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WTO ACCESSION FROM THE PERSPECTIVE OF WTO MEMBERS

The view from the other side of the table

Abstract

This paper was originally prepared for the Islamic Development Bank's Seminar on WTO Accession Issues for selected OIC Member Countries, which took place on 28 -29 March 2006, in Jeddah, Saudi Arabia. A final version of this paper was published in the edited volume *New Reflections on International Trade* (Jeremy Streatfeild and Simon Lacey [eds], Cameron May, London, 2007). It offers a detour from the well-trodden ground of WTO accession procedures and the challenges acceding countries face throughout their accession negotiations, and instead focuses on the WTO accession process from the point of view of those on the other side of the table, namely WTO Members.

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ABSTRACT

This paper was originally prepared for the Islamic Development Bank's *Seminar on WTO Accession Issues for selected OIC Member Countries*, which took place on 28 -29 March 2006, in Jeddah, Saudi Arabia. A final version of this paper was published in the edited volume *New Reflections on International Trade* (Jeremy Streatfeild and Simon Lacey [eds], Cameron May, London, 2007). It offers a detour from the well-trodden ground of WTO accession procedures and the challenges acceding countries face throughout their accession negotiations, and instead focuses on the WTO accession process from the point of view of those on the other side of the table, namely WTO Members.

WTO accession as an issue has traditionally and indeed still continues to take a back seat to other fields of activity within the WTO, which tend to attract more attention from Members as well as grabbing more headlines in the media.¹ These more well-known issues include WTO dispute settlement, as well as the on-going multilateral trade negotiations within the struggling Doha Round. It is perhaps for this reason that the topic of WTO accession tends to attract only a handful of Members, who take a consistent and systemic interest in the topic.²

This paper has two main sections. Section One discusses the different kinds of issues which Members pursue during the negotiations of acceding countries and makes an intellectual distinction between: 1) market access issues; 2) systemic issues, and; 3) non trade-related issues. Section Two of the present paper looks at some of the issues which come up, in particular, under two different sectors, namely trade in agriculture and trade-related aspects of intellectual property rights.

What is interesting is that each Member seems to have its own "pet" issues on which it will invariably take a firm and committed stance. Also interesting is the fact that when two neighboring countries are negotiating with one another, one as a Member and the other as an applicant, the Member can sometimes be relied upon to make a whole series of bilateral trade issues part of the multilateral accession process, thereby capitalizing on its brief negotiating leverage. Finally, there seems to be a consensus that once bilateral deals have been completed with the few major players, accession negotiations tend to become a matter of dotting the "i"s and crossing the "t"s, although, again, this strategy can also come unraveled in the face of a recalcitrant Member who has chosen to take a tough and committed stance on a particular issue.

¹ The exception to this rule has, of course, been the accession of the People's Republic of China, completed in 2001.

² These include: Australia, Canada, the European Communities and its Member States, India, Japan, New Zealand, Switzerland, and the United States; See Evenett/Gage/Kennett, *WTO Membership and Market Access: Evidence from the Accessions of Bulgaria and Ecuador*, September 2004, at p. 9.

SECTION I

THE DIFFERENT KINDS OF POLICY INTERESTS AT STAKE

From a trade-policy perspective, various interests will be driving different WTO Member countries to take a particular stance on any one issue within the context of a given accession working party. Section One of this paper divides these issues into 1) market access issues, 2) systemic issues and 3) non trade-specific issues. Within these three categories, however, further subdivisions can also be distinguished. Thus it is possible for a WTO member to pursue a real and effective market access interest as opposed to one which is merely of potential or theoretical significance. Systemic issues can also be divided into current systemic objectives relating to rules which are already part of the trading system on the one hand, and others that seek to have the acceding country join the WTO with its trade policy framework resembling what the multilateral trading system might look like at some point in the future. This latter phenomenon is indeed what seems to be driving a lot of the so-called “WTO Plus” or “WTO Minus” issues.³ We will come back to look at some of these categories and subdivisions below.

1. MARKET ACCESS ISSUES

The WTO as an organization and the GATT as an international treaty framework are and were arguably, first and foremost, about market access. Thus it is market access issues which will inevitably be the primary force which drives a particular WTO Member to effectively join an accession working party. In doing so, it takes what will generally be scarce trade-policy resources⁴ away from other pressing issues such as the on-going trade negotiations, and/or dispute settlement, and focuses them towards achieving a specific market access outcome in what is, for all intents and purposes, a bilateral negotiation between the Member and the acceding country. I shall focus first on real market access issues before turning to those which are of more potential or theoretical interest to any given Member.

A. Real Market Access Interests

A real market access interest, for the purposes of the present paper, concerns a good or service which a WTO Member currently exports into the market of the acceding country. In the process of accession negotiations, the Member will generally be seeking to improve the market access conditions it currently enjoys both to and within the acceding country’s market for the good or service in question, and will often try to obtain a measurable improvement in these conditions

³ See Julia Ya Qin, “WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System An Appraisal of the China Accession Protocol, published in *Journal of World Trade* 37(3), 2003, at pp. 483–522.

⁴ For a number of larger WTO Members, dedicating human resources and trade-policy expertise to a given accession working party will not create too many problems. However, most Members simply do not have enough WTO expertise on hand in Geneva to sufficiently cover the myriad of issues and meetings which are in constant progress at the WTO, and thus the decision to take a particular position in a given accession working party will be one that must be carefully weighed by most WTO Members. For countries whose presence at the WTO is limited by such constraints (i.e. most WTO Members), the decision to “weigh in” and make specific requests of an acceding country will inevitably require a clear and present economic interest.

i. Real Market Access Issues for Trade in Goods

Negotiations under this heading will inevitably involve the applicant having to negotiate a tariff binding at or below the applied level which the product enjoys at the time of the negotiations. It will also involve a commitment to neither roll-back nor allow any deterioration in the market access conditions currently prevailing for a good in the applicant country.

