Introduction

Accession is a strategic priority of the WTO. To achieve universality is the ultimate goal of the WTO, because enlargement of the rules-based multilateral trading system is a key source of strength.1

– Pascal Lamy, former European Commissioner for Trade and former Director-General of the World Trade Organization

The World Trade Organization (WTO) was founded in 1995 after the completion of the Uruguay Round of Multilateral Trade Negotiations (the Uruguay Round).2 The organization succeeded the General Agreement on Tariffs and Trade of 1947 (GATT 1947) as the main global institution governing international trade. The WTO is founded on the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) which sets out the organization’s five main functions.3 In succeeding GATT 1947 with its 128 Contracting Parties, the WTO has become an international organization with an almost universal membership. The multilateral trading system is firmly rooted in public international law and the legal instruments underpinning the organization are sources of international law.4 Several events in 2016 illustrated that the organization’s relevance has not reduced in the 21 years since its inception. The vote for ‘Brexit’ in the United Kingdom and the election of President Donald Trump in the United States placed renewed emphasis on the rules of international trade and the role of the rules-based multilateral trading system.

3 Article III WTO Agreement.
International trade used to be largely unregulated until the creation of the GATT 1947 shortly after the end of the Second World War. Trade policy in the period leading up to the Second World War was characterized by outbursts of unbridled protectionism, which are often cited as one of the causes of the darkest period in modern history. In order to curb the hands of governments with protectionist intentions after the War, the allied governments – in particular the United States and the United Kingdom – started negotiating a commercial union. In 1946 the General Agreement on Tariffs and Trade was first negotiated in its eventual form at the London Conference. The GATT was initially conceived as a tariff reduction agreement and was intended to be a part of an International Trade Organization (ITO). After this organization was stillborn, the GATT turned into a de facto international organization, which turned out to become increasingly popular in the first years of its existence.

Trade liberalization continued as the GATT Contracting Parties concluded numerous negotiation rounds and the membership of GATT grew incrementally. Through these negotiation rounds the average tariff rate applied by industrialized countries on non-agricultural goods gradually dropped from between 20-30 per cent in 1947 to approximately 5.5 per cent in 2006. After several decades the importance of tariffs in trade liberalization began to decrease. Non-tariff barriers (NTBs), such as product standards or origin requirements, became increasingly important. With the growing importance of NTBs, GATT Contracting Parties began to search for new ways to limit the use of these instruments for protectionist purposes. In the Uruguay Round of Multilateral Trade
Negotiations several multilateral agreements on trade in goods – the Annex 1 Agreements – were negotiated. These agreements, such as, for example, the Agreement on Technical Barriers to Trade set out disciplines which WTO Members have to adhere to when they adopt technical regulations and standards. These agreements are a good example of the broadening scope of the multilateral trading system. The creation of the WTO thus marked the beginning of a new era in international trade law and policy. The WTO is built upon what is termed a ‘single undertaking’. The WTO Agreement serves as an umbrella agreement, with annexes covering – in addition to trade in goods – services and the trade-related aspects of intellectual property. Furthermore there are agreements covering dispute settlement and the review of WTO Members’ trade policy. All agreements operate as one single package.

The membership of the organization has steadily grown from 128 in 1995, to 164 in July 2016. The birth of the organization did not only increase the substantive scope of the multilateral trading system, but also led to some important institutional changes. The most well-known example is the WTO’s Dispute Settlement Body (DSB), which is widely heralded as one of the most successful inter-state dispute settlement mechanisms. One institutional aspect that remained unchanged, however, is the accession process that states and customs territories have to go through in order to accede to the organization. The GATT 1947 provided for the possibility of states and customs territories to accede to it ‘on terms to be agreed between it and the Contracting Parties’. This wording allowed for the creation of an accession process that is to a large extent power-based. Although this particular phrase is also reflected in Article XII of the WTO Agreement, the accession process has, to a certain extent, also been formalized in the first 20 years of the WTO’s existence. Nevertheless, in essence, the process has remained the same. The WTO – in negotiations with the acceding state or customs territory – can demand that these states adjust their existing trade policy in order to be compliant with the WTO’s obligations at the time of accession. The question that can be posed is whether this institutional aspect, combined with the broadening scope of the organization, has led to a situation in which the WTO can require states and customs territories that want to become a Member to accept an ‘accession package’ that includes rights and obligations, or rules commitments, that are different – or even more

