

# Accession as Dialogue: Epistemic Communities and the World Trade Organization

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## Abstract

Accession to the World Trade Organization (WTO) is viewed as a major step in the development of a state, and the commitments made by acceding states are often interpreted as a symbolic commitment to international economic and political community. However, as a subject of scholarship, WTO accession is under-theorized – there has been no sustained academic attempt to build a theory that accounts for the complexity of the accession process. Traditional, positivist approaches can point to increasingly onerous terms of accession, but fail to probe past Article XII's one-dimensional concept of 'the acceding state' negotiating with 'the WTO'. This perspective dislocates the accession process from the broader political, economic, and legal reforms that involve both state and non-state actors. This article examines the role of these actors as epistemic communities, and argues that these epistemic communities engage in a series of dialogues about the nature of law and the legal system in the acceding state.

## Key words

accession; international economic law; socio-legal methodology; World Trade Organization; WTO

## I. INTRODUCTION

In the past decade, the accession process has brought over 30 new members into the WTO, including China, Vietnam, and the Russian Federation. This represents a major step forward in integrating the world's most significant transitional economies into the international economic community. Around the same number of states are in the process of seeking accession. When all of these accessions are complete, the WTO will have near-universal membership. WTO accession is of interest for the international community as a whole, for both the organization's supporters and its opponents, and accession is routinely prescribed for transitional and developing states as part of a broader development strategy. The WTO's supporters argue that accession leads directly to economic development, and its opponents generally acknowledge that although the terms of accession are not pro-development as such, non-participation is, long-term, even less pro-development. Within this context, WTO accession is viewed as a major step in the development of an acceding state.

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Accession means more than the exchanging of concessions – the commitments made by an acceding state are routinely interpreted as a symbolic commitment to the international economic and political community.<sup>1</sup> For example, the US ambassador to Vietnam commented that Vietnam's WTO accession 'will show the world that [Vietnam] has made the reforms and commitments needed to be a full participant in the international economic community.'<sup>2</sup> China's accession has similarly been interpreted as a 'new beginning'.<sup>3</sup> WTO director-general, Pascal Lamy, noted that 'the political commitments and determination showed by the Chinese government is serious and responsible and all members have acknowledged it'.<sup>4</sup> Likewise, Russia's accession has been characterized as a 'symbol of the country's path of democratization and economic opening',<sup>5</sup> which 'will play a significant role in the development of Russian law and enforcement in matters relating to trade and economy'.<sup>6</sup>

Despite the interest in accessions continuing to occur, the accession process is only rarely the subject of academic scholarship. The body of literature on accession tends to explore the problems in a general manner, concentrating either on the capacity of developing states to deal with the logistics of accession, or focusing on the accession conditions of individual states.<sup>7</sup> There has not, however, been a sustained academic attempt to build a theory that accounts for the complexity of the accession process. Specifically, existing studies fail to probe past Article XII's one-dimensional concept of 'the acceding state' negotiating with 'the WTO.' This one-dimensional viewpoint dislocates the accession process from the broader political, economic, and legal reforms, involving multiple government and non-government actors.

Positivist approaches to issues such as accession can point to the ever-increasing benchmarks required for accession, but lack the capacity to analyse the impact of different agents within and outside the structures of the WTO. This paper uses discourse analysis as a methodological tool to explore how, in reality, multiple actors

<sup>1</sup> C. Michalopoulos, 'WTO Accession for Countries in Transition', World Bank Working Paper 1934 (1998); J. Pietras, 'The Role of the WTO for Economies in Transition', in A. Krueger (ed.), *The WTO as an International Organization* (1998), 353.

<sup>2</sup> Statement by US Ambassador to Vietnam, Michael Marine, quoted in 'US Strongly Backs Viet Nam's WTO Accession', *Viet Nam News*, 4 July 2006.

<sup>3</sup> H 18005, 106th Cong, 2d Sess, (14 September 2000), in 140(13) Cong Res H 18005 (19 September 2000), at 18396.

<sup>4</sup> L. Zhao and Y. Wang, 'China's Pattern of Trade and Growth after WTO Accession: Lessons for Other Developing Countries', (2009) 2(3) JCEFTS 178, at 182, available online at <<https://openknowledge.worldbank.org/handle/10986/5042>> (visited 29 April 2012).

<sup>5</sup> S. Marini, 'A Wind of Change?', *EUInside* (28 November 2011), available online at <<http://www.euinside.eu/en/analyses/russia-wto-accession>> (visited 29 April 2012).

<sup>6</sup> 'Russia's Accession to the WTO Implies Far-Reaching Changes', *Moscow Times* (28 February 2012), available online at <[http://www.themoscowtimes.com/business/business\\_for\\_business/article/russias-accession-to-the-wto-implies-far-reaching-changes/453744.html](http://www.themoscowtimes.com/business/business_for_business/article/russias-accession-to-the-wto-implies-far-reaching-changes/453744.html)> (visited 29 April 2012).

