

The Contribution of WTO Accessions to Rule-Making

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What makes WTO accession commitments “rules”?



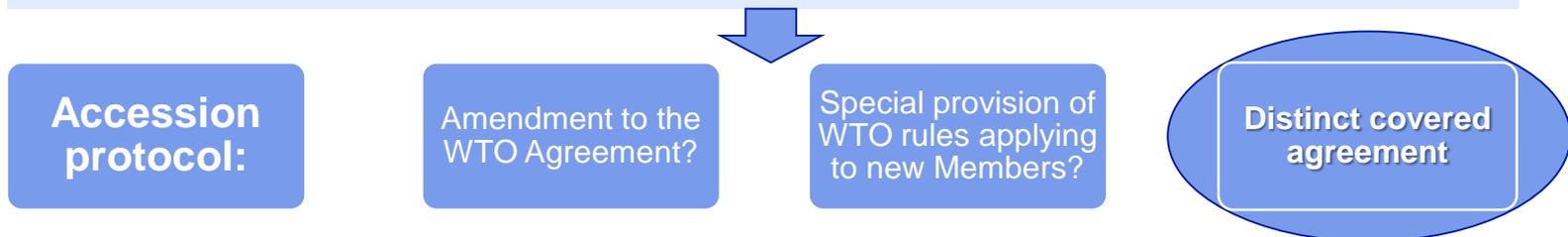
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Accession commitments and the WTO dispute settlement system

Accession Protocols are linked to the multilateral framework of rules: All accession Protocols provide that the Protocol “shall be an *integral part* of the WTO Agreement”.

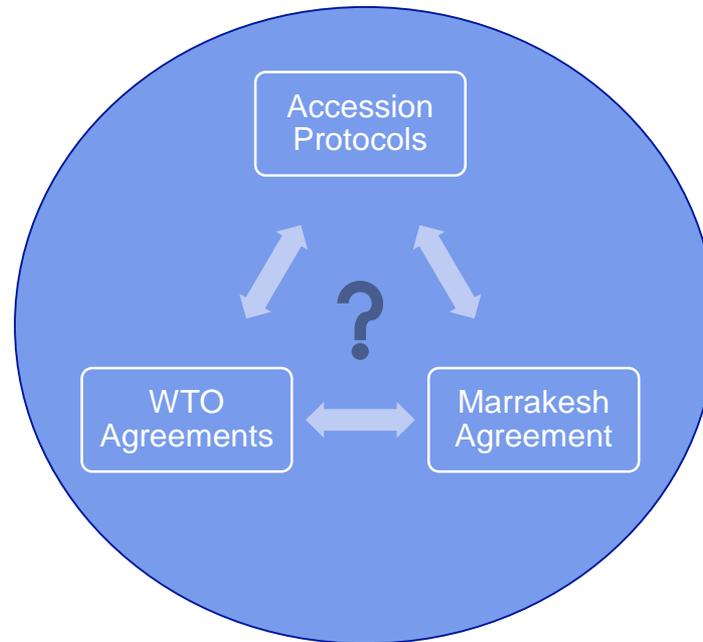
Enforceable rights and obligations: The WTO dispute settlement system treats accession commitments as “covered agreements”. Members have not questioned their enforceability.

Accession commitments = Treaty text: Panels and the Appellate Body have reasserted that accession commitments can be interpreted in accordance with the customary rules of interpretation of public international law codified in the Vienna Convention.



What makes WTO accession commitments “rules”?

Accession commitments in the WTO legal hierarchy



Substantive relationship not addressed in Article XII or in Accession Protocols.

Appellate Body in *China - Rare Earths*: “**A bridge of a general nature**”.

Need to analyze on a case-by-case basis taking into account context, incl. Protocol provisions.

What makes WTO accession commitments “rules”?

Relevant disputes

China – Auto Parts (AB Report adopted 2008)

The first case where a WTO Panel assumed enforceability of an Accession Protocol.

China – Publications and Audiovisual Products (AB Report adopted 2009)

Accession Protocol treated as a separate “covered agreement”.

China – Raw Materials (AB Report adopted 2012)

Accession Protocol treated as a separate “covered agreement”.

China – Rare Earths (AB Report adopted [AB Report adopted 2014)

Accession Protocol “builds a bridge” between Protocol provisions and the existing package of rights and obligations in the Marrakesh Agreement and the Multilateral Trade Agreements.

What makes WTO accession commitments “rules”?

A typology of accession commitments

1500+ accession specific commitments undertaken by 36 Article XII Members: tailored to individual circumstances, but some patterns have emerged.

“WTO+” commitments: obligations to abide by the rules created by the commitment paragraph and not contained in the multilateral trade agreements.

