New Developments in WTO Accession Practice: Commitments on the Elimination of Export Duties in recent Protocols of Accession

Dylan Geraets[*]

Introduction

The accession process to the World Trade Organization (WTO) has not changed considerably in comparison to that of the General Agreement on Tariffs and Trade (1947) and has remained highly political in nature. The process is characterized by a high degree of flexibility for incumbent Members to make accession of applicant States or Customs Territories conditional upon the acceptance of more stringent obligations. These types of commitments are commonly referred to as "WTO-plus" obligations or, where they provide for more flexibility for incumbent Members, "WTO-minus" rights. This contribution presents an overview of the recent developments in the manner in which States and Customs Territories have accepted new obligations. In

[*] Associate, Mayer Brown Europe-LLP (Brussels, Belgium); Associate Fellow, Leuven Centre for Global Governance Studies (GGS) (Leuven, Belgium). Email: dylan.geraets@kuleuven.be. The views expressed in this article do not represent the views of Mayer Brown Europe-LLP or its clients. This contribution builds on a more comprehensive overview of the legal aspects of WTO Accession as presented in Accession to the World Trade Organization: A Legal Perspective 360 (Edward Elgar Publishing, Cheltenham 2018).

particular, it discusses the commitments that have been undertaken by new "acceders" such as Afghanistan, Kazakhstan and Tajikistan. This discussion is based on a detailed typology of these commitments and analyzes the prevalence of "WTO-plus" commitments in the accession protocols of Members that have acceded after 1994. The picture that emerges from this analysis explains whether there is a trend towards the inclusion of more stringent commitments in new Members' accession protocols or whether these commitments are purely negotiated on a country-specific basis. Particular attention is paid to the question whether newly acceded Members, such as the ones mentioned above, have included explicit references to the general exceptions contained in Article XX of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as GATT 1994) in their respective commitments. In light of the reports by panels and the Appellate Body in cases such as *China – Publications and Audiovisual Products*, *China – Raw Materials* and *China – Rare Earths*, this would appear to be recommended in order to ensure that new commitments and obligations benefit from the same justification grounds as the substantive obligations contained in the covered agreements.[1]

Even if the WTO is currently facing severe criticism of one of its founding Members, the topic of accession continues to be of high relevance for developing countries that, as outsiders of the system, fail to reap the most basic benefits that being a Member brings. In this regard it is noteworthy that the 11th Ministerial Conference of the WTO featured the establishment of the Working Party on the Accession for South Sudan, reflecting WTO Members' continuing attention for the subject.[2]

WTO Accession and WTO-Plus Commitments

The roots of the accession process to the WTO can be found in the GATT 1947. Article XXXIII of the GATT 1947 provided that governments not party to the agreement may accede to the agreement "on *terms to be agreed*

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[1] Appellate Body Report, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", WT/DS363/AB/R, adopted on 19 January 2010; 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, adopted on 22 February 2012 and Appellate Body Reports, "China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum", WT/DS431/AB/R/WT/DS432/AB/R/WT/DS433/AB/R, adopted on 29 August 2014.

[2] *See* World Trade Organization, Eleventh WTO Ministerial Conference, (WTO) https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm (accessed 24 January 2018).

between such government and the Contracting Parties." Hence, the accession process to GATT was characterized by political bargaining by the incumbent membership and the government wishing to accede. With the creation of the World Trade Organization (WTO) after the conclusion of the Uruguay Round of Multilateral Trade Negotiations some aspects of the multilateral trading system changed significantly. A Trade Policy Review Mechanism (TPRM) was introduced and the dispute settlement mechanism underwent a process of legalization. Other institutional characteristics, such as the process of accession, remained relatively unchanged, however. The procedure of accession is governed by Article XII of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). The text of this article to a large extent mirrors the text of Article XXXIII of the GATT 1947, which dealt with the issue of accession to GATT. It provides [in relevant part] that "any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations … may accede to this Agreement, on *terms to be agreed* between it and the WTO." Consequently, the essentially political nature of the accession procedure under GATT has remained unaltered with the creation of the WTO. Although undoubtedly a degree of formalization has occurred through the WTO Secretariat's monitoring of the accession process and the development of certain practices, the conditions for accession remain open and are the outcome of a negotiation process between the acceding country and the WTO. Importantly, in comparison to GATT, the scope of the WTO is considerably broader. In addition to tariff schedules, which were the main focus of GATT-negotiations, there are also negotiations on rules on trade in goods, trade-related aspects of intellectual property rights and transparency obligations. Hence, the amount of fields in which there is scope for the negotiation of more stringent commitments than those provided for in the baseline obligations has grown considerably.