However a “real” market access interest does not need to be limited to tariff bindings or phased reductions thereof. It can also apply to tariff-rate quotas (TRQs) which have been a particularly tricky issue during a number of accessions.⁵ It should be recalled that tariff rate quotas tend to be more prevalent when it comes to agricultural products.⁶ TRQs were an important element of the compromise that was reached during the Uruguay Round, by which Members agreed to dismantle their non-tariff barriers on agricultural imports and convert them into tariff bindings (a process known as “tariffication”). Tariffication was accompanied by commitments to provide minimum amounts of market access for even the most contentious products. These minimum access commitments were largely provided by means of tariff rates quotas, whereby a certain quantity of a good was allowed to enter a market at one tariff level (the so-called “in-quota amount”), whereas all imports of the product in question in excess of that amount can only be imported subject to a much higher (and in some cases prohibitive) tariff (so-called out-of-quota tariff).⁷

Within this context, there are a number of so-called “real” market access issues that WTO Members may raise while negotiating with an acceding country. These may include 1) whether the applicant is at all entitled to even use this trade-policy instrument; 2) if they do have that right, how high the in- and out of quota tariff rates should be; 3) how much of the in-quota amount should be allocated to each trading partner; and finally, there might be negotiations on a phase-out period for tariff rate quotas on the products concerned.⁸

Another concrete and specific market access issue which does not involve tariffs *per se* might revolve around antidumping or other contingency protection measures currently in place. This can be an issue if the acceding country already implements antidumping measures which are of particular concern to one of the Members of its working party, or – in an entirely opposite scenario – where a Member has antidumping duties in place against the acceding country and wants to negotiate a solution to these measures before

⁵ This is the case, e.g. in Russia, with regard to poultry, pork and beef (see p. 549 of the *2006 USTR Trade Estimate Report on Foreign Barriers*, available at www.ustr.gov); This is also the case in Vietnam, for raw tobacco, salt, eggs, as well as raw and refined sugar (see page 698 of the *2006 USTR Trade Estimate Report on Foreign Barriers*).

⁶ An important exception in non-agricultural products is automobiles: By way of example, the schedule of Chinese Taipei shows that the Taiwanese acceded with tariff rate quotas for passenger cars and light commercial vehicles (see *Schedule CLIII – The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Part III – Non-Tariff Concessions, A. Tariff Quotas for Passenger Cars and Light Commercial Vehicles*, available at www.wto.org)

⁷ See Melaku Desta, *The Law of International Trade in Agricultural Products*, Kluwer Law International, 2002, at pp. 78 ff. See also WTO, “*Special Studies 6, Market Access, Unfinished Business, Post Uruguay Round Inventory and Issues*” at pp. 51 ff, available at www.wto.org.

⁸ See, e.g. *Schedule CLIII* for Chinese Taipei, cited in footnote 6 above, which contains a commitment to phase out TRQs for products such as pork bellies and poultry, by January 2005.

the applicant joins and subsequently gains access to the WTO's dispute settlement system. One now well-known instance of the latter phenomenon was the antidumping duties Mexico had in place against China, which was one of the very last issues to be resolved during those already lengthy accession negotiations.⁹ Less well-known examples of the first phenomenon include antidumping duties Belarus had in place against certain exports from Lithuania or, in a very similar case, antidumping duties the Ukraine has in place against light bulbs from the Kyrgyz Republic.¹⁰ In both of these latter examples, Members have made removal of these measures an important issue in the applicant's WTO accession process.

ii. Real Market Access Issues for Trade in Services

In the area of trade in services, any "real" market access issues will relate to such items as the percentage of foreign ownership allowed to companies which are active in a specific sector (under Mode 3), as well as any other restrictions such as geographical limitations or the kind of services a service provider is allowed to offer.

For example, a look at the commitments entered into by the People's Republic of China in telecommunications can offer a useful illustration of how market access issues are handled. Upon entering the WTO, China committed (under Modes 1 & 3), to only allow foreign service providers to enter into joint ventures with local entities with no more than 25 percent foreign ownership. Moreover, any foreign telecoms operators active in this capacity, were only allowed to provide services in and between the cities of Shanghai, Guangzhou and Beijing. Over time, these restrictions were relaxed, so that, within one year of China's entry into the WTO, foreign ownership ceilings were increased to 35 percent and the geographical regions in which foreign operators were allowed to provide their services were subsequently extended to include Chengdu, Chongqing, Dalian, Fuzhou, Hangzhou, Nanjing, Ningbo, Qingdao, Shenyang, Shenzhen, Xiamen, Xi'an, Taiyuan and Wuhan. After three years, foreign ownership was allowed to rise up to 49% and after five years, all geographical restrictions are to be lifted. These commitments show what kind of market access interests WTO Members pursued in the Chinese mobile telephony market, and how China responded to these interests (through staged and incremental – albeit relatively rapid - liberalization). It also shows the limits beyond which China was not willing to go in opening its mobile telephony market to foreign operators.

It is not difficult to imagine which Members have an interest in exporting their telecommunications services and would thus have been actively pursuing their own national economic interest in the negotiations with China. Deutsche Telekom (a German company, also owner of the cellular provider, T Mobile), Orange Communications (France) and Vodafone (UK) are each located within the EU and have been active in foreign markets to one degree or another. Even companies in developing countries, such

⁹ See, article in the *People's Daily*, August 14, 2001, entitled *Mexico Wants to Extend Duties on Chinese Imports as Part of WTO Pact*, available at: http://english.people.com.cn/english/200108/14/eng20010814_77266.html (last visited on 27 October 2006).

¹⁰ See article in *Pravda.Ru*, 2 September, entitled *Kyrgyzstan comes out against Ukraine, Kazakhstan's joining WTO*, available at: <http://newsfromrussia.com/world/2003/09/02/49732.html> (last visited on 27 October 2006).

as Orascom (Egypt) and Singtel (Singapore), have exercised expansionist strategies over the last few years. Lobbying efforts from all of these companies can invariably translate into a concrete market access request on the part of a given Member and, indeed, it is no secret that the EU has certainly been one of the countries doing a lot of what is known as “the heavy lifting” in telecoms services negotiations within the framework of numerous accession working parties, not just limited to China.

iii. Real Market Access Issues for Intellectual Property Rights

With respect to intellectual property, real market access interests are also at stake. However, this topic shall be addressed later in this paper, under Section II, as these issues are generally of a more systemic nature. Although often driven by a specific and concrete economic or commercial interest, intellectual property negotiations tend to be dealt with in the context of multilateral or plurilateral meetings which focus on such issues as implementation of the right sort of legislative framework, as well as enforcement mechanisms for guaranteeing domestic legal protection of intellectual property rights.

