RECONCILING WTO GENERAL EXCEPTIONS WITH CHINA'S ACCESSION PROTOCOL

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Abstract

Every WTO accession protocol states that it "shall be an integral part of the WTO Agreement." But what legal effect does this clause really have? Specifically, does it allow application of the general exceptions found in GATT Art. XX and GATS Art. XIV to accession protocol commitments?Understanding this relationship between the Multilateral Trade Agreements and accession protocols is critical next step as Members seek to enforce these obligations in Dispute Settlement Body ("DSB") proceedings.To date, few WTO disputes have addressed issues arising from accession protocols. However, Panel and Appellate Body reports have reached discordant results regarding how and when a Member's rights under the Multilateral Trade Agreements, apply to accession protocol obligations. China's Accession Protocol provides valuable insight into the emerging legal relationship between accession protocols and the Multilateral Trade Agreements, as it is the first non-standard, and most disputed, accession protocol.This Note concludes that permitting application of GATT Art. XX and GATS Art. XIV, simplifies legal issues underlying WTO disputes, comports with interpretation under the Vienna Convention on the Law of Treaties ("VCLT"), and balances the obligations of existing WTO members with the expectations of entering members.

I. INTRODUCTION

Since the inception of the WTO in 1995, 29 governments[1] have acceded to and become members of the WTO.[2] Currently, another 26 candidate governments[3] are under consideration[4] and as many as 35 percent of future WTO Members could enter through the accessions process.[5] Through accession, new obligations may be imposed on applicant governments.[6] While legitimate and permissible under the Marrakesh Agreement,[7] the use of accession protocols as the means

[1] *Members and Observers*, WTO.ORG, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Dec. 3, 2012) (this equates to 18% of Members).

[2] *Accessions*, WTO.ORG, http://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited Dec. 3, 2012).

[3] The term "government" in this note means the state or separate customs territory that is seeking to join the WTO pursuant to Art. XII of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. Governments party to the WTO Agreements are referred to as Members.

[4] *Id*.

[5] Steve Charnovitz, *Mapping the Law of WTO Accession* (George Washington University Law School Public Law and Legal Theory Working Paper No. 237 Legal Studies Research Paper No. 237, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=957651.

[6] Jolita Butkeviciene ET AL,. *Terms of WTO Accession*, *in* UNCTAD, WTO Accessions and Development Polices, UNCTAG, DITC/TNCD/11 (2001) at 37.

[7] MARRAKESH AGREEMENT, *supra* note 3 at Art. XII.

to create these new obligations results in a complex legal relationship between accession protocols and the Multilateral Trade Agreements.[8]

Further complicating the relationship between the Multilateral Trade Agreements and accession protocols is the unclear and convoluted language that is used to define these new obligations in accession protocols. Understanding this relationship between the Multilateral Trade Agreements and accession protocols is critical next step as Members seek to enforce these obligations in Dispute Settlement Body ("DSB"[9]) proceedings.[10]

Underlying these disputes over accession protocol obligations is confusion over whether the general exceptions made available under the Multilateral Trade Agreements, such as GATT Article XX and GATS Article XIV, apply to accession protocol obligations.

To date, few WTO disputes have addressed issues arising from accession protocols. However, Panel and Appellate Body reports have reached discordant results regarding how and when a Member's rights,[11] under the Multilateral Trade Agreements, apply to accession protocol obligations.

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[8] The WTO Agreements consist of the Marrakesh Agreement, *supra* note 3, the General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, *in* the Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts 21 (1995), 33 I.L.M. 1154 (1994), [hereinafter GATT or GATT '94], the General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, *in* the Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts 325 (1995), 33 I.L.M. 1168 (1994), [hereinafter GATS], the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C *in* the Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts 365, 33 I.L.M. 1197 (1994) [hereinafter TRIPs] and the Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Texts--The Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 112 (1994) [hereinafter DSU].

[9] The DSB may refer to either a WTO Panel or the WTO Appellate Body. *See* RICHARD K. GARDINER, TREATY INTERPRETATION 116-19 (2012).

[10] Anna Lanoszka, *The World Trade Organization Accession Process*, 35 J. WORLD TRADE 575, 583 (2001).

[11] [T]he general concept of WTO 'rights' is difficult to comprehend. If by WTO rights, one means the procedural right to invoke dispute settlement so as to allege a violation (or a non-violation that nullifies and impairs), then that usage is unobjectionable. If by WTO rights, one means that a WTO member has a right to expect other WTO members to adhere to their obligations under WTO law, then that usage is comprehensible, but would seem to be noting an intended beneficiary of the WTO law obligation. But if by WTO rights, one means that a WTO member has a substantive right to a defined *trade* benefit or result like an export, then that usage seems unjustified under WTO law because most rules are qualified by exceptions.

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Section I addresses the legal relationship between the Multilateral Trade Agreements and accession protocols. Section I also discusses the legal structure of the general exceptions and accession protocols, with particular emphasis on China. Section II details relevant WTO disputes involving accession protocols, GATT Art. XX and GATS Art. XIV. Section III discusses the advantages of uniform application of GATT Art. XX and GATS Art. XIV to accession protocols.

This Note concludes that permitting application of GATT Art. XX and GATS Art. XIV, simplifies legal issues underlying WTO disputes, comports with interpretation under the Vienna Convention on the Law of Treaties ("VCLT"),[12] and balances the obligations of existing WTO members with the expectations of entering members.

II. THE WTO AGREEMENTS & THE GENERAL EXCEPTIONS

To properly frame accession protocols commitments, it is first necessary to examine the "baseline" obligations found in the Multilateral Trade Agreements.[13] Generally, a WTO Member's obligations can be divided into two categories: "(a) the general obligation to comply with WTO rules of conduct (the rule obligations); and (b) the individual obligation to reduce trade barriers with respect to specific goods and services (the market access obligations)."[14]

While the rules of conduct formally consist of obligations found in GATT 1994, GATS, TRIPS, and the DSU, a more illustrative example of a rule obligation may be most-favored nation clause in GATT 1947 Art. I[15] or GATS Article 2.[16] Measures inconsistent with GATT or GATS obligations may still be permitted if they fall

trade benefit or result like an export, then that usage seems unjustified under WTO law because most rules are qualified by exceptions.

CHARNOVITZ, *supra* note 5 at 3.

[12] Vienna Convention on the Law of Treaties, art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

[13] CHARNOVITZ, *supra* note 5 at 11.

[14] Julia Ya Qin, *"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol*, 37(3) J. WORLD TRADE 483, 484 (2003) [hereinafter Qin Accession Protocol Appraisal].

[15] Binding by reference in GATT 1994, Art. 1(a), *supra* note 8.

[16] *See* GATS, *supra* note 8.

within a GATT Article XX or GATS Article XIV exception.[17] Market access obligations are those commitments in a Member's goods and services schedules annexed to GATT 1994 and GATS.[18]

This distinction between rules and market access obligations is critical, as accession protocols can alter both rule and market access obligations, and can directly affect whether the general exceptions may be used to justify an inconsistent measure. When commitments are integrated directly into the GATT and GATS, such as a Member's market access commitments, Members may avail themselves of GATT Article XX or GATS Article XIV defenses. However, when an accession protocol alters a WTO rule obligation, it is less clear whether GATT Article XX or GATS Article XIV apply. Instead of a straightforward analysis under GATT Article XX or GATS Article XIV, the availability of an exception may depend on related accession protocol terms. These terms or commitments frequently only pertain to specific articles, paragraphs or portions of the Multilateral Trade Agreements. However, the WTO trade framework established by the Multilateral Trade Agreements, is not so easily compartmentalized.[19] GATT Article XX and GATS Article XIV exceptions are an inseparable component of the WTO trade framework. Thus, it is easy to conflate issues arising out of accession protocol commitments, phrased as "WTO-plus"[20] or "WTO-minus"[21] commitments, with the underlying issue of whether GATS & GATT exceptions apply to a given measure. As such, a closer examination of the exceptions' function within baseline WTO trade framework is necessary to properly evaluate the effect of accession commitments.

A. GATT Article XX

The general exceptions in GATT Article XX consist of two parts: the chapeau and "a list of types of measures that fall within its

[17] Appellate Body Report, *Thailand–Customs and Fiscal Measures on Cigarettes from the Philippines*, 173, WT/DS371/AB/R (June 17, 2011) ("[A]n analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the "further and separate" assessment of whether such measure is otherwise justified.").

