, does not have access to its internal dispute settlement mechanism. According to the DSU, the WTO dispute settlement mechanism is available to members only.[225]

Despite the lack of a clear legal basis for adjudicating claims arising under an accession protocol, the WTO judiciary has accepted the enforceability of accession obligations under the DSU without question. The panels and the Appellate Body have thus far cited three grounds for this position: (i) All parties to the dispute agree that the accession commitments in question are enforceable in WTO dispute settlement proceedings; (ii) the accession protocol is an integral part of the WTO Agreement pursuant to the integration clause of the protocol; and (iii) in the case of China's Accession Protocol, the mandatory nature of much of its language indicates that its drafters intended it to be enforceable under the DSU.[226]

None of these grounds, however, is completely sound. First, consent by all parties to the dispute is not sufficient to confer jurisdiction in WTO dispute settlement.[227] The authority and jurisdiction of the WTO Dispute Settlement Body (DSB) are established in the DSU, which limits the application of its rules and procedures specifically to a list of WTO agreements defined as "covered agreements."[228] Accession protocols are not on that list. Second, even assuming the integration clause in the accession protocol is legally valid, being an integral part of the WTO Agreement (which is a covered agreement) does not necessarily make the accession protocol itself a covered agreement. As Matthew Kennedy notes, the Trade Policy Review Mechanism (TPRM)[229] is also an "integral

223. GATT dispute settlement panel reports were adopted by consensus. *See* WORLD TRADE ORG., GATT ANALYTICAL INDEX, *supra* note 46, at 640.

224. Tyagi, *supra* note 12, at 414.

225. DSU art. 1.1.

226. *See* Panel Reports, *China — Measures Affecting Imports of Automobile Parts*, paras. 7.740–741, WT/DS339/R, WT/DS340/R, WT/DS342/R (July 18, 2008); Appellate Body Report, *China — Auto Parts*, *supra* note 110, paras. 213–14; Panel Reports, *China —Measures Related to the Exportation of Various Raw Materials*, paras. 7.64, 7.114, 7.962, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011) [hereinafter Panel Reports, *China — Raw Materials*]; Appellate Body Report, *China — Rare Earths*, *supra* note 117, para. 5.19 & n.422.

227. *See* Tyagi, *supra* note 12, at 398–99.

228. DSU art. 1.1, Appendix I.

229. Trade Policy Review Mechanism, Apr. 15, 1994, Marrakesh Agreement Establishing the

part[ ]" of the WTO Agreement,[230] but because it is not a covered agreement under the DSU, disputes concerning TPRM may not be brought in WTO dispute settlement.[231] Third, the mandatory nature of the language used in China's Accession Protocol merely indicates the intention of its parties to make its provisions legally binding, which is a different question from the one of where and how such provisions may be enforced. Technically, disputes arising from the protocol provisions can be resolved outside the WTO if the parties so choose. Furthermore, from a systemic perspective, if the mandatory language used in the accession protocol is indeed a factor in conferring the jurisdiction of WTO dispute settlement, then it becomes questionable whether the many accession commitments contained in the working party reports of the acceding members are ever enforceable under the DSU, since these commitments are typically expressed in the form of "would" — rather than "shall" — language of a non-mandatory nature.[232]

It has been suggested that jurisdiction over accession protocols can be derived from Article XII of the WTO Agreement, the provision authorizing the accession agreements.[233] According to Steve Charnovitz, accession protocols entered into "pursuant to" Article XII are enforceable in WTO dispute settlement even though they are not "covered agreements,"[234] because the DSU applies to "consultations and the settlement of disputes between Members concerning *their rights and obligations under the provisions of the [WTO Agreement]* . . . taken in isolation or in combination with any other covered agreement."[235] This proposition assumes that members have rights and obligations under Article XII of the WTO Agreement that can extend to agreements entered thereunder. However, Article XII does not provide rights and obligations of members. Rather, it prescribes the authority and decision-making process of the Ministerial Conference regarding accession and the scope of accession. The only "right" it grants is to the applicant country, which "may" accede to the WTO on terms to be agreed with the WTO. Hence, as a formal

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World Trade Organization, Annex 3, 1869 U.N.T.S. 480.

230. WTO Agreement art. II:2.

231. Kennedy, *supra* note 12, at 48.

232. Because the working party report is a summary of the accession proceedings, it is conventionally written in the past tense. In keeping with this style, all specific commitments made by the acceding country during the proceedings are expressed in the past future tense of "would" in the working party report. See *infra* note 298 for an example. Despite such a non-standard way in which the accession commitments are formulated, they become binding as "an integral part" of the WTO Agreement. The binding nature of these commitments, however, does not speak to the issue of whether they are enforceable under the DSU.

233. *See* Charnovitz, *supra* note 12, at 895.

234. *Id.*

235. DSU art. 1.1 (emphasis added).

matter, Article XII cannot become the basis for jurisdiction over accession protocols.[236]

Notwithstanding the dubious legal basis for enforcing accession protocols, the key issue is to ascertain the intention of the parties. Per Charnovitz, the intention of the members regarding the enforceability of accession terms can be deduced from, *inter alia*, the executory nature of the accession terms and "the object and purpose of expending years in accession negotiations."[237] It should be recalled, however, that at the time the WTO Agreement was negotiated in the early 1990s, the "terms" of accession were generally understood as commercial concessions that would be incorporated into the GATT and GATS schedules, which would be enforceable as part of the covered agreements.[238] Since the practice of routinely demanding additional rule commitments (i.e., commitments not incorporated into the GATT and GATS schedules) did not develop until years after the conclusion of the WTO Agreement, it is difficult to conclude that enforceability of such rule commitments was the original intention behind Article XII.

So the question remains as to whether there is also a subsequent intent of the members to make the additional rule commitments enforceable in WTO dispute settlement. To date, in all disputes involving accession protocols, parties have accepted their enforceability, and no member has voiced objection to DSB's jurisdiction. But such subsequent practice may not be sufficient to establish "the agreement" of members regarding the interpretation of Article XII.[239] Technically, a WTO dispute settlement

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236. Moreover, substantively, article XII could not be expected to authorize the Ministerial Conference to enter into agreements that would alter the rights and obligations of members under the WTO Agreement and its annexes. *See* Tyagi, *supra* note 12, at 402.

237. Charnovitz, *supra* note 12, at 894–95 (asking "[i]f [the terms] are not enforceable, what would be the object and purpose of expending years in accession negotiations?").

238. *See generally* Antonio Parenti, *Accession to the World Trade Organisation: A Legal Analysis*, 27 LEGAL ISSUES ECON. INTEGRATION 141, 152 (2000) (analyzing the legal framework of WTO accession, and concluding that despite "the vagueness" of Article XII of the WTO Agreement, "the terms of accession of one country cannot go beyond the requirements imposed by the [WTO] Agreement itself, which is the scheduling of [commercial] commitments in the market access sphere and the assurance of the respect of the various parts that form the WTO Agreement").

239. Under VCLT Article 31(3)(b), a treaty interpreter is required to "take[ ] into account, together with the context[,] . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." VCLT, *supra* note 14, art. 31(3)(b). The Appellate Body has been very cautious in finding "subsequent practice" within the meaning of Article 31(3)(b). It specifically cautioned that

> "lack of reaction" should not lightly, without further inquiry into attendant circumstances of a case, be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty. This is all the more so because the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the treaty, including those that have not actually engaged in such practice.

decision is only binding on the disputing parties with respect to their particular dispute. Thus, absent an authoritative interpretation by the Ministerial Conference or the General Council confirming the enforceability of accession protocols,[240] nothing could prevent an acceded member from raising objection to such enforceability in the future,[241] which would destroy any sense that there existed an implicit "agreement" among the members on the issue.[242]

In the view of this author, a more convincing argument is that the members did intend to make the additional rule commitments enforceable, and such intent can be inferred from their clear intention to integrate the accession protocols into the WTO Agreement. Since the WTO Agreement and all of its integral parts other than the TPRM are "covered agreements" if the members intended accession protocols to be "integral parts" of the WTO Agreement, it is reasonable to assume that they also intended to make such protocols part of "covered agreements" coextensively, that is, to make the DSU applicable to all provisions of the protocols other than those relating to the TPRM.[243] In short, the members' intention on the enforceability of accession protocols is the logical extension of their intention to integrate the accession protocols with the WTO Agreement. Ultimately, treating accession protocols as "covered agreements" is yet another example of "subsequent practice" of the WTO that effectively amends the DSU.

### *D. Defining Relationship Between Accession Protocols and the WTO Agreement*

Defining the relationship between accession protocols and the WTO Agreement is critical for the interpretation and application of the

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Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, para. 273, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005).

240. WTO Agreement art. IX:2.

241. The fact that an accession protocol is binding on the acceded member under international law does not mean such protocol is automatically enforceable in WTO dispute settlement. Arguably, those members that have accepted the enforceability of accession protocols in previous cases can be estopped from claiming otherwise in future disputes. However, it is far from clear how the estoppel principle would apply in the context of WTO dispute settlement. *See* Tyagi, *supra* note 12, at 422–24; *see also* Feldman, *supra* note 193, at 693.

242. This uncertainty may be removed at a future point in time when general practice is considered sufficient to establish the agreement of all members concerning the enforceability of accession protocols.

243. Accession protocols do mention TPRM. *See, e.g.*, Russia Working Party Report, *supra* note 106, para. 1413 ("[T]he Russian Federation would participate in other WTO mechanisms, such as the Trade Policy Review Mechanism and WTO Council and Committee reviews, and various WTO consultation procedures which would provide opportunities to exchange information and provide for increased transparency."). The paragraph is incorporated into the Russia Accession Protocol. *See* Russia Accession Protocol, *supra* note 105, para. 2.

accession protocols and of the WTO provisions that have been effectively modified by the accession protocols. The characterization of a WTO accession protocol either as a subsequent agreement modifying the WTO agreements, or as a subsequent practice of the WTO modifying its underlying treaties, provides a conceptual foundation for defining such a relationship properly.