B. Potential or Theoretical Market Access Interests

In many cases, Members will make market access requests of an acceding country involving a product or service where there is little or even no trade currently taking place. In the context of this paper, I have opted to refer to these as “potential” or “theoretical” market access issues. These will, as a rule, involve products or services which are of general export interest to a given Member. Again it does not take too much imagination to get an idea of what these may be. The importance of cheese, or luxury watches to the Swiss is mirrored by what Tequila means to the Mexicans, regardless of whether or not they may currently be exporting these goods to the accession country in question.

These issues more often than not, arise in the accession of smaller countries, which do not represent important export markets to those Members making the market access requests. However, the Member in question will have this request as part of a standard form or template which it will seek to extract from any country attempting to join the WTO. Thus, even though no concrete or specific export interest exists, the importance of this concession to the Member in question can be seen more in terms of domestic politics or trade policy, where the government requesting it can showcase the concession it has obtained as just another example of its commitment to promote the export interest of one or more of its economic and/or political constituents.

2. SYSTEMIC INTERESTS

A. Applying Today's Rules Now

Not everything that Members will want to discuss with an acceding country will necessarily focus on a narrowly-defined or specific market access interest, although market access for a Member's export interests are inevitably the driving force behind these negotiations. A number of broader and more far-reaching concerns also see Members take a tough and committed stance and a number of these will be discussed in

some detail here. The present paper focuses on a couple of key issues in this context, namely technical barriers to trade (TBT), Sanitary and Phytosanitary (SPS) barriers, as well as National Treatment concerns.

i. Implementation of the TBT and SPS Agreements

This issue is one which generally tends to cause numerous headaches for acceding countries, given they typically have thousands of technical standards and regulations on their statute books, many of which will attract the attention of the WTO Members on its working party. Many of these standards will have been adopted before the TBT and SPS agreements of the WTO were even negotiated. The notion that every single one of these standards has to be brought into full conformity with the requirements contained in these agreements *before* the applicant can join is one which can cause trade negotiators and the technical staff who support them in these negotiations, many sleepless nights.

From the point of view of Members, these issues are important, given that they will not want the valuable market access commitments they fought for subsequently undermined, nullified or impaired by technical regulations that are more trade restrictive than necessary to fulfill a legitimate policy objective¹¹, or sanitary and phytosanitary measures which are applied in excess of what is necessary to protect human, animal or plant life, are not based on scientific principles or which are maintained without sufficient scientific evidence.¹²

Of course, given that Members will generally have a genuine market access interest (whether real or potential) underlying their TBT and SPS concerns, it should be enough for an applicant to ensure that standards and regulations have been brought into conformity with WTO requirements for the several dozen products which are of the greatest concern to the Members who are most active on its accession working party. These products would certainly include sugar, dairy products, beef, as well as automobiles, but also numerous others. For the rest, a legislative action plan which promises steady and certain progress towards complete implementation of these two Agreements in a relatively short time will probably be sufficient for the applicant to pass muster and have Members cease and desist from continuing to regard non TBT and SPS Agreement compliant statutes and regulations as an obstacle to accession.

One request often heard by applicants, particularly those who consider themselves developing countries, is that they wish to benefit from an implementation period before being required to have completely complied with the TBT and/or SPS Agreements. This request is generally treated with a certain degree of enmity by Members and can also be a point on which much negotiating capital is spent. Members' hostility to the request is usually grounded in the fact that accessions these days generally tend to require more than five years to complete, and sometimes longer than ten years. Thus during the course of these already protracted negotiations, Members feel that the applicant is afforded more than adequate time to bring its technical standards and SPS legislation into conformity with WTO rules. Why, they ask, after so many years of negotiating, should applicants be given another 5 years or so to implement rules which have been clearly coming their way for such a long time?

¹¹ See Art. 2.2 of the TBT Agreement. For more on the TBT Agreement, see, *inter alia*, UNCTAD, *Dispute Settlement, World Trade Organization, 3.10 Technical Barriers to Trade*, United Nations, 2003, available at: http://www.unctad.org/en/docs/edmmisc232add22_en.pdf, (last visited on 27 October 2006).

¹² See Art. 2.2 of the SPS Agreement. For more on the SPS Agreement, see, *inter alia*, David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, published in 32 *N.Y.U. J. INT'L L. & POL.* 865 (2000), available at: <http://www.law.nyu.edu/journals/jilp/issues/32/pdf/32p.pdf>, (last visited on 27 October 2006).

ii. National Treatment Issues

Another issue which regularly pops up in working party reports is how applicants intend to bring an end to (often outdated) laws and regulations that discriminate between products on the basis of their origin (i.e. domestically produced versus imported goods). One area in which this can often be seen is in the area of taxation and excise duties. Article III.2 of the GATT requires that imported goods enjoy treatment which is at least as favorable as that afforded to domestically-produced like products¹³ when it comes to “internal taxes or other internal charges of any kind”. This was a contentious issue, for example, in the Kyrgyz accession (as in many other accessions), where some Members complained that excise taxes for some imported goods were higher than for domestic like products. The issue was only resolved when the Kyrgyz government committed to adopt (and indeed had taken concrete steps to do so) a new law which extended equal excise duties to both domestically produced and imported products.¹⁴

Another (now well-known) national treatment issue was faced by China in its accession. Article III.4 of GATT provides that imported products cannot be treated any less favorably than their domestically produced equivalents when it comes to “their internal sale, offering for sale, purchase, transportation, distribution or use”. In the case of China, Members had complained of licensing practices which resulted in discriminatory sales requirements against imported goods for a number of items, such as, *inter alia*, cigarettes, spirits and pharmaceutical products. This issue was resolved once China agreed to take the necessary measures, at both national and sub-national levels, to either repeal or modify any legislation that violated Article III.4 GATT for these items, with cigarettes being subject to a two-year transition period.¹⁵

Members intend to ensure that applicants accede to the WTO without any blatant violations of GATT Article III. This is firstly in the interest of avoiding the nullification or impairment¹⁶ of market access concessions extracted from the applicant by measures which discriminate between imports and domestically-produced goods.¹⁷ Secondly, the more general systemic interest in having all Members, present and future, adhere strictly and earnestly to one of the system’s most fundamental principles is also easy to see. The multilateral trading system as well as almost fifty years of hard-fought-over case law would be critically undermined if applicants were allowed to join without upholding this key tenet of the multilateral trading system.

