Accession to the World Trade Organisation: 
A Legal Analysis

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The World Trade Organisation (WTO) has a widespread membership covering over 130 countries. This result however falls short of the universal membership of the United Nations and, above all, still falls short of the presence among its Members of important traders like China, Taiwan, Russia and Saudi Arabia. At the same time, membership in the WTO is increasingly seen as a necessary recognition by the international community of the reliability of one country’s trade policy and a necessary step towards reaping the benefits of international trade. It is therefore not surprising that the number of countries requesting the accession to the WTO is increasing and spread to the various areas of the world.¹ Nor is it surprising that countries are ready to undergo lengthy negotiations in order to complete the accession process compared to the time that was requested under GATT.²

Acceding to the WTO is however totally different compared to acceding to the GATT. While GATT had a rather limited scope, the WTO is an organisation covering almost all facets of international trade and expanding. Since the end of the Uruguay Round, several important agreements (e.g. ITA, financial services) have been concluded in the WTO and others are forthcoming as either part of the WTO built-in-agenda, or for when the new Round will be launched. This is why acceding to the WTO is often compared to ‘catching a moving train’ and why many acceding countries tried to complete the accession in the course of last year or are currently endeavouring to do so.

What is then the ticket that acceding countries have to pay in order to catch the ‘moving train’? Important literature exists on how this ticket is

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1. There are currently thirty-three countries in the process of accession to the WTO. These are: Albania, Algeria, Andorra, Armenia, Azerbaijan, Belarus, Bhutan, Bosnia and Herzegovina, Cambodia, Cape Verde, People’s Republic of China, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Kazakhstan, Lao People’s Democratic Republic, Lebanon, Lithuania, Moldova, Nepal, Sultanate of Oman, Russian Federation, Samoa, Saudi Arabia, Seychelles, Sudan, Chinese Taipei, Tonga, Ukraine, Uzbekistan, Vanuatu, Vietnam, Yemen.

2. As an example it can be recalled that China started negotiating its accession to GATT (later converted on accession to WTO) back in 1986. Georgia, which is simply awaiting the ratification of the protocol in order to join, and Jordan, which joined in April this year, started negotiations in 1996 and 1994 respectively.
determined in the realities of the accession negotiations. What is lacking perhaps is a discussion and debate on the legal framework in which accession to the WTO takes place. This article would like to make a contribution to this debate by examining accessions to the WTO from an exclusively legal perspective.

To this end we will first examine the international law which governs accession to international open organisations like the WTO. Then, the core of the article will treat the question of accession to the WTO proper. In that part we will examine first the question of who may accede to the WTO, with particular attention given to the determination of when customs territories can apply. Second, there will be an examination of the various phases of the negotiation process, including the aspect concerning a determination of the terms of accession. Finally, we will look into the eventual obligations of existing Members vis-à-vis the acceding country. Given that no legal rule can exist in abstracto, the findings of this article will be constantly confronted with the practice resulting from the ongoing process in Geneva.

1. Accession to international organisations under international law

Once an international organisation has been established, countries can join either through the procedures established by the Charter of the organisation or through a modification of the Charter itself. In the first case, the Charter of the organisation foresees an ‘accession clause’ and the organisation itself is said to be an open one. The WTO Agreement contains such a clause in Article XII. The analysis that follows is therefore limited to those organisations that, like the WTO, are open ones.

Accession to open international organisations has seldom been at the centre of juridical examination. The most important case is the First Admission Case judged by the International Court of Justice with reference to the accession to the United Nations. According to the ICJ,

'A member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State


to membership in the United Nations, it is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article.  

The spirit as well as the terms of the paragraph precluded the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which comply with them.  

The ICJ has therefore made clear that there are specific limits to the freedom enjoyed by current members of an international organisation when negotiating the accession of a new member. In particular, in case the Charter establishes specific conditions for the admission of new Members, this freedom is limited to the assessment of whether these conditions are met by the acceding country.  

In addition, from the reasoning of the Court another characteristic of the accession process of open organisations can be inferred. If, as stated by the Court, the accession of a given country cannot be made dependant on conditions other than those specified in the Charter, then the acceding country is entitled to an examination by the existing Members upon the question of whether it meets the conditions requested. This is particularly relevant for those organisations, like the WTO, that determine only in part the conditions for accession, and then leaving their subsequent specifications to further negotiations among the interested parties.  