### 1. *VCLT Article 30 Provides the Principle*

If we posit that an accession protocol is a treaty "subsequent" to the WTO Agreement and that it pertains to the application of the WTO Agreement, then VCLT Article 30 becomes applicable in defining the relationship between the accession protocol and the WTO Agreement.[244] Article 30, *Application of Successive Treaties Relating to the Same Subject Matter,* contains rules for determining the rights and obligations of state parties to successive treaties relating to the same subject matter.[245] Pursuant to Article 30(3), "[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation . . . , the earlier treaty applies only to the extent that its provisions are *compatible* with those of the later treaty."[246] This provision, embodying the doctrine of *lex posterior derogat priori,* recognizes that the same parties to a treaty may enter into another treaty relating to the same subject matter that contains provisions incompatible with those of the earlier treaty. In this situation, the parties effectively amend the earlier

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244. Characterizing WTO accession protocols as "subsequent practice" of the WTO modifying its underlying treaty does not change the fact that the accession protocols are treaties themselves.

245. Article 30 reads in full:

> Application of Successive Treaties Relating to the Same Subject Matter
>
> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) As between States parties to both treaties the same rule applies as in paragraph 3;
>
> (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

VCLT, *supra* note 14, art. 30.

246. *Id.* art. 30(3) (emphasis added).

treaty by the later treaty without making formal amendment to the earlier one.

Article 30 covers not only the situation where the parties to the two treaties are identical, but also the situation where there are additional parties to the later treaty. Pursuant to Article 30(4)(b), "[w]hen the parties to the later treaty do not include all the parties to the earlier one, . . . [a]s between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."[247] This provision is understood to cover both the situation where the additional party is only to the earlier treaty and the situation where the additional party is only to the later treaty.[248] The WTO accession protocol can be deemed to fall into the second situation — where the parties to this later treaty include all incumbent members represented by the WTO and the acceding country as an additional party, and where the mutual rights and obligations between the incumbent members and the acceding country are governed by this later treaty.

There are two general circumstances in which the later treaty may not modify an earlier treaty relating to the same subject matter. The first is when an earlier treaty explicitly prohibits derogation from its provisions by subsequent treaties.[249] The WTO Agreement does not contain such a prohibition. The second is when the later treaty conflicts with a norm in the earlier treaty that is *jus cogens* in character, which will render the later treaty void.[250] No norms in the WTO agreements, including the norm of nondiscrimination, have attained the status of *jus cogens*.

Article 30 contains, in essence, the priority or conflict rules between the provisions of successive treaties relating to the same subject matter.[251] In accordance with Article 30, in relation between the acceded member and other members of the WTO, the provisions of the accession protocol

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247. *Id.* art. 30(4)(b).

248. *See* SEYED ALI SADAT-AKHAVI, METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES 64 (2003); MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 322 (2005).

249. For example, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 11, *opened for signature* Mar. 22, 1989, 1673 U.N.T.S. 126, provides that "Parties may enter into [other agreements] regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention." *See* SADAT-AKHAVI, *supra* note 248, at 163–64.

250. VCLT, *supra* note 14, art. 53. *Jus cogens* is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*

251. *See generally* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 361–85 (2003) (analyzing the content of Article 30 in the subsection entitled "Lex posterior").

shall prevail over the prior WTO agreements to the extent they are inconsistent or incompatible or in conflict with each other.[252] If a provision of the accession protocol is seen as inconsistent with a provision of the WTO agreements, the two provisions necessarily relate to the same subject matter.[253]

Are WTO-plus and WTO-minus provisions of an accession protocol inconsistent or incompatible with the WTO agreements? The answer seems straightforward with respect to WTO-minus provisions. Since a WTO-minus provision (e.g., Paragraph 16 of China's Accession Protocol providing for the China-specific safeguards) permits a WTO member to depart from the MFN obligations of the WTO agreements — in the case of safeguard measures, GATT Article I:1 and the Agreement on Safeguards Article 2.2[254] — it is inconsistent and incompatible with the MFN provisions of the WTO agreements.[255]

The question of inconsistency between WTO-plus provisions and the WTO agreements may require a bit more explanation. Because a WTO-plus provision prescribes an obligation *additional* to those prescribed by the WTO agreements, one might not see conflict between the WTO-plus provision and the WTO agreements. This view, however, is based on a very narrow definition of conflict, i.e., conflict exists only between two contradicting commands.[256] This narrow definition is insufficient to define conflict in the WTO system, which provides both *rights* and *obligations* for its members.[257] If we are to "tak[e] WTO rights seriously,"[258] we need to adopt a broader definition of conflict, namely, that conflict exists not only when two provisions prescribe inconsistent obligations, but also when a provision prescribes an obligation that contravenes a right or takes away an exemption granted by another WTO provision.[259] Take for example

252. The terms "inconsistency," "incompatibility," and "conflict" are used interchangeably in this Subpart.

253. *See* PAUWELYN, *supra* note 251, at 364.

254. *See supra* text accompanying notes 136–37.

255. The conflict between the obligation of incumbent members under a WTO agreement and the permission for them to derogate from the obligation under an accession protocol can also be viewed as a conflict between the right of the acceded member to receive MFN treatment under the WTO agreement and its obligation to forgo such right under the accession protocol.

256. *See* PAUWELYN, *supra* note 251, at 179–84 (describing this situation as one of the four situations of conflict).

257. That the WTO agreements provide both rights and obligations is confirmed by WTO treaty language and by WTO case law. *See, e.g.*, DSU art. 19.2 (referring explicitly to "the rights and obligations provided in the covered agreements"); Appellate Body Report, *Brazil — Measures Affecting Desiccated Coconut*, at 13, WT/DS22/AB/R (Feb. 21, 1997) (stating that "all WTO Members are bound by all the rights and obligations in the *WTO Agreement* and its Annexes 1, 2 and 3").

258. PAUWELYN, *supra* note 251, at 197.

259. Pauwelyn, however, does not seem to recognize conflict between a norm granting a right and a subsequent norm taking away that right. *See id.* at 178–79. Nonetheless, he also cites as an

China's WTO-plus obligation to eliminate export duties. This obligation contravenes members' right to use duties to restrict exports permitted by GATT Article XI:1, hence the obligation is inconsistent with the latter provision.[260]

In a sense, the relationship between the WTO agreements and WTO accession protocols is analogous to the relationship between GATT 1947 and the Multilateral Agreements on Trade in Goods (Annex 1A of the WTO Agreement), which are later treaties expanding and modifying the provisions of GATT 1947. Recognizing the potential conflict between the new agreements on trade in goods and GATT 1947 (which was then re-concluded as GATT 1994), the Uruguay Round negotiators adopted a conflict rule as the General Interpretive Note to Annex 1A: "In the event of conflict between a provision of [GATT 1994] and a provision of another agreement in Annex 1A . . . the provision of the other agreement shall prevail to the extent of the conflict."[261] By contrast, WTO accession protocols do not contain an explicit conflict rule. As a result, it becomes necessary to follow the conflict rules in VCLT Article 30 in determining the relationship between an accession protocol and the WTO agreements.

In summary, WTO-plus and WTO-minus terms of an accession protocol give rise to conflict with provisions of the WTO agreements, either because they permit members to depart from an obligation prescribed by the WTO agreements or because they require the acceded member to forgo its rights granted by the WTO agreements. Pursuant to the conflict rule in VCLT Article 30(3), the WTO agreements will apply to the acceded member only to the extent that their provisions are compatible with the accession protocol. That is, the accession protocol shall take precedence over the provisions of the WTO agreements to the full extent of its WTO-plus and WTO-minus provisions.

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example of conflict the discrepancy between GATT Article XVI:4, which exempts primary products from export subsidy disciplines — a norm granting a right — and certain provisions of the Agreement on Agriculture, which prescribes explicit export subsidy disciplines on agricultural products — a subsequent norm taking away that right. *Id.* at 196–97 (citing Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, para. 117, WT/DS108/AB/R (Feb. 24, 2000) (recognizing the inconsistency between GATT Article XVI:4 and the Agreement on Agriculture)).

260. GATT Article XI:1 prohibits any member from maintaining any restrictions "other than duties, taxes or other charges" on the exportation of any product destined for the territory of another member. The dissenting Panelist in *China — Rare Earths* correctly pointed out that this WTO-plus obligation "modifies the general rule contained in GATT Article XI:1 — that is, China waived its right to apply export duties." Panel Report, *China — Rare Earths*, *supra* note 131, para. 7.136 (dissenting opinion). In contrast, the majority of the Panel erroneously held that China's obligation to eliminate export duties "does not relate to the same subject-matter" as GATT Article XI. *Id.* para. 7.95 (majority opinion).

261. General Interpretive Note to Annex 1A, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187.

### 2. *Implications of Being "An Integral Part": Availability of Public Policy Exceptions*

A vexing issue in disputes involving China's Accession Protocol has been the applicability of the general exceptions in GATT Article XX to China's accession commitments.[262] The issue arises because the accession protocol does not contain a set of general exceptions of its own[263] and is silent as to whether the general policy exceptions contained in the WTO agreements, such as GATT Articles XX and XXI, and GATS Articles XIV and XIV *Bis*, should also be available to its country-specific accession obligations.

As previously noted, taking a narrow textualist approach, the Appellate Body has reached different conclusions on this issue with respect to different provisions in China's Accession Protocol.[264] In *China — Publications and Audiovisual Products*, the Appellate Body found that GATT Article XX is available to China's commitment on trading rights set out in paragraph 5.1 of China's Accession Protocol, based on a textual reference to the WTO Agreement in the paragraph.[265] In *China — Raw Materials,* it found that GATT Article XX is not available to China's commitment on the elimination of export duties set out in Paragraph 11.3 of China's Accession Protocol, in light of "the lack of any textual reference" to GATT Article XX in that paragraph.[266] Notably, in *China — Rare Earths*, which involved the same issue concerning Paragraph 11.3,[267] the Appellate Body stated: "[E]xpress textual references, or the lack thereof, to a covered agreement (such as the GATT 1994), a provision thereof (such as . . . Article XX of the GATT 1994), or 'the WTO Agreement' in general, are *not* dispositive in and of themselves."[268] Yet, having made this statement, the Appellate Body went on to reaffirm its findings in *China — Raw*

262. *See supra* text accompanying notes 127–32.