¹³ The notion of “like product” is an important legal concept in the context of non-discrimination provisions within the WTO legal framework, as well as being of great relevance in the area of contingency protection rules (antidumping and countervailing duties, as well as safeguard measures). For more on like product, see, *inter alia*, Robert E. Hudec, “Like Product”: The Differences in Meaning in GATT Articles I and III, originally published in Thomas Cottier and Petros Mavroidis, (eds.), Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, University of Michigan Press, 2000, at pp. 101-123, also available at: <http://www.worldtradelaw.net/articles/hudeclikeyproduct.pdf> (last visited on 27 October 2006).

¹⁴ See Report of the Working Party on the Accession of the Kyrgyz Republic of 31 July 1998 (WT/ACC/KGZ/26), at pp. 23 – 25, available at www.wto.org.

¹⁵ See Report of the Working Party on the Accession of China of 1 October 2001 (WT/ACC/CHN/49), at pp. 8 – 9.

¹⁶ Nullification or impairment is another important concept under WTO law and refers to a situation in which market access concessions, which could legitimately have been expected to accrue, are not forthcoming, either due to the adoption of some kind of (WTO-consistent or inconsistent) measure or due to the existence of any kind of situation. For a detailed elaboration on this concept, see: *inter alia*, James Durling and Simon Lester, *Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy*, published in 32 Geo. Wash. J. Int’l L. & Econ. 211 (1999), also available at: <http://www.worldtradelaw.net/articles/lesternullification.pdf>, (last visited on 27 October 2006).

¹⁷ The notion of National Treatment under WTO law is well-trodden ground and much has been written about it by many distinguished authors. See, *inter alia*, Mitsuo Matsushita, Thomas J. Schoenbaum and Petros Mavroidis, *Chapter 8, the National Treatment Principle*, in: The World Trade Organization. Law, Practice and Policy, Oxford University Press, 2003, pp. 155 - 179.

B. Creating Conditions on the Ground for Tomorrow

From a purely systemic perspective, Members often see a given accession as an opportunity to request the applicant country to commit to aspects of the WTO as well as to other requirements which are not necessarily universally adhered to by other WTO Members. A few examples of this will be discussed under this heading, namely the tendency for Members to require applicants to join the Government Procurement Agreement, as well as the trend towards requiring applicants to make sector specific commitments in most if not all service sectors. The underlying trade-policy interest here is also relatively easy to see: by increasing the number of Members who have adopted these (more liberal) rules, less enthusiastic liberalizers who are already WTO Members will become increasingly isolated and the number of WTO Members with differing (more liberal) trade policy regimes in these areas steadily increases, as does the momentum for the more reluctant liberalizers to also adopt these rules.

i. *The Government Procurement Agreement*

The GPA, a plurilateral agreement contained in Annex 4 to the Results of the Uruguay Round of Multilateral Trade Negotiations, is not part of the famous Single Undertaking which was concluded with the Uruguay Round.¹⁸ It currently has some 13 signatories, none of whom acceded to the WTO under the new procedures set out in Article XII of the Marrakesh Agreement Establishing the WTO.¹⁹ However, the GPA also has some twenty observer governments, thirteen of whom acceded to the WTO under the Article XII procedures and who, while doing so, were requested by Members to make a commitment to begin negotiations, within a certain period of time, with a view to joining the GPA.²⁰ Of these thirteen, nine are already in the process of negotiating accession to the GPA.²¹

Both the EC and the US, original members of the WTO, are also members of the GPA. They are also active participants in all WTO accession working parties and given the disappointingly small number of original WTO Members who also decided to join the GPA at the conclusion of the Uruguay Round, the accession process represents a unique opportunity to enlarge membership of this agreement without having to re-open the agreement's rules or make other concessions which would be required if one were negotiating with another WTO Member. However here also, there is a market access issue driving the more systemic concerns, namely that in many smaller or former planned economies, the government is (still) the biggest consumer of goods and services and thus it is of clear economic interest to those Members who export those goods and services to be able to compete with the relevant domestic producers subject to clear and enforceable rules, where the emphasis is on competition, price contestability and efficiency.²²

¹⁸ For more on the Government Procurement Agreement, see, *inter alia*, Sue Arrowsmith, *Government Procurement in the WTO*, (Studies in Transnational Economic Law), Kluwer Law International, 2002; see also the WTO's own site on the topic: http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited on 26 October 2006).

¹⁹ This figure includes the EC as one signatory. Of the 25 EU Member States, only Estonia, Latvia and Lithuania joined the WTO under the Article XII procedures.

²⁰ These are: Albania, Argentina, Australia, Bulgaria, Cameroon, Chile, China, Colombia, Croatia, Georgia, Jordan, Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Republic of Armenia, Sri Lanka, Chinese Taipei, Turkey; see: http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

²¹ These are: Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, Chinese Taipei; see: http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

²² In Russia, for example, the government spends more than a third of its budget on procurement, this figure was reputed to be \$30 billion for the 2005 fiscal year, (see page 553 of the 2006 *USTR Trade Estimate Report on Foreign Trade Barriers*, cited above at footnote 5).

ii. *Extensive Commitments in Services*

When the Uruguay Round was over and the dust had settled, Members reviewed and evaluated what had been agreed. Of course, much has been written in praise of what a substantial leap forward the Uruguay Round signified, in so many fields. Such observations include the institutionalizing of the former *ad hoc* GATT structure by establishing the WTO, creating new and more enforceable dispute settlement procedures, as well as bringing agriculture more fully into the fold of multilateral disciplines. Another, wholly new achievement, was of course bringing trade in services into the multilateral framework, by adopting the General Agreement on Trade in Services (GATS) and getting Members to bind specific commitments into their country services schedules.

