Accession of Iran to the World Trade Organization: A Legal-Political Overview

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Abstract

Iran's decision to join the World Trade Organization (WTO) is now 14 years old, among the longest cases in the General Agreement on Tariffs and Trade (GATT) and WTO history. Given the fact that negotiations have not yet started, it may be the longest accession process when Iran finally joins the Organization. This paper attempts to shed some light on the procedural and substantive aspects of the case. A brief account of the WTO accession procedures and a quick glance on the history of the Iran's application provides solid background for the more analytical parts of the paper. It will be shown how unnecessary application of "consensus rule" to the purely procedural stage of accession (establishment of the working party) cost Iran 9 years. Iran could have become full member during the same period in a less demanding negotiating context. The paper will also look briefly into the political environment surrounding Iran's application for membership.

The paper also presents a critical outlook on the negotiations for accession and the accession outcomes. It criticizes WTO-plus commitments/WTO-minus rights paradigm which now prevails over the accession negotiations and argues that this paradigm contradicts the contractual nature of the WTO Agreement. It emphasizes that an acceding country should have a clear picture about rights and obligations of the membership. That should be the WTO Agreement as it is. The balance of rights and obligations (terms of contract) should not be changed in the course of negotiations.

This paper also intends to serve as a basis for further research and discussion over an important and challenging area of Iran's trade and foreign policy.

Keywords: Iran, Trade Relations, WTO, Accession Regulations, Consensus Rule, Multilateral Trading System.

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Introduction

Iran's bid to join the WTO is now 14 years old, a long wait by WTO standards. This included a 9-year hiatus caused by lack of consensus among member countries, followed by a 5-year on and off process, driven in part by apathy in the incumbent government in Tehran and simultaneous continued reluctance on the part of the WTO membership. Since February 2010, the process seems to have gained some impetus when WTO member countries began to submit written questions concerning the foreign trade regime of Iran. It means that in the last 14 years or so, Iran's formal request for accession went almost nowhere in Geneva, the WTO headquarters. It doesn't mean, however, that the case was unattended at the national level. Technical preparatory work has been arguably ongoing during the last one and half decade, thanks to the consensual national decision of 1996 to join the WTO. This paper is an attempt to provide an update on Iran's application to join the WTO. It does not intend to address technical or sectoral aspects of the accession. The paper is structured in 4 parts. In the first part, the WTO accession procedures will be introduced in a nutshell. Part two will review the history of Iran's application for WTO full membership and will discuss the state of play since the establishment of the working party for its accession in 2005. Part three will provide a critical view on the ways WTO enlarges its membership, taking into account Iran's case. Part four will conclude.

Accession to the WTO: Procedures in a Nutshell

Since the establishment of the WTO in 1995, twenty six countries have joined it, increasing its full membership to 153.(1) Thirty more countries are now negotiating their terms of accession.(2) The legal coverage for accession to the WTO is Article XII.1 and 2 of the Marrakesh Agreement establishing the World Trade Organization:

> "1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
>
> 2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO."

Everything starts with the formal communication by the applicant country to the Director-General of the WTO indicating its interest to become a full member of the Organization. The Secretariat circulates the request to the members and places the issue on the agenda of the General Council, the second highest decision-making body, next to the ministerial conference, for its consideration. The Council then establishes a so-called "working party" with the following typical mandate:

> " to examine the application of the Government of [the name of the applicant country] to accede to the WTO under Article XII and to submit to the General Council/Ministerial Conference recommendation which may include a draft Protocol of Accession."(3)

The establishment of the working party entails observer status for the applicant country in the General Council and other WTO bodies. There is elapsed time between establishment of the working party and its first meeting. The first obligation of the acceding country is to submit, for consideration by the interested members, a Memorandum describing in a detailed format its current foreign trade regime. This should be accompanied by some additional information including the current applicable tariff schedule and other laws and regulations relevant to accession. In the elapsed time just referred to, the Memorandum and other submitted information would be clarified through exchange of written questions and answers by interested members and the applicant. The working party convenes

its first meeting when exchange of written questions and answers proves adequate. The working party of an applicant is usually chaired by an ambassador resident in Geneva who is elected through consultations by the chairperson of the General Council with the interested members and applicant country. The membership of the working party is open to all WTO members. Members who have meaningful trade relations with the applicant and also those with systemic interest in the work of the WTO usually form the membership of the working parties. The ever largest and smallest working parties have had 62 and 17 members respectively, counting European Union and its 27 members as one.(4)

The working party operation is not time-bound. Chinese and Kyrgyz working parties are the longest and the shortest of their kind, with 185 and 34 months respectively(5). As alluded to above, the working party's terms of reference is to agree on the terms of accession of the acceding country which will be reflected in its final report and a draft protocol of accession. The report and the protocol are the end results of the accession process. There are two main negotiating exercises in the working party: the multilateral and the bilateral tracks. The multilateral track, with the Memorandum of Foreign Trade as its base, addresses the conformity gaps between the applicant laws, regulations and administrative practices and the WTO requirements. The applicant is expected to commit itself to fill these gaps. The bilateral track deals with the market access commitments in goods and services. The interested members of the working party individually conduct bilateral negotiations with the applicant on its maximum possible customs duties on goods imported into its market. They also negotiate the permitted limitations imposed by applicant on the services and service providers in its markets. The outcomes of the various bilateral negotiations on the market access will convert automatically into multilateral concessions through the famous Most Favoured Nations clause (MFN).(6) This means that whatever a single member of the working party agrees bilaterally with the applicant is considered as the applicant's commitment towards all WTO members. For this reason and upon its full membership, concessions made by an applicant in its bilateral negotiations will be annexed to GATT and General Agreement on Trade and Services (GATS) as part of the commitments made by members on an MFN-basis.