263. The absence of general exceptions in the accession protocol is understandable from a historical perspective. The issue did not arise in GATT accession protocols because special rule commitments by the acceding countries were rare during the GATT era. While WTO accession practice has since changed dramatically, WTO accession protocols still follow the format of GATT accession protocols. In addition, it might be technically difficult to design one set of general exceptions applicable to all special obligations under a WTO accession protocol, given that such obligations may relate to subject matters across the entire spectrum of the WTO agreements and more.

264. *See supra* text accompanying notes 128–31.

265. *See supra* note 128 and accompanying text.

266. Appellate Body Reports, *China — Raw Materials*, *supra* note 116, para. 306.

267. China chose not to directly challenge the Appellate Body's finding on this issue in *China — Raw Materials*, which was followed by the Panel in *China — Rare Earths*, but sought to clarify the systemic relationship between its accession protocol and the WTO Agreement in general. *See* Appellate Body Report, *China — Rare Earths*, *supra* note 117, paras. 2.10, 5.65.

268. Appellate Body Report, *China — Rare Earths*, *supra* note 117, para. 5.61 (emphasis original).

*Materials*, declaring its interpretive approach in that case as a "holistic" one.[269]

Much of the confusion over this issue stems from the lack of a clear understanding of the relationship between the accession protocol and the WTO agreements. Once we recognize that the WTO accession protocol constitutes a subsequent agreement — or subsequent practice of the WTO embodying the agreement of its members — that modifies the provisions of the WTO agreements in their application to the acceded member, the analysis becomes easier.

Let us again take the case of export taxes for example. As previously noted, under GATT Article XI:1, WTO members are permitted to use duties and taxes to restrict exports.[270] Nonetheless, a number of acceded members have been required to eliminate or limit the use of export taxes under their accession protocols.[271] In the case of China, it was obligated to eliminate duties and taxes on all exports except for eighty-four products.[272] Consequently, the provision of GATT Article XI:1 has been modified by these subsequent accession agreements. In effect, GATT Article XI:1 should now read as follows:

> *Subject to the provisions restricting the use of export taxes set out in the accession protocols of acceded Members,* [n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.[273]

This amended version of Article XI:1 reflects the current status of WTO law on the rights and obligations regarding export taxes. The amendment is *de facto* only, since it was done by subsequent agreements (or subsequent practice of the WTO), rather than through the formal amendment

269. *Id.* para. 5.63.

270. *See supra* note 260 and accompanying text.

271. These countries include Mongolia, Latvia, Croatia, China, Saudi Arabia, Vietnam, Ukraine, Montenegro, and Russia. For detailed discussion on the topic, see Julia Ya Qin, *Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection*, 46 J. WORLD TRADE 1147 (2012).

272. Paragraph 11.3 of China's accession reads: "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994." Annex 6 contains a list of eighty-four products and the maximum rates of export duties that may be levied on them. In addition, the Note in Annex 6 obligates China not to increase the rates applied at the time of accession "except under exceptional circumstances." China Accession Protocol, *supra* note 42, at Annex 6.

273. GATT 1947 art. XI:1 (proposed amendment in italics); GATT 1994 art. 2(a).

procedures provided in the WTO Agreement. This *de facto* amendment to Article XI:1 is legally inevitable, given the inconsistency between its provision that allows *all* members to use export taxes, and the provisions of the subsequent accession protocols that disallow such use by *some* members.

This amendment, however, does not affect the application of the GATT general policy exceptions available to Article XI:1, such as Articles XX and XXI, because there is no incompatibility between the additional obligations of some members not to use export taxes and such policy exceptions.[274] Thus, unless an accession protocol explicitly provides otherwise, the policy exceptions of GATT Articles XX and XXI continue to apply to Article XI:1, as amended.

The same analysis should apply to the relationship between other WTO-plus provisions of the accession protocols and the general exceptions contained in the WTO agreements, such as GATT, GATS, and TRIPS. So long as a WTO-plus provision relates to the subject matter of a WTO agreement, be it trade in goods, trade in services, or trade-related intellectual property rights or investment measures, the provision *de facto* amends the WTO agreement by expanding the scope of its obligations. While such a provision may take away an existing right under the WTO agreement, it does not conflict with the general exceptions contained therein. Accordingly, unless the accession protocol explicitly provides otherwise, the general exceptions should remain available to the expanded scope of obligations under the same agreement.

The above understanding of the relationship between specific obligations of an accession protocol and the general exceptions in the WTO agreements reflects the inherent nature of the accession protocol being an "integral part" of the WTO Agreement. Because an accession protocol is concluded later in time and its provisions are intended to elaborate, expand, or modify the provisions of the WTO agreements in application to the acceded member, the integration between the accession provisions and the rest of the WTO Agreement must be made organically, that is, on the basis of "same subject matter" within the meaning of VCLT Article 30. Only after any potential conflict between the accession provisions and the rest of the WTO Agreement is identified and resolved properly can the relationship between them be interpreted in a truly

274. As the dissenting opinion in *China — Rare Earths* duly pointed out, the provisions of the GATT policy exceptions "strike a balance between the policy space governments enjoy to pursue legitimate objectives and their obligations under the GATT 1994." And "the fundamental importance of the flexibilities" provided in GATT Articles XX and XXI is "incontrovertible," "[i]n light of the preamble of the WTO Agreement, which embodies the purpose and objective of the WTO." Panel Report, *China — Rare Earths*, *supra* note 131, para. 7.137 (dissenting opinion).

"coherent and consistent manner, giving meaning to all applicable provisions [of the WTO Agreement] harmoniously."[275]

*3. Appellate Body's Assessment of the Relationship Between Accession Protocols and the WTO Agreement*[276]

In *China — Rare Earths*, China sought to clarify the systemic relationship between its accession protocol and the WTO Agreement by advancing a number of arguments on how its accession commitments should be interpreted as an integral part of the WTO Agreement. In response, the Appellate Body conducted an extensive analysis to assess the relationship between China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other. It reached the following conclusions:

> (a) Just like the Multilateral Trade Agreements, China's Accession Protocol is "an integral part of the Marrakesh Agreement" and thereby forms "an integral part" of the "single package of WTO rights and obligations."
>
> (b) Just "like the approach to ascertaining the relationship among provisions of the Multilateral Trade Agreements, the specific relationship between the provisions of China's Accession Protocol, on the one hand, and the provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand, must also be determined on a case-by-case basis . . . . Neither obligations nor rights may be automatically transposed from one part of the [WTO] legal framework into another."
>
> (c) "[T]he questions of whether a particular protocol provision at issue has an objective link to specific obligations under the Marrakesh Agreement and the Multilateral Trade Agreements, and whether the exceptions under those agreements may be invoked to justify a breach of such protocol provision . . . . must be ascertained through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute."[277]

275. *See* Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, para. 5.123, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014).

276. A portion of the analysis in this Subpart is contained in Julia Ya Qin, Editorial Comments, *Judicial Authority in WTO Law: A Commentary on the Appellate Body's Decision in* China-Rare Earths, 13 CHINESE J. INT'L L. 639, 643–49 (2014).

277. Appellate Body Report, *China — Rare Earths*, *supra* note 117, para. 5.57.

In short, the Appellate Body viewed the relationship between an accession protocol and the Multilateral Trade Agreements as no different from the relationship among the Multilateral Trade Agreements, since they all form "integral parts" of the Marrakesh Agreement.

From this basic position, the Appellate Body dismissed all of China's arguments that did not comport therewith. China had argued that specific provisions of the accession protocol should be treated as integral parts of one of the Multilateral Trade Agreements, depending on the subject matter to which they "intrinsically relate[ ]."[278] The Appellate Body rejected this argument on the grounds that China did "not provide[ ] a clear definition of the 'intrinsic relationship' test" and that China's position "sits uncomfortably with our interpretation . . . that rights and obligations *cannot be automatically transposed* from one part of the WTO legal framework to another."[279]

China also sought to differentiate its accession protocol from the Multilateral Trade Agreements, arguing that unlike the Multilateral Trade Agreements, its accession protocol is not a "self-contained agreement," since it "does not include most of the important features that many of the Multilateral Trade Agreements possess, such as proper general exceptions, security exceptions, or a modification clause."[280] The Appellate Body dismissed the term "self-contained agreement" as not being "an apt descriptor" of any of the agreements contained in the integrated WTO framework. It further stated that, within the "single package of [WTO] rights and obligations, . . . . whether an instrument can be characterized as a 'self-contained agreement'" is "of limited relevance for the question . . . [of] specific relationship between a Protocol provision and provisions of a covered agreement."[281]

Notably, China also submitted that its accession protocol is properly characterized as a "subsequent agreement" relating to the same subject matter in the sense of VCLT Article 30, and that to the extent that specific

278. Panel Report, *China — Rare Earths*, *supra* note 131, para. 7.76. In *China — Rare Earths*, the parties and the Panel had engaged in a lengthy debate over the specific part of the WTO Agreement to which China's Accession Protocol should be considered integral. The majority of the Panel held that China's Accession Protocol is an integral part of the Marrakesh Agreement, not of the Multilateral Trade Agreements annexed thereto. *See id.* para. 7.89. While the Appellate Body declined to accept China's position, it did not make a direct finding on the issue. *See* Appellate Body Report, *China — Rare Earths*, *supra* note 117, para. 5.73. In the view of this author, the accession protocols should have been drafted as annexes to the Marrakesh Agreement. *See infra* Part III.E. The precise location of the accession protocols within the WTO Agreement, however, should not affect the interpretation of the relationship between specific accession provisions and other WTO provisions, as they must be integrated on the basis of the "same subject matter."

279. Appellate Body Report, *China — Rare Earths*, *supra* note 117, para. 5.68 (emphasis original).

280. *Id.* para. 5.69 (footnotes omitted) (internal quotation marks omitted).