[18] Appellate Body Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, ¶ 21.1, WT/DS27/AB/R (adopted Sept. 9, 1997).

[19] Except for the two remaining, optional 'plurilateral' agreements, which relate to trade in civil aircraft and government procurement. *Understanding the WTO: The Agreements*, *Plurilaterals: of Minority Interest*, WTO.ORG, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm (last visited Oct. 29, 2012).

[20] Nhan Nguyen, WTO Accession at Any Cost? Examining the Use of WTO-Plus and WTO-Minus Obligations for Least-Developed Country Applicants, 22 TEMP. INTL. & COMP. L.J. 243, 257 (2008).

[21] THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 880-82 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008).

scope."[22] Exceptions are commonly invoked when a measure is (a) necessary to protect public morals,[23] (b) necessary to protect human, animal or plant life or health,[24] (d) necessary to secure compliance with laws or regulations which are not inconsistent with GATT rules, [25] and (g) relating to conservation of exhaustible natural resources.[26]

Determination of whether a measure falls within a GATT Article XX exception requires a two-tier analysis.[27] First, the measure at issue must fall within the scope of one of the enumerated exceptions.[28] Only if a measure can be "provisionally justified" under a particular clause, does the analysis continue onto the second step: whether the measure "complies with the requirements of the chapeau."[29] To meet this requirement, a measure must "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[30]

B. GATS Article XIV

GATS Article XIV contains exceptions[31] analogous to those available in GATT Article XX.[32] Similar to the analysis employed in GATT Article XX analyses, GATS Article XIV follows a two-tiered analysis.[33] First, a measure must fall within the scope of one of the

[22] John H. Jackson, William J. Davey, Alan O. Sykes, Jr., Legal Problems of International Economic Relations: Cases, Materials and Text 592 (5th Ed.) (2008).

[23] *See* Article XX: General Exceptions, WTO.ORG, http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX (last visited Oct. 29, 2012).

[24] *Id. See*, e.g., Appellate Body Report, European Communities–Measures Affecting Asbestos and Asbestos-Containing Products, ¶ WT/DS135/AB/R (Apr. 5, 2001).

[25] *See* GATT Article XX, *supra* note 8; *see*, e.g., Appellate Body Report, Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Bee*f*, WT/DS161/AB/R, ¶ WT/DS169/AB/R (Dec. 11, 2000).

[26] *See* GATT Article XX, *supra* note 8; *see*, e.g., Panel Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/RW (June 15, 2001).

[27] Panel Report, Argentina–Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, 11.288-11.289, WT/DS155/R (Dec. 19, 2000).

[28] Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 118-121, WT/DS58/AB/R (Oct. 12, 1998) (*adopted* Nov. 6, 1998).

[29] JACKSON, DAVEY, & SYKES, *supra* note 22 at 592.

[30] Appellate Body Report, *Brazil –Measures Affecting Imports of Retreaded Tyres*, ¶ 214-15, WT/DS332/AB/R (Dec 3, 2007).

[31] Article XIV *bis* also contains an exception for "essential security interests" and "any action in pursuance of [a Member's] obligations under the United Nations Charter for the maintenance of international peace and security." *See* GATS, *supra* note 8 at XIV *bis* (1) (a), (b), (c).

[32] JACKSON, DAVEY& SYKES, *supra* note 22, at 592.

[33] Panel Report, United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 6.449, WT/DS285/R (Nov. 10, 2004) [hereinafter U.S.–Gambling].

enumerated exceptions in Article XIV [34] "in order to enjoy provisional justification."[35] To date, the DSB has only addressed exceptions for measures (a) "necessary to protect public morals or to maintain public order" and (c) "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [GATS]."[36] Second, the measure must "meet the requirements of the introductory provisions of Article XIV, the so-called 'chapeau'."[37] Furthermore, the party invoking GATS Article XIV bears the burden of proof to demonstrate that the elements of this defense are fulfilled.[38]

C. The Role of General Exceptions: A Delicate Compromise

The general exceptions reflect the WTO's "struggle with drawing the appropriate line between overreaching intrusion by international panels and tribunals into sovereign national affairs, on the one hand, and the inevitable necessity for an effective rule-based system to accord such panels and tribunals the power to evaluate national government actions, on the other."[39] For this reason, it is easy to understand why even the DSB's deferential application of a "least restrictive means test" with respect to the suitability of measures under the general exceptions could "ultimately inject the WTO into national debates on alternative approaches to important problems."[40] It is on this seesaw between WTO obligations and the general exceptions that accession protocols and working party reports interject commitments, altering rule obligations and threatening to disturb this delicate balance.

III. ACCESSION PROTOCOLS & WORKING PARTY REPORTS

A. Construction of WTO-Plus or Minus Obligations

Given that the DSB refers to accession protocols without significant ferment, one may suppose that the binding nature of accession protocol obligations are straightforward. However, accession protocol commitments are legally convoluted, requiring a

[34] *Id*. (*citing* GATS Art. XIV (a)-(e)).

[35] U.S.–Gambling, *supra* note 33 at 6.449.

[36] GATS *supra* note 8 at XIV (c) (Art. XIV (c) specifically includes measures related to prevention of deceptive and fraudulent practices, defaulted services contracts, identity theft, and safety.).

[37] *Id*.

[38] *Id*. at 6.450.

[39] Steven P. Croley & John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 AM. J. INT'L. L. 193, 213 (1996).

[40] John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 519 (2000).

close examination of both the member's accession protocol and the working party report. Binding commitments can arise from (1) the accession protocol, (2) the working party report, or (3) the accession protocol interpreted in light of the working party report, or vice-versa.

In order for an applicant government to be admitted to the WTO, an Article XII decision adopting the accession protocol has to be approved by the WTO General Council or the Ministerial Conference.[41] Each accession protocol conforms to a standardized format as identified by the WTO Secretariat,[42] consisting of a preamble,[43] general provisions (defining the legal relationship of specific paragraphs of the working party report),[44] schedule provisions (integrating the applicant's "Schedule of Specific Concessions" into the GATT '94 and GATS)[45] and final provisions (containing administrative details).[46] At the outset, it is important to note that violations of a member's market access commitments and their accession protocol commitments are not mutually exclusive.[47] Facts may implicate either, or both.[48] However, the choice of claims between these two sets of obligations has significant legal ramifications. The key component is that these commitments are legally separate from China's commitments in its Schedule of Commitments, which are legally integrated into the GATT and GATS.

1. Commitments in the Accession Protocol Text

First, a commitment may arise from the text of the accession protocol itself. For example, Article 2 (A)(4) of China's Accession Protocol states that "China shall establish a mechanism under which individuals and enterprises can bring the attention of the national

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[41] Approval of the "Accession Package", WTO.ORG, http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (last visited Dec. 1, 2012); *see also* WTO SECRETARIAT, *Technical Note on the Accessions Process*, WT/ACC/10/Rev./4/Add.1, 3 (May 25, 2010) [hereinafter *Secretariat Technical Note*] (the text of the WTO General Council decision was changed for China's accession to be more specific, referring directly to the Marrakesh Agreement Art. XII, paragraph 2 and Article IX, paragraph 1).

[42] SECRETARIAT TECHNICAL NOTE, *supra* note 41, 3-5.

[43] *Id*., at 3-4.

[44] *Id*., at 4.

[45] *Id*., at 4.

[46] *Id*., at 4-5.

[47] *See, e.g.., Resolving WTO Challenge to China's Treatment of U.S. Financial Information Service Suppliers*, Office of the United States Trade Representative, USTR.gov (Nov. 2008), http://www.ustr.gov/sites/default/files/
uploads/factsheets/2008/asset_upload_file345_15219.pdf (last visited Nov. 11, 2012).

[48] *Id*.

authorities cases of non-uniform application of the trade regime."[49] As in a contract, the word "shall" indicates a binding term.[50] Written using terms of agreement, accession protocols appear to be the intuitive place for inserting additional commitments. However, the mainstay of an applicant government's WTO-plus or minus commitments arise from the working party report.

2. Commitments in the Working Party Report

Second, a commitment may arise from the working party report. While the full text of a working party report is not binding, an applicant's accession protocol incorporates by reference a specific paragraph within the working party report that is binding.[51] In turn, that 'holding' paragraph contains an extensive list of paragraphs within the working party report that contain binding commitments. The 'holding' paragraph also frequently contains a reciprocal clause indicating that it is binding under the respective clause of the accession protocol.