The end result of the working party is its report to the Ministerial Conference

or General Council accompanied by a draft Decision and a Protocol of Accession for final approval. The report contains a summary of the proceedings of the working party, including commitments taken by the acceding country. The protocol of accession outlines the terms of accession agreed by and between the applicant and incumbents with some references to the commitments included in the Report. With the adoption of the Report and approval of the draft Decision by the Ministerial Conference or the General Council, the Protocol of Accession enters into force thirty days after acceptance by the acceding country, either by signature or parliamentary ratification (if national legal system so requires).

With the preceding in mind, the next part will present an overview on Iran's long journey through these procedures. It will be shown how procedural misconduct by the WTO put Iran's decision to start negotiations for WTO accession on hold for a decade.

II. Iran's Accession to the WTO

II.1 A Historical Overview

Iran was among the participants in the Havana Conference (1946-1948), a UN initiative to give birth to the International Trade Organization (ITO). The ITO Charter was subsequently submitted to participants for ratification. Iran did not sign the Charter. Given the party politics and change in the administration in the US, the Charter was never submitted by the Administration to the Congress. The US withdrawal led to ITO failure. Pending ITO establishment, some interested participants took the trade–related parts of the Charter and produced the "General Agreement on Tariffs and Trade (GATT)," with a provisional implementation clause. The provisional nature of the GATT lasted until 1994 when the World Trade Organization came into being.

Iran's reliance on oil revenues, which started in earnest in the post-1953 period, and also its heavy and increasing emphasis on import substitution in the 1960s, made it apathetic to join the GATT. In mid-1970s, however, under changing circumstances, Iran decided to join the negotiations on "Preferential Arrangements among Developing Countries".(7) These negotiations were held under the auspices of the GATT with the participation of both GATT and non-GATT members.(8) This was the only negotiating context where Iran was briefly present. Given its

GATT non-membership, Iran was totally absent from successive GATT trade negotiating rounds, including the most important one, the so-called "Uruguay Round", which gave birth to the World Trade Organization in 1995. With the establishment of the WTO, Iran applied for observer status in July 1995.[9] Interestingly enough, that status was never granted.

A year later, in September 1996, Iran submitted its formal request for full membership to the WTO Secretariat.[10] It was under the legal cover of Article XII of the Marrakesh Agreement Establishing the World Trade Organization. The decision to apply for WTO membership was made following a series of government-sponsored studies and wide-ranging discussions with the participation of governmental departments and organizations concerned, including the Foreign Ministry, on the implications of accession on different sectors of the national economy. Different ministries and organizations had been tasked to conduct the sectoral studies. A high-level governmental committee, chaired by deputy foreign minister, was charged with the responsibility of general oversight of the technical studies, and preparation of a final report to be submitted to the Council of Ministers. The end result was a clear recommendation by the Committee supporting formal application for WTO accession.

One month later, while awaiting WTO General Council's action on the application, Iran submitted another formal request for participation as observer in the first WTO ministerial conference in Singapore.[11] The second request was rejected in the November meeting of the General Council when the United States informally refrained from joining the consensus. It is interesting to know, however, that the same Council meeting accepted a similar request by Laos; similar requests by Iran and Laos on the same issue received a blatantly dissimilar response.[12] The reason was not trade-related, rather politically-motivated, as noted by a member country at that meeting that these two differing decisions underlined the lack of objective criteria in the General Council decision-making as relates to accession or granting of observer status.[13]

While customary practice and precedence of the General Council suggest that formal requests for accession are normally considered by the next Council meeting,[14] Iran's request for full membership skipped over 81 meetings of the Council. As per customary practice, Iran's request should have been considered by

the 14th meeting of the Council on 2 October 1996. It happened a decade later and at the 95th meeting of the Council on 26 May 2005.(15) To those in the say, accession to the WTO spans 20 steps.(16) As for the case at hand, it took almost nine years for Iran to reach step 3; that is, establishment of the working party. Table 1 shows the elapsed time between application and establishment of the working parties for Iran and other current acceding countries. The only comparable case is Syria with as almost the same elapsed time as Iran, attributable to the same non-trade-related reasons which will be explained further down in the paper.

It is also interesting to note that fifteen out of twenty-five countries that have acceded to the WTO since 1995 spent nine years or less for all 20 steps, i.e. full membership. In other words, Iran could have been a full member by 2005 when its working party was established following a breakthrough in a long hold-up by the United States. The next section of this part provides a more detailed account of Iran's long journey across the unregulated terrain of WTO accession.