281. *Id.* para. 5.70 (footnote omitted).

provisions of the accession protocol conflict with the provisions of the Multilateral Trade Agreements, the provisions of the accession protocol must prevail to the extent of the conflict.[282] To illustrate, China pointed to Paragraph 11.3 of its accession protocol and GATT Article XI:1 and explained that, pursuant to VCLT Article 30(3), GATT Article XI:1 has been modified by Paragraph 11.3 of its accession protocol, so that China can no longer freely impose export duties under GATT Article XI:1.[283] The Appellate Body dismissed China's argument as not "comport[ing] well" with its previously stated views. Without further explanation, the Appellate Body declared that:

> [W]e do not consider Article 30(3) of the Vienna Convention to be apposite for understanding the relationship between the different components of this single package of rights and obligations, all of which form part of the "the same treaty" to which China acceded in 2001.[284]

This summary dismissal of VCLT Article 30(3) as inapposite for understanding the relationship between different components of the WTO agreements, however, is erroneous. As previously noted, the principle of VCLT Article 30(3), which codifies the general conflict rule of *lex posterior*, is explicitly embodied in the WTO Agreement.[285] Recognizing the potential conflict between the various agreements on trade in goods concluded in 1994 and the provisions of GATT 1947, the Uruguay negotiators adopted the General Interpretive Note to Annex 1A, which provides that in the event of conflict between a GATT provision and a provision of another agreement on trade in goods contained in Annex 1A, "the provision of the other agreement shall prevail to the extent of the conflict."[286] As for understanding the relationship between specific provisions of accession protocols and the provisions of the WTO agreements, VCLT Article 30(3) is not only "apposite," but indispensible. That is because, in the absence of any explicit conflict clause in the WTO Agreement that otherwise defines such relationship, VCLT Article 30(3) provides the "relevant rules of international law" applicable, and as such, must be taken into account in treaty interpretation.[287] Unfortunately, it

282. *Id.* paras. 2.26, 5.69.

283. *Id.* para. 5.69. Implicit in China's position should be the argument that pursuant to VCLT Article 30(3), GATT Article XX should apply to Paragraph 11.3 of its accession protocol since there is no incompatibility between the two provisions. According to the Appellate Body, China did not elaborate the arguments and concepts underlying its position. *See id.* para. 5.70.

284. *Id.* para. 5.70 (footnote omitted).

285. *See supra* text accompanying note 246.

286. General Interpretive Note to Annex 1A, *supra* note 261.

287. VCLT, *supra* note 14, art. 31(3)(c).

appears that the Appellate Body completely overlooked the need to resolve conflict between the provisions of the accession protocols and the provisions of the WTO agreements on the same subject matter. Without first identifying and resolving such conflict, however, it is impossible to interpret the accession protocols and other components of the WTO Agreement as the "single package of rights and obligations" in a truly consistent and coherent manner.

On the whole, in assessing the relationship between the accession protocol and the Multilateral Trade Agreements, the Appellate Body chose to focus only on their commonality as "integral parts" of the WTO Agreement, but ignored the special nature, characteristics, and circumstances that make the accession protocols distinct from the Multilateral Trade Agreements. Compared to the Multilateral Trade Agreements, the accession protocols are concluded later in time, and their contents cover subject matters across the entire spectrum of the WTO legal framework rather than focusing on a single subject in trade. The purpose of the accession protocols is to integrate the acceding countries into the WTO system, but on terms that expand and modify the existing provisions of the Multilateral Trade Agreements. Moreover, the circumstances of the conclusion of each accession protocol are markedly different from that of the Multilateral Trade Agreements.[288] Instead of being subject to multilateral checks and balances, the terms of accession and the quality of their drafting depend heavily on the negotiating ability, including the level of legal capacity, of the particular acceding country.[289] All of these characteristics and circumstances inform the "context" and the "object and purpose" of the accession protocol, and should be taken into account in the interpretation of the relationship between the accession protocol and the Multilateral Trade Agreements, as per the customary rules of treaty interpretation embodied in VCLT Articles 31 and 32.

Thus, contrary to the view of the Appellate Body, the relationship between the accession protocol and the Multilateral Trade Agreements is not the same, and should not be treated in the same way, as the relationship among the Multilateral Trade Agreements. As already explained, the accession protocol and the Multilateral Trade Agreements are connected through their provisions on the same subject matter, and

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288. *See infra* note 331 and accompanying text (discussing differential bargaining power in accession protocol negotiations).

289. The very existence of the large gaps in China's Accession Protocol, which the Appellate Body was compelled to fill, is an indication of the inferior quality of its drafting as compared to that of the Multilateral Trade Agreements. For another example of the drafting quality of China's Accession Protocol, see *infra* note 298.

individual terms of the accession protocol cannot be understood without the context of the Multilateral Trade Agreements. Accordingly, the relationship between specific accession provisions and the Multilateral Trade Agreements must be defined on the basis of "the same subject matter" within the meaning of VCLT Article 30. At this juncture, it should be noted that the dissenting Panelist in *China — Rare Earths* did define such relationship as based on the same subject matter,[290] and provided an extensive analysis of the relationship between accession protocols and the WTO Agreement in general, as well as the relationship between Paragraph 11.3 of China's Accession Protocol and the GATT 1994 in particular.[291] Regrettably, the Appellate Body did not address the views of the dissenting Panelist directly, but chose to dispense with the entire dissenting opinion in a single footnote.[292]

In sum, by ignoring the distinct features of the accession protocols, the Appellate Body was able to avoid the whole question of how such features might impact the interaction between the accession provisions and the rest of the WTO Agreement. As a result, however, the Appellate Body was unable to articulate a cogent interpretive approach to the systemic relationship between them, except to say that such relationship must be determined on "a case-by-case" basis.

### *E. The "Missing" Provisions*

This Subpart is an exercise in hindsight. It asks the question of what provisions need to be inserted into the WTO Agreement in order to reflect the current WTO accession practice. The exercise to identify the "missing provisions" can help illustrate exactly how far the "intentions" of the parties to the WTO Agreement have evolved over time with respect to the accession criteria.

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290. Panel Report, *China — Rare Earths*, *supra* note 131, para. 7.136; *see also supra* note 260.

291. Panel Report, *China — Rare Earths*, *supra* note 131, paras. 7.127–7.138.

292. *See* Appellate Body Report, *China — Rare Earths*, *supra* note 117, at 107 n.504. This footnote, which is attached to paragraph 5.68 that dismisses China's argument on the "intrinsic relationship" between specific provisions of its accession protocol and other WTO provisions, reads in its entirety as follows:

> For these reasons, we also see no basis for the opinion of the dissenting panelist in these disputes that "the defences provided in the GATT 1994 are automatically available to justify any GATT-related obligations, including border tariff-related obligations — unless a contrary intention is expressed by the acceding Member and WTO Members[.]" (Panel Reports, para. 7.137)[.] Indeed, the Appellate Body rejected arguments by China to this effect in *China — Raw Materials*. (Appellate Body Reports, *China — Raw Materials*, paras. 300 and 303-306)[.]

*1. Integration: Creating Annex 5 to the WTO Agreement*

The WTO Agreement currently has four annexes: Annex 1 for GATT, GATS, and TRIPS, Annex 2 DSU, Annex 3 TPRM, and Annex 4 Plurilateral Trade Agreements. In order to effectively integrate all the accession protocols into the WTO Agreement, it would be necessary to create an Annex 5 to hold the protocols.[293]

The proper location for providing Annex 5 should be Article II *Scope of the WTO*. Presently, Article II:2 designates agreements included in Annexes 1, 2, and 3 (referred to as the "Multilateral Trade Agreements") as "integral parts" of the WTO Agreement, and Article II:3 designates agreements in Annex 4 as "parts" of the WTO Agreement for those members that have accepted them. Since accessions apply to the Multilateral Trade Agreements, the logical place for designating the instruments in Annex 5 would be after Article II:2. Following the same format, a new provision numbered Article II:2 *bis* should be added:

> The agreements and associated legal instruments included in Annex 5 (hereinafter referred to as "Protocols of Accession") are integral parts of this Agreement, binding on all Members.

This provision would ensure that all future members would also be bound by the accession protocols previously entered.[294]

In addition, it would be necessary to link Annex 5 to Article XII *Accession*. To that end, a new paragraph to the following effect should be added to Article XII:

> The agreement on the terms of accession shall be set out in Annex 5. The schedules annexed to such agreement relating to the acceding country shall become a Schedule to GATT 1994 and a Schedule to GATS, respectively, relating to that country on the day on which such agreement enters into force.

These provisions would ensure that the integration of the accession protocols with the WTO Agreement and its annexes is done properly at the formal level.[295]

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293. It is interesting to note that in *China — Rare Earths*, "the United States argue[d] that China's Accession Protocol is akin to a new annexed multilateral agreement, parallel to Annexes 1A, 1B, and 1C, and an integral part of the WTO Agreement." Panel Report, *China — Rare Earths*, *supra* note 131, para. 7.126.

294. To accommodate the situation of non-application under Article XIII, it might be desirable to add to Article XIII:1 a reference to Annex 5, so its provision would read: "This Agreement, the Multilateral Agreements in Annexes 1 and 2, *and Annex 5* shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application."

295. These provisions, however, cannot resolve the issue of how a specific accession provision should be integrated into the WTO agreements, which is to be dealt with through treaty

### 2. *Priority/Conflict Rules*

Article XVI:3 of the WTO Agreement provides the priority rule between the provisions of the WTO Agreement and the provisions of its annexes. Accordingly, a reference to the protocols of accession, shown in italics below, should be inserted into Article XVI:3 so it would read as follows:

> In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, *or between a provision of this Agreement and a provision of any of the Protocols of Accession,* the provision of this Agreement shall prevail to the extent of the conflict.