Another point discussed by the Court is whether existing Members are required to specify the reasons of their vote. The Court concluded negatively on this point but specified that if reasons were given, then these ‘must conform to the rules and limitations applicable to the vote’ and, as a corollary to this, that Members have an obligation to act in good faith when exercising their vote so that a negative vote on admission must be based on a negative assessment of the fulfilment of the conditions set out in the Charter and not be a cover for a different reason.  

This obligation to act in good faith goes beyond the voting on accession to cover all of the process. If the Charter specifies the conditions for accession, and these have to be considered the benchmark against which the capacity to accede is measured, then this examination must be carried out in an

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5. Ibid., p. 65.  
6. Ibid., p. 63.  
8. Ibid., p. 60 et seq.
impartial way by the organisation so to effectively assess the respect of the conditions.9

From the examination of the international law pertaining to accessions we can therefore conclude, even if disputed,10 that the jurisprudence of the ICJ and the doctrine agree that a minimum set of rules defining more clearly the scope of the accession process for international organisations of an open character exist. Such rules apply necessarily also in the case of accession to the WTO.

2. Accession to the WTO

Accession is regulated by Article XII according to the following terms:

'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 the Agreement and the Multilateral Trade Agreements may accede to this Agreements 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-third majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.'

Already from a superficial reading of Article XII there emerges a strong similarity with the corresponding provision of GATT Article XXXIII,11 which however was not the only possibility foreseen for joining GATT. Article XXVI:5(c) GATT, in fact, allowed accession of territories and separate customs

9. I doubt that it is possible, as part of the doctrine does, to consider that from the duty to act in good faith, as constructed by the ICJ, there derives a more general obligation for those organisations that submit the accession to conditions to be determined through negotiations, 'not to impose terms which are unrealistic in the context of the applicant’s economic or other status in relation to other members of the organisation.' C. F. Amerasinghe, ‘Principles of the institutional law of international organisations’, 1998, p. 110.

10. It should be recalled, in fact, that the ICJ opinion was a contested one with a dissenting opinion expressed by six judges. In addition, the then Soviet Union and also the US never accepted the opinion of the Court.

11. GATT Article XXIII reads: ‘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 Contracting Parties under this paragraph shall be taken by a two-third majority.’
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territories (SCT) through ‘sponsorship’ of another country, namely the metropolitan territory having international responsibility over such territories. This system was a consequence of the de-colonisation phase, albeit used in the last instance by Liechtenstein to join GATT under the wings of Switzerland. The main difference between GATT and the WTO, apart from the obvious semantic changes, is the end of the process of accession via the sponsorship of another government. As a result SCTs can now join the WTO only on their own capacity.

Another element that is evident from the reading of Article XII is its very limited scope. Nothing is said about the rules to be followed during accession nor during the pre-accession phase as, for example, on the right of a country to have its accession case ‘heard’ by the WTO Members. This is a loophole that has been largely, but not completely, closed by guidelines prepared by the WTO Secretariat codifying the practice emerging from the accession negotiations.

Last but not least, Article XII makes it clear that the prospective Member will accede to the Marrakesh Agreement establishing the WTO and the Multilateral trade agreements annexed to it, thus confirming the application of the principle of the ‘single undertaking’, as contained in Article II.2 WTO, as also applicable to the acceding countries.

2.1. Who can join the WTO

Contrary to the practice of international organisations whose membership is limited to States, both States and separate customs territories can become Members of the WTO, the latter provided that they fulfill the criteria set out in Article XII WTO. The formulation of Article XII differs from Article XXXIII GATT in the sense that it seems to require that both States and SCTs possess a full autonomy in the conduct of their foreign trade. If so, then the problem of the admissibility of a State which is part of a SCT may arise, as that State, depending on the scope of the SCT, may have well have lost full autonomy over its foreign trade.