3. Commitments Construed From Joint Interpretation of the Accession Protocol and Working Party Report

Third, a commitment may arise through the interpretation of the accession protocol and the working party report in tandem. This situation normally arises when the working party report and the accession protocol contain overlapping binding commitments on the same commitment or subject.[52] However, reliance on both an accession protocol a working party report may result in interpretive questions that obfuscate an acceding Member's commitment.

B. Interpretive Issues

The structure of commitments also results in interpretive issues. First, the DSB does not clearly delineate between binding and non-binding paragraphs of working party reports. This creates an issue when both binding and non-binding working party report paragraphs

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[49] THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA, WT/L/432 (10 Nov. 2001), *available at* https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn.

[50] Bryan A. Garner, BLACK'S LAW DICTIONARY 711 (3rd pocket ed. 2006).

[51] *See* Panel Report, *Raw Materials infra* note 147 at ¶ 7.114 ("Finally, all parties agree that commitments included in the related Working Party Report, and incorporated into the Accession Protocol by cross-reference, are binding and enforceable through WTO dispute settlement proceedings.").

[52] Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, ¶ 199, ¶ 200, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter China – AV Products] (finding Chinese film measures inconsistent with China's obligation under paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83 (d) and 84 (a) of China's Working Party Report).

are used by a DSB to reach a substantive conclusion. For example, in *U.S.–Shrimp* when interpreting Anti-Dumping Agreement[53] Article 9.4 in light of Vietnam's accession protocol, [54] the panel quoted in full paragraphs 254 and 255 of Vietnam's working party report.[55] However, paragraph 527, the holding paragraph in the Vietnam WPR, indicates that only the commitments in paragraph 255 were incorporated into Vietnam's accession protocol.[56]

At first glance, this distinction appears trivial and formalistic, especially since paragraph 254 provides background and justification for the WTO-minus obligation allowing other Members to use certain methodologies when calculating prices under the Anti-Dumping Agreement.[57] However, when the DSB relies on both a binding and non-binding paragraph in reaching a legal conclusion, this implies that the non-binding paragraph contains a commitment, or information necessary to define a commitment. The adverse consequences to the DSB are analogous to those created by citation to unpublished judicial opinions in the U.S.[58]

Yet, DSB citation to non-binding paragraphs may be justified under the VCLT [59] as providing context or reference to these paragraphs may be necessary to make other commitments effective.[60]

Generally, accession protocols contain two relevant provisions. According to the standard format for accessions, the preamble states that "The World Trade Organization . . . [t]aking note of the Report of the Working Party on the Accession of . . . [name of applicant] . . . to the WTO in document WT/ACC/[. . .] . . . [a]gree as

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[53] WTO, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15. 1994, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf [hereinafter Anti-Dumping Agreement].

[54] Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, ¶ 7.249 – ¶ 7.251, WT/DS404/R (July 11, 2011) [hereinafter U.S.–Shrimp].

[55] Working Party on the Accession of Vietnam, *Accession of Viet Nam*, ¶ 254, ¶ 255, WT/ACC/VNM/48 (Oct. 27, 2006) [hereinafter Vietnam WPR].

[56] General Council, Protocol on the Accession of the Socialist Republic of Viet Nam, WT/L/662 (Nov. 15, 2006).

[57] *Id*.

[58] *See* Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 4, 22 (1996); *see* generally, J. Jason Boyeskie, A Matter of Opinion: Federal Rule of Appellate Procedure 32.1 and Citation to Unpublished Opinions, 60 ARK. L. REV. 955 (2008).

[59] *See* VCLT, *supra* note 12, art. 31; *see also* Julia Ya Qin, *The Challenge of Interpreting 'WTO-PLUS' Provisions*, 44(1) J. WORLD TRADE 127, 132, n. 25 (contending interpretation of an accession protocol should be governed by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, opened for signature Mar. 21, 1986, U.N. Doc. A/CONF.129/15 [hereinafter VCLTIO]); *but cf.* GARDINER, *supra* note 9 at 143, n. 7 ("Such treaties are governed by the same rules as the Vienna rules.") (*citing* VCLTIO, chapter 4, section 2.2).

[60] GARDINER, *supra* note 9, at 177-180, 202-204.

follows . . . ."[61] While this incorporation of the entire working party report creates no binding commitments, it does justify the use of the preamble or full text of an accession protocol under VCLT Article 31(2) to determine the "context for the purpose of the interpretation of a treaty."[62] Second, use of non-binding paragraphs is also consistent with the principle of effectiveness,[63] whereby reference to the non-binding term is used to "give meaning and affect to all terms of a treaty."[64] As in the case of *U.S.–Shrimp*, reference to non-binding paragraph 254, which memorialized Members' anticipated difficulty calculating comparable prices and costs,[65] allowed for a more effective interpretation of the commitment to calculate price and cost in the detailed manner described in paragraph 255.

The structure of the commitments raises a second interpretive issue: commitments in the working party reports are not consistently phrased using words of agreement.[66] Instead, commitments are signified with the statement "[t]he Working Party took note of this commitment."[67] Consider the legal clarity of the following commitments made by China regarding safeguards:

> [16.]2. If, in the course of these bilateral consultations, it is agreed that imports of Chinese origin are such a cause and that action is necessary, China *shall* take such action as to prevent or remedy the market disruption. Any such action *shall* be notified immediately to the Committee on Safeguards.[68]
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> 154. The representative of China stated that upon accession, China *would* implement its Regulation on Safeguard

[61] *See* SECRETARIAT TECHNICAL NOTE, *supra* note 41 at 4; *see, e.g.*, General Council, Protocol of Accession of the Sultanate of Oman to the Marrakesh Agreement Establishing the World Trade Organization, 2, WT/ACC/OMN/28 (Nov. 3, 2000) ("Taking note of the Report of the Working Party on the Accession of Oman to the WTO in document WT/ACC/OMN/26 (hereinafter referred to as the 'Working Party Report')").

[62] *Id.* at art. 31(2).

[63] The principle of effectiveness may also be referred to as *ut res magis valeat quam pereat. See* Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, para. 80-81, WT/DS98/AB/R (Dec. 14, 1999).

[64] *See* Appellate Body Report, United States–Standards for Reformulated and Conventional Gasoline, 23, WT/DS2/AB/R (Apr. 29, 1996).

[65] *U.S.–Shrimp*, *supra* note 54 at ¶ 7.249.

[66] *See, e.g.*, BLACK'S LAW DICTIONARY 711 (3rd pocket ed. 2006) ("term, n. . . . 2. A contractual stipulation"); *id.* at 653 ("shall, vb. Has a duty to; more broadly, is required to . . . . Only sense 1 is acceptable under strict standards of drafting.").

[67] *See, e.g.*, WTO, Report of the Working Party on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, ¶ 66, WT/MIN(01)/4/Add.1 (Nov. 11, 2001).

[68] The Protocol on the Accession of the People's Republic of China, ¶ 16.2, WT/L/432 (10 Nov. 2001), *available at* https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn (emphasis added) [hereinafter *China Protocol*].

> by which the future safeguard measures *would be* regulated. The contents of this new regulation *would be* fully consistent with the Agreement on Safeguards. China *was in the process* of drafting safeguard legislation in accordance with Article 29 of the Foreign Trade Law and the Agreement on Safeguards. *The Working Party took note of this commitment*.[69]

In the former excerpt from China's Accession Protocol, the exact nature of China's commitment is clear from the legally operative word "shall."[70] In contrast, China's commitment is less clear in the working party report, which employs the word "would" and comingles statements conveying an obligation to undertake future action with statements recording the present state of affairs. Consider the statement, "[t]he contents of this new regulation would be fully consistent with the Agreement on Safeguards."[71] On its face, it is not clear whether this reflects an obligation to promulgate an agreement consistent with the Agreement on Safeguards, or whether the current draft was consistent with the Agreement on Safeguards. This confusion stems from the dual function of working party reports: (a) to record "the applicant country's commitments on opening its markets and on applying WTO rules"[72] and (b) to memorialize negotiations and discussions.[73] In the sense that working party reports memorialize negotiations, they are functionally equivalent to *travaux préparatoires*.[74] This creates an additional problem for WTO dispute resolution as it may not be clear whether individual statements reflect a commitment, or whether they merely have interpretive value in deciphering the context or object and purpose of

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[69] Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, ¶ 154, WT/ACC/CHN/49 (Oct. 1, 2001) [hereinafter *China WPR*] (emphasis added).