Because accession protocols provide substantive obligations on the subject matters covered by the Multilateral Trade Agreements, a more significant question is whether there should be an explicit priority rule between accession protocols and the Multilateral Trade Agreements, similar to the priority rule given to GATT 1994 and other agreements on trade in goods.[296] Since accession protocols are concluded subsequent to the Multilateral Trade Agreements, and since they address issues specific to acceded members, a clause giving priority to accession terms over any conflicting provision in the Multilateral Trade Agreements, including the MFN provisions, would be consistent with the general conflict rules of *lex posterior* (embodied in VCLT Article 30) and *lex specialis.* On the other hand, it may be wise not to provide such an explicit conflict clause, and instead leave to the treaty interpreter to determine, on a case-by-case basis, the relationship between a provision of an accession protocol and a potentially conflicting provision of the Multilateral Trade Agreements. It is so not only because of the complexities and difficulties involved in applying the rules of *lex posterior* and *lex specialis*,[297] but also because of the non-standard way in which many provisions of accession obligations are formulated.[298] Providing the loosely drafted country-specific rules an absolute priority over the Multilateral Trade Agreements may create undue prejudice to the acceded members.

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interpretation. *See supra* Part III.D.

296. *See supra* note 261 and accompanying text (quoting General Interpretive Note to Annex 1A).

297. *See generally* PAUWELYN, *supra* note 251, at 361–418 (examining the doctrines of *lex posterior* and *lex specialis* and their applications in WTO law).

298. An extreme example can be seen in the China Working Party Report, which provides: "The representative of China further confirmed that China would provide the same treatment to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China." China Working Party Report, *supra* note 99, para. 18. As worded, this national treatment obligation has no limit on the scope of its application, which is unlikely to be intended by the parties. *See also supra* note 232.

In the interest of avoiding any confusion, it would be desirable to clarify that there is no conflict between the WTO-plus obligations contained in the accession protocols and the general policy exceptions contained in the Multilateral Trade Agreements. For this purpose, a provision to the following effect should be added to the general provisions of the accession protocol in its standard format:[299] "None of the commitments under this Protocol shall be understood to derogate the rights of [the acceding country] to invoke the general exceptions under the Multilateral Trade Agreements."

*3. Enforceability: Making Annex 5 Part of "Covered Agreements"*

In order to make the enforceability of accession protocols beyond any doubt, it would be necessary to specify Annex 5 as part of "covered agreements" under the DSU. Article 1.1 of the DSU describes two types of covered agreements: The first sentence refers to the agreements listed in Appendix 1 which have their own dispute settlement provisions;[300] the second sentence refers to the WTO Agreement and the DSU, which are also listed in Appendix 1. Since accession protocols do not have their own dispute settlement provisions, it would be proper to include them in the second sentence. With the added text in italics below, the second sentence of DSU Article 1.1 would read:

> 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 Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding, *and of the Protocols of Accession in Annex 5*, taken in isolation or in combination with any other covered agreement.

Correspondingly, DSU Appendix 1 *Agreements Covered by the Understanding* should include a new item: "(D) Protocols of Accession: Annex 5."

*4. Amendment to Accession Protocols*

Since none of the accession protocols contains a provision on amendment, it remains unclear whether the protocols can ever be amended, and if so, how. As a matter of principle, the accession protocols,

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299. *See* 2010 Secretariat Note, *supra* note 7, at 4.

300. The first sentence of DSU provides: "The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements')." DSU art. 1.1.

being integral parts of the WTO Agreement, should be amendable in a manner comparable to other agreements within the WTO framework. However, given the fact that an accession protocol is bilaterally concluded between the WTO and an acceding country, the procedure for its amendment should be distinct from that for the multilateral WTO agreements.

The logical place to provide for amendment to accession protocols is Article X of the WTO Agreement, which sets out the procedures for amendment to the WTO Agreement and its annexes. Presently, paragraphs 1 through 7 of Article 10 provide detailed rules for making amendments to the WTO Agreement and to GATT, GATS, and TRIPS respectively; paragraphs 8 and 9 contain rules for amending DSU and TPRM; and paragraph 10 stipulates generally that amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. To accommodate amendments to accession protocols, a new provision should be added to Article X as paragraph 11.

Similar to amendments to the multilateral WTO agreements, any member, including any acceded member, should have the right to initiate a proposal to amend the provisions of an accession protocol.[301] Unlike amendments to the multilateral WTO agreements, which will take effect only upon acceptance by (all or a certain majority of) individual members, the adoption of amendments to the provisions of an accession protocol should follow essentially the same procedure as that for approving the accession terms under Article XII. Thus, the new paragraph 11 could provide to the following effect:

> Any Member of the WTO may initiate a proposal to amend the provisions of a Protocol of Accession included in Annex 5 by submitting such proposal to the Ministerial Conference. The proposed amendment shall take effect upon approval of the Ministerial Conference. The decision of the Ministerial Conference to approve such proposal shall be taken by a two-thirds majority of the Members of the WTO, including the concurring vote of the acceded Member to which the Protocol of Accession relates.

This special procedure for amendments to the accession protocols could be justified on both procedural and substantive grounds. Procedurally, it makes sense not to impose more stringent requirements for approving an amendment than those for approving the original provisions. Substantively, since the obligations under an accession protocol are almost exclusively those of the acceded member, it is consistent with

301. *See* WTO Agreement art. X:1.

the principle of consent to require the concurring vote of the acceded member for approving any amendment to the accession protocol.

## IV. THE LEGITIMACY OF ACCESSION RULES

### *A. The Concept of Legitimacy of WTO Law*

While the legality of WTO accession rules can be explained under general international law, the legitimacy of such rules is a different matter. The concept of legitimacy refers to the justification of authority.[302] While legality (i.e., lawfulness) provides one possible justification for the exercise of authority, legitimacy is a "broader concept" in that it "has a normative quality."[303] Thus, an act may be legal under existing law but is seen as illegitimate because it is against a fundamental norm of the society. Conversely, an act in violation of existing law may nonetheless be considered legitimate because it is justifiable by a higher norm. In other words, "[l]egitimacy watches over laws" and "serves to support and, when necessary, to correct legality."[304]

In the context of governance, legitimacy may be derived from a variety of sources, such as democratic elections, technical competence, efficacy of outcomes, reason, and procedural fairness.[305] In international governance, the legitimacy of international institutions is initially derived from state consent. As international institutions gain greater authority, their consensual basis weakens, and questions concerning their legitimacy arise.[306] This has happened to the world trade regime. Historically, the GATT derived its legitimacy largely from its technical competence and efficacy of outcomes.[307] After the Uruguay Round greatly expanded the authority of the trade regime, however, the WTO has encountered its legitimacy crisis, as demonstrated by the numerous anti-WTO protests from Seattle to Hong Kong.[308] Now that the decisions of the trade regime

302. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 600–01 (1999) [hereinafter Bodansky, *Challenge for International Environmental Law*].

303. *See* Daniel Bodansky, *The Concept of Legitimacy in International Law*, *in* LEGITIMACY IN INTERNATIONAL LAW 309, 310–11 (Rüdiger Wolfrum & Volker Röben eds., 2008).

304. Vesselin Popovski & Nicholas Turner, *Legality and Legitimacy in International Order*, at 1, 1 (United Nations Univ., Policy Brief No. 5, 2008), *available at* http://unu.edu/publications/policy-briefs/legality-and-legitimacy-in-international-order.html.

305. *See* Daniel Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 7 (2002).

306. Bodansky, *Challenge for International Environmental Law*, *supra* note 302, at 597.

307. Esty, *supra* note 305, at 10.

308. *See id.* at 11–14; Jeffrey L. Dunoff, *The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution*, 13 AM. REV. INT'L ARB. 197 (2002); Manfred Elsig, *The World Trade*

can more directly affect the lives of ordinary people around the globe, the public demands more transparency of and participation in its rulemaking process. In order to maintain the WTO's legitimacy, it has been suggested that the WTO should change its governance model and strengthen, among other things, reason and procedural fairness as the bases for its legitimacy.[309]

*B. Legitimacy Deficits in WTO Country-Specific Rules*

By the same token, the legitimacy of WTO country-specific rules cannot rest on state consent alone. The fact that the acceding country has consented to the country-specific rules in its accession protocol does not in itself justify those rules. Instead, the justification has to come from reason, and from a sense of substantive and procedural fairness, i.e., the more fundamental values of the international community.

The central issue regarding the legitimacy of WTO country-specific rules is discrimination. To the extent that the WTO mandates less favorable treatment of acceded members, it is expected to provide clear reasons for doing so (procedural fairness), and such reasons are expected to be consistent with the objectives and principles of the WTO, as well as the basic principles of international law (substantive fairness).

It should be made clear at the outset that country-specific rulemaking is not necessarily a discriminatory practice and not all country-specific rules are discriminatory in nature. As previously noted, recent EU accession treaties typically contain country-specific rules for the acceding countries. These rules are designed to bring the laws of the acceding countries into full compliance with EU law or to provide transitional measures in temporary derogation of EU law in order to facilitate the integration of the acceding countries.[310] As such, the country-specific rules of the EU accession treaties are fully justifiable by the principles and objectives of the Union, and do not give rise to the issue of discrimination. Similarly, many country-specific rules in WTO accession protocols merely elaborate the provisions of the WTO agreements in the context of the acceding country, requiring the acceding country to bring its specific law and practice into compliance with the WTO agreements.[311] Such rules are not

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*Organization's Legitimacy Crisis: What Does the Beast Look Like?*, 41 J. WORLD TRADE 75 (2007).

309. Esty, *supra* note 305, at 17–18.

310. *See supra* text accompanying notes 33–38.

311. For example, the acceding country may be required to eliminate a specific internal tax on imported products so as to be compliant with GATT Article III, or to notify government subsidies as required by the SCM Agreement, Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

discriminatory — provided that they are subject to the same exceptions available to the relevant provisions of the WTO agreements — and do not raise special legitimacy concerns.

The problem lies with the WTO-plus and WTO-minus provisions that result in less favorable treatment of acceded members as compared to the original members.[312] From the standpoint of procedural fairness, the less favorable treatment has to be explained by reason. The accession protocols, however, rarely articulate a rationale for their WTO-plus and WTO-minus provisions. In fact, the WTO has never acknowledged that these accession terms constitute another category of MFN derogation in WTO law.[313] One sometimes gets the impression that the existence of this category of MFN derogation is an "inconvenient truth," the discussion of which is to be avoided.[314] The ambivalent official attitude towards the accession rules may well have contributed to the absence of a central catalogue and index of these rules at the WTO.[315] Without a central catalogue, it is difficult even to know how many such rules currently exist and what their exact contents are, because many of these rules are couched in non-standard legal language and scattered in the lengthy working party reports of individual acceding members. The lack of articulated reason and transparency in the accession rules contravenes the basic norms of procedural fairness.