“WTO+” obligations for the WTO and its Membership

- WTO+ rulemaking for existing Members & provisions increasing the WTO’s institutional obligations
- E.g. China’ transitional review mechanism
 - Notifications to the General Council and subsidiary bodies.
- E.g. Chinese Taipei and GATT Article XV:6
 - Obligation on existing Members to sign a special exchange agreement, thus limiting options to enforce other exchange contracts

“WTO-” obligations for new Members

- New Members undertaking obligations which contain less than the relevant WTO rule.
- E.g. longer transition periods for implementing commitments

“WTO+” obligations for new Members

- Rule-of-law obligations
- E.g. price controls, energy transit, transparency, administrative and judicial review
- Accession to plurilateral WTO Agreements?

From “WTO+” to “WTO normal”?



From “WTO+” to “WTO normal”

TRANSPARENCY: accession commitments v. WTO Trade Facilitation Agreement (2013)

Trade Facilitation Agreement (TFA)

TFA Articles 1 to 5 aim to clarify and improve GATT Article X (Transparency)

2004: Launch of formal negotiations

2013: Adopted at MC9 in Bali

2017: Entry into force of the TFA

Accession commitments

Accession commitments stipulate in detail how to implement the general obligations of GATT Article X

2001: 1st enquiry point commitment (China)

2001: 1st “opportunity to comment” commitment (C. Taipei)

2004: 1st internet-related commitment (Cambodia)

...

Before the TFA’s entry into force, WTO accessions contributed 37 commitments on transparency in dedicated “Transparency” section of WP Reports and 200+ commitments on transparency under other WP Report headings (e.g. RoO, SPS, TBT, TRIPS).

Notable areas of overlap / convergence between TFA and accession commitments: online publication, enquiry points, opportunity to comment, appeal/review

Similar objectives pursued: promoting further transparency, more specificity and clarity, keeping pace with technological developments.

From “WTO+” to “WTO normal”

TARIFF RATE QUOTAS: accession commitments v. Bali Decision on TRQs (2013)

- Tariff rate quotas (TRQs) introduced during Uruguay Round tariffication process
- WTO rules limited to GATT Article XIII: non-discriminatory application; allocation to approximate shares expected in the absence of restrictions; details negotiated with Members concerned
- No details on methodologies used to administer TRQs or to address TRQ underfill situations

2013 Bali Decision on TRQs

- TRQ administration = import licensing
- Transparency obligations: re TRQ openings, applications, notifications
- Re-allocation of underfilled TRQs
- Absolute necessity test re TRQ admin

Accs. commitments (13 Members since 1996)

- Rules for related licensing procedures
- Allocation of TRQ volume
- Principles of reallocation of underfilled TRQs
- Description of current/prospective legal authority
- Opportunity for newcomers to have a TRQ share

Before the 2013 Bali Decision, 12 WTO accessions contributed commitments on TRQs in a dedicated “TRQ” section of WP Reports and in the Goods Schedules

Notable areas of overlap / convergence between Bali 2013 and accession commitments: reallocation of unfilled TRQs, link to Import Licensing agreement, transparency, consultation

Similar objectives pursued: disciplining the use of TRQs.

From “WTO+” to “WTO normal”

AGRICULTURE EXPORT SUBSIDIES: accession commitments v Nairobi Decision (2015)

WT/MIN(15)/45

- “Developed Members shall immediately eliminate their remaining scheduled export subsidy entitlements”
- “Developing country Members shall eliminate their export subsidy entitlements by the end of 2018”

Since 1996, all Article XII Members have committed to bind export subsidies at zero, with seven new Members agreeing to eliminate existing export subsidies.

From “WTO+” to “WTO normal”

EXPORT DUTIES? The story so far...

No general WTO discipline on export duties: but several Art. XII Members bound exp. duties:

- Positive list: Latvia (1999), Mongolia (1997), Saudi Arabia (2005), Viet Nam (2008)
- Positive list referring to use of GATT exceptions: Ukraine (2008)
- Negative list: China (2001), Tajikistan (2013)
- Goods Schedule: Russian Federation (2012), Kazakhstan (2015), Afghanistan (2017)

1st Schedule on export duty concessions = Part V of Russian Schedule (2012)

(Note: Australia concession through footnote in Part I of Schedule concerning minerals)

Logical evolution?

- Automatic recourse to DSU directly through GATT Article II
- More transparent
- Integration into a Schedule provides Members with existing GATT tools (flexibilities)?

Multilateral negotiations: EU proposal on WTO Agreement on Export Taxes (2006-2008)

(TN/MA/W/101)

Could the creation of several new Goods Schedules on export duties “normalize” the practice for recording export duty commitments?

Does Part V now exist in the Schedules of 161 other Members but remains “unbound”?

The contribution of WTO accessions to WTO rule-making



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WTO Accessions: “Determining the frontiers of WTO rules”

Each accession is a building block for the multilateral trading system

Advancing the implementation of existing rules - “legal tightening”

Accessions rule-making = a counterpart to multilateral rule-making?
E.g. transparency, TRQs, export subsidies

Could it be argued that WTO+ obligations have accelerated or facilitated the multilateral-level rules negotiation process?

How best to relate the results of WTO accession negotiations to systemic updates of the MTS?

Leveling the playing field “up” - setting the stage for future negotiations?

Thank you



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