[70] *See* Keith William Watson, Interpreting WTO Accession Commitments According to their Function Relationship with Provisions of the WTO Agreements, 40-46 (May 20, 2012) (unpublished L.L.M. dissertation, George Washington University Law School), *available at* http://gradworks.umi.com/1510354.pdf.

[71] *CHINA WPR*, *supra* note 68 at ¶ 154.

[72] *Glossary Term Working Party Report (Accession)*, WTO.ORG, http://www.wto.org/english/thewto_e/glossary_e/wkg_party_rep_acc_e.html (last visited Dec. 10, 2012).

[73] Handbook on Accession to the WTO: Chapter 4, The Accession Process – The Procedures and How They Are Applied, 4.7 Completion of Working Party Mandate, WTO.ORG, http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s7p1_e.htm ("Working Party Reports start with short introductory sections and references to the documentation provided and go on to summarize the discussions held on WTO rules. In each specific case where commitments have been negotiated and accepted by the applicant, the Reports contain texts laying down the details.").

[74] GARDINER, *supra* note 9 at 162-163; *see* generally Evan Criddle, The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation, 44 VA. J. INT'L L. 431 (2004).

an acceding Member's commitments.[75] Yet, nowhere are these interpretive issues more apparent than in the case of China.

IV. CHINA'S ACCESSION PROTOCOL

While China's Accession Protocol and China's Working Party Report ("China's WPR") follow the conventional legal structure for accession documents, the[76] However, China's accession documents are also unique both in number and detail of commitments as well as the nature of certain obligations imposed[77]—which are neither traditional market barrier reductions or conventional rule-based WTO-plus obligations.

From an organizational standpoint, there is nothing unusual about China's Accession Protocol or China's WPR. China's Accession Protocol integrates China's WPR through the same cross-referencing scheme used by other Member's accession documents. First, the Preamble contains a general reference to China's WPR: "*Taking note* of the Report of the Working Party on the Accession of China in document WT/ACC/CHN/49 ('Working Party Report')."[78] Second, Article 1.2 incorporates a holding paragraph into the Accession Protocol, by stating: "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."[79] Third, paragraph 342 of China's WPR contains an enumerated list of other paragraphs within China's WPR that contain binding commitments.[80] Fourth, paragraph 342 of China's WPR contains a cross-reference back to Article 1.2 of China's Accession Protocol.[81]

The use of the conventional cross-referencing scheme means that China's Accession Protocol and China's WPR relate the Multilateral Trade Agreements in the same manner as all other Member's accession documents. Thus, while the DSB has had few disputes relating to accession protocols outside of the Chinese context,[82] there

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[75] GARDINER, *supra* note 9, at 177-194.

[76] Accession documents consist of an applicant government's accession protocol, working party report and GATT/GATS schedules. *See also* Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 403, n.6 (2002).

[77] *See* Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 326 (2004); *see also* Henry Gao, 6 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 137, 142-145 (2011).

[78] *China Protocol*, *supra* note 68 at Preamble, para. 4.

[79] *Id*. art. 12.

[80] *China WPR*, *supra* note 69, para. 342.

[81] *Id*.

[82] *See generally* U.S.–Shrimp, *supra* note 54.

is no reason to believe that DSB decisions regarding other Member's accession documents will not apply to China, or vice versa.[83]

Yet, China's Accession Protocol and China's WPR deviate from prior accession documents in their length, as well as the extent and nature of the commitments imposed on China.[84] Descriptively, China's Accession Protocol consists of 11 pages of main text, 18 sections of substantive provisions (which are further divided into more than 56 paragraphs and subparagraphs),[85] and 9 annexes.[86] China's WPR is no less extensive, consisting of 343 sections, of which 143 sections are binding by their incorporation into China's Accession Protocol.[87] This is significant when compared with prior and subsequent accession protocols, such as those for Ecuador[88] and Cape Verde,[89] respectively, which are both only two pages long.

Substantively, each of China's Accession Protocol and China's WPR commitments has two components: (a) the commitment's subject matter and (b) the commitment's functional relationship to the Multilateral Trade Agreements. First, China's Accession Protocol and China's WPR may be broken down into commitments falling into one of seven subjects: "(1) transparency, (2) judicial review, (3) uniform administration, (4) national treatment, (5) foreign investment, (6) market economy, and (7) transitional review."[90] Once

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[83] Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶ 7.392, WT/DS414/R (Jun. 15, 2012) ("Therefore, while there is no system of precedent under the DSU, China has not advanced a convincing reason for the Panel to depart from the reasoning of the Appellate Body . . . ."); *see also* Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products From China*, ¶ 325, WT/DS379/AB/R (Mar. 11, 2011) ("We note that the definition of 'context' in Article 31(2) of the *Vienna Convention* [VCLT] makes no mention of jurisprudence. Panel reports in previous disputes do not form part of the context of a term or provision in the sense of Article 31(2) of the [VCLT]. Rather, the legal interpretation embodied in adopted panel and Appellate Body reports become part and parcel of the WTO *acquis* and have to be taken into account as such.").

[84] While the Protocol itself contains a number of WTO-Plus commitments, the majority of China's commitments actually arise out of the Working Party Report.

[85] It is arguable whether Art. 18 discussing China's Trade Review Mechanism is substantive. *See generally* William Steinberg, *Monitor With No Teeth: an Analysis of the WTO China Trade Review Mechanism*, 6 U.C. DAVIS. BUS. L.J. 2 (2005).

[86] PROTOCOL, *supra* note 68; *see also* QIN ACCESSION PROTOCOL APPRAISAL, *supra* note 14 at 489.

[87] The full list of binding paragraphs in China's WPR are: 18-19, 22-23, 35-36, 40, 42, 46-47, 49, 60, 62, 64, 68, 70, 73, 75, 78-79, 83-84, 86, 91-93, 96, 100-103, 107, 111, 115-117, 119-120, 122-123, 126-132, 136, 138, 140, 143, 145, 146, 148, 152, 154, 157, 162, 165, 167-168, 170-174, 177-178, 180, 182, 184-185, 187, 190-197, 199-200, 203-207, 210, 212-213, 215, 217, 222-223, 225, 227-228, 231-235, 238-242, 252, 256, 259, 263, 265, 270, 275, 284, 286, 288, 291, 292, 296, 299, 302, 304-305, 307-310, 312-318, 320, 322, 331-334, 336, 339 and 341. CHINA WPR, *supra* note 69, ¶ 342.

[88] WTO, Protocol on the Accession of the Republic of Ecuador to the Agreement Establishing the World Trade Organization, WT/ACC/ECU/6 (Aug 22, 1995).

[89] WTO, Protocol on the Accession of the Republic of Cape Verde, WT/L/715 (Jan. 8, 2008).

[90] Qin Accession Protocol Appraisal, *supra* note 14 at 490.

the subject is identified, it is necessary to assess the second component: the commitment's relationship to the WTO Agreements. Under this analytical framework, China's commitments fall into three categories of provisions, "[c]ommitments on rules within the scope of the Multilateral Trade Agreements,"[91] "[c]ommitments on 'WTO-plus' obligations"[92] and "[c]ommitments on rules that result in 'WTO-minus' disciplines and rights."[93] In order to understand the significance of the language of accession protocols, it is important to distinguish between WTO rule obligations as opposed to market access obligations. WTO rule obligations are "general obligation[s] to comply with WTO rules of conduct,"[94] whereas a market access obligation is an "individual obligation to reduce trade barriers with respect to specific goods and services."[95] An understanding of both Accession Protocol commitment components is necessary to accurately assess China's commitments in a dispute context, as China's commitments intersect both well-established WTO disciplines, such as safeguards, [96] and the existing relationship between the Multilateral Trade Agreements and subsidiary WTO agreements, such as between GATT 1994 and the Anti-Dumping Agreement.[97]

For a more illustrative example, consider China's Accession Protocol's treatment of price comparability for the purposes of dumping analyses,[98] which dictates the use of Chinese

prices when the "producers under investigation can clearly show that market economy conditions prevail"[99] or "costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China" [100] when

[91] *Id*. at 490.

[92] *Id*.

[93] *Id*.

[94] *Id*.

[95] *Id*.