The role of WTO protocols of accession in WTO dispute settlement proceedings is somewhat special. Protocols of accession are different from the "covered agreements", over which the Understanding on the Settlement of Disputes (DSU) confers jurisdiction to the Dispute Settlement Body (DSB). Available panel and Appellate Body reports that deal with commitments contained in protocols of accession indicate that the Members involved in these disputes have so far not challenged the jurisdiction of panels or the Appellate Body to adjudicate these disputes. Considering that there is no clear basis in the DSU for the enforcement of protocols of accession, some had expected such a challenge. In absence of any arguments to that effect, panels and the Appellate Body have so far been able to suffice by referring to the statement contained in protocols of accession that these protocols

"shall be an integral part" of the WTO Agreement.[3] The Appellate Body has held that " "Paragraph 1.2 of China's Accession Protocol, and in particular its stipulation that the Protocol is to be an "integral part" of "the WTO Agreement", essentially serves *to build a bridge* between the package of protocol provisions and the existing package of WTO rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements."[4] This has led to fierce criticism in scholarship, in particular because of the fact that this would signal that both the WTO Members and the judicial organs of the WTO would not pay sufficient attention to the rule of law.[5] By accepting that protocols of accession can declare themselves to be "an integral part" of the WTO Agreement, panels and the Appellate Body have implicitly accepted that the General Council has the power to amend the WTO Agreement. Although it is uncertain whether any acceded Member that so far has not been involved in WTO dispute settlement proceedings involving its protocol of accession could successfully challenge the enforceability of such a protocol, it is possible that at some stage panels and the Appellate Body may be required to develop a more elaborate reasoning on this issue. For now, however, the enforceability of WTO protocols of accession appears to be fully accepted by the membership, regardless of the exact legal basis for such enforceability.

The relationship between the commitments contained in acceded Members' protocols of accession, including the working party reports, and the provisions contained in the Marrakesh Agreement and the Multilateral Trade Agreements is of crucial importance. This is especially true when one considers the fact that certain commitments entered in to by acceded Members may extend beyond the obligations that original WTO Members are under by virtue of their WTO membership. In particular, the question whether the general exceptions contained in Article XX of the GATT 1994 are available to justify violations of such 'more far-reaching' commitments is of relevance in assessing whether there is an appropriate balance between the rights and the obligations of acceded Members.

In three disputes involving China's Protocol of Accession, panels and the Appellate Body have developed an interpretative approach that determines

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[3] WTO, Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001, para 1.2.

[4] Appellate Body Reports, "China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum", para 5.50. (emphasis added)

[5] *See*, for example, Charnovitz, Steve, "Mapping the Law of WTO Accession" in Janow, Merit E., Donaldson, Victoria and Yanovich, Alan (eds.), "The WTO: Governance, Dispute Settlement and Developing Countries" 855, 883 (Juris Publishing, Huntington, NY 2008).

whether or not the violation of a certain commitment in a Protocol of Accession can potentially be justified under the general exceptions of the GATT 1994.[6] This interpretative approach has been heavily criticized in scholarship for allegedly being (too) textualist and for failing to take into account relevant policy considerations.[7] Moreover, it has been argued that the approach is not consistent with the standard laid down by the Vienna Convention. *Inter alia*, it has been suggested that the approach does not accurately take into account the object and purpose of the relevant provisions of the WTO Agreement and the commitments contained in WTO protocols of accession. Additionally, it has been argued that the Appellate Body has failed to take into account relevant context. In doing so, the Appellate Body has – in the view of certain authors – adopted an approach that might eventually undermine the legitimacy and credibility of the WTO in general and the organization's dispute settlement mechanism in particular. Nevertheless, such criticism, however well-argued, fails to acknowledge the member-specific nature of protocols of accession. Moreover, it fails to acknowledge that if Members consider that this situation is undesirable, they always have the option of asking the WTO Ministerial Conference or the General Council to address it.[8]

METHODOLOGY: A MAPPING EXERCISE

The findings published in this article are the result of a mapping exercise of the commitments contained in the protocols of accession of all 36 WTO

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[6] Appellate Body Report, "China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", para 233. The Appellate Body noted that "For all these reasons, we consider that the provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products. In the light of this relationship between provisions of China's measures that are inconsistent with China's trading rights commitments, and China's regulation of trade in the relevant products, we find that China may rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994."

[7] *See* Julia Ya Qin, "Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence – A Commentary on the China-Publications Case", 10 CHINESE JOURNAL OF INTERNATIONAL LAW 271, 316 (2011); Douglas A. Irwin and Joseph Weiler, "Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS285)", 7 WORLD TRADE REVIEW 71, 89-95 (2008). One of the criticisms put forward by Irwin and Weiler is best summarized by their statement - "*[e]xaggerated textualism is as undermining as is exaggerated teleology since, among many other concerns, at a profound level it severs the legitimating nexus between the law as the handmaiden of its social, political, and economic goals*".