<sup>7</sup> See, e.g., M. Kennett et al, *Evaluating WTO Accessions: Legal and Economic Perspectives* (2005); M. Smith, 'Accession to the WTO: Key Strategic Issues' in J. Schott (ed.), *The World Trading System: Challenges Ahead* (1996), at 167; World Bank, *WTO Accession: Lessons from Experience* (2005); S. Charnovitz, 'Taiwan's WTO Membership and Its International Implications', (2006) 1 AJWH 401; P. Naray, *Russia and the World Trade Organization* (2001); 'China's WTO Accession: Survey of Materials', (2001) 4(2) JIEL, at 329; R. Grynberg and R. M. Joy, 'The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System', (2000) 34(6) JWTL 167; United Nations Conference on Trade and Development, *WTO Accessions and Development Policies*, UN Doc. UNCTAD/DITC/TNCD/11 (2001), at 19, and W. Cai, 'Vietnam's Accession to the World Trade Organization: Background and Issues', (1996) 30(6) JWTL, at 75.

are engaged in constructing a series of dialogues about the nature of law and the legal system in the acceding state, a structure which itself has a variety of elements and perspectives. The objective of this paper is to explain the important, but generally overlooked, role of epistemic communities in creating and perpetuating discourse about the appropriate terms of accession. To this end, the paper first provides an overview of the formal requirements of the accession process, and how the requirements largely inherited from the GATT now operate within a dramatically different political context under the WTO. Second, the paper explains the significance of discourse analysis and epistemic communities as a means of unpacking the influence of outside actors on the accession process, using Vietnam's recent accession as a case study. The third part of the paper then explores several specific examples of how actors outside the formal WTO accession process impacted upon the ultimate terms of accession. Finally, the paper concludes by observing that it is an indelible network-type effect that perpetuates WTO-plus and WTO-minus obligations as an outcome of the accession process, and commenting on what measures (if any) might be capable of overcoming this problem.

Accession commitments are of more than merely theoretical interest. Aspects of China's accession have provided a template for the accession of other countries, such as Vietnam and the Ukraine, and this trend is likely to continue. Of particular interest is the establishment of precedents for acceding states agreeing to obligations in excess of those required on the face of the WTO Agreements ('WTO-plus'), or agreeing to forgo concessions to which they would otherwise be entitled under the WTO Agreements (generally referred to as 'WTO-minus'<sup>8</sup>). As cases such as *China – Raw Materials* have illustrated, commitments contained in accession protocols can be enforced through the dispute settlement system, even where no other WTO member is subject to a similar obligation.<sup>9</sup> A further reason for scrutinizing accession commitments is that the increasing tendency towards non-reciprocal accession commitments undermines the aspiration of the WTO to be a truly multilateral, rules-based organization, and creates a system of norms that fall short of the single undertaking on which the WTO was founded.<sup>10</sup>

## 2. THE ACCESSION PROCESS

Article XII of the Marrakech Agreement, governing accession, is extremely brief. Rather than specifying the procedures for accession, it imposes instead two fairly sketchy criteria. The first is that the entity wishing to accede must 'possess full autonomy' in relation to its international commercial activities and also, somewhat cryptically, must have 'full autonomy' in relation to 'the other matters provided

<sup>8</sup> Note, however, the concerns raised by Charnovitz in relation to this typology. S. Charnovitz, 'Mapping the Law of WTO Accession', (2006) *George Washington University Law School Public Law and Legal Theory Series Working Paper No. 237*, at 18–26.

<sup>9</sup> World Trade Organization, Report of the Appellate Body *China – Measures Related to the Exportation of Various Raw Materials*, 22 February 2012, WTO Doc. No. WT/DS394/AB/R.

<sup>10</sup> On the single undertaking, see M. J. Trebilcock and R. Howse, *The Regulation of International Trade* (2005), at 642–3.

for' in the WTO agreements generally. In practice, this limb of Article XII requires that a future WTO member be either a state or separate customs territory, with only Chinese Taipei joining under this provision by the title 'the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu'. For present purposes, the second requirement of Article XII(1) is the more significant. It provides that accession may take place on terms that are 'agreed between [the new member] and the WTO'. In other words, potentially any accession terms may be sufficient, regardless of how lenient or onerous they may be, provided that 'the WTO' is in agreement. Article XII(1) of the Marrakech Agreement contains a polite institutional fiction when it states that the terms of accession are 'to be agreed' with 'the WTO'. Although Article XII(2) then makes reference to 'the Members of the WTO', the provision is still constructivist in its implication that member states are acting as constituents of the WTO, rather than as complex, non-unitary actors in their own right. The decision to accept the accession of a new member is made by the Ministerial Conference, based on the consensus of two-thirds of the existing membership in accordance with Article XII(2) of the *Marrakech Agreement*. In practice, however, decisions are made on consensus in either the General Council or Ministerial Conference.<sup>11</sup> It is a distinctive and (from the perspective of acceding countries) problematic feature of the accession process that the standard required for accession is very poorly defined. As stated above, the requirements of Article XII(1) allow the terms of accession to be those reached between the acceding member and 'the WTO', although in reality this means that each of the interested WTO members must be satisfied with the accession package for consensus to be reached.