[96] *Compare* PROTOCOL, *supra* note 68 at para. 16 *with* Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter Safeguards Agreement]; *see generally* Yanning Yu, *China's Adopting Emergency Safeguard Measures for Services: A Political Economy Analysis*, 5 ASIAN J. WTO & INT'L HEALTH L & POL'Y 429 (2011).

[97] World Trade Organization, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15. 1994, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf [hereinafter Anti-Dumping Agreement or AD Agreement]; *see also* Lei Yu, Note, *Rule of Law or Rule of Protectionism: Anti-Dumping Practices Toward China and the WTO Dispute Settlement System*, 15 COLUM. J. ASIAN L. 293, 313-337 (2002).

[98] In fact, this provision of China's Accession Protocol was the subject of a dispute. *See* Panel Report, *European Union – Anti-Dumping Measure on Certain Footwear from China*, ¶¶ 7.181-205, WT/DS405/R (Oct. 28, 2011).; *see also* PROTOCOL, *supra* note 68.

[99] *Id*. ¶15(a)(i).

[100] *Id*. ¶15 (a).

"producers under investigation cannot clearly show that market economy conditions prevail."[101] Under the two-part analytical framework, this commitment concerns China's 'market economy' (in relation to established anti-dumping principles), resulting in a 'WTO-minus' commitment.[102]

While the legal relationship between the China's Accession Protocol, China's WPR and the Multilateral Trade Agreements is complex, this relationship is further complicated by internal references to other WTO agreements, such as the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"),[103] the Agreement on Agriculture[104] and the Agreement on Trade-Related Investment Measures ("TRIMs").[105] At issue is the legal relationship of subsidiary WTO agreements to China's Accession Protocol and WPR, as inconsistent language is used to phrase China's commitments in relation to these other agreements.[106] Consider for contrast the legal clarity of China's obligation to comply with TRIMs as compared with the *ad hoc* application of the SCM Agreement[107] in China's Accession Protocol:

> 7.3 China shall, upon accession, comply with the TRIMs Agreement, without recourse to the provisions of Article 5 of the TRIMs Agreement.[108]
>
> 10.3 China shall eliminate all subsidy programmes falling within the scope of Article 3 of the SCM Agreement upon accession.

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[101] *Id*. ¶15 (a)(ii).

[102] Arguably, this could also be considered a "[c]ommitment[] on rules within the scope of the Multilateral Trade Agreements," because it affects the analytical rule in the AD Agreement. *See Qin Accession Protocol Appraisal*, *supra* note 14, at 490.

[103] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

[104] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [hereinafter Agriculture Agreement].

[105] Agreement on Trade-Related Investment Measures *in* General Agreement on Tariffs and Trade: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, substantially reprinted in 33 I.L.M. 1 (1994) [hereinafter TRIMs].

[106] *See, e.g.*, Appellate Body Report, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, ¶ 283-290, 366, WT/DS/397/AB/R (July 15, 2011).

[107] The following excepts are only a sample and do not include every reference to the SCM Agreement in China's Accession Protocol.

[108] *Protocol*, *supra* note 68, at art. 7.3.

> 15(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

The result is an increasingly complex dispute environment where it is unclear if accession protocol or working party report commitments supersede Multilateral Trade Agreement obligations.[109] Additionally, it results in uncertainty as to the proper structure of complaints and the application of defenses and mechanisms available within the Multilateral Trade Agreements.[110] These interpretive issues are reminiscent of GATT *a la carte*, a problem compounded by the fractured application of subsidiary WTO agreements in China's Accession Protocol and WPR, and given rise to a number of WTO disputes.[111]

V. THE DSB'S TREATMENT OF THE GENERAL EXCEPTIONS IN THE CONTEXT OF CHINA'S ACCESSION PROTOCOL[112]

The DSB has consistently reiterated that "WTO Members' Accession Protocols are integral parts of the WTO Agreement"[113]—an obvious homage to the clause binding the working party reports to the accession protocols. Ostensibly, this suggests that the Protocol

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[109] *See* Jackson, Davey, & Sykes, *supra* note 22, at 220-21 ("One result [of the amending provisions of GATT 1947] was the development of an elaborate system of 'side agreements or codes,' which created additional problems. . . . A key problem was the relationship of these many side agreements, which in most cases were stand-alone treaties, but which were intimately linked to the GATT treaty structure itself. It was unclear in some circumstances what this relationship was and whether an obligation contained in a side agreement would prevail over one contained in the General Agreement or vice versa.").

[110] Petko D. Kantchevski, The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement, 3 BYU INT'L L. & MGMT. REV. 79, 110 (2006).

[111] Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, pg. 18, ¶ 3, WT/DS22/AB/R (Feb. 21, 1997) ("The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system.").

[112] Disputes are addressed in chronological order by date of last Appellate Body Report or last action.

[113] *See* Qin Accession Protocol, *supra* note 14, at 484.

should be fully integrated into the WTO Agreements, making the general exceptions and defenses applicable to the Protocol's terms. And, until recently, DSB proceedings have only tentatively addressed this issue. Furthermore, disputes addressing the applicability of GATT Article XX remain at odds with one another, as the Appellate Body permitted the application of GATT Article XX in *China – AV Products*,[114] but denied such application *China – Raw Materials*.[115] Closer examination of these reports reveals that it is not the legal status of accession protocols and working part reports that control the availability of GATT Article XX defenses, but the specific language of a protocol term or working party report commitment.

A. GATT Disputes

1. China-Auto Parts

China-Auto Parts[116] was one of the first disputes comment on both the relationship between the Multilateral Trade Agreements to China's WPR and the relationship between GATT Article XX(d) and China's GATT Schedule of Commitments.

This dispute concerned three Chinese legal instruments that imposed a 25% "charge" on imported auto parts. The United States, the European Union and Canada alleged that this charge violated China's national treatment commitments under GATT 1994,[117] TRIMs Article 2 and Annex 1, paragraph 1(a),[118] SCM Agreement Articles 3.1(b) and 3.2 (subsidies contingent on the use of domestic over imported goods), as well as China's Accession Protocol paragraphs 7.2 (no unjustifiable non-tariff measures) and 7.3 (compliance with TRIMS), and China's WPR paragraphs 93 (tariff rate for motor vehicle kits not to exceed 10%) and 203 (prohibiting local content and export performance requirements).[119]

The Appellate Body held that the measures violated the national treatment clause because the measures "imposed an internal charge on imported auto parts that is not imposed on like domestic auto

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[114] *See infra* Part IV.A.ii.

[115] *See infra* Part IV.A.iii.

[116] Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS 342/AB/R (Dec. 15, 2008) [hereinafter *AB Report, China–Auto Parts*].

[117] GATT art. III:2, III:4, 1994.

[118] National treatment and quantitative restrictions discussing "the purchase or use by an enterprise of products of domestic origin . . . in terms of volume or value of products, or in terms of a proportion of volume or value of its local production." *See* TRIMs, *supra* note 105 at Annex: Illustrative List 1(a).

[119] China–Auto Parts, *supra* note 116, ¶ 5.

parts"[120] and "accorded imported parts less favourable treatment than like domestic auto parts."[121] However, the Panel and Appellate Body's interpretation of China's WPR and GATT Article XX(d) warrants further discussion.

As an initial matter, the Appellate Body's pause before accepting paragraph 93 of China's WPR as a binding commitment is significant.[122] Even though the Panel stated that "[a]ll parties agree that China's commitments under its Working Party Report are enforceable in WTO dispute settlement proceedings,"[123] the Appellate Body remarked that the binding nature of China's WPR paragraph 93 was not disputed "at any point in these proceedings, including this appeal."[124] While this may be simply foundational, it also intimates that the referenced provision of China's WPR may not be binding. This is distressing not only because China's WPR paragraph 93 rests on solid legal footing, but because the Appellate Body's reliance on party agreement on underlying terms of the dispute is reminiscent of consensus issues in GATT proceedings.[125]

Yet, even though China's commitment (to not apply a tariff rate exceeding 10%) in China's WPR paragraph 93 was enforceable, the Appellate Body's reversed the Panel's finding of inconsistency, because the Panel had incorrectly construed the measures as imposing an ordinary customs duty, when in a prior analysis under GATT Article III, the Panel treated the measures' charges as an internal charge.[126]

This is significant not because it reverses the Panel's inconsistency finding,[127] but because it indicates the DSB's willingness to transfer legal conclusions between analysis under the Multilateral Trade Agreements to analysis under China's Accession Protocol and China's WPR.