[8] Jingdong Liu, "Accession Protocols: Legal Status in the WTO Legal System", 48 J. OF WORLD TRADE 751 (2014).

Members that have joined the organization under the procedure laid down by Article XII of the WTO Agreement.[9] The analysis of all these commitments allows for a comparison between the commitments entered into by different Members. The mapping exercise includes protocols of accession of Members that joined the WTO after its inception in 1995 until the accessions of Kazakhstan, Afghanistan and Liberia in December 2015. The exercise revealed the existence of five categories of commitments that acceded Members have included in their Protocol of Accession:

- The first category consists of commitments that relate to transitional periods and special and differential treatment for developing countries, and in particular, Least Developed Countries (LDCs).
- The second category contains the commitments that serve as a confirmation of the acceding state's intention to adhere to the baseline obligation that is contained in the WTO Agreement. These "confirmation commitments" signal an intent to "ensure conformity" with these baseline obligations.
- The third category of commitments consists of commitments aimed at implementing WTO obligations and ensuring conformity of domestic trade policies with obligations prescribed by the WTO. This is a major category of commitments, which includes commitments in the areas of, for example, transparency, State-Owned Enterprises (SOEs) and internal taxes. Often, these commitments already pre-judge the WTO-consistency of the acceding state's trade policy, prior to it being subject to WTO dispute settlement proceedings.[10] Some authors have questioned the legitimacy of this particular practice.[11]
- The fourth category of commitments is of a particular type. It provides other WTO Members with the authority to adopt certain measures or practices that they would not otherwise be allowed to adopt under the baseline obligations contained in the WTO Agreement. This type of commitment can mainly be found in the sphere of anti-dumping and countervailing measures.[12]

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[9] For a comprehensive overview of the mapping exercise, see Dylan Geraets, *Accession to the World Trade Organization: A Legal Perspective* (2018).

[10] WTO, Report of the Working Party on the Accession of the Islamic Republic of Afghanistan to the World Trade Organization, ¶ 90, 146, WT/ACC/AFG/36 (13 November 2015). The cited paragraphs refer to Annex 10, which contains four export measures maintained by Afghanistan at the time of accession and their apparent justification grounds under Article XX of the GATT 1994.

[11] Roman Grynberg, Roman and Roy Mickey Joy, "The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System", 34 J. OF WORLD TRADE 159 (2000). See: § 5.4.3.

[12] Countervailing measures seek to off-set the negative effects caused by subsidized imports.

- The fifth category of accession protocol commitments consists of commitments that do not have a direct counterpart in the WTO Agreement. These commitments often prohibit an acceded Member from doing something which is not prohibited for original Members. So far it appears that it is this fifth and final type of commitment that has caused the most controversies in respect of WTO accessions.

COMMITMENTS ON THE ELIMINATION OF EXPORT RESTRICTIONS

Commitments on the elimination of export restrictions, such as export duties, are perhaps the single most discussed of all Protocol of Accession commitments.[13] They are a prime example of commitments that limit the regulatory autonomy of the applicant, by creating an obligation that prohibits the applicant from adopting particular measures. This type of commitments is, nevertheless, quite rare.[14]

The WTO Agreement itself is silent on the issue of export duties and as such, does not prohibit them. Article XI of the GATT 1994 only applies to quantitative export restrictions and does not regulate export duties.[15]

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[13] Carlos P. Braga and Olivier Cattaneo (2011), *Global Trade Governance and Development: The WTO Accession Conundrum*, *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries*, 364-366 [Carolyn Deere Birkbeck, (ed.), 2011].

[14] Julia Ya Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol", 37 J. OF WORLD TRADE, 488 (2003). Qin, referencing the note compiled by the WTO's Secretariat, notes that "Except in the case of China, these commitment paragraphs are generally of the following types: (a) obligations to abide by existing WTO rules, e.g., a commitment to bring specific national measures into conformity with WTO provisions on the subject in question; (b) Obligations relating to transitional periods permitted under the various WTO agreements, e.g., a commitment not to have recourse to specific WTO provisions providing for transitional periods for developing country Members; (c) Authorization to depart temporarily from specific WTO rules or from market access commitments contained in the goods schedules; and (d) Obligations to abide by rules created by the commitment paragraph and not contained in the Multilateral Trade Agreements. These relate to a commitment to comply with "WTO obligations and other international obligations" of the acceding country, privatization, sub-central governments, government procurement, trade in civil aircraft and publication."

[15] Article XI:1 of the GATT 1994 stipulates: "No 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 contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." Qin argues that Article XI:1 GATT 1994 thereby "explicitly permits the use of export duties on any products." See: Julia Ya Qin, "Mind the Gap: Navigating

Commitments on export duties (or export taxes) have, however, been made in 15 accessions. The commitments made during recent accessions, i.e. accessions concluded since 2012, are presented in Table 1.