In terms of substantive fairness, there are two possible justifications for imposing additional rules on the acceding members. The first is trade liberalization. Since the more stringent (WTO-plus) rules raise the level of WTO discipline, it can be argued that such rules advance the WTO agenda of trade liberalization. In a sense, this argument is similar to that of preferential trade agreements (PTAs). Under WTO law, members may depart from MFN and grant preferential treatment to each other within customs unions or free trade areas.[316] The main justification for this MFN derogation is that PTAs enhance trade liberalization. Many PTAs also prescribe rules beyond the scope of the WTO agreements (PTA WTO-plus rules).[317] However, there are important differences between the

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312. *See supra* Part III.A.

313. Browsing through WTO official websites, one cannot find any mention of this category of MFN exception. *See, e.g.*, *Principles of the Trading System*, *supra* note 11 (explaining the basic principles of the world trading system and their major exceptions); *Accessions*, *supra* note 1 (explaining the accession process).

314. The government of an acceding member may not wish to highlight the WTO-plus obligations it has accepted, lest the fact attract political criticism domestically.

315. The 2010 Secretariat Note, *supra* note 7, provides merely an incomplete summary of the accession rules. For example, it does not list the export duty obligations of many acceded members.

316. *See* GATT 1947 art. XXIV; GATS art. V.

317. For a general discussion on PTA WTO-plus obligations and their relationship with the

accession WTO-plus rules and PTA WTO-plus rules. Most critically, the PTA WTO-plus rules are not mandated and enforced by the WTO. Entering into a PTA is a right, not an obligation, of the WTO member. In contrast, accession WTO-plus rules are created within the WTO system. As a matter of fact, accession WTO-plus rules are the only type of MFN derogation that is *mandated* by the WTO — all other MFN exceptions under WTO law are merely permissible.[318] To justify such system-mandated discrimination, trade liberalization would not seem sufficient. This is so especially considering that most of the acceded members are developing countries, which are supposed to be given extra policy space under WTO law, rather than to be bound by more stringent rules.[319]

The second possible justification is the need to level the playing field. If an acceding country has systemic conditions that may adversely affect trade interests of other members and that cannot be effectively regulated by the WTO agreements, special rules designed to offset such adverse effects may be justified as a mechanism for achieving substantive equality among WTO members. This argument may be used in particular to justify certain WTO-minus rules relating to "nonmarket conditions" in former centrally planned economies. A major difficulty with this argument lies in the lack of a coherent theory for the WTO-minus provisions. "Market economy" and "nonmarket economy" are not concepts used in the WTO agreements. The terms appear for the first time in the China Accession Protocol, undefined.[320] When China joined the WTO, it had already developed a functional domestic market, albeit under the heavy influence of the government. Even assuming that "nonmarket" elements in the Chinese economy may distort trade in ways that cannot be effectively regulated by the normal rules of the WTO agreements, the China Accession Protocol failed to provide a principled way to deal with such elements. For example, the existence of "nonmarket economy" conditions is supposed to be the rationale for both the special antidumping and countervailing-duty provisions in the China protocol. Yet, there is no

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WTO provisions, see Mitsuo Matsushita & Y. S. Lee, *Proliferation of Free Trade Agreements and Some Systemic Issues — In Relation to the WTO Disciplines and Development Perspectives*, 1 L. & DEV. REV. 22, 14–25 (2008).

318. *See, e.g.*, GATT 1947 art. XXIV:5; Decision of the Contracting Parties, *Differential Treatment*, *supra* note 185, para. 1 (the "Enabling Clause").

319. For accession experience of certain developing countries, see Roman Grynberg & Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, J. WORLD TRADE, Dec. 2000, at 159; Nhan Nguyen, *WTO Accession at Any Cost? Examining the Use of WTO-Plus and WTO-Minus Obligations for Least-Developed Country Applicants*, 22 TEMP. INT'L & COMP. L.J. 243 (2008).

320. China Accession Protocol, *supra* note 42, para. 15(d).

explanation why the special antidumping rules are valid for 15 years[321] — a period arbitrarily chosen — whereas the special countervailing-duty provision has an indefinite duration. The most extreme case is the China-specific safeguards.[322] While this explicitly discriminatory mechanism contradicts every principle of the WTO multilateral discipline on safeguards,[323] its rationale is nowhere to be found in any WTO document. The lack of principle and coherence in the WTO-minus rules betrays the true nature of these rules. Rather than leveling the playing field, these rules have in practice served as protectionist devices.[324]

*C. Problematic Jurisprudence: The "Entry Fee" Theory*

Although it has rendered decisions in several disputes involving the China Accession Protocol, the Appellate Body has so far avoided discussing the rationale for the country-specific rules. Nonetheless, the Panel in *China — Raw Materials* has offered this explanation:

> Pursuant to Article XII of the Marrakesh Agreement, accessions take place "on terms to be agreed" between the acceding Member and the WTO membership. Most accession processes take several years to complete and lead to detailed negotiated provisions. The terms of each WTO Member's accession are set out in its Accession Protocol and accompanying Working Party Report. The negotiated agreement between the WTO membership and the acceding Member results in a delicate balance of rights and obligations, which are reflected in the specific wording of each commitment set out in these documents. *Ultimately, the acceding Member and the WTO membership recognize that the intensively negotiated content of an accession package is the "entry fee" to the WTO system.*[325]

Thus, in the eyes of the Panel, the country-specific rules are merely part of the "entry fee" an acceding country has to pay to join the WTO, and

321. *Id.*

322. *See supra* note 102 and accompanying text.

323. *See* Chad P. Bown, *China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement*, *in* CHINA'S GROWING ROLE IN WORLD TRADE 281, 308 (Robert C. Feenstra & Shang-Jin Wei eds., 2010) (stating that many characteristics of the China safeguards "are at odds with core WTO principles"); *see also* Julia Ya Qin, *China, India, and the Law of the World Trade Organization*, 3 ASIAN J. COMP. L. 215, 225–27 (2008).

324. For economic analyses of the protectionist effects of these rules, see generally Bown, *supra* note 323. *See also* Chad P. Bown & Rachel McCulloch, *U.S. Trade Policy Towards China: Discrimination and Its Implications*, *in* CHALLENGES TO THE GLOBAL TRADING SYSTEM: ADJUSTMENT TO GLOBALIZATION IN THE ASIA PACIFIC REGION 58–82 (Sumner La Croix & Peter A. Petri eds., 2007).

325. Panel Reports, *China — Raw Materials*, *supra* note 226, para. 7.112 (emphasis added).

the fee is ultimately fair because it is the result of long and intensive negotiations between the acceding member and the WTO membership.

At first glance, the "entry fee" concept is the same as "ticket of admission," the metaphor used to describe the tariff concessions an acceding country was required to make in order to join the GATT.[326] In using this concept, however, the Panel ignored a fundamental difference between tariff concessions and country-specific rules: Tariff concessions are made on a reciprocal basis, whereas country-specific rules are imposed on the acceding country only. Because an acceding country can expect to enjoy the benefit of lowered tariffs in other member states resulting from previous rounds of multilateral trade negotiations, it is required to reciprocate by negotiating the reduction of its own tariffs.[327] The commitments of the acceding country will be inscribed into the GATT schedule, entitled to the same legal treatment as those made by incumbent members. Therefore, there is no issue of discrimination between the acceding country and incumbent members with respect to tariff and other scheduled concessions.

It is troubling that the Panel seemed to be completely oblivious to the distinctions between tariff concessions and WTO rules of conduct. While both are treaty obligations of the WTO member, the two types of obligations are qualitatively different as a matter of WTO law. The rules of conduct, which are set out in the provisions of the WTO agreements, are normative and supposed to be uniform, internally consistent, and generally applicable to all members. Tariff and other trade concessions, on the other hand, are commercial commitments of individual members set out in their respective GATT and GATS schedules. By design, the scheduled commercial commitments are country-specific, varying in scope and content from member to member depending on the result of their trade negotiations. The qualitative difference between WTO rules and commercial concessions is also reflected in the way in which they can be changed: WTO provisions are extremely difficult to amend, whereas scheduled commitments may be modified or withdrawn by individual members at regular intervals or at any time pursuant to certain procedures.[328] As Joost Pauwelyn observes, "even though the norms set out in WTO members' schedules are treaty language and an integral part of the WTO treaty, they do have an inherently lower legal standing than the provisions in the WTO treaty *stricto sensu*, i.e., those binding equally on

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326. *See supra* note 55 and accompanying text.

327. The practice accords with the GATT tenet of "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT 1947 pmbl.

328. *See id.* art. XXVIII; GATS art. XXI.

all WTO members."[329] By characterizing the country-specific rules for the acceding members as part of their entry fee to the WTO, the Panel obliterates the qualitative differences between rules of conduct and commercial concessions under WTO law.

What is most troubling, though, is that the Panel — being part of the WTO judiciary — would simply take for granted that WTO rules can be bargained for in the same way as tariff concessions, without showing concern for the integrity and coherence of the WTO legal system.[330] Underlying the Panel's entry fee theory is the notion of "negotiated consent." As already noted, state consent alone is insufficient to justify discriminatory terms of accession. This is so in particular when we consider the political reality of accession negotiations. Unlike WTO's multilateral rulemaking processes, in which diverse interests of the members can be expected to provide the checks and balances necessary to produce well-considered rules, accession negotiations are conducted between the acceding government on the one hand, and the incumbent membership on the other. The asymmetrical bargaining position of acceding countries versus the incumbent membership is well known.[331] Since there is no guiding principle or institutional control over the accession terms that may be negotiated, the quality and quantity of the accession rules for a particular acceding country will depend on its bargaining power and negotiating ability *vis-à-vis* the incumbents, which in turn may be subject to the capture of special interests at home. The unprincipled, *ad hoc* rulemaking in accessions damages the integrity of the WTO legal system and undermines the legitimacy of the regime.