Such an interpretation would however be misleading. It is not only contradicted by the solution retained in the case of the European Communities, where both the Communities and its Member States are part of the WTO,12 but it would also contradict with the sovereignty of the decision taken by a State to join or form a SCT with another State, as such a decision may always be reversed by a later contrary decision. In addition, it would also make partially void of significance the provisions of Article XXIV which foresee the possibility for Members to form customs unions – an important element of any SCT formed by States, as shown below, with other countries but without mentioning any potential effects on WTO membership. Finally, the

12. WTO Agreement Article XI.
proposed solution is confirmed by the practice of the WTO: when Andorra, which is in an enhanced customs union with the EC, applied to join WTO, its application was accepted and a Working Party was formed under the standard terms of reference. One can conclude therefore that any State, regardless of its size, world trade share, or participation in a separate customs territory, can start negotiations to join the WTO.

On the opposite hand, not all SCTs can join. In order to do so, according to Article XII, an SCT must possess 'full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement and the Multilateral Trade Agreements'. Before examining these conditions, one should first determine when we are in the presence of a separate customs territory.

Three descriptive elements can be inferred from Article XII itself: one negative and two positive. The negative element is that by separating this entity from that of a State, one notes that statehood qualities are not a condition. This potentially opens the door to a variety of both supra-national and sub-national entities. This possibility is however limited by the two positive conditions set out in that Article.

The first positive element is that the entity must be a customs territory. That is the case, according to Article XXIV:2 GATT, for 'any territory with respect to which separate tariffs or other regulation of commerce are maintained for a substantial part of the trade of such territory with other territories'. Therefore, when a territory covers, with separate tariffs or other regulations of commerce, part of its trade with other territories a first step is accomplished in the fulfilment of the legal requirements. Whereas defining this first element, the tariff one, poses no problem, determining the second one is less evident. Such determination should be done with reference not simply to GATT but rather to the entire WTO Agreement to which the SCT will accede by virtue of Article XII WTO. Regulations of commerce are not therefore regulations dealing exclusively with trade in goods but also with trade in services and the protection of intellectual property rights. As such, the term 'regulations of commerce' should not be interpreted exclusively as pertaining to trade regulations but rather to any regulation having a bearing on the aspects of trade covered by the WTO. Finally, in Article XXIV:2 GATT the two elements of tariff and regulations of commerce are posed in the alternative. It is therefore possible to envisage, at this stage, an application to the WTO of a SCT that has separate regulations of commerce but no separate tariffs whatsoever. We will see below however, that an SCT that does not cover tariffs will likely fail the test of the autonomy of external commercial relations.

The second step in the definition of the customs territory is that the

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13. Andorra in fact not simply applies the common external tariff of the European Communities for industrial goods, but also most of the regulations pertaining to commerce adopted by the same entity.
coverage of trade, either through tariffs or regulations of commerce or a mixture of both, must be substantial. The legal appreciation of a quantitative requirement not clearly defined is always difficult and open to legitimate criticism. However, when we consider that a customs union or a free trade area is considered to be consistent with WTO rules when 'duties are eliminated with respect to substantially all the trade'\textsuperscript{14} with no 'major sector excluded'\textsuperscript{15} and that there is no agreed definition in the WTO of when the first criteria is supposed to have been met,\textsuperscript{16} it then seems reasonable to interpret Article XXIV:2 in a flexible way and to put the 'bar' of conformity at a lower level than the one suggested for customs unions or free trade areas with the possibility, in particular, of excluding some major sectors from the coverage of the SCT.

The second positive element is that the custom territory must be separate, necessarily, from a state or another customs territory. However, after having described what is a customs territory according to GATT rules and considering that SCTs have to fulfil the criteria of autonomy in foreign trade, one should ask what is the real meaning of this requirement and if it adds anything to these requirements, which seems doubtful.

Under GATT 47, SCTs were allowed to join through governments acting on their behalf or through sponsorship. As mentioned above, these possibilities were envisaged mainly to allow the participation in the GATT of countries that were in the process of de-colonisation. The term 'separate' seems therefore to be contingent on this specific situation as confirmed by the reading of Article XXVI:5 GATT\textsuperscript{17} and the practice which has seen various SCTs joining GATT under this provision rather than Article XXXIII. On the other hand, the fact that a reference to 'separate' has been maintained in the text requires us to find an appropriate meaning for it. That would be the requirement that the SCT possess a legal personality distinct from that of another custom territory. This is in fact the \textit{condicio sine qua non} for a customs territory to have responsibility for its own acts. One can therefore conclude that when we are in presence of an autonomous custom territory endowed with its own legal personality, we are also in presence of a separate one.