However, it did not take long for Members to realize that the commitments entered into under GATS and their respective services schedules, had not achieved very much in the way of actual increased liberalization of domestic service markets or greater market access for foreign service providers. In fact, the achievements of the Uruguay Round in trade in services were more to be found in the area of setting up a binding legal framework (the GATS) and establishing a tangible and potentially effective mechanism for reducing trade barriers in services trade in the future (through the schedules of specific commitments). Everything else represented, to a large degree, standstill obligations where Members agreed to “lock-in” the existing degree of market access and national treatment which foreign service providers enjoyed in these markets. Any increased levels of liberalization were left to future rounds of trade negotiations as mandated by Article XIX of the GATS.

Enter the WTO accession process. Here again, given the difficulty of getting Members to liberalize their services markets under the conditions provided by the traditional negotiating dynamic which underlies the various rounds of multilateral trade negotiations, it has been the WTO accession process where those Members, genuinely interested in liberalizing trade in services at the multilateral level, have been steadily creating “conditions on the ground” to tip the balance in their favor. This phenomenon can be seen when comparing the services schedules of original Members with those of Members who acceded under the Article XII procedures. For example, Jordan, a country which acceded in April 2000, made sector specific commitments in almost every group of services sectors in the WTO Secretariat’s analysis, with the exception of Rail and Road Transport.²³ This is fairly representative of the level of commitments of other accession countries, although the number of sectors in which commitments were made does not, in and of itself, say much about the type of commitments made or the extent of liberalization.²⁴ On the other end of the spectrum, one finds original WTO Members such as India, whose schedule figures the term “unbound” in modes 1, 2, and 4 for a majority of sectors, while limiting any foreign participation in mode 3, within the limited number of sectors it allows, to a 51% foreign equity ceiling.

Again, one should not be fooled into thinking that there are purely systemic interests at play here, because as always, market access interests are essentially what drive Members to require applicants to make commitments in a given sector, be they real and effective market access interests, or of merely a potential or theoretical nature.

²³ See WTO Secretariat, *Technical Note on the Accession Process, Note by the Secretariat*, 28 November 2005, (WT/ACC/10/Rev.3), at p. 33; available at: www.wto.org.

²⁴ *Ibid.*

Nevertheless, there is clearly a systemic dimension at play, which also provides an explanation of Members' eagerness to see applicants make commitments in as many services sectors and sub-sectors as possible. Nowhere is this "one-size-fits-all" approach to the accession negotiations more visible than in the requirement that the Kyrgyz Republic, a landlocked country, make far-reaching commitments in maritime services.²⁵

Finally, to conclude this section on systemic interests, it should be noted that Members, frustrated at the pace of liberalizing different markets at the multilateral level and within the WTO framework, have been turning to another forum, besides accession, in which to achieve substantial market access gains in a timeframe which is more palatable to governments (and trade ministers) with only a limited amount of time in the job. I am, of course, referring to the proliferation in the number of free trade agreements, regional trade initiatives and preferential trading arrangements which have sprung up in recent years and which many observers agree represent a serious challenge to the multilateral trading system espoused by the WTO.²⁶

3. NON TRADE-SPECIFIC ISSUES

Apart from market access interests and systemic issues which are both related to the current shape of WTO rules or to the direction in which those rules are evolving, a number of accessions have also seen a different set of issues leveraged within the distinct dynamic represented by the WTO accession process. One such example is the bilateral agreement signed between the EU and the Russian Federation, for which the *quid pro quo* was widely reported to be the latter's undertaking to ratify the Kyoto Protocol. Another, less well known example, is the attempt by the Kyrgyz Republic to use its leverage within the accession process with Ukraine to achieve a settlement on what it sees as some outstanding Comecon debts. In short, it is a recurring theme that a number of current WTO Members, taking advantage of both the limited rules governing the accession process and the unprecedented power it gives them, exploit this opportunity to exact far-reaching concessions from applicants.

i. The EU-Russian Bilateral

On 21 May 2004, Pascal Lamy (then the EU's chief trade negotiator) and the Russian Trade Minister German Gref, signed the agreement concluding the bilateral market access negotiations for the accession of the Russian Federation to the WTO.²⁷ At the same time, newspapers carried the story that Russia had agreed to ratify the Kyoto Protocol, thereby effectively agreeing that the treaty would finally enter into force.²⁸ The Kyoto Protocol to the United Nations Framework Convention on Climate Change was opened for signature on 11 December 1997 in Kyoto Japan. However before it could enter into force, it required at least 55 countries to ratify it and cover at least 55% of the world's 1990 CO₂ emissions.

On 31 May 2002, all then fifteen EU Members States deposited the relevant ratification instruments at the UN. The EU produces around 22% of global greenhouse gas emissions, and had agreed to cut this by 8 percent, on average, from 1990 base emission levels. The EU had consistently been one of the major supporters of the Kyoto

²⁵ See The Schedule of Specific Commitments in Services for the Kyrgyz Republic, available at www.wto.org

²⁶ For more on this, see: Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, at pp. 19 ff., available at: www.wto.org.

²⁷ See: http://europa.eu.int/comm/trade/issues/bilateral/countries/russia/pr210504_en.htm, (last visited on 27 October 2006).

²⁸ See: <http://news.bbc.co.uk/2/hi/europe/3734205.stm>, (last visited on 27 October 2006).

Protocol and had worked hard to bring wavering countries on board.²⁹ However, once the United States began to waver on whether or not to ratify the treaty under the Clinton administration, and then made clear its intention not to do so under the Bush administration, the only hope which remained for the treaty of ever entering into force was for the Russian Federation to ratify it, since both China and India, other big producers of greenhouse gas emissions would be exempt (as developing countries), from meeting greenhouse gas reduction targets under the terms of the treaty. The EU, involved in protracted and difficult negotiations with Russia over market access issues, saw an opportunity to bring the negotiations to a rapid end and achieve one of its foreign policy objectives. However, this climate change treaty was by no means part of the balance of rights and obligations represented by the Results of the Uruguay Round of Multilateral Trade Negotiations. In this, Russia could be very satisfied, as it had concluded one of the more difficult bilateral negotiations of its WTO accession odyssey, while the EU, for its part, could also be pleased, as the Kyoto Protocol would now enter into force and become binding upon its signatories under international law. Of course, this did not mean that Russia's WTO accession negotiations were over, merely that it now had one less Member (albeit one of the most demanding in the WTO accession process) to negotiate with before it would be invited to join the club.

ii. Settling Old Scores

The WTO accession process represents a once-in-a-lifetime opportunity for many countries to leverage issues which, under normal circumstances, would not stand much chance of enjoying a serious hearing. Many countries navigating the accession process can thus be surprised to find that neighboring countries who are already WTO Members can turn out to be some of the most recalcitrant negotiating partners on their accession working party. Long-running disputes, which may have little to no substantive connection with the WTO accession process, can suddenly find themselves posing major stumbling blocks to progress in the negotiations on the terms of WTO accession. Thus, where bilateral negotiations between the applicant and WTO Members are supposedly first and foremost about trade and market access issues, such long-standing disputes can often see accession negotiations stray considerably beyond the very narrow confines of their traditional ambit.