In addition, it must be noted that WTO accession negotiations are typically conducted behind the closed doors in Geneva, and the general public of the acceding country has no access to the terms of accession until after they have been fixed.[332] Insofar as the accession rules are

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329. PAUWELYN, *supra* note 251, at 357 (citing WTO case law establishing the position that WTO treaty provisions prevail over schedules of concessions).

330. Although the particular provisions at issue in *China — Raw Materials* relate to China's commitments on export taxes which are commercial in nature, the Panel's entry fee theory was offered generally as justification for all special terms of accession protocols. For an analysis of legal and policy issues involved in China's export tax commitments, see generally Qin, *supra* note 271.

331. As Tyagi observes, due to the WTO practice of making accession decisions by consensus, "the views of even one incumbent can impede accession negotiations. The resulting imbalance in bargaining power between incumbent Members and governments seeking accession has led to increasingly onerous [accession protocols]." Tyagi, *supra* note 12, at 395–96; *see* Charnovitz, *supra* note 12, at 861; Qin, *supra* note 12, at 168 (observing that many of the China-specific rules resulted from bilateral negotiations between the United States and China, in which the United States enjoyed a greater bargaining power).

332. For example, the Chinese translation of China's Accession Protocol was not published and made available to the public until well after the accession had taken effect.

discriminatory, the lack of transparency and public input in their making further highlights their legitimacy problem.

Ironically, in the context of accession, the "rule-based" WTO system is far less principle-oriented than the "power-based" GATT regime.[333] Normatively, the unprincipled rulemaking in WTO accessions has made a mockery of the nondiscrimination principle of the world trading system, creating both formal and substantive inequity among its members. Worse yet, unlike in the GATT era when a contracting party could block the adoption of a dispute settlement ruling it deemed politically unacceptable, all country-specific rules of the WTO are enforceable through the compulsory dispute settlement mechanism. With the WTO judiciary fully endorsing the practice of unprincipled rulemaking, the resulting inequity is liable to become firmly entrenched.

### *D. What Is to Be Done?*

What should and can be done to reduce the legitimacy deficits created by unprincipled rulemaking in WTO accessions? This Subpart suggests a few possibilities.

#### *1. The Provision Necessary to Prevent Unprincipled Rulemaking*

In order to prevent unprincipled rulemaking in accessions, the WTO Agreement would need to place a limit on the terms of accession. In this regard, the IMF provides a good model. As previously noted, the IMF Board of Directors has broad power to prescribe the terms for new IMF membership, but such terms "shall be based on principles consistent with those applied to other countries that are already members."[334] A similar provision, shown in italics below, could be added to Article XII:1 of the WTO Agreement so that it would read as follows:

> Any State . . . may accede to this Agreement, on terms to be agreed between it and the WTO. *Such terms shall be based on principles consistent with those applied to the Original Members of the WTO. . . .*

With this provision in place, an accession protocol could still prescribe country-specific rules, but such rules could not go beyond the scope of

333. *See generally* Meinhard Hilf, *Power, Rules and Principles — Which Orientation for WTO/GATT Law?*, 4 J. INT'L ECON. L. 111 (2001) (suggesting the world trading system has jumped from a power-oriented one under the GATT to a rule-based and principle-oriented one under the WTO). *But see* Grynberg & Joy, *supra* note 319, at 159 ("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."), *quoted in* Charnovitz, *supra* note 12, at 861.

334. IMF Articles of Agreement, *supra* note 26, art. II, § 2; *see also supra* Part I.B.2.

the existing WTO agreements. In the event a WTO-plus or -minus rule is desired, it would have to be justified by principles consistent with those applied to the original members.

The adoption of such a provision would not have been controversial at the time the WTO Agreement was drafted, judging from the Ministerial Decision of April 15, 1994, declaring that the WTO Agreement "does not distinguish in any way" between the original and acceding Members.[335] Unfortunately, the drafters of the WTO Agreement overlooked the need for such a provision. Now that the WTO accession practice has developed in the opposite direction, it has become politically infeasible to reinstate this principled position.

*2. Differential Treatment According to Predetermined Criteria*

Alternatively, the WTO could choose to treat the acceded members as a different class from the original members and impose on them more stringent rules, provided that such differential treatment is based on a set of predetermined criteria rather than by *ad hoc* rulemaking. In this regard, reference can be made to the differential treatment of developing countries as a class, and to the preferential trade agreements permitted within the WTO legal framework. In both cases, differential treatment among WTO members in derogation of the MFN principle is justified by one or more objectives of the WTO and is granted in accordance with certain predetermined conditions.[336] Similarly, the WTO could decide to raise the level of its rules of conduct on all newcomers by formally adopting a set of WTO-plus standards in advance. Such standards may include, for example, the binding of export duties, the expansion of national treatment of foreign direct investment beyond the scope of existing WTO provisions, and more stringent requirements on transparency and due process in the domestic regulatory system. New obligations could be negotiated with acceding countries under such WTO-plus standards, taking into account the specific circumstances of each applicant. This approach would generalize WTO-plus rulemaking in a principled manner, thereby reducing the legitimacy deficits in the accession regime.

*3. Making the System More Transparent*

Procedurally, the WTO can take steps to make its accession rulemaking more transparent, so as to enhance its legitimacy based on procedural

335. *See supra* text accompanying notes 85–89.

336. *See, e.g.*, Decision of the Contracting Parties, *Differential Treatment*, *supra* note 185, para. 1 (the "Enabling Clause"); GATT 1947 art. XXIV.

fairness. As noted above, it is unclear how many country-specific rules have been made and what their exact contents are. Although all the accession protocols and working party reports are publicly available, it is not easy to identify the country-specific rules for each acceding member, as such rules are typically expressed as specific "commitments" of the acceding member in non-standard legal language and are scattered throughout lengthy working party reports. Thus, the first step to improve transparency of the system will be to compile and catalogue all the country-specific rule commitments, and publish them together on the WTO official website. Based on this compilation, the WTO Secretariat should endeavor to identify all the country-specific commitments that are WTO-plus or -minus rules in nature and include them in the official publication of WTO Analytical Index.[337]

The need for more transparency in this area is apparent. At the most basic level, because all country-specific rules are an "integral part" of the WTO Agreement, they should be readily accessible to the public. Publishing these rules in a centralized and systematic manner will assist traders in monitoring their compliance. At the systemic level, without knowing all country-specific rules that deviate from the WTO agreements, our understanding of WTO treaty law is incomplete. Inventorying all WTO-plus and WTO-minus rules, therefore, is necessary to delineate the universe of WTO treaty law. Moreover, the indexing of such rules will provide WTO judges with a clear view of the entire treaty context relevant to a particular country-specific rule, as similar provisions may exist in different accession protocols and should be interpreted consistently.[338]

Given that nondiscrimination and transparency are two fundamental principles of the WTO, it is inexcusable that an entire category of WTO rules in derogation of MFN should be allowed to exist in obscurity. At the minimum, the WTO Secretariat should be urged to take the initiative of cataloguing all the country-specific rules that go beyond or contravene the provisions of the WTO agreements.

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337. *See* WORLD TRADE ORG., WTO ANALYTICAL INDEX, *supra* note 80; WORLD TRADE ORG., WTO ANALYTICAL INDEX: SUPPLEMENT COVERING NEW DEVELOPMENTS IN WTO LAW AND PRACTICE: OCT. 2011–AUG. 2013, *available at* http://www.wto.org/english/res_e/booksp_e/analytic_index_e/ai_new_dev_e.pdf (last visited Mar. 18, 2015).

338. *See supra* Part III.D.2 (discussing the application of general public policy exceptions to various of China's Accession Protocol commitments); *see also* Bronckers & Maskus, *supra* note 130, at 7–8 (pointing out the policy inconsistency between the Appellate Body's refusal to allow availability of GATT Article XX to China's commitments on export duties and the explicit provision in Ukraine's Accession Protocol granting such availability to Ukraine's commitments on export duties).

*4. Treaty Interpretation*

The damaging effect of unprincipled rulemaking in WTO accessions may be mitigated through treaty interpretation. Under the WTO Agreement, the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of WTO provisions.[339] It is highly desirable that they adopt authoritative interpretations of the relationship between accession protocols and the WTO agreements, especially on systemic issues such as the applicability of GATT and GATS general exceptions to the WTO-plus obligations under accession protocols. In practice, however, the WTO has never issued an authoritative interpretation,[340] and there is no reason to expect such interpretation will be forthcoming regarding accession protocols.

Short of the authoritative interpretations, the burden falls upon the WTO judiciary to mitigate the damaging effect of unprincipled rulemaking in the context of resolving specific disputes. It might be an undue burden, as it requires WTO judges to fill the large gaps left in the treaty provisions. But since the panels and the Appellate Body did not hesitate to take on the task of interpreting accession protocols in the first place,[341] they should be expected to get things right. Unfortunately, the case law developed on the China Accession Protocol has not been particularly encouraging. To date, the only official interpretation of the nature of country-specific rules is the entry fee theory offered by the Panel in *China — Raw Materials*,[342] which amounts to nothing but a wholesale endorsement of unprincipled rulemaking.

The hope now remains that the Appellate Body will eventually be able to reorient the interpretation of accession protocols in the right direction. In order to do so, however, the judges need to gain a clear understanding of the history and political reality of the WTO accession regime. Furthermore, they need to recognize that the WTO-plus and WTO-minus accession rules constitute a new category of MFN derogation, and that such derogation requires justification as a matter of WTO law. Although the WTO judiciary may not have the authority to declare an unjustifiable country-specific rule "unconstitutional,"[343] it does have the power as well as the means to interpret the rule in a manner that would minimize its damaging effect. Such an interpretive approach would be fully consistent

339. WTO Agreement art. IX:2.

340. *See* WORLD TRADE ORG., WTO ANALYTICAL INDEX, *supra* note 80, paras. 196–202 (WTO Agreement, Article IX, Section B: Interpretation and Application of Article IX).