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9 The cut-off date for this monograph is June 2017.
stringent – from the rights and obligations applicable to the incumbent membership. It is important to note that the examination of the acceded states focuses on these rules commitments, and thus not on the market access commitments that these states have also had to undertake. It is evident that trade liberalization commitments in the fields of trade in goods and trade in services will differ from state to state, as a consequence of the unilateral liberalization efforts already undertaken prior to the accession bid. Whereas these differences also reflect a distinction within the membership, the extent to which states have also had to undertake different rules commitments might be the real reason for characterizing the membership of the WTO as multi-tiered. Concerns have been raised that the multi-tieredness within the WTO membership erodes the legitimacy of the organization as a whole. It has been argued that ‘the lack of reasoning and transparency in the accession rules is the main legitimacy problem’. This contribution therefore focuses on two aspects relating to the concept of accession. First, the process of accession itself, and second, the interpretation of commitments in protocols of accession by the WTO’s DSB.

The first chapters of this book address the institutional and historical aspects of the WTO accession process. Chapter 1 draws on non-legal fields of scholarship to determine the main rationales that underpin the desire to obtain membership of the multilateral trading system and the accession bids thereto. Research in the fields of economic science and international relations is examined in order to determine the main motivation for states to become a Member of the WTO. As noted, the WTO is based on the Marrakesh Agreement Establishing the World Trade Organization, which is in itself a source of international law. Chapter 2 contains an analysis of the accession process to the multilateral trading system. The ways in which states and customs territories could become Contracting Parties to the GATT 1947 are examined, followed by an

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11 The notion of legitimacy is broader than the notion of legality. A particular act, law or regulation may be considered legal if it complies with all the procedural steps that are required for it. However, such an act, law or regulation will only be considered as legitimate if the actors that are subject to it consider that it was taken in light of broader notions such as fairness, democracy and justice. The legitimacy of a particular act, process or outcome therefore depends on the way in which it is considered by those that will be subjected to it.

analysis of the accession process to the WTO. This chapter also contains an overview of the evolution of the membership of the multilateral trading system. In Chapter 3 the main features of WTO accession, which is governed by Article XII of the WTO Agreement, are examined. The process of accession is examined in detail, enabling an analysis of the issue of a multi-tiered membership in subsequent chapters.

The book proceeds with an in-depth discussion of the legal status of protocols of accession within the legal framework of the WTO. These protocols are the legal instruments that together form the end result of each accession. In Chapter 4 the legal structure of the WTO is described with a view to identifying the place of protocols of accession in that structure. Questions have arisen as to the legal basis for the enforceability of the commitments contained in these protocols. The chapter addresses the case law of the WTO’s DSB in order to determine how panels and the Appellate Body have dealt with protocols of accession in their reports.13 Thirty-three requests for consultations have so far cited provisions of an accession protocol and, in several disputes, panels and the Appellate Body have dealt with the relationship between these protocols and the WTO Agreement. The interpretative approach adopted by panels and the Appellate Body in these disputes is analysed.14 This chapter examines the relationship between the commitments contained in protocols of accession and the provisions of the WTO Agreement. To this end four important issues that arise in this respect are examined: i) the availability of the general exceptions contained in Article XX of the GATT 1994; ii) the rights or derogations that accession protocol commitments can create for other WTO Members; iii) the issue of the waiving of rights by acceding Members; and iv) the relevance of the commitments contained in protocols of accession for the interpretation of a) provisions of the

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WTO Agreement, and b) provisions of the protocols of accession of other non-original Members.