The *China–Auto Parts* dispute is also significant because the panel addressed the relationship between GATT 1994 obligations and Article XX defenses in the context of China's Accession Protocol. Describing the legal relationship between China's tariff provisions and the Multilateral Trade Agreements, the Panel noted

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[120] China– Auto Parts, *(DS 339, 340, 342), available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds342sum_e.pdf .

[121] *See Id.*

[122] AB Report, China–Auto Parts, *supra* note 116, ¶ 213.14.

[123] Panel Report, *China – Measures Affecting Imports of Automobile Parts*, ¶ 7.736, WT/DS339/R, WT/DS340/R, WT/DS 342/R (July 18 2008) [hereinafter *Panel Report, China–Auto Parts*].

[124] AB Report, China–Auto Parts, *supra* note 116, ¶ 214.

[125] Kantchevski, *supra* note 116, at 106 .

[126] AB Report, China–Auto Parts, *supra* note 116, ¶ 245.

[127] Which is, in-and-of-itself, significant because it demonstrates the viability of claims under binding commitments of China's WPR.

that the tariff provisions reproduced commitments in China's Schedule of Concessions, which in turn "is part of China's Accession Protocol and thus an integral part of the WTO Agreement."[128] In this dispute, China contended that even if the Panel found a GATT violation, the measures would be justified under Article XX(d), which permits measures "necessary to secure compliance with laws or regulations . . . not inconsistent with the provisions of [the GATT]."[129] A measure may fall under this exception if it is "designed"[130] to or "in fact 'secures compliance with'"[131] a not inconsistent law or regulation. While the Panel did not find "sufficient evidence to conclude that the measures are not *per se* designed to secure compliance with China's tariff schedule,"[132] the Panel did conclude that the measures at issue did not, in fact, "secure compliance" with China's tariff's schedule. The Panel reasoned measures used to "secure compliance" must respond to a cognizable problem, such a loophole, in the Schedule. However, the Panel could not identify such a problem,[133] and thus found that the measures could not be "necessary" to secure compliance with China's tariff schedule. Therefore, China's measures could not be justified under an Article XX(d) defense.[134]

The Panel's dicta on China's measures intimates that Article XX defenses may be applied in disputes arising out of China's Schedule of Commitments, even if the argument was not successful in this particular dispute. However, what is peculiar is that the Panel addresses China's Schedule of Commitments as binding through the Accession Protocol, and not directly as part of GATT. Thus, this does not preclude the application of Article XX more broadly in the context of China's Accession Protocol—an issue addressed by the DSB in *China – AV Products*.

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128 Panel Report, China–Auto Parts, *supra* note 123, at ¶ 7.295.

129 *Id*. ¶ 7.281.

130 *Id*. ¶ 7.298 (citing Appellate Body Report, Mexico–Tax Measures on Soft Drinks and Other Beverages, ¶ 72, WT/DS308/AB/R (Mar. 6, 2006) and Panel Report, European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries, ¶ 7.200, WT/DS246/R (Dec. 1, 2003)).

131 *Id*. ¶ 7.299, ¶ 7.315 (citing Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 655, 658, WT/DS/161/R, WT/DS/169/R (July 31 2000)).

132 *Id*. ¶ 7.314.

133 *Id*. ¶ 7.346.

134 *Id*. ¶ 7.347.

2. China-Publications and Audiovisual Products

In *China – AV Products*,[135] the United States initiated a dispute with China over a series a Chinese measures that regulated the importation and distribution of publications and audiovisual entertainment products.[136] The complaints alleged that China's measures affected the trading and distribution of these products in violation of GATT Article III:4, GATS XVI and XVIII, and China's Accession Protocol and Working Party Report.[137] The Panel found that some of the measures were inconsistent with paragraph 5.1 of China's Accession Protocol and paragraphs 83(d), 84(a) and 84(b) of China's WPR.[138] For those inconsistent measures, China sought to justify their measures under GATT Article XX(a), which permits measures "necessary to protect public morals."[139]

In evaluating China's defense under GATT Article XX, the Panel initially assumed that Article XX defenses were available.[140] The Panel reasoned that GATT Article XX could apply, as the underlying commitment in China's Accession Protocol was qualified by the introductory phrase "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement."[141] The Panel interpreted the word "Agreement" as referring to the entirety of GATT 1994, including GATT Article XX(a).[142]

Despite the availability of a GATT Article XX(a) defense, the Panel found that the Chinese measures did not meet the "necessity" requirement in Article XX(a). Since the measures failed to meet the threshold criteria of Article XX(a), the Panel did not find it necessary to make findings regarding the chapeau of Article XX, the second step of Article XX analysis.[143]

On appeal, the Appellate Body clarified that the introductory clause of China's Accession Protocol paragraph 5.1 indicated that China could seek to justify measures under GATT Article XX(a).[144] Nevertheless, the Appellate Body upheld the Panel's conclusion that

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[135] Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS/363/R (Aug. 12, 2009) [hereinafter Panel Report, AV Products]; Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS/363/AB/R (Dec. 21, 2009) [hereinafter AB Report, AV Products].

[136] *China – Publications and Audiovisual Products (DS 363)*, *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds363sum_e.pdf.

[137] *See id*.

[138] *AB Report, AV Products*, *supra* note 135, at ¶ 203-204.

[139] *See Panel Report, AV Products*, *supra* note 135, at ¶ 7.735; GATT, *supra* note 8, at art. XX(a).

[140] Panel Report, AV Products, *supra* note 135, at ¶ 7.742.

[141] *Id.* ¶ 7.742.

[142] *Id*. ¶ 7.743.

[143] *Id*. ¶ 7.910-7.911.

[144] AB Report, AV Products, *supra* note 135, ¶ 233.

the measures were not "necessary" to protect public morals, and thus the measures were not justified under Article XX(a).[145]

While China's measures were ultimately not protected under GATT Article XX, the dispute stands for the proposition that certain phrases in accession permit the application of Article XX defenses.[146] The challenge, after *China – AV Products*, is determining exactly when such application is permissible.

3. China – Raw Materials

The DSB's most recent pronouncement in *China – Raw Materials*[147] laid out a framework for evaluating the relationship between accession protocols and the availability of GATT Article XX defenses.[148] The dispute evolved out of 32 Chinese measures that allegedly restrained the export of certain minerals.[149] Complaints alleged that these measures violated GATT Article VIII and China's Accession Protocol paragraph 11.3, which committed China to eliminate all taxes on exports (except as permitted by GATT Article VIII).[150]

After finding that the Chinese measures operated "in concert" to impose export duties inconsistent with China's Accession Protocol paragraph 11.3 on all but one of the products in question,[151] the Panel launched into an exhaustive discussion of the legal status of China's Accession Protocol.[152] In reaching its legal conclusion that GATT Article XX did not apply, the Panel discussed three analytical approaches (1) a textual interpretation of the provision, as in *China – AV Products*, (2) a contextual analysis, and (3) an analysis of the

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[145] *Id*. ¶ 233.

[146] *See*, e.g., Heng Wang, What Do Trading Rights and General Exceptions Mean for China?: Some Observations of China-Audiovisual Services, 12 GONZ. J. INT'L L. 3, 8-10 (2009).

[147] China–Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R (Jan. 30, 2012) [hereinafter AB Report, Raw Materials]; Panel Report, China–Measures Related to the Exportation of Various Raw Materials, WT/DS394/R, WT/DS395/R, WT/DS 398/R (July 5, 2011) [hereinafter Panel Report, Raw Materials].

[148] *See id*.

[149] Summary of the Dispute to Date, *China – Measures Related to the Exportation of Various Materials, Dispute Settlement: Dispute DS394, available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm (including bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc).

[150] *Id*. (other claims were raised under GATT art. X (administration of trade regulations) and China's Accession Protocol, art. 5.1, 5.2, and 8.2); *see also* Danielle Spiegel Feld & Stephanie Switzer, 38 YALE J. IN'TL L. ONLINE 16, 27 (2012).

[151] *Panel Report, Raw Materials, supra* note 135 ¶ 7.105 (measures related to bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc were inconsistent, but the Panel did not make any findings regarding yellow phosphorus).

[152] *Id*. ¶ 7.115-160.

relationship between the Multilateral Trade Agreements and China's Accession Protocol.