Table 1: Elapsed time between application and establishment of the working party for current WTO acceding countries

Country	Application	Establishment of the WP	Country	Application	Establishment of the WP
Afghanistan	Nov. 2004	Dec. 2004	Liberia	Jan. 2007	Dec. 2007
Algeria	Jun. 87	Jun. 87	Libya	Jun. 2004	Jul. 2004
Andorra	Jul. 97	Oct. 97	Montenegro	Dec. 2004	Feb. 2005
Azerbaijan	Jun. 97	Jul. 97	Russia	Jun. 93	Jun. 93
Bahamas	May 2001	Jul. 2001	Samoa	Apr. 98	Jul. 98
Belarus	Sept. 93	Oct. 93	Sao Tome and Principe	Jan. 2005	May 2005
Bhutan	Sept. 99	Oct. 99			
Bosnia	May 99	Jul. 99	Serbia	Dec. 2004	Feb. 2005
Comoros	Feb. 2007	Oct. 2007	Seychelles	May 95	Jul. 95
Equatorial Guinea	Feb. 2007	Feb. 2008	Sudan	Oct. 94	Oct. 94
Ethiopia	Jan. 2003	Feb. 2003	Syria	Oct. 2001	May 2010
Iran	Jul. 96	May 2005	Tajikistan	May 2001	Jul. 2001
Iraq	Sep. 2004	Dec. 2004	Uzbekistan	Dec. 94	Dec. 94
Kazakhstan	Jan. 96	Feb. 96	Vanuatu	Jul. 95	Jul. 95
Laos	Jul. 97	Feb. 98	Yemen	Apr. 2000	Jul. 2000
Lebanon	Jan. 99	Apr. 99			

Source: WTO website -- http://www.wto.org/english/thewto_e/acc_e/status_e.htm

II.2 A Lost Decade: What Went Wrong?

This lost decade for Iran started when its formal application of September 1996 was not placed on the agenda of the General Council for its consideration. As already explained, formal requests for membership are normally considered by the next Council meeting whose decision to establish a working party for applicant country ensues. The US opposition, albeit informally conveyed, made it impossible for the Secretariat to include Iran's request for membership in the agenda of the General Council. The application was blocked from the very beginning - at the pre-agenda stage. This placed the General Council in a long "no action" mode. Given the tenuous, even at times, hostile relations between the US and Iran in the post-Revolution era, it was widely expected that the US would not allow a smooth accession by Iran to the WTO. The WTO accession process, in substance as well as in procedural terms, is intrinsically susceptible to disruption by any WTO member, let alone by the US as a superpower and one of the most powerful members of the Organization. As it turned out, the US opted for the least-trade-related means available to members to put Iran's accession process on hold. Given the lack of regulatory framework for accession negotiations, there are ample opportunities for incumbent members during every stage of the multilateral and bilateral accession negotiations to hinder the process. This is what happened in the case of the Russian and Chinese applications. The question begs to be raised as to why the US, under both Democratic and Republican administrations, decided to block Iran's accession from the very first step of the 20-step accession process, and exposed itself to criticism and allegation of politicizing an intrinsically technical accession process. The answer to this and other similar questions should be sought in the context of broader historic, legal and political issues surrounding Iran-US trade and economic relationships.

More specifically, the economic and trade aspects of Iran-US relations seem to have been subordinated for long to political, diplomatic and strategic considerations, dating even as far back as the last decades of the 19th and the first half of the 20th centuries.(17) It is interesting to note that even when political relations between the two countries were substantially close, the level of direct trade between them was relatively low, as compared to Iran's trade with Russia, UK and Germany

– perhaps, among others, due to sheer distance. The only exceptional period was the last two years of the Second World War when US became the main exporter of foods, arms and other goods to Iran, attributable to the wartime traffic.[18] This pattern of relations explains why the 1856 "Treaty of Friendship and Commerce between the United States and Iran" and 1955 "Treaty of Amity, Economic Relations, and Consular Affairs" between them were mainly of minimum impact on expansion of trade between the two countries. The two Treaties, once viewed within the larger political-strategic context, appear to reflect clearly US reaction at the time to the Iran' relations with other powers of the time; namely Tsarist Russia (1850s) and Soviet Union and UK (1950s). There were also two other bilateral agreements between the two countries. The first was negotiated and agreed on provisional basis (for 15 years) in 1928 covering trade and diplomatic affairs. This was succeeded by the 1943 bilateral agreement on exchange of tariff concessions. The latter agreement, as referred to above, was specific to the requirements of the final years of the Second World War.

Notwithstanding the superiority of political and strategic concerns in the US relations with Iran, there have been points in the history of these relations when trade and economic aspects have played a more prominent role. It is also of interest to note that a few years prior to the 1856 "Treaty of Friendship and Commerce," the two countries had already negotiated and agreed on the terms of another agreement -- "Treaty of Friendship, Commerce and Navigation"(1851). The US Senate later on amended the Treaty as to incorporate "Most Favoured Nations Clause" with a view to implying the same extraterritoriality that Iran had granted to Russia through the Treaty of Turkmanchai – a much despised Treaty that had been forced on Iran in 1828 following a humiliating military defeat. Iran refused to accept the US Senate proposal and the agreement never saw the light of the day. The 1856 Treaty governed Iran-US relations until the early decades of the 20th century, including their decision three decades later in the 1880s to open diplomatic missions in Tehran (1883) and Washington (1888) This, it merits to be added, was the period that neither Iran nor the region was on the priority list of the American foreign policy.