Finally, it is interesting is to note the fact that Article XII WTO eliminated the reference contained in GATT for the need of an SCT to have a government acting on its behalf for accession purposes. This opens the door

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\textsuperscript{14} Article XXIV:8.
\textsuperscript{15} Understanding on the interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.
\textsuperscript{17} In Article XXVI:5(c), which deals with the customs territories that possess or acquire full autonomy in the conduct of external commercial relations, the term 'separate', previously used in the article with reference to the same territories, disappears.
of membership to a very wide potential number of customs territories, like customs unions, that can fulfil all the other relevant criteria.  

The other criteria that a SCT must fulfil, according to Article XII WTO, is to possess both full autonomy in the conduct of its external commercial relations and full autonomy in the conduct of the other matters provided for in the WTO Agreement. One proposed interpretation of these criteria is the compliance with the elements that the UN/ECOSOC Sub-Committee investigated when it dealt with the request of Burma, Ceylon and Southern Rhodesia to accede to GATT as an STC under Article XXXIII. These are: (a) the territory’s ability to approve and modify tariffs without the consent of the metropolitan power; (b) the territory’s ability to apply GATT without reference to the metropolitan power; (c) the territory’s ability to enter into legal contractual relations on commercial matters with foreign governments. This is certainly a good starting point even if the first two criteria should be reformulated to take into consideration the evolution of GATT into the WTO. As modified, they could read as: (a) the territory’s ability to approve and modify tariffs and services commitments without the consent of any other State or SCT; (b) the territory’s ability to apply to the WTO without reference to any other State or SCT.

There is a common element to all three criteria, this concerning the notion of ‘ability’. This is simply the capacity, according to the legal structure of the SCT, to adopt measures of type suggested above. It should be stressed that any investigation directed at determining the existence of such a capacity should go beyond the data of its formal attribution to the SCT in order to examine whether in practice the SCT can adopt these measures without violating its own legal structure.

The ability criteria is particularly important for determining which supranational customs territories could join the WTO. As mentioned before, the joint examination of Article XII WTO and Article XXIV GATT as operated so far seems to open the door of membership to customs unions. The criteria of ability qualifies this assumption by limiting the possibility to join only to those customs unions that go beyond the pure tariff aspect and which become competent for other areas of trade policy, notably those covered by the WTO.

A second element, common to the first two criteria, is the determination of when the ability to perform the requirements described exists without the consent of reference to other States or SCTs. To put it in a different way: what is meant by ‘without consent or reference’?

18. For customs unions in particular, these include full respect of the requirements foreseen in Article XXIV of GATT.
20. This capacity can in fact result implicitly from the powers attributed to the SCT.
One could wonder whether this element maintains its validity today given that the reference to a government acting on behalf of an SCT, and for which the criteria of the capacity to act without consent or reference to other entities was clearly a relevant one, has been eliminated. In any event, even if one wants to maintain this requirement, its interpretation should be done in the light of the developments that have taken place since the time they were formulated. And the major development in the field of trade relations in this period is the emergence of the European Communities as a trade actor which is also an original Member of the WTO. If, as correctly pointed out, the EC is a separate SCT possessing full autonomy in the sense of Article XII, then some important considerations can be inferred from this conclusion.

The first is that while the EC is endowed with competence over trade matters, this competence is exclusive only for trade in goods whereas, for certain aspects of trade in services and of the regulation of intellectual property rights, the competence is shared with Member States and unanimity must be reached within the EC before a decision can be taken. As such, in these two fields the EC cannot act without their consent. Even in the sphere of trade in goods, reference to them is necessary as the majority of Member States must approve a proposal by the Commission.

The second is that when a common position is reached, no matter whether through majority voting or unanimity, then the decision is imputable to the EC as a whole.