First, the Panel determined that the proper interpretive approach was an examination of the text of the relevant provisions.[153] Dissecting each phrase within paragraph 11.3 of China's Accession Protocol, the Panel focused on the operative words "shall eliminate," and the two explicit exceptions referencing Annex 6 of China's Accession Protocol and GATT 1994 Article VIII.[154] The Panel determined that the ordinary meaning of the operative words "shall eliminate" represented an all-inclusive commitment to eliminate export tariff charges.[155] Furthermore, this commitment was only qualified by the a "specific set of exceptions"[156] exception of the 84 enumerated products listed in Annex 6 and by specific justification under GATT Article VIII.[157]

The Panel buttressed their conclusion by comparing the text of China's Accession Protocol Article 11.3, the commitment at issue, with paragraph 5.1, which was the subject of *China – AV Products*. The Panel found that that the lack of the introductory clause in paragraph 5.1, "without prejudice to China's rights to regulate trade in a manner consistent with the WTO Agreement," precluded the application of GATT Article XX defenses in reference to China's commitments under paragraph 11.3 of China's Accession Protocol.[158]

Second, the Panel examined the context provided by China's WPR, specifically paragraph 170. China contended that China's WPR paragraph 170 provided context for China's Accession Protocol paragraph 11.3 commitment. China also highlighted that paragraph 170 contained a phrase, "in full conformity with [China's] WTO obligations,"[159] which appeared analogous to the introductory clause of paragraph 5.1 of China's Accession Protocol. China then reasoned that if Article XX defenses were available in paragraph 5.1, then they should also be apply to China's WPR paragraph 170, and by extension, China's Accession Protocol paragraph 11.3.[160]

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153 *Id.* ¶ 7.117 ("[T]he Appellate Body did not discuss the systemic relationship between provisions of China's Accession Protocol and those of the GATT 1994, within the WTO Agreement. The Appellate Body instead focused [sic] on the text of the relevant provisions of the Protocol, including an examination of the meaning of the particular terms at issue, as well as the surrounding context and overall structure of the Accession Protocol.").

154 *Id.* ¶ 7.122.

155 *See id.*

156 *Id.* ¶ 7.126.

157 *Id.* ¶ 7.122.

158 *Id.* ¶ 7.124, ¶ 7.129.

159 *Id.* ¶ 7.137.

160 *See id.*

However, the Panel rejected this argument, finding that China's WPR paragraph 170 was not similar to China's Accession Protocol paragraph 11.3.[161] Furthermore, when compared with other WPR paragraphs which more directly referenced Article XX defenses,[162] the Panel found that paragraph 170's relevant phrase did not imply that the Article XX defenses were available.[163]

Third, the Panel discussed the relationship among the WTO Agreement, the Multilateral Trade Agreements, other WTO agreements, and accession documents. Noting that the WTO Agreement provides "no general umbrella exception,"[164] the Panel instead looked directly to the text of GATT Article XX, and determined that the term "Agreement" in Article XX's chapeau referred only narrowly to GATT 1994.[165] Furthermore, the provisions of GATT Article XX could only be incorporated into other agreements by explicit cross-reference.[166]

The Appellate Body agreed, finding that "there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of the Accession Protocol."[167]

The DSB's finding that GATT Article XX did not apply is peculiar, as the Panel effectively uses a negative inference,[168] the lack of *general* qualifying language in one commitment versus another commitment,[169] to imply a WTO-minus commitment in paragraph 11.3 of China's Accession Protocol. This result, which effectively creates a WTO-minus commitment, would seem to be at odds with DSU Article 19, which states that the DSB "cannot add to or diminish the rights and obligations [of a Member] provided in the

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161 *Id*. ¶ 7.139.

162 *Id*. ¶ 7.145 (citing China's WPR, ¶ 165 ("[R]estrictions on exports would be notified to the WTO annually and would be eliminated *unless they could be justified under the WTO Agreement* or the Protocol.") (emphasis added)).

163 *Id*. at ¶ 7.148 ("[T]he Panel does not find in China's Working Party Report any explicit or implicit provision that would allow China to invoke the general exceptions of Article XX of the GATT 1994 to justify violations of Paragraph 11.3 of its Accession Protocol.").

164 *Id*. ¶ 7.150.

165 *Id*. ¶ 7.153.

166 *Id*. ¶ 7.153 (using TRIMs as the quintessential example).

167 AB Report, Raw Materials, *supra* note 116 ¶ 307 (quoting Panel Report, Raw Materials, *supra* note 116, ¶ 7.159).

168 The negative inference is constructed by the DSB's "attach[ing] significance to the fact that Paragraph 11.3 of China's Accession Protocol expressly refers to Article VIII of the GATT 1994, but does not contain any reference to other provisions of the GATT 1994, including Article XX."). *Supra* note 116, ¶ 303

169 In both China's Accession Protocol and in China's WPR.

covered agreements."[170] Furthermore, the result appears to atomize not only China's Accession Protocol, but the Multilateral Trade Agreements as a whole.[171]

B. GATS Disputes: China-Financial Information Services

To date, no GATS dispute invoking Article XIV has also addressed China's Accession Protocol, China's WPR, or, more generally, accession documents. However, one dispute relating to both GATS and China's WPR was *China-Financial Information Services*,[172] although it was resolved before it reached the panel stage.[173] This dispute involved Xinhua News Agency measures that allegedly violated China's commitments to maintain regulatory independence in service sectors.[174] In 1996, the PRC's State Council issued a regulation permitting foreign news agencies to distribute economic and financial news to customers in China.[175] However, in 2006 the Chinese state news agency, Xinhua, issued a decision that required foreign news agencies to "operate through an agent designated by Xinhua" and prohibited foreign news agencies from directly soliciting subscriptions.[176]

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[170] DSU, *supra* note 8, at art. 19.2; *see also* Appellate Body Report, *Chile- Taxes on Alcoholic Beverages*, ¶ 79, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999) ("[W]e have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements.").

[171] *Cf*. *AB Report, Raw Materials*, *supra* note 116 ¶ 306 (The AB refers the WTO Agreement's objective to "'to develop an integrated, more viable and durable multilateral trading system'" but concludes that "none of the objectives listed above, nor the balance struck between them, provides specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol.").

[172] Request for the Establishment of a Panel by Canada, *China—Measures Affecting Financial Information Services and Foreign Financial Information Supplie*rs, WT/DS378/1 (June 23, 2008), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds378_e.htm (last visited Nov. 20, 2012); Request for Consultations by the European Communities, *China—Measures Affecting Financial Information Services and Foreign Financial Information Supplie*rs, WT/DS373/1, S/L/329, IP/D/27 (Mar. 5, 2008), *available at* http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139700.pdf [hereinafter EC, China-FIS Consultations]; Request for Consultations by the United States, *China—Measures Affecting Financial Information Services and Foreign Financial Information Supplie*rs, WT/DS373/1, S/L/320 (Mar. 5, 2008), *available at* http://www.worldtradelaw.net/cr/ds373-1%28cr%29.pdf [hereinafter US, China-FIS Consultations] [together hereinafter referred to as China–FIS].

[173] *See infra* note 179.

[174] *Id*. at 2; *see also* Julia Ya Qin, *The Challenges of Interpreting 'WTO-PLUS' Provisions*, 44(1) J. WORLD TRADE 127, 152 (2010) [hereinafter *Qin Challenges*].

[175] Notice Authorizing Xinhua News Agency to Implement Centralized Administration over the Release of Economic Information in the People's Republic of China by Foreign News Agencies and their Subsidiary Information Institutions issued by the State Council on 31 December 1995 as Circular No. 1 of 1996.

[176] *See* EC, China-FIS Consultations, *supra* note 172, at 2.

The United States, EC, and Canada alleged that China's measures were inconsistent with GATS, the horizontal standstill commitment in China's GATS Schedule of Commitments, and paragraph 309 of China's WPR, as integrated through China's Accession Protocol.[177] The dispute was settled in December 2008, when China agreed to revise and repeal the measures at issue[178] and establish an independent regulator.[179]

The significance of this dispute lies in the relationship between GATS and China's GATS Schedule of Commitments, as qualified by China's WPR commitments.[180] Specifically, this dispute raises the issue of whether GATS Article XIV defenses would be available.[181] Like *China-Auto Parts*, this dispute involves a commitment under one of China's schedules, which is also the subject of China's WPR paragraph 309. Like paragraph 93 of China's WPR, paragraph 309 does not contain any qualifying language that either imparts Multilateral Trade Agreement rights[182] or otherwise indicates that GATS Article XIV defenses should not apply. This suggests that in the absence of qualifying language in either the relevant provisions of China's Accession Protocol or China's WPR, Article XIV exceptions should apply to disputes involving China's accession commitments.