The discovery of oil in the early years of the 20th century in the Middle East - first in Iran in 1907 and subsequently in other countries in the Persian Gulf area -

served, among other factors, to substantially change the US interest and profile in the area. The US regional policy underwent further change during and after the end of WW2, which climaxed with the 1953 coup against the nationalist government of Prime Minister Mossadeq. In so far as Iran was concerned, the 1953 episode changed the US from a potential "honest broker" in Iran's relations with UK and Russia to a dominant foreign power enforcing these countries' claims in Iran.[19] The very first step was to put relations on a contractual basis, amply reflected in the signing of the 1955 Treaty of Amity, which replaced the 1856 Treaty of Friendship. The Amity Treaty with Iran was somehow different from the similar treaties the US was concluding with other countries at that time. It excluded, apparently at Iran's request, some trade and economic related provisions, including the right of entry and establishment of foreign-owned enterprises. The reason, as we are informed, was not trade- or economic-related. It was of political and security nature – Iranian fear of new capitulations.[20] proving again the subordination of trade and economic considerations to political ones. That, however, was not the end of the story.

As of mid-1970s, the US along with some other developed countries, started to give duty-free or preferential market access to several thousands of products of export interest to developing countries, under the so-called Generalized System of Preferences programme (GSP). The US GSP scheme provided preferences to over four thousands products from over one hundred developing countries. It excluded all OPEC members from the preferences because of the 1973 oil embargo. Iran, which had not participated in the embargo, was also denied preferential access to US markets, indicative also of the highly politicized Iran-US trade and economic ties.

The pattern of Iran-US trade and economic ties up to 1979 was disrupted as a result of the Revolution, and the post-Revolution pattern has been dominated by the US sanctions policy, which was triggered first by the hostage crisis in November 1979 and was continued and expanded during the Iran-Iraq War (1980-88). Some isolated, short-lived tightening and loosening notwithstanding, the US sanctions remained in place during 1990s. *The US decision to block Iran's application to join the WTO in 1996 and beyond should, therefore, be viewed within and as part and parcel of an overall sanctions policy against Iran.*

The US blockage of Iran's application and keeping the WTO General Council in the "no-action" mode continued until mid-2001. In May 2001 and following a request by the "Informal Group of Developing Countries in the WTO", Iran's request for accession entered the agenda of the 65th meeting of the General Council, thus putting an end to the "no-action" mode. All hopes for a decision by the Council on establishing a working party vanished when the US representative intervened at the same meeting:

> "[h]er government was currently reviewing this matter internally and was not in a position to discuss Iran's accession request at this time."(21)

This was the beginning of another period of pause – and suspension - in Iran's accession marathon, putting the Council in its "no-decision" mode. This period lasted another 4 years due to the adamant reluctance of the United States in joining the consensus. The consensus-building attempts by the Council rotating chairpersons failed more than 20 times.(22) At its 95th meeting on 8 May 2005, the General Council finally reached the consensus and established a working party for Iran's accession.(23) The Council decision, terminating a 9-year procedural hiatus in the process, was politically-motivated. The US agreed not to block the consensus in a broader deal reached outside of the WTO in the context of the Iran-EU3 negotiations over Iran's nuclear program.

While keeping in mind the tenuous relations between Iran and the United States as the larger context for the case at hand, the author believes that at the practical level the main reason for this lost decade lies in the so-called "consensus rule" in the WTO decision-making system. As is well known consensus is the normal approach to all decision-makings in the WTO.(24) Article IX.1 of the Marrakesh Agreement stipulates that the WTO shall continue the practice of decision-making by consensus. As referred to above, Article XII.2 of the Marrakesh Agreement sets the two-third majority of membership as the necessary condition for an accession decision to be passed. Since this provision sets an exception to the "consensus rule" as contained in Article IX.1, WTO members adopted a decision on 15 November 1995 and agreed to act in accordance with Article IX:1 (consensus) unless a decision cannot be arrived at by consensus. If that happens,

decision on accession shall be decided by voting.[25] With the preceding in mind, it can be stated that Iran's lost decade at the WTO can be mainly attributed to the unnecessary application of the "consensus rule" to the purely procedural stages of the accession process, e.g. establishment of the working party.[26] The issue will be further taken up in the next part where a challenging outlook to the accession process will be reviewed.

II.3 The Current State of the Play: Two Shaky Consensuses

Since the establishment of the working party in 2005, both Iran and the WTO membership have sent conflicting signals as to their plan on how to proceed further with the accession bid. The consensual national decision of 1996, while still in force in official terms, appears to have received a somewhat wobbly treatment following the change of government in Iran in 2005. As it happened, the post-2005 government under Mahmood Ahmadinejad seemed to accord the issue a lesser priority than had been the case previously. The issue was left practically dormant for a number of years, until November 2009 when the Memorandum of Foreign Trade was submitted to the WTO Secretariat.[27] The Memorandum was then circulated among WTO members for their preliminary examination. In February 2010 WTO members submitted several hundred written questions to the Iranian authorities seeking clarification on the actual operation of Iran's current foreign trade regime. According to Iran Trade Law Gateway, Iran intends to answer these questions by the end of fall 2010. Iran's answers to the questions will then be passed by the Secretariat to the members concerned. If members believe that Iran's responses are insufficient to clarify its current trade regime, further round(s) of questions and answers would follow in order to reach a satisfactory point which sets off the negotiations in the working party.