It follows from these considerations that the terms ‘consent and reference’ must be restrictively defined as simply requiring that any decision taken on matters of tariffs and services commitments and the application of the WTO rules must be formally imputable to the SCT independently of its decision-making structure.

As far as the third criteria examined by the UN/ECOSOC Sub-Committee is concerned, the one pertaining to the territory’s ability to enter into legal contractual relations on commercial matters with foreign governments, it is sufficient to note that the Sub-Committee already dropped any consideration of ‘reference or consent’ to limit itself to request the ‘ability’ to enter contractual relations on trade matters.

If it is within the legal system of the SCT that it must be ascertained whether full autonomy exists, then a consequence of this interpretation is that there is no need for a formal act of recognition of such autonomy by interested parties as was the case under XXVI(c) and as sustained by a certain doctrine. This is clearly confirmed by the decision of the WTO to estab-

lish a Working Party on the accession of Taiwan, notwithstanding the well-known position of the Chinese government.

2.2. The accession process

2.2.1. Setting up the process

The procedural aspects of the accession negotiations are not regulated in Article XII but in a note of the WTO Secretariat, discussed and agreed upon by the Council, that reproduces and adjourns the GATT practice. Accordingly the applicant ‘… submits a communication to the Director-General of the WTO indicating its desire to accede to the WTO under Article XII. The communication is circulated to all Members. The General Council considers the application and the establishment of a working party …’

The formulation chosen prompts a question. Is there a legal obligation for the General Council to establish a Working Party or may the result of the ‘consideration’ be negative?

Following the conclusions on the international law discussion above, the margin of discretion for the Council seems to be rather limited. The only possibility that the Council has to reject an application at this stage, and to refuse the establishment of the Working Party, is for it to consider that the applicant is not a State nor a SCT in the sense of Article XII. So, any State or SCT has the right to ‘have its case heard’ in the WTO.

A second question concerns the decision-making process that should be followed at this stage of the procedure. How should decisions be taken in case of a difference of opinion among WTO Members on the qualification of a territory as a State or SCT? Article XII WTO, first sentence, specifies that ‘decisions on accession shall be taken by the Ministerial Conference’, whereas the second sentence requires a two-third majority for the approval of the accession. Decision making in the WTO Agreement is regulated by Article IX, which requires Members to endeavour to reach consensus, which is deemed to be reached, ‘… if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.’ If consensus on a decision cannot be reached, then the issue should be decided by the majority of the votes cast unless otherwise specified in the Agreement.

The fact that Article XII makes a clear distinction between decisions on accessions and approval of accessions indicates that the WTO Members wished to reinforce the majority needed to adopt a decision only in regard to this second possibility. Consensus however, remains the guiding principle in the accession negotiations. As such it will not simply rule on the decision to

establish a Working Party, but also on all the decisions taken during the life of the Working Party itself.25

Once the General Council has decided upon the establishment of a Working Party, it will be generally given the standard terms of reference, ‘to examine the application of the Government of … to accede to the World Trade Organisation under Article XII and to submit to the General Council recommendations which may include a draft Protocol of accession.’26 We will see in the next section what the examination of the application means in practice. It is interesting to note here that the terms of accession foresee the possibility of a negative conclusion of the examination carried out by the Working Party. The Working Party may in fact decide to recommend not to accept the request made by a certain country. This is however unlikely to happen in practice and the fact that no deadline is fixed under the terms of reference for the life of the Working Party makes this possibility even more remote. What happens in practice is that negotiations continue indefinitely until an agreement is reached and the draft protocol of accession is submitted to the General Council.

2.2.2. The terms of accession

The core of the accession negotiations lies in the determination of the terms of accession: the cost of the ticket to join the WTO train. How is this price determined? Once again Article XII WTO, as is its homologue in GATT, is very vague in limiting itself to require that such terms should ‘… be agreed between it [the acceding country] and the WTO.’ As noted above, from Article XII WTO, it is only evident that these terms must encompass all WTO multilateral agreements.