341. *See supra* Part III.C.

342. *See* WORLD TRADE ORG., WTO ANALYTICAL INDEX, *supra* note 80, para. 253 (WTO Agreement, Article XII, Section B: Interpretation and Application of Article XII).

343. *See* Tyagi, *supra* note 12, at 418.

with the requirement of the customary international rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties.[344] If the WTO judiciary is willing to adopt a principle-based approach towards the interpretation of country-specific rules, it will be able to help remedy some of the legitimacy deficits in the WTO accession regime.

## CONCLUSION

The World Trade Organization accession regime is unique among international organizations in that it permits the conclusion of accession protocols to alter the rights and obligations of its members under the underlying treaties of the WTO, all without going through the formal procedures for amendment. This raises important questions about the legality of the WTO practice. Thus far, there has not been a coherent theory that can satisfactorily explain the phenomenon. This Article has addressed the legality questions by examining the history of WTO accession practice and by applying alternative theories of treaty law. It has reached several conclusions.

First, it was not the original intention of the parties to the WTO Agreement to allow accession terms to modify the effect of the underlying trade agreements. Although the text of the WTO Agreement does not place any limit on the terms of accession, a 1994 Ministerial Decision issued in the context of concluding the WTO Agreement explicitly affirmed that "the WTO Agreement does not distinguish in any way" between the original and acceded members.[345] Early WTO practice did not deviate significantly from this norm. Accession practice, however, has changed dramatically with China's accession in 2001. A large number of special rules of conduct were created in the China Accession Protocol to modify the application of the WTO agreements in China trade. Subsequently, it has become a standard practice to require acceding countries to accept additional and more stringent rules of conduct than those applying to the original members.

Second, WTO accession has followed the accession practice of the General Agreement on Tariffs and Trade, but failed to take into account the fundamental differences in treaty structure between the two regimes. GATT 1947 never entered into force itself; instead, it was applied through a web of protocols — the Protocol of Provision Application and various protocols of accession — each of which was concluded as a multilateral

344. VCLT, *supra* note 14, arts. 31, 32.

345. *See supra* note 88 and accompanying text.

agreement among the contracting parties of the GATT. This particular treaty structure allows individual protocols of accession to set their own terms of GATT application, without causing incoherence or inconsistency as a matter of treaty law. By contrast, the WTO has a unified and integrated treaty structure. Consequently, when an accession agreement prescribes additional and different terms from the provisions of the WTO agreements, it effectively amends the WTO agreements in their application to the acceded member, but does so without a proper legal basis within the uniform treaty structure of the WTO.

Third, there are two viable ways to explain the legality of WTO accession practice under international law. One is to characterize the WTO accession protocols as "subsequent agreement" modifying the WTO agreements. The use of subsequent agreement to modify a prior treaty is recognized and codified in Vienna Convention on the Law of Treaties Article 30. This characterization, however, requires the piercing of the WTO's institutional veil so that the accession protocol can be deemed as a subsequent multilateral agreement among all WTO members. Alternatively, the accession protocols can be viewed as "subsequent practice" of the WTO that modifies the WTO agreements. Although "subsequent practice" as a means of treaty modification is not codified in the VCLT, it has occurred in practice. Most significantly, the International Court of Justice has effectively recognized the role of subsequent practice of the United Nations in modifying the provisions of the UN Charter. That is, the underlying treaty of an international organization can be modified by the actions of the organization it created. This view recognizes the independent authority of an international organization over its members and, in the view of this author, better comports with today's reality of expanding global governance, of which the WTO plays a major part. It should be noted, however, that the WTO accession practice has far exceeded the UN practice in its magnitude of treaty modification. This is an important phenomenon that should, but has yet to, attract the attention of the International Law Commission in its ongoing study on the subject of treaties over time.

Fourth, while the external legality of the WTO accession practice can be established under public international law, its internal legality under the institutional law of the WTO remains questionable. Strong arguments can be made that the WTO Ministerial Conference acted *ultra vires* in approving terms of accession that modify the effect of the multilateral WTO agreements, because it does not have the authority to adopt amendment to the latter. As a practical matter, however, the act of the WTO authority is unlikely to be challenged.

Fifth, to the extent an accession protocol modifies the effect of a multilateral WTO agreement, there is conflict between them. Such conflict

should be addressed in accordance with the rules of VCLT Article 30 on the application of successive treaties relating to the same subject matter. Only after such conflict is identified and resolved can the accession protocol and the rest of the WTO Agreement be interpreted and applied in a systemically consistent and coherent manner. The Appellate Body, however, has not recognized the need to address the issue of conflict between the accession protocol and the multilateral WTO agreements. As a result, it has not been able to articulate a coherent theory as to how their respective provisions should interact with each other.

The above conclusions on the legality of WTO accession practice do not prejudice the question of the legitimacy of such practice. The issue of legitimacy arises because of the discriminatory nature of the country-specific rules of accession: Derogation from the WTO principle of nondiscrimination requires justification. In the absence of any articulated rationale for the country-specific rules in the accession protocols, the WTO judiciary has justified such rules as the result of "negotiated consent." Yet, the consent of the acceding government to the discriminatory terms of its accession protocol does not in itself justify those terms. This is especially so considering the asymmetrical bargaining position of an applicant government versus the incumbent membership in the accession negotiations. The legitimacy of the discriminatory terms must instead derive from procedural and substantive fairness of the WTO practice. It is submitted here that the WTO has failed on both counts. Despite the growing number of accession rules, the WTO has not catalogued and indexed them, nor has it acknowledged that these rules constitute another category of MFN derogation in WTO law. The lack of transparency and articulated reason in the accession rules contravenes the basic norms of procedural fairness. Substantively, it is difficult to justify why the acceding members, most of which are developing countries, should be required to adhere to more stringent legal standards than the original members, and why the legal standards should vary from country to country depending on the negotiating ability of the acceding government.

What has enabled this troublesome practice to arise and continue is the absence in the WTO Agreement of a provision that requires equal or consistent treatment between the acceded and original members of the WTO, a lacuna in sharp contrast with the membership provisions in other major international organizations. Without such an explicit requirement, the WTO accession process is vulnerable to unprincipled rulemaking. Powerful incumbent members may demand "concessions" on WTO rules from the applicant country based on their special interests, and the government seeking accession often has little choice but to yield to such demands. Thanks to compulsory WTO dispute settlement, the results of

unprincipled rulemaking can be enforced and become firmly entrenched in the system.

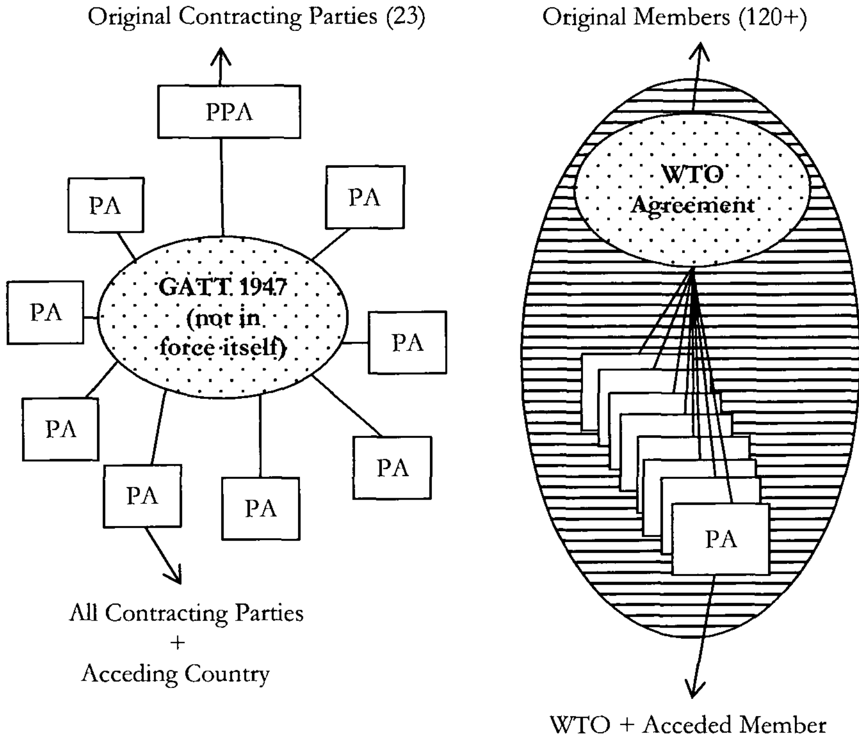
Given the difficulty in amending the WTO Agreement, this Article has made some suggestions on what can and should be done at the WTO to remedy the situation. At a minimum, it should be feasible for the WTO Secretariat to catalogue all the accession rules that expand or deviate from the provisions of the WTO agreements and include these rules in the official WTO Analytical Index. It is simply inexcusable that a significant part of WTO treaty law should be kept in obscurity.

Substantively, the damaging effect of unprincipled rulemaking can be mitigated through treaty interpretation. Short of authoritative interpretation by the WTO "legislature," the burden falls upon the WTO judiciary. In the recent case of *China — Raw Materials,* the Panel offered an entry fee theory to justify the country-specific rules of accession.[346] Unfortunately, this theory not only is legally erroneous — it ignores the important distinctions between commercial concessions and rules of conduct under WTO treaty law — but also is normatively damaging to the WTO system, as it completely embraces unprincipled rulemaking through accession negotiations. Instead of endorsing the entry fee theory, the Appellate Body should rather recognize its harmful effect and endeavor to develop a principle-based approach in the interpretation of *ad hoc* accession rules. Consistent with the interpretive rules of VCLT, such an approach should take into account the historical and political contexts of WTO accession negotiations, and aim to arrive at conclusions in line with the declared principles and objectives of the WTO. If the Appellate Body is willing to do so, it would go a long way toward repairing the tattered legitimacy of the WTO accession regime.

346. *See supra* Part IV.C.

## APPENDIX

Difference in Treaty Structure Between the GATT and the WTO




PPA: Protocol of Provisional Application
PA: Protocol of Accession