It is not just neighbors that play this game. The collapse of the Soviet Union saw an end to the system of monetary transfers and barter arrangements which had existed between the 15 former Soviet Republics. In the accession negotiations of the Ukraine, Kyrgyzstan, a WTO Member since 1998, is seeking to obtain monetary compensation for goods and transfers made under the former Soviet economic arrangements. Of course, this is not a WTO issue and could easily be relegated to the annals of history if it were not for the unique negotiating leverage that being a WTO Member affords a country when negotiating with a non-Member over accession terms.³⁰

This paper shall now look at a number of the issues raised by WTO Members under different sectors. The author has chosen to focus on two sectors in brief, namely agriculture and intellectual property.

²⁹ See Council Decision 2002/358/EC, OJ L 130, 15.5.2002; and the BBC report cited in footnote 28.

³⁰ See article cited above in footnote 10.

SECTION II

A LIMITED SECTORAL ANALYSIS

This paper now turns to a limited number of hand-picked sectors on which to demonstrate the kinds of interests Members pursue. The attentive reader will note that most, if not all the demands Members tend to approach applicants with, can be subsumed under one of the categories of interests set out and described above in Section I. However, it is worth noting that market access interests tend to dominate with systemic interests playing an important reinforcing role.

1. Sectoral Analysis One: Trade in Agriculture

The negotiations on trade in agriculture are almost always perceived as a relatively taxing process for most acceding countries, and most, if not all of them can be sure that a “before” and “after” snapshot of their agricultural sectors will look quite different once they have completed negotiations and implemented their WTO commitments in this sector. Much of the so-called “heavy lifting” in these negotiations is done by the United States, who invariably has an official seconded from the US Department of Agriculture taking the lead on these talks in Geneva. A few Cairns Group³¹ countries, particularly Australia, Argentina and Brazil, also tend to distinguish themselves by their tenacity and single-minded devotion towards bringing about the stated goals of the Uruguay Round Agreement on Agriculture, namely “to establish a fair and market-orientated agricultural trading system”.³² This section shall look at these negotiations from the perspective of the so-called three pillars, namely Market Access, Domestic Support and Export Competition (focusing here only on export subsidies).

i. Tariffs and other Market Access Issues

Market access interests were addressed extensively in Section I and indeed, much of what was said there will inevitably apply to negotiations on market access more particularly in agriculture. The significant producers of heavily traded agricultural commodities are no secret. Thus one has the Thais, the Brazilians and the Australians who can generally be relied upon to make market access requests for sugar. Beef is a major export industry which enjoys huge political support in the United States. Dairy products are a major export interest of both Canada and New Zealand. Without fail, it is these same countries who address their respective agricultural products in the course of agricultural market access negotiations and who will be pushing hard for the best market access terms they can get.

Members generally expect to see the accession of a given applicant result in *improved* market access for the products they wish to export. This means that an applicant should generally refrain from raising applied tariffs or erecting new trade barriers (such as import licensing procedures, or tariff-rate quotas) on those products during accession talks. It also means that applicants will probably need to negotiate *down* from their *applied* tariff rates instead of from their tariff bindings.³³

³¹ The Cairns Group is a coalition of 18 agricultural exporting countries, both developed and developing, which was formed in August 1986, a month before the Punta del Este declaration launching the Uruguay Round. For more information on the Cairns Group and its members, see www.cairnsgroup.org.

³² See para. 2 of the Preamble to the Uruguay Round Agreement on Agriculture.

³³ See Miho Shirotori, *WTO Accession Negotiations on Agriculture*, published in UNCTAD, *WTO Accession and Development Policies*, Geneva & New York, 2001, at p. 214, available at: www.unctad.org.

Upon completion of the accession process, a country will usually have to commit to an average bound tariff level at somewhere between 10 and 20 percent. Of the countries which joined the WTO under the Article XII procedures, Chinese Taipei, which joined with an average bound tariff rate (for agricultural products) of 18 percent, China's was 15 percent, Moldova was 12 percent, Lithuania was 16 percent and Croatia was 10 percent³⁴. These levels are comparatively low when examined alongside some original WTO Members such as, for example, Switzerland (51.1 percent), Korea (62.2 percent) or Norway (admittedly not the most representative of Members in this respect) which has an average bound tariff rate for agricultural products of 123.7 percent.³⁵

In addition, Members will generally be suspicious of tariff peaks and special safeguards (SSG) under Article 5 of the URAA³⁶, but have been known to allow a very limited number of accession countries to enter with both these instruments on their schedules. The hostility of Members to these instruments results from their impression that these were part of the package of rights and obligations for which they fought over for several decades, and which were agreed to in the Results of the Uruguay Round. The Article 5 safeguard mechanism was, for example, the only way to get then GATT Contracting Parties to dismantle all non-tariff barriers to agricultural imports and to tariffify them. It was the *quid pro quo* for tariffication. The Members hostile to extending this instrument to applicants question why the latter, who for the most part have already tariffified any non-tariff barriers, should still reap the benefits of this particular escape clause. This is all the more so when one considers that other safeguards exist against import surges within the WTO framework, as well as the fact that only a limited number of WTO Members have, in any event, availed themselves of the opportunity to even use the special safeguard instrument.³⁷

ii. Domestic Support

When it comes to negotiations on domestic support, it is generally the views of the Cairns Group and the US, all quite strongly committed to reducing overall levels of trade-distorting domestic support, which will be heard loudest.