The negotiation of the terms of accession is a two-track system whereby on one track the parties negotiate the so-called market-access commitments (that is the duties that will be applied to the imports of agricultural and industrial goods by the acceding country and the commitments in the field of services). The other track consists of examining the compliance of the internal legislation in trade-related fields with the WTO rules and the discussion on how to achieve such compliance in future. While the first track is eminently bilateral in nature, the second one is carried out mainly in the various sessions of the Working Party. As noted in the introduction,27 an important literature exists on how those terms have been determined in the practice of the accession negotiations. I will therefore limit myself only

25. One should not however forget that during GATT, and so far during WTO, Members have never really reverted to the possibility of majority voting, guarding with particular care that the tradition of consensus in all fields is maintained.
27. Supra, p. 1, note 3.
to a discussion of the question of whether any limits can be found in the WTO Agreement itself to the desiderata of WTO Members.

A first consideration is that one should not overestimate the vagueness of Article XII WTO. That it seems to leave the acceding country at the mercy of the WTO Members since, in case an agreement is not reached, then the only possibility left for the country is to renounce altogether its intent to complete the accession, does not go so far as to warrant the imposition of any particular terms on the acceding country. This article needs to be interpreted in a teleological way. As such, the terms of accession of one country cannot go beyond the requirements imposed by the Agreement itself, which is the scheduling of commitments in the market access sphere and the assurance of the respect of the various parts that form the WTO Agreement.

Another limit is to be found in Article XI:2 WTO which foresees that least developing countries (LDCs) can ‘… only be requested to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capacities.’ The fact that this provision is contained in the article entitled ‘original membership’ and is not repeated in Article XII should not be interpreted as denying its application to acceding countries. Otherwise, it would be rendered void of most of its meaning. The concessions and commitments of the LDCs that are original members of the WTO are in fact part of the WTO Agreement itself and were therefore negotiated in parallel to this provision of Article XI. As such, the provision maintains a proper sense if referred to commitments and concessions to be negotiated in future by LDCs, either through negotiations in the WTO or via their accession to the WTO. The limit of this provision as interpreted is that it has a simple programmatic value and is therefore difficult to qualify in legal terms. In any event, it obliges WTO Members to take into account these elements when negotiating the terms of accession of least developing countries.

Within these limits, the margin of appreciation left to the negotiations is wide indeed. It is in particular wide as to the determination of whether the respect for the various Agreements has been reached by the acceding country, or regarding how this compliance will be reached in the future. In the same vein, the margin is wide for determining when the proposed commitments in the field of market access can be considered as satisfactory, where the level offered by other countries can set a precedent but not form the rule.

Another point that is debated during accession negotiations is whether the eventual status of developing country or economy in transition should be recognized to the acceding country by the WTO Members. It should be noted that in neither the WTO nor elsewhere does there exist any binding definition of developing country or economy in transition. Only for the least developing countries does there exist a process of formal recognition operated by the UN. Political considerations on the opportunity of granting such status aside, the question remains whether acceding countries are auto-
matically entitled to benefit from the special provisions that exist in the various WTO Agreements for such countries?

In most cases these provisions are simply granting a transitional period for the application of a specific agreement. For developing countries and economies in transitions, most of these periods expired on the 1st of January 2000, so the question has become largely redundant. For the least developing countries such periods continue until 2005. For these countries the granting of the transitional period must therefore be automatic. This results plainly from the fact that the WTO is an open agreement and from the teleological interpretation of the accession rules outlined above. Such right however, does not go as far as to shelter acceding countries from WTO Members’ requests of specific engagements as to the application of such agreements, like the request to submit specific action plans for their application, which are in fact part of the terms of accession. In the same vein, the terms of the accession could contain provisions allowing transitional periods to countries other than the least developed one.

A final point concerns the eventual request for the acceding countries to join the Plurilateral Trade Agreements (PTAs). Article XII.3 WTO specifies that accession to these agreements shall be governed by their provisions, while Article XII.1 limits the scope of the accession negotiations to the multilateral agreements. In combining these two provisions, two points emerge: first, it is clear that the accession to the Plurilateral Agreements is a wholly separate process from the accession to the WTO; second, by limiting the separation solely to the procedural aspect, Article XII.3 allows discussions and limited negotiations on the PTAs during the accession negotiations. This conclusion is confirmed by the practice that has emerged in the WTO of requesting acceding countries to undertake the starting of negotiations for accession to the Agreement on Government Procurement (GPA) as part of their accession ticket, a practice that has often been criticized, but at end accepted by the acceding countries. As long as the commitment requested is one limited to the starting of negotiations, and no obligation of accession to the GPA is foreseen, such a request can hardly be considered contrary to the provisions of Article XII WTO.