Table 1: Commitments on the Elimination of Export Duties in Recent Accessions

Member	*Paragraph*	*Scope*	*Language used*	*(In)direct reference to Article XX?*
Montenegro (2012)	132	All export taxes	"Would not apply or reintroduce"	None
Russian Federation (2012)	638	Part V Schedule of Concessions and Commitments	"Not to increase", "to reduce" or "to eliminate" export duties	"Except in accordance with the provisions of the GATT 1994"
Tajikistan (2013)	169	All export taxes, unless provided for in Table 9	"shall eliminate"	"or applied in conformity with the provisions of Article VIII of the GATT 1994."
Kazakhstan (2015)	540	Part V Schedule of Concessions and Commitments	"Not to increase", "to reduce" or "to eliminate" export duties	"Except in accordance with the provisions of the GATT 1994"
Afghanistan (2016)	145	All export taxes, unless provided in Annex 12	"Not to increase", "to reduce" or "to eliminate" export duties	"or applied in conformity with the provisions of Article VIII of the GATT 1994."

The extent to which the commitments made by acceding Members limits their regulatory freedom varies considerably. In Tajikistan's case, a select number of products have been excluded from this obligation (negative listing), whereas in the case of Montenegro the commitment applies to all products. The Russian Federation agreed to reduce, not to increase or eliminate export duties on a particular set of products in its Schedule of Concessions or Commitments.[16] The most stringent commitments have been entered into by Montenegro which agreed to eliminate, not apply or reintroduce export taxes. This indicates that there is a visible trend towards the positive listing of goods on which export taxes may still be imposed or the negative listing of goods on which export duties will have to be phased out or eliminated.

Between the WTO Agreement and Its Accession Protocols", *Assessing the World Trade Organization: Fit for Purpose*?, 223, 231-232 [Manfred Elsig, Bernard Hoekman, and Joost Pauwelyn (eds.), 2017].

[16] In the example of the Russian Federation, the commitment to reduce export duties was incorporated in its Schedule of Concessions or Commitments and refers to over 700 products in 26 HS Chapters.

Interestingly, whereas some of the less strict commitments would leave open the possibility to resort to the general exceptions contained in Article XX of the GATT 1994, this option is not available in the case of Tajikistan (following the Appellate Body's reasoning in *China – Publications and Audiovisual Products*, *China – Raw Materials* and *China – Rare Earths*) and Montenegro (because of the lack of any reference to the WTO Agreement or the GATT 1994) in the paragraph containing the commitment.

Conclusion

This paper has explored recent developments in the accession practice of States and Customs Territories joining the WTO. It has examined, in particular, the way in which commitments on the elimination of export duties have been scheduled in the Working Party Reports of some acceded Members. Although this conclusion may sound straightforward and obvious, it is essential that states have a clear idea of what they intend to obtain from WTO membership and what the price is that they are willing to pay to pay for these benefits.[17] Consequently, it is advisable that acceding states and entities seek (legal) advice from either the private sector or from institutions such as the Geneva-based Advisory Centre on WTO Law (ACWL).[18] States such as Seychelles, which became a Member of the WTO in 2015, acceded to the ACWL in 2003. The ACWL also notes that LDCs that are Members of the WTO or in the process of acceding to the WTO are entitled to its legal services without becoming a Member of the Centre. In terms of concrete legal advice on particular issues to be negotiated as part of the accession process, it is extremely important to be remember that the commitment-containing paragraphs of working party reports on the accession of a state constitute treaty text and are enforceable in WTO dispute settlement proceedings. The absence of cross-references to particular provisions in the WTO Agreement may have as a consequence that such provisions cannot be relied upon to justify an alleged violation of a protocol commitment. Considering the controversy that arose because of the lack of such cross-references in China's Protocol of Accession in respect of its commitments on the elimination of export duties, it is surprising that some of the more recently made commitments also do not contain such a cross-reference. At the same time, it should be noted that the approach adopted by the working parties dealing with

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[17] Igor I. Kavass, "WTO Accession: Procedure, Requirements and Costs", 41 Journal of World Trade, 453-474 (2007).

[18] Chad P. Bown, and Rachel McCulloch, "Developing Countries, Dispute Settlement and the Advisory Centre on WTO Law", 19 The J. of Intl. Trade & Econ. Dev.: An Intl. and Comp. Rev., 33, 63 (2010)

the accessions of the Russian Federation and Kazakhstan would appear to guarantee the availability of the general exceptions contained in Article XX of the GATT 1994 by incorporating the export duty commitments in the schedule of concessions. Nevertheless, as the commitment entered into by Afghanistan shows, some Members have still opted for scheduling a commitment for which the general exceptions may not necessarily be available in case of an alleged violation.