On Amber Box support³⁸, Members will, as a rule, be quite hostile to any applicant who thinks they need to support their farmers with trade-distorting domestic support in excess of the 5 percent product-specific and 5 percent non-product specific ceilings which the Uruguay Round Agreement on Agriculture allows Members to have under Art.

³⁴ See Lars Brink. *New Members of the WTO: Their Commitments in Agriculture and Provisions proposed in the Doha Negotiations*, p. 15, published in: Ministry of Agriculture of Estonia, *Impact of the WTO Process on Agriculture in Transition Countries*, Conference Materials, 27 – 29 July 2003, Tallinn, Estonia.

³⁵ See, OECD, Working Party on Agricultural Policies and Markets of the Committee for Agriculture, *Agricultural Policies in Emerging and Transition Economies 2000*, (COM/AGR/APM/TD/WP[2000]43/FINAL) at p. 74, available at www.oecd.org.

³⁶ Unlike other GATT and WTO escape clauses, the use of which is contingent on making explicit findings on such factors as unforeseen developments or injury to the domestic industry, the special agricultural safeguard contained in Article 5 of the URAA allows those countries which reserved the right to use it to do so once prices of the commodity in question fall below a specific floor (price trigger), or import quantities of the commodity rise above a certain ceiling (volume trigger). For more on the special agricultural safeguard see: WTO, *Special Agricultural Safeguard, Note by the Secretariat*, (TN/AG/S/12), available at www.wto.org.

³⁷ Thirty-nine WTO members currently have reserved the right to use special safeguards on a combined total of 6,156 agricultural products; see: *WTO Agriculture Negotiations: the issues, and where we are now*, at p. 39, available at: http://www.wto.org/English/tratop_e/agric_e/agnegs_bkgrnd_e.doc

³⁸ This is domestic support which is considered to be most trade distorting, and which does not otherwise meet the criteria for the Green Box (set out in Annex 2 of the URAA), or the Blue Box (set out in Art. 6.5 of the URAA). During the Uruguay Round, Members agreed to bind and reduce (so-called AMS reduction commitments) the amount of Amber Box support they provide to their agricultural producers. Members, who did not make such commitments, must keep any Amber Box support they provide to their farmers below 5% of the value of production (10% for developing countries).

6.4 (a) as so-called *de minimis* support levels. When entering these negotiations, applicants should remember that within the WTO membership as a whole, only 34 countries have commitments to reduce their trade-distorting domestic support in the Amber Box. Everyone else keeps such support below the aforementioned *de minimis* levels which, for developing countries, is 10 percent product-specific and 10 percent non-product specific (Art. 6.4 [b] URAA). Thus, AMS reduction commitments in excess of *de minimis* levels are the exception within the WTO, and so has it been also in the context of WTO accession. Only a handful of countries have acceded with Total AMS commitments above *de minimis* levels, generally subject to reduction within a few years.³⁹

Developing country applicants have also found it difficult to avail themselves of the 10 percent *de minimis* ceilings provided by the aforementioned Art. 6.4 (b). Working party Members have been reluctant to award this status to any requesting applicant who thinks it might be their due, except of course for LDCs. Members' reluctance here could be explained by the fact that a majority of countries in the Cairns Group are, in fact, developing countries themselves (Thailand, Brazil, Argentina), whose farmers are already extremely competitive without high levels of trade-distorting domestic support.

Members will also be carefully scrutinizing the data which applicants submit on their WT/ACC/4 form.⁴⁰ They will want to ensure that the data provided is from a recent and representative period, usually the three years immediately prior to the submission by the applicant to join the WTO. They will also want to verify that product-specific support is not being "hidden" in the figures provided for non-product specific support.

On Green Box support, which is supposed to be non or minimally trade distorting, Members' main concern will be that any policies the applicant lists under this heading are truly price-neutral in their impact and that they indeed fulfil the Annex 2 criteria in order to qualify as Green Box measures. Thus an applicant can be expected to have to justify, in fairly precise terms, which policies have been notified as falling within the Green Box, how they fulfil the Annex 2 criteria in detail, as well as the exact magnitude of the budgetary outlays involved. Members will again be looking to ensure applicants are not merely trying to "hide" more trade-distorting forms of domestic support in this category.

Blue Box support, which it should be recalled was, for all intents and purposes, specifically tailored to fit domestic support programs in the US and the EC at the time of the famous Blair House accord in the early 1990s, has never been much of an issue in WTO accession. Certainly this author is not aware of any countries that have acceded with Blue Box measures notified on their schedule. At the time of the WTO Secretariat paper cited below, only the EU, Iceland, Norway, Japan, the Slovak Republic and Slovenia notified the use of Blue Box subsidies; the latter two have since been covered by EU notifications.⁴¹ Thus it would be difficult for an accession country to make the case for using these kinds of policies, and any applicant doing so could reckon with a certain degree of hostility from Cairns Group countries who had originally been hoping to scrap these policies altogether by the end of the Doha Round.

³⁹ Bulgaria, Jordan, Croatia, Lithuania, Moldova, Chinese Taipei, the former Yugoslav Republic of Macedonia and Saudi Arabia; see the respective Working Party Reports. Note that Cambodia and Nepal, both of whom acceded as developing countries, would be entitled to 10 percent *de minimis*, whereas China negotiated an exceptional 8 percent *de minimis* for trade distorting (Amber Box) support.

⁴⁰ This form, entitled "Information to be Provided on Domestic Support and Export Subsidies in Agriculture" provides fairly detailed guidelines and templates which applicants can use to describe any domestic support policies they have on the statute books.