2.2.3. The conclusion of the process
Once the two-track negotiations described above are completed, their results are compounded in the Working Party report to which the consolidated schedules of concessions for goods and services are attached. The report contains the description of the foreign trade regime of the acceding country and the commitments it will undertake at the moment of accession. These mainly consist of commitments assuring the respect of the various WTO

28. These are the Agreements signed only by some WTO Members, as such failing outside the scope of the single undertaking.
Agreements, but can also include the commitment to start new negotiations for the GPA, as just described, or to also submit annual reports on the privatization process.

The consolidated schedules of concessions contain the results of the various bilateral market-access negotiations and are compiled by the WTO Secretariat on the basis of the Most-Favored-Nation (MFN) principle contained in both the GATT and GATS Agreements.\(^29\) They are therefore the compilations of the best concessions offered in the course of the various bilateral negotiations by the acceding country to the various WTO Members for each good or service. Finally, the report also contains the drafts of the Decision on the accession and, most importantly, the Protocol of accession.

Once the report is completed it is adopted by the Working Party and then sent to the Ministerial Conference or when not in session, to the General Council, for the approval of the agreement on the terms of accession. The adoption of the report by the Working Party signs the formal conclusion of the Working Party. Therefore, should the General Council reject the report, a new Working Party would have to be established.

The final approval of the terms of accession is, as noted above, referred to the Ministerial Conference, but how does the Ministerial Conference decide on accession? Article XII.2 indicates that the agreement should be approved by a two-thirds majority of the WTO Members. Article XI.1 however, requires that the practice of decision by consensus to be given priority in the WTO. As one can easily imagine, the matter soon came to the attention of the General Council. It decided that, ‘... when the General Council deals with matters related to requests for accessions to the WTO under Article XII of the WTO Agreement, the General Council will seek a decision in accordance with Article IX.1. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting under the relevant provision of Article XII. The above procedure does not preclude a Member from requesting a vote at the time the decision is taken.’\(^30\)

One should not interpret this decision of the Council as modifying the provision of Article XII.2, as clearly underlined by the General Council decision itself. The General Council should simply endeavor to find a consensus and where this is not possible, the decision would have to be taken by the two-third majority of the WTO Members. This last possibility however remains rather hypothetical due to the strong tradition existing in the WTO that all decisions should be taken by consensus. If a Member objects to the terms of accession of another country and does not want to make use of the possibility, as foreseen in Article XIII WTO of non application of the WTO vis-à-vis the acceding country, it would block the formation of the consensus.

\(^{29}\) Respectively, GATT 94 Article I and GATS Article II.

The approval by the General Council of the agreements on the terms of accession does not constitute the end of the accession process. The General Council in fact decides that the country 'may accede' to the WTO, but such accession is only completed when the acceding country has accepted the protocol which enters into force thirty days after the acceptance.\textsuperscript{31} There is therefore a lapse of time between the conclusion of the process in Geneva and the actual accession of a country. The length of this period can be quite important and depends on the type of procedure for ratification requested by the Constitution of the acceding country. In order to avoid too long a period passing between the decision of the General Council and the completion of the ratification process, the Protocol foresees a deadline for its acceptance. The passing of the deadline without the acceptance by the acceding country or the granting of an extension by the General Council voids the Protocol of its validity.

Finally, the accepted Protocol, which includes the specific commitments undertaken by the acceding country in both legislative and market access areas, will form an integral part of the WTO Agreement for the acceding country. As such, its eventual violation will be subject to the discipline of the Dispute Settlement Understanding.

3. The rights of the acceding country

Any country wishing to join an already established international organization will find itself in a more difficult situation compared to being among the founders of such an organization. The joining country must pay the ticket for the train, in the WTO jargon. However, is accession to the WTO all about paying? Or, can acceding countries consider that they also have certain rights in the process and upon the outcome of the process? As far as the process of accession is concerned, we have answered this question in the previous sections. What remains to be examined is whether acceding countries have any rights in regard to the outcome of the process of accession to the WTO.