Finally, the last two chapters contain the results of a mapping exercise conducted in order to determine the prevalence and substance of so-called WTO-Plus and WTO-Minus obligations. One of the main reasons for the research has been the concern that the WTO is in fact characterized by a two-tiered — or even a multi-tiered — membership. It has been argued that, as a result of the power-based accession process, new Members have had to accept obligations that exceed the commitments that are allegedly more stringent than those undertaken by the incumbent membership. Existing literature often contains assumptions over what constitutes, or does not constitute, a WTO-Plus obligation. Through a detailed mapping exercise of 36 protocols of accession, and the corresponding working party reports, an analysis is made of the type of commitments that new WTO Members have agreed to in order to be allowed to join the organization. The results of this mapping exercise, as presented in Chapters 5 and 6, allow for the definition of a typology by means of which the commitments contained in accession protocols can be compared with the existing ‘baseline’ obligations in the WTO Agreement, including its annexes. The mapping exercise has been carried out on the basis of the accession protocols of non-original Members of the WTO. The results of the mapping exercise provide conclusions as to the prevalence of WTO-Plus and WTO-Minus obligations. Are they being negotiated more often in recent accessions? Are they merely country-specific, or is there a discernible trend? Are they negotiated in particular areas (export policies, trade remedies, subsidies, etc.) or can they be seen across the board? The mapping exercise contains detailed scrutiny of all areas in which rules obligations have been agreed upon by the new Member and the WTO. Examples of such areas include state-owned enterprises (SOEs), the domestic policy-making framework and rule of law commitments, tariff rate quotas (TRQs), quantitative restrictions, customs valuation, pre-shipment inspection, anti-dumping, countervailing duties, safeguards, subsidies, services, technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), trade-related aspects of intellectual property rights (TRIPS) and transparency obligations. Of

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15 It is important to note that this chapter will only address the so-called ‘rules’ obligations — those that lay down the material rules the incumbent Member has to adhere to — and will not address the amount of concessions required for a Member to be allowed to accede.

16 Yamaoka (2013), Analysis of China’s Accession Commitments in the WTO.
particular interest are the commitments made in respect of the elimination of export duties. It will be established that there is a gap in the baseline disciplines on export restrictions, as these merely prohibit the use of quantitative export restrictions and do not focus on export taxes as a means of restricting the export of certain goods. WTO Members have sought to fill this gap by including provisions on the elimination and/or prohibition of export duties in protocols of accession. Using the results of the mapping exercise, the prevalence of this type of WTO-Plus obligation will be examined.

The final part, Chapter 7, summarizes the main findings presented in this book. Some general recommendations are proposed for countries that are not yet a Member of the WTO. The importance of, and the need for, trade-related capacity building is highlighted, especially with respect to those countries that have not yet joined the multilateral trading system. It is submitted that this is a crucial condition for achieving universal membership and maintaining the legitimacy and centrality of the WTO and the multilateral trading system in the long term.

The book adopts an integrated approach that combines a comprehensive mapping exercise with a legal analysis of the decisions by the WTO DSB involving protocols of accession. Additionally, it provides an update of the existing scholarship on WTO accession. This monograph is the first contribution that comprehensively addresses the issue of Member-specific ‘WTO-Plus’ commitments in protocols of accession by analysing 36 protocols of accession and their corresponding working party reports. All accessions until 2016, including those of Afghanistan, Kazakhstan and Liberia, are covered. Although it does not purport to be a comprehensive textbook on the WTO, it can nevertheless serve as a useful reference guide for those who have become interested in the workings of the organization as a result of events such as Brexit and the increase in protectionist rhetoric around the world. This book aspires to serve as a useful resource for those studying the topic of WTO accession, but also for those who are, as yet, not quite familiar with the workings of the World Trade Organization and the multilateral trading system.

17 See, for example, the working party reports on the accessions of Viet Nam, para. 260, Croatia, para. 101, Tonga, para. 102, Saudi Arabia, para. 184, China, Protocol I.11, Nepal, para. 79, Russian Federation, paras. 668–9, and Ukraine, para. 255.