⁴¹ See *WTO Agriculture Negotiations: the issues, and where we are now*, cited above at footnote 37, at p. 56.

iii. Export Subsidies

As a rule, a number of fairly influential Members are extremely hostile towards export subsidies and this is certainly the case for those Members doing most of the talking on WTO accession working parties. Applicants will need to remember that since the 1960s, it has been the sworn and solemn objective of a number of agricultural exporting countries to ensure that export subsidies in agriculture, like those for industrialized goods, are eliminated. This is a goal that actually might be achieved by 2013, which is largely what explains Members' reluctance to accept new Members into the Organization with these instruments on their schedules. Up to now, only Bulgaria and Panama have been allowed to accede with export subsidies on their schedules and these were subject to steep reduction commitments.⁴²

Here more than perhaps anywhere else, one can see the interplay of market access interests with systemic interests. Although some Members' hostility to Amber Box support in excess of *de minimis* levels, and towards export subsidies can be justified in terms of their own market access interests in third-country markets, it is, in this author's view, as much out of systemic considerations, that such hostile positions are taken. For groups like the Cairns Group, and countries like the US, who have been fighting for decades to achieve a more market-orientated trading system in agricultural products, there is simply no reason, they feel, to let any applicant into the Organization, whose agricultural sector does not resemble where they feel the system should be going. Why, after all, should they further swell the ranks of the G-10?⁴³

2. Sectoral Analysis Two: TRIPS

Most of the "heavy lifting" in trade-related intellectual property rights in the context of WTO accession tends to get done by those Members with clear IP export interests. These are, most notably, the US and the EU, although Switzerland also has significant IP interests when it comes to its chemical and pharmaceutical industries. From a trade-policy perspective, it was the "unholy alliance" of pharmaceuticals, entertainment industries, and high-tech software which first got intellectual property rights enforcement onto the multilateral trade agenda⁴⁴, and it is still these industries which will be behind any demands and complaints coming from USTR, the European Commission (or others) during accession negotiations.

The language from most of the Working Party Reports on this issue tends to revolve around the fact that the applicant agrees to fully implement all provisions of the TRIPS agreement "without recourse to any transition period"⁴⁵, and thus it is clear that, from Members' perspective, it is important that TRIPS be fully implemented by the applicant upon the date of accession. Only in one case, to the author's knowledge, has an

⁴² See e.g. *Schedule CXXXIX – Republic of Bulgaria, Part IV – Agricultural Products: Commitments Limiting Subsidization, Section II – Export Subsidies: Budgetary Outlay and Quantity Reduction Commitments*; available at www.wto.org;

⁴³ The G-10 are a group of developed country importers with high levels of protection and include Bulgaria, Iceland, Israel, Japan, Korea, Republic of, Liechtenstein, Mauritius, Norway, Switzerland, and Chinese Taipei. It should be noted that both Bulgaria and Chinese Taipei joined the WTO under the Article XII procedures.

⁴⁴ See, Anna Lanoszka, *The World Trade Organization (WTO) and the Accession Process: Testing the Implementation of the Multilateral Trade Agreements*, 2001, at p. 280.

⁴⁵ See, by way of an example, the Working Party Report on the Accession of the Kyrgyz Republic, of 31 July 1998 (WT/ACC/KGZ/26), at p. 53 (para. 164).

acceding country been allowed a transition period, and this was Ecuador, whose implementation period expired on 31 July 1996.⁴⁶

Unlike the negotiations which typically take place over goods and services, there are no tariff schedules or schedules of specific commitments for Members and applicants to negotiate over when it comes to TRIPS. Rather, the negotiations will invariably center on the extent to which the laws, administrative institutions and judicial procedures in the applicant guarantee foreign investors sufficient legal protection for their intellectual property rights, as well as real and effective means of judicial redress in the event of any infringements thereof.

Thus it is that negotiations under this heading will focus on such issues as, e.g., whether the trademark law allows three-dimensional symbols, combinations of colors, alphabets and figures to be registered as trademarks.⁴⁷ Also a significant topic in negotiations on TRIPS are, of course, copyright piracy and trademark counterfeiting, and here the applicant will first have to demonstrate that adequate laws are in place and secondly that they are being vigorously enforced by the competent authorities. A look at the commitments paragraphs in the Working Party Report on the Accession of China can be informative when it comes to seeing what the (long-list) of Members' concerns were, and how the People's Republic was able to assuage them.⁴⁸ Another interesting insight into the interests Members pursue under this heading and how they do so can be seen in the USTR Trade Barriers Estimate Report (cited above) with regard to both Russia and Vietnam. The Report reveals that both countries have high levels of (in some cases industrial-scale) copyright piracy (to mention just one of many issues raised), and that this issue was primarily being leveraged in the WTO accession process.⁴⁹

⁴⁶ Ecuador became a WTO Member in January 1996; see Report of the Working Party on the Accession of Ecuador of 14 July 1995 (WT/L/77), at p. 34 (para. 78).

⁴⁷ This was apparently an issue in the accession of China and got special mention in the Working Party Report; see *Technical Note on the Accession Process*, 28 November 2005, (WT/ACC/10/Rev.3), at p. 178.

⁴⁸ See Working Party Report on the Accession of China of 1 October 2001, (WT/ACC/CHN/49), pp. 50 ff (para 251 – 305).

⁴⁹ See, e.g. p. 553 ff. of the Report.

SECTION III

FINDINGS AND CONCLUSIONS

From the perspective of Members, the WTO accession process is first and foremost about market access. Applicants will need to “pay the price” of admission to the WTO by means of providing meaningful market access to their goods and services markets. However accession for some WTO Members is about much more than just market access, but rather also represents a chance to achieve rapid gains with regard to systemic issues on which progress amongst the WTO membership as a whole has proven difficult or slow.

For right or wrong, the WTO accession process offers Members a unique opportunity to leverage issues against the applicant country to a degree which they will probably not be able to do again. Members, whose primary concern at the WTO is to promote, advance and defend their own national economic interests, would not be faithfully fulfilling their mandate to the people they govern if they failed to avail themselves of this opportunity.

This dynamic, although the topic of much discussion on the part of applicants and those who provide technical assistance to them, as well as by a number of other interested Members, is not likely to change anytime soon. Only Members can change the system, but they have a clear vested interest in maintaining the status quo.

One is tempted to ask how we got to this situation, and why, say, joining WIPO or the UN is not a similarly daunting endeavor. The answer to this question appears to lie in the historical origins of the multilateral system. Before the WTO, the GATT was essentially a contractual structure and those wishing to adhere had to negotiate the contract terms under which they would be allowed to do so as part of the protocols of accession. When the contractual structure was dispensed with in favor of a more institutional set-up – in 1995 when the WTO was established – Members opted to continue with GATT practices and procedures with regard to many if not most issues (including accession) and enshrined this principle in Art. XVI of the Marrakesh Agreement Establishing the WTO. For better or for worse, these are the procedures we are stuck with now.

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