As far as the 2005 consensus at the WTO is concerned, it merits to add that the established practice has not been pursued here either. Although the working party was established in 2005, appointment of its chairman is still pending. As mentioned earlier in the paper, the chairpersons of the working parties are normally appointed through consultations conducted by the chairperson of the General Council involving the applicants and the interested members. Since the establishment of the working party in May 2005, attempts by

the rotating General Council chairpersons to fill this yet vacant post have failed thus far to bear fruit. The names of a few Geneva-based ambassadors as possible candidates for the post have emerged at different times, and subsequently dropped, which according to grapevine in the WTO hallways point in the direction of some form of US involvement blocking the process. In other words, the consensus that emerged once in May 2005 for the establishment of the working party is needed, once again, for the appointment of the working party chairperson. And it goes without saying that the reason appear to fall outside the WTO universe and purely technical issues and aspects; rather it lies in the challenging relations between the two countries, particularly over the nuclear dossier. It is also worth noting, however, that in practice, the functions of the chairperson – yet to be appointed - begin with the convening of the first session of the working party, a time still to come for Iran pending the satisfactory round(s) of written questions and answers.

III. WTO Enlargement: A Critical View

III.1 Procedural

Part two provided an overview on the procedural obstacle that delayed for a decade the establishment of Iran's working party for accession. It showed that how an improper application of "consensus rule" led Iran to experience a phenomenon that has been called elsewhere as "compulsory deferred admission".[(28)] Iran's case, along with Syria and a few other similar cases,[(29)] represent an anomalous phenomenon in the history of the WTO accessions, where an applicant country is forced to wait for quite a long time to be admitted as acceding country.

One can barely deny the benefits of the consensus rule for the member states[(30)] The reason why consensus should be relied on as the main decision-making tool in the WTO is perhaps twofold: I) consensual decisions reduce the scope for disputes arising from differing understandings of the rules[(31)]; and II) consensus rule gives weaker members a leverage to prevent unfavorable decisions by more powerful members who can easily form the majority needed for winning the vote.[(32)] There is also a downside to this.[(33)] A leading example where consensus rule has proved counterproductive relates to the decisions on accession; where it poses a serious impediment to the WTO universality, i.e. through foot-dragging. An

incumbent member can easily refrain from joining consensus deemed necessary for consideration of a membership application at the first step. The history so far, including the cases of Iran and Syria, reveals that consensus here can be hostage to non-trade incentives. Bhala gives some evidence to this effect: "[I]n contrast with Iran and Syria, the General Council approved requests from Afghanistan and Iraq to begin negotiations to join the WTO." He further emphasizes that violence in these two countries undermines the rule of law needed for membership to mean anything in practice.[34]

It is important to note that "consensus rule" seems workable and meaningful if, and only if, used among members and not against non-members. In other words, "consensus rule" equals "veto power" for all members of the WTO. Veto for all can reduce, to a large extent, "foot dragging" incidence on the understanding that if you block consensus on a decision to my interest today I will block consensus on a decision to your interest tomorrow. This means that consensus rule and bargaining power are two sides of the same coin. This is why a multilateral trading system with a membership size of the GATT/WTO has been able to make consensual decisions during the last 3 decades. Consensus is, however, susceptible to manipulation and misuse if used against non-members who have no bargaining power to counterbalance intentions behind the blockage by a member. Guzman and Pauwelyn underline the fact that consensus-based accession gives every existing member of the WTO the chance and power to block the accession of any newcomer. They refer to tensions on order of accession of China versus Taiwan or Ukraine and Georgia joining the WTO before Russia.[35]

In putting Iran's application on a 9-year hold, "consensus rule" was pivotal in two ways: in the first 5 years (Council no-action mode), consensus was absent in putting the application on the agenda of the General Council. For more than 50 meetings of the Council (from 14th to 65th meeting), the WTO Secretariat did not put Iran's formal request on the list of items proposed for the agenda of the Council, claiming that there was no consensus. This means that there should be a "negative consensus" requirement for inclusion of any item in the agenda of the Council meetings. The language of the Rules of Procedures of the Council meetings, however, does not support this practice:

> "A list of the items proposed for the agenda of the meeting shall be communicated to Members together with the convening notice for the meeting. *It shall be open to any Member to suggest items for inclusion in the proposed agenda* up to, and not including, the day on which the notice of the meeting is to be issued."(36) (Emphasis added)

As shown here, at the agenda-setting level, members can suggest items for inclusion in the proposed agenda and are not entitled to oppose any item therein. Therefore, neither the procedures for negotiations under article XII nor the rules of procedures of the Council meetings indicate that a consensus is needed for putting a formal request for accession on the agenda of a Council meeting. In other words, any reaction to an item on the agenda has to be delayed until that agenda item comes up for consideration in the course of the Council meeting. Given this, one tends to conclude that any request for accession shall be automatically put on the agenda of the next Council meeting for its consideration where dissenting positions by any incumbent member(s) may then ensue - as also happened in Iran's case between 2001 and 2005.