VI. INTERPRETATIONS & RECOMMENDATIONS

A. Onus on the Language Used in the Accession Protocol or Working Party Report Commitment

The DSB's emphasis on the specific language of accession protocol terms conforms with prior reports' reliance of textual and

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[177] *See, e.g.*, US, China-FIS Consultations, *supra* note 172, at 3.

[178] *See* USTR, *Measures Affecting Financial Information Services and Foreign Information Suppliers, Key Facts*, USTR.GOV, http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/china-%E2%80%93-measures-affecting-financial-informa (last visited Dec. 8, 2012); Joint Communication from China and the European Communities, *China—Measures Affecting Financial Information Services and Foreign Financial Information*, WT/DS372/4, S/L/319/Add.1, IP/D/27/Add.1(Dec. 9, 2008) *available at* http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141667.pdf.

[179] *Qin Challenges*, *supra* note 174, at 154-55.

[180] *Id*. at 153-54.

[181] *Id.* (suggesting the application of GATS Article XIV (a): "necessary to protect public morals or to maintain public order.").

[182] *Id*. at 154 ("This more defined relationship might suggest that paragraph 309 should eb interpreted completely within the context of GATS, including all the applicable GATS exceptions. On the other hand, unlike section 5.1 of the Protocol which provides the trade rights commitment with the condition that such commitment is 'without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement', paragraph 309 does not contain any qualifying language.").

contextual interpretation under the VCLT.[183] However, accession protocols and working party reports contain a wide variety of legally operative phrases that alter the nature of a Member's commitments, but do not clearly define the commitment's relationship to GATT Article XX or GATS Article XIV defenses. Generally, these legally operative phrases fall into three categories: (1) clauses broadly relating to the "WTO Agreement," (2) clauses related to a specific portion of a WTO agreement, and (3) clauses related to a specific WTO agreement or subset of WTO agreements. However, even within these categories, there remains a significant amount of diversity in the legal language employed by accession documents. Consider for contrast the following phrases in China's Accession Protocol:

> 2.A.3. China's local regulations, rules and other measures of local governments at the sub-national level *shall conform to the obligations undertaken in the WTO Agreement* and this Protocol.
>
> 5.1. Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement . . .
>
> 7.2. China shall eliminate and shall not introduce, re-introduce or apply non-tariff measures *that cannot be justified* under the provisions of the *WTO Agreement.*

While each of these clauses modifies a commitment in relation the WTO Agreement differently, there is no explicit basis to interpret these clauses different. For example, when interpreting paragraph 5.1 of China's Accession Protocol, the DSB has permitted the application of GATT Article XX defenses. However, the permissibility of Article XX defenses is less clear under paragraph 7.2, even though the word "justified" is a term-of-art directly related to WTO jurisprudence on the general exceptions. Without a clear foundation for distinguishing the two clauses, the current analytical approach applied in WTO disputes makes it unclear as to how a panel would interpret clauses such as "shall conform to the obligations undertaken in the WTO Agreement." Would the DSB consider this merely a restatement of obligations, without legal import. . . Or, would the DSB attach legal significant to the words "shall conform" and explicit use of the word "obligations" to narrow the applicability of GATT Article XX defenses. . .

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[183] *See* Parts III.B and IV.A.iii.

These interpretive issues are compounded in the second category, clauses that are related to a specific portion of a WTO agreement. Again, China's Accession Protocol provides several illustrative examples:

> 2.B.3. *Except as otherwise provided for in this Protocol*, in providing preferential arrangements for enterprises within such special economic areas, *WTO provisions on non-discrimination and national treatment shall be fully observed*.
>
> 11.1 China shall ensure that customs fees or charges applied or administered by national or subnational authorities, *shall be in conformity with the GATT 1994*.

These clauses provide two additional challenges, as the terms of reference are not clear and the scope of the modified obligation is not adequately defined. To illustrate the former point, China's Accession Protocol, paragraph 2.B.3 does not clearly identify the agreements or other documents in which the non-discrimination and national treatment provisions can be found. One may assume that it refers to GATT 1994 and GATS, but a number of other WTO agreements contain similar language. If challenged, will the DSB extend this WTO-plus commitment to other agreements. . . China's Accession Protocol paragraph 11.1 also presents a similar issue for the application of GATT Article XX, as the phrase "shall be in conformity with" implies nothing about how the overarching architecture of the WTO system should be applied in relation to this specific commitment.

Finally, even the third category, clauses that are related to a specific WTO agreement or subset of WTO agreements, raises a number of delicate interpretive issues. For example, China's Accession Protocol uses markedly different language when discussion specific WTO agreements and provisions:

> 7.3. China *shall*, upon accession, comply with the TRIMs Agreement, *without recourse to the provisions* of Article 5 of the TRIMs Agreement.
>
> 11.3 China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

> 18.3. Consideration of issues pursuant to this Section shall be *without prejudice to the rights and obligations* of any Member, including China, *under the WTO Agreement or any Plurilateral Trade Agreement*, and shall not preclude or be a precondition to recourse to consultation or other provisions of the WTO Agreement or this Protocol.

While the diversity of linguistic tools used to cross-reference WTO agreements may be deliberate,[184] it is equally plausible that these differences do not represent conscious choices to alter other elements of the WTO architecture, specifically by excluding GATT 1994 or GATS general exceptions.

B. Uniform Application of the General Exceptions to the Accession Protocol

One possible solution to these interpretive issues is for the DSB to permit Members to apply the GATT 1994 and GATS general exceptions in all claims, except those predicated on an accession protocol or working party report commitment that explicitly excludes the application of GATT Article XX or GATS Article XIV.

Allowing the uniform application of the general exceptions has three benefits. First, it provides "security and predictability to the multilateral trading system,"[185] which is a central objective of the WTO system.[186] Second, it maintains the integration of the WTO's rules-based system,[187] which is predicated on a single set of rules applicable to all Members. While Accession Protocol commitments may be the 'entry fee' to the WTO, these commitments should not be interpreted in a manner that interferes with the architecture of the WTO system[188] unless it clearly and explicitly provides for such a WTO-minus commitment, as in China's Accession Protocol, paragraph 7.3. Third, uniform application incentivizes the resolution of disputes. The ability to anticipate when a GATT Article XX or GATS Article XIV defense can be plausibly raised facilitates communication among Members in the pre-dispute context and incentivizes parties to resolve disputes, rather than testing the

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[184] Especially considering that China's accession was fiercely negotiated for more than 15 years. *See* Halverson, *supra* note 77, at 325, Table 1.

[185] Panel Report, United States – Sections 301-310 of the Trade Act of 1974, ¶ 7.75 WT/DS152/R (Dec. 22, 1999).

[186] *See id*.

[187] Panel Report, *European Communities – Selected Customs Matters*, ¶ 6.33-34, WT/DS315/R (June 16, 2006) ("[T]he architecture of the WTO system, which is a rules-based system, implies that security and predictability is an object and purpose of the WTO Agreement.").

[188] *See id*.

viability of a general exception against a panel or the Appellate Body.

VII. CONCLUSION

The general exceptions in GATT Article XX and GATS Article XIV are an essential component in the architecture of the WTO system. However, their applicability to accession protocol and working party report commitments has been placed into question. Interpretive issues involving both the general exceptions and accession documents is challenging due to the variety of legally operative phrased used to connect WTO agreements to accession commitments. This interpretive problem is compounded by the multifaceted nature of accession commitments, as well as the complex nature of their legal standing. These issues are exemplified in China's Accession Protocol and Working Party Report, which has been, and continues to be, the subject of numerous WTO disputes. However, the analytical approach applied by the DSB in Chinese trade disputes has not resulted in greater consistency or a more cohesive understanding of the relationship between the Multilateral Trade Agreements and China's accession documents. Instead, the DSB's treatment of accession protocols threatens to fracture the WTO system into a complex hierarchy of unilateral or bilateral commitments reminiscent of the GATT system. The DSB should remedy this problem by permitting Members to apply the general exceptions in all claims, except those predicated on an accession protocol or working party report commitment that explicitly exclude their application. This improves the predictability of disputes, maintains the integrity of the WTO system, and incentivizes resolution of disputes in the pre-dispute or consultation stage.