The answer is that they have the right to obtain the full application to their country of the WTO Agreements, except in the case foreseen by Article XIII WTO. This follows from the combined reading of Articles X, XII and XIII WTO.

Article XII, which stipulates that the acceding country will join on 'terms to be agreed', refers necessarily to the acceding country. These terms are the obligations described above that the acceding country undertakes when joining the WTO and an endorsement of these terms by WTO Members cannot

\textsuperscript{31} In most cases the formal acceptance of the protocol takes the form of its signature by an empowered authority of the acceding country.
be made conditional on the acceptance by the acceding country of altered terms, or the non application *vis-à-vis* itself of any WTO Agreement.

Any alteration to the obligations of a WTO Member is possible only in the cases and according to the conditions specifically foreseen in the Agreement. These are of two kinds, specific and general. Specific ones include the possibility for a Member to increase the level of the customs duties beyond the consolidated one in case of balance of payment problems, as foreseen in Articles XII and XVIII GATT. Those of a general nature would have to be considered tantamount to an amendment of the WTO Agreement, and as such, governed by the provisions and procedures foreseen in Article X WTO. An alteration occurring in case of an accession would therefore not be consistent with the WTO rules. This could not be rectified by even the eventual unanimous voting on the terms of accession, because such an alteration would have occurred without the respect of the rules of the WTO.

This is further confirmed by the reading of Article XIII WTO which provides for the possibility of non-application of the WTO Agreements between Members and between a Member and an acceding country. Article XIII is very clear in determining that the non application refers to ‘this Agreement and the Multilateral Trade Agreements’, therefore eliminating any doubt as to the possibility for an existing Member to use the position of relative strength it enjoyed during the accession negotiations to pick and choose parts of the WTO that it does not wish to apply to the new Member. In addition, should an existing WTO Member decide to opt for the non-application of the WTO Agreements, then the acceding country will not be obliged to apply them *vis-à-vis* the non consenting country.

The option of non-application is available, according to Article XIII, to both existing and acceding Members, and it is only subjected to the procedural requirement of notification of the Member’s decision to the Ministerial Conference previous to the vote on the terms of accession. The practice is however recognized as constituting an eventual request by existing Members. This raises the question of whether the non consenting Member should be allowed to vote on the terms of accession. The practice, during GATT, was in favour of allowing non consenting Members to vote.32 This seems to be the correct solution as neither Article XII nor Article XIII specify any consequences on the voting rights of a Member should it not consent to the application of the WTO Agreements.

32. In 1951 Cuba invoked Art. XXXV GATT (the correspondent of current Article XIII WTO) against various acceding countries while voting for their accession. Similarly, so did the US in 1971 on the accession of Romania. This practice has continued under the WTO; see WT/ACC/77/Rev.1 (19 November 1999), p. 29.
4. Conclusions

In the passage from the GATT to the WTO most of the rules pertaining to accession have been maintained. This has allowed the WTO to preserve the flexibility that was characteristic of the GATT. Accessions however are not taking place in isolation from specific legal rules that can be inferred either directly from the WTO or indirectly from the international legal system of which the WTO is part. This article has tried to specify what these rules are and implications flow from them for the accession process.

The number of countries in the process of joining the WTO is increasing as new areas of the world try to escape from previous isolation and integrate themselves into the world trading system as a way to stabilize and expand their economies. There is no doubt that such activity will sooner or later come to test these rules. It is a possibility that the Palestinian Authority may apply to the WTO as a separate customs territory.33

As the inner philosophy of the multilateral trade system is directed to giving clear rules to trade relations among its members, it would be at odds with such an idea if the very first approach for many countries to this system would take place without reference to such specific rules and then be left alone to political considerations. These have, and will continue to have, an important place in the WTO, but they must go hand in hand with clear rules so to favor that universal membership to which a world organization must aspire.

References


Lei Wang, ‘Separate Customs Territory in GATT and Taiwan’s Request for GATT Membership’, 25 *Journal of World Trade* 5, pp. 5–19


33. Tomer Broude, *op. cit.*