Second, during these 4 years of Iran's accession case (Council no-decision mode) when the item was on the agenda, consensus was due in more than 20 Council consecutive meetings. A very preliminary and procedural step in the very long accession process was again maltreated by misusing the consensus rule; that is, the Council failing to decide simply because of the politically-motivated, non-trade-related opposition of one member – the US. This not only was in stark contrast with the very rationale behind consensus rule but also represented a paradox in pursuing the universal membership of the WTO. As mentioned before, "consensus rule" still constitutes a procedural obstacle in Iran's accession by practically "blocking" the appointment of the chairperson of the working party.

III.2 Substantive

The prominent feature of the accession negotiations in the WTO is lack of specific rules. Charnovitz, an authority in the field, while attempting to map the law of accession, asserts that "[u]nlike most other multilateral organizations where the membership process for states is fairly routine, rapid, and transparent, the WTO

accession process is Byzantine, drawn out, and opaque".[37] What distincts accession to the WTO from GATT's procedure admitting new members is the way incumbent members do bargain with the acceding countries. While the GATT accession process had been judged to be biased in favour of newcomers,[38] the WTO process appears to have reversed that sharply and become totally biased against them and in favour of incumbents. The terms of accession of an acceding country are hammered out through negotiations with WTO membership that follow no clear rules. As further underlined by VanGrasstek, the rules on accession are marked by ambiguities that place the entire accession process in a negotiating context.[39]

As already discussed, the only body of law governing accession to the WTO is Article XII of the Marrakesh Agreement Establishing the WTO Trade Organization. This relatively short article has no clear operational guidelines. Secretariat Note "Accession to the World Trade Organization: Procedures for Negotiations under Article XII" of March 1995 tried to set out procedures for the implementation of Article XII provisions.[40] The 3-page note is practically a guide of a general nature, lacking normative value. It also lacks requirements to make accession negotiations predictable as relates to the outcome; coherent as regards accession negotiations of all acceding countries; and development-friendly (all acceding countries are either developing or least developed countries). This notwithstanding the fact that accession outcomes are enforceable. As Charnovitz puts it, "enforceable" means that violation of an accession commitment can entails judicial litigation.[41] It means that commitments taken by acceding countries in the unregulated, lopsided accession negotiations are admissible against them when they become full members. China is an exemplary acceded country in this regard. China joined the WTO in 2001. Four years down the road, the first legal complaint against China was filed in the WTO litigation bodies (*China Auto Parts* case). Along with the alleged violations of the WTO covered agreements, China had been sued for violation of a particular accession commitment.

The irony is that accession commitments, which are enforceable according to the WTO jurisprudence, are not always WTO-consistent. The notion of WTO-plus commitments is now very well acknowledged in the WTO. Incumbents drive a hard bargain to overload applicants with commitments beyond those taken by

incumbents themselves. For instance, several acceding countries committed themselves in their accession negotiations to join to the so-called plurilateral agreements.[42] Plurilateral Agreements (agreement on trade in civil aircrafts and public procurement agreement) are optional for existing members. The situation even gets worse with another well-acknowledged notion which is WTO-minus rights. Applicants are forced in accession negotiations to give up some of the rights they are otherwise entitled as the WTO members. Saudi Arabia, for example, agreed not to invoke flexibilities available to regional trade agreement among developing countries.[43] There have been other WTO-minus cases where newly acceded countries were not granted favourable treatments available to original members and even formerly acceded countries.[44]

The WTO-plus and minus paradigms seem unique and phenomenal in the WTO as compared to other international organizations. This is perhaps because accession process in the WTO is phenomenal in itself. In principle, membership to most global organizations is open to all sovereign states without a burdensome or lengthy process, indicating a presumptive right to membership.[45] Accession to WTO, as an exceptional case, is left to rather one-sided negotiations. Acceding countries have to – and do - negotiate to lose less. Accession negotiations never culminate in WTO-minus commitments and WTO-plus rights. The orthodoxy is quite the opposite. From the perspective of an applicant, there are only two possible negotiating outcomes -"bad" or "very bad".[46] Bhala further argues that a bad or very bad option does not necessarily mean that in an overall picture accession is a negative-sum-game or zero-sum-game exercise. Rather, it ought to be considered as a potential positive-sum-game. He also goes on further to argue – show - the benefits of accession to the WTO versus the costs of remaining outside.[47] VanGrasstek also presents an interesting analysis on applicants' approaches to accession. He opts for an approach which concentrates more on the ends than the means and sees accession as an opportunity to reinforce the country's economic reform process.[48] As mentioned earlier above, the cost-benefit analysis of accession is not discussed in this paper.

Perhaps the key element in the discussion above finally reduces to what is called "membership fee". The incumbents, especially the original members of the system, claim, through accession negotiations, compensation for trade liberalization

they have made in the last 6 decades, since the inception of the GATT. They believe that the multilateral trading system today is by far less restrictive and protected than it was in early GATT days. Based on this outlook, from their vantage point, the newcomers should pay to benefit from the liberalization dividends created along the way and in their absence. And since multilateral trading system continues to liberalize, delaying the accession means higher membership fee. While such an argument may be considered meritorious from the pure cost-benefit perspective of an economic enterprise, it is hardly convincing from a legal perspective.

And finally, when an applicant decides to accede to WTO it should have had a clear picture in mind of what WTO is. The GATT/WTO is a contract. Joining a contract requires that terms of contract remain intact while accession is taking effect. GATT/WTO is, however, considered an incomplete contract, which is attributed to certain contractual uncertainties at the time of drafting (*ex ante*).[49] As Mavroidis writes in a Foreword to Schropp's book, the contractual gaps should be filled *ex post* either through adjudication or further (re)negotiations among members.[50] Fact of the matter is that there is no room to complete WTO contract through accession commitments whatsoever. Article XII clearly stipulates that the goal for accession negotiations is to accede to "*thi*s *Agreement*" (Emphasis added). "This agreement" has a legal structure composed of "rights and obligations of the members" (Article X.3 of the Marrakesh Agreement). "This Agreement" further highlights the importance of the maintenance of a proper balance between rights and obligations of the members (Article 3.3 of Annex 2 of the Marrakesh Agreement). Moreover, "This Agreement" should not have different meanings and scopes at different stages of the accession process. The WTO-plus and minus paradigm is illustrative of what Jones coins as "lopsided bargaining in accessions".[51] There is now an established practice of changing the terms of contract during the accession negotiations, a blow to the perceived balance between rights and obligations of the members. To this author, what is needed to make accession negotiations predictable and coherent is to ensure that the acceding countries accede to the same body of law as they had in mind when they began to negotiate. Hence, neither WTO-plus commitments nor WTO-minus rights but "WTO-equal" accession outcomes.

Conclusions

This paper intended, first and foremost, to shed some light on the actual parameters of Iran's bid for WTO accession. It showed how consensus-based decision-making system in the WTO derailed Iran's application at its early stage, imposing a 9-year moratorium. The paper argued that this 9-year disruption could have been avoided had "consensus rule" not been extended to the procedural stages of the accession process. The opportunity cost of this lost decade has been huge, taking into account the ever-increasing membership fee in Geneva and the hesitancy in decision-making in Tehran.

The paper also endeavored to present a critical view on the ways negotiations for accession are conducted in the WTO. WTO-plus commitments/WTO minus rights is the prevailing discourse in the accession negotiations now. There is no pre-defined set of rights and obligations for newcomers. The WTO built-in rights and obligations are not guaranteed for the new members. The newcomers are usually less privileged and more committed than their fellow members who have been among the GATT founders or, for one reason or another and under different circumstances, have acceded to the Organization. The paper had a brief look into this phenomenon from a contract law perspective. Unlike most of the international organizations, accession to WTO is driven in a lopsided negotiating context which makes terms of entry floating. Worse still, as it happens in reality, the terms of contract change in the course of negotiations.

Having recent accessions to WTO in mind, it appears that an acceding country like Iran can no longer expect that its integration into the multilateral trading system and the WTO would benefit from the flexibilities accruing to developing country members. The "developing country" status does no longer guarantee smooth adjusting to the membership requirements. In sum, accession negotiations and membership itself are both much more costly now than used to be in the past. Negotiations for membership and membership for trade liberalization are challenging. And since the WTO system is not assisting much in this respect, Iran and other candidate countries in similar situations would be well advised to rely more on in-house preparedness.

As discussed in the paper, Iran's accession faces particular multifaceted

challenges. It is most unfortunate that the continuing US-Iran political disputes still serve as a practical “Sword of Damocles” for Iran’s attempt to advance its accession project in Geneva, thus increasing the cost for Iran along an unpredictable process and prospects. Even absent this specific political complication and its associated uncertainties, the process will be more technical and legal. From both technical and legal perspectives, delayed accession means more expensive membership. But this is equally becoming more expensive if accession negotiations do not follow a good level of technical and regulatory preparation at home. Since 1996 when formal request for accession was submitted to the WTO, there has been reasonably good preparatory work for accession at both sectoral and national levels. Taking this for granted, Iran’s policy makers and negotiators should also bear in mind that accession to the WTO is still an unregulated domain. This means that different approaches to negotiations can result in different terms of accession. This calls for further in-depth studies and analysis and open debates by scholars, practitioners and policy makers.

Notes

1. They include Albania, Armenia, Bulgaria, Cambodia, Cape Verde, China, Croatia, Ecuador, Estonia, Former Yugoslav Republic of Macedonia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania, Moldova, Mongolia, Nepal, Oman, Panama, Saudi Arabia, Chinese Taipei, Tonga, Ukraine and Vietnam.
2. They include Afghanistan, Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Comoros, Equatorial Guinea, Ethiopia, Iran, Iraq, Kazakhstan, Laos, Lebanon, Liberia, Libya, Montenegro, Russia, Samoa, Sao Tomé and Principe, Serbia, Seychelles, Sudan, Syria, Tajikistan, Uzbekistan, Vanuatu and Yemen.
3. WTO Doc WT/ACC/1.
4. Peter John Williams, *A Handbook on Accession to the WTO.* Cambridge University Press, 2008, p.31.
5. Kent Jones,"The Political Economy of WTO Accession: the Unfinished Business of Universal Membership". *World Trade Review*, 2009, p.5.
6. GATT Article I.1 stipulates that "…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". Article II.1 of the General Agreement on Trade in Services (GATS) has the same legal value: "… each Member shall accord immediately and unconditionally to services and services suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country."
7. GATT Docs CPC/W/17 of 24 March 1975.
8. With the increased number of independent developing countries in the 1960s, and the establishment of the UN Conference on Trade and Development (UNCTAD) and the Group of 77 (1964), development dimension began to feature more prominently in the GATT, including through a new amendment as "GATT Part IV: Trade and Development". In mid -1960s, developing contracting parties of the GATT indicated their interests in negotiating preferential tariff concessions among themselves. These negotiations became open to GATT non-members later. In 1980s and especially during the Uruguay Round of trade negotiations in the GATT, tariff negotiations among developing countries started to lose its momentum. It was also affected by an almost

identical negotiating process in UNCTAD, the so-called "Global System of Trade Preferences among Developing Countries (GSTP), which led to its total shift from GATT to UNCTAD.

9. WTO Docs WT/L/78 of 25 July1995.
10. WTO Doc. WT/ACC/IRN/1.
11. WTO Doc. WT/L/191.
12. WTO Doc. WT/GC/M/16.
13. WTO Doc. WT/GC/M/16.
14. Peter Milthorp," WTO Accessions: The Story So Far", *The Hague Journal of Diplomacy*, 2009, p.104.
15. WTO Doc. WT/ACC/IRN/2.
16. Jones, Op. Cit. p. 291.
17. Craig VanGrassetek., Why demands on Acceding Countries increase over the time", in *WTO Accessions and Development Policies*, New York and Geneva: United Nations, 2001a.
18. Ibid.
19. Ibid.
20. Ibid.
21. WTO Doc. WT/GC/M/65.
22. WTO Docs. WT/GC/M/71, 72, 74-78, 80-88, 90 & 92.
23. WTO Doc. WT/GC/M/95.
24. Steve Charnovitz, "Mapping the Law of WTO Accession", in *The WTO: Governance, Dispute Settlement & Developing Countries,* edited by Merit E. Janow, Victoria Donaldson and Alan Yanovich., 2008, p. 860.
25. WTO Doc. WT/L/93.
26. Alavi, S. Jalal. 2001. "Iran's Accession to the WTO", in *WTO Accessions and Development Policies.* New York and Geneva: United Nations, 2001, p.83.
27. WTO Doc. WT/ACC/IRN/3.
28. Jalal Alavi, "Letter to the Editor", *World Trade Review.* 2010, pp. 389-390.
29. Syria, Libya, Lebanon, and Liberia are among other cases whose formal applications for accession to the WTO at first faced lack of consensus. Syria applied for membership in 2001. Its working party was established in 2010.
30. Some scholars believe that although consensus rule has an important function in the system it is also open to misuse or abuse. See, for example, a presentation by John Jackson on "The WTO after Fifteen Years of Operation: Reflections on the World Trading System" at the WTO headquarters, Geneva, 23 June 2009.
31. Walter Goode, *Dictionary of Trade Policy Terms*. Cambridge University Press, fifth edition, 2007, p.99.
32. Developing countries attache high importance to respecting consensus as the dominant decision-making procedure in the WTO and strongly avoid recourse to voting even where consensus seems unachievable. This is based on the understanding that recourse

to voting would set a dangerous precedent which would give rise to the subsequent recourse to voting by big members, whereby pushing their own agenda.

33. Peter Sutherland, Bhagwati,Jagdish, Botchwey Kwesi, FitzGerald Niall, Hamada Koichi, John H. Jackson and Thierry de Montbrial.. *Report on the Future of the WTO: Addressing Institutional challenges in the New Millennium.* WTO Publication, 2004, pp.269-296.

34. Raj Bhala,. Modern GATT Law, A Treatise on the General Agreement on Tariffs and Trade. Sweet &Maxwell, 2005, pp.1112-1113.

35. Guzman, Andrew T., and Joost Pauwelyn, International Trade Law, Wolters Kluwer., 2009, p.94.

36. WTO Doc. WT/L/161.

37. Charnovitz, Op. Cit., pp. 858.

38. Gerard Curzon, *Multilateral commercial diplomacy : the General Agreement on Tariffs and Trade, and its impact on national commercial policies and techniques*, London : M. Joseph, 1965,pp. 35-36.

39. VanGrassetek, Op. cit. p. 118.

40. WT/ACC/1.

41. Charnovitz, Op. Cit, pp. 856.

42. Ibid.

43. WTO Doc. WT/ACC/SAU/61.

44. Butkeviciene Jolita, Michiko Hayashi, Victor Ognivtsev & Tokio Yamaoka.. "Terms of WTO Accession", in WTO Accessions and Development Policies. New York and Geneva: United Nations. Juris Publishing. Originally published in George Washington University Legal Studies Research Paper No. 237, 2001, pp., 233-235.

45. VanGrassetek, Op. cit. p.116.

46. Bhala, Op. cit,pp. 1113.

47. Ibid, pp. 1113-1116.

48. VanGrassetek, Op. cit. p. 137.

49. Simon A. Schropp.. Trade Policy Flexibility and Enforcement in the WTO: A Law and Economic Analysis, Cambridge University Press, 2009, pp. 60-62.

50. Ibid,pp. xviii.

51. Jones, Op. Cit, pp. 310.