Recognizing the lack of particularity contained in Article XII, the WTO has produced a number of analyses of the accession process. Some, such as a series of notes produced by the Secretariat,<sup>12</sup> are an explanation of the procedural steps, designed for use by acceding parties. These procedures tend to have been very closely modeled on the accession procedures of the GATT,<sup>13</sup> and were not the subject of specific negotiations during the Uruguay Round.

Of particular significance are the bilateral negotiations, which take place after the extensive fact-finding phase has been complete. The bilateral negotiations focus primarily on the terms of access to the markets of the acceding country, for both goods and services, and the results of the bilateral negotiations are then incorporated into the terms of accession for the benefit of all existing members. As failure to conclude bilateral negotiations can prevent accession, incumbent WTO members have enormous bargaining power. Any trade issue between the two states will be raised in the bilateral negotiations, and concessions sought, and there is a general sense that this is the price of the ticket for entry. Further, the dynamic of the bilateral

<sup>11</sup> World Trade Organization, Decision-Making Procedures under Articles IX and XII of the WTO Agreement Agreed by the General Council, 24 November 1995, WTO Doc. No. WT/L/93.

<sup>12</sup> World Trade Organization, Secretariat Note on Accession to the World Trade Organization: Procedures for Negotiations under Article 12, 24 March 1995, WTO Doc. No. WT/ACC/1.

<sup>13</sup> The GATT procedures were primarily contained in *Complementary Procedures on Accession Negotiations* (27 October 1993), available online at < [http://www.wto.org/gatt\\_docs/](http://www.wto.org/gatt_docs/) (visited 28 April 2008) and *Management of Accession Negotiations – Statement by the Chairman of the Council*, GATT Document C/COM/4, 16 November 1994, GATT BIDS 41S, Vol. 1/32–33, which were consolidations of earlier practices.

negotiation process means that non-trade issues may be raised, directly or indirectly. For example, Georgia was able to use its power as a WTO member in Russia's accession negotiations, using the accession negotiations as a rare bargaining chip in its broader grievances with Russia.

The bilateral negotiation process is very resource intensive and can take many years, requiring knowledge and capacity that developing and transitional states often lack. Multilateral negotiations occur in parallel with the bilateral negotiations, and in addition to concatenating the bilateral concessions into a single document, they focus on implementation issues such as transition periods and phasing-in of access, as well as on the capacity of the acceding member to implement its obligations. At this stage, Lanoska reports, 'the overall regulatory framework of the country, its administrative institutions, and its capacity to consolidate the promised reforms, are carefully evaluated'.<sup>14</sup>

The Secretariat has produced an analytical document that traces the types of commitments made by different acceding members for the first decade of the WTO's operation.<sup>15</sup> It reveals that there is a dramatic difference in the attitude towards accession between the GATT and the WTO, particularly regarding the accession of transitional economies, as discussed below.

### 3. EARLY TRENDS

The political climate of the Cold War caused the major GATT powers to quite uncritically accept new members, as the GATT was an instrument by which an ambivalent Soviet satellite state or other non-aligned state could be drawn through trade towards the Western sphere of influence. As Hoekman and Kostecki observe, negotiations were 'tempered by pragmatism and flexibility', and certainly were 'far from a demand that the newcomer be a paragon of liberal trade virtues'.<sup>16</sup> Thus, the accession process was conducive to the admittance of new members, with incumbent members 'not normally try[ing] to drive too hard a bargain in payment of concessions which they made to third countries many years before'.<sup>17</sup> A small number of examples serve to illustrate how this dynamic impacted directly upon the terms of accession.

Poland was keen to join the GATT to avoid being subject to European quantitative restrictions and the high tariffs on goods exported to the United States. However, the GATT members, aware that Polish tariff concessions would not lead to reciprocity due to the state-centred system of trade, were unsure as to the price of accession. They were also aware that while the new Polish leadership was somewhat more moderate than the previous Stalinist leaders, Poland was unlikely to deviate from

<sup>14</sup> A. Lanoska, 'The World Trade Organization Accession Process' (2001) 35(4) JWTL 575, at 584.

<sup>15</sup> World Trade Organization, Technical Note on the Accession Process, 28 November 2005, WTO Doc. No. WT/ACC/10/Rev.3.

<sup>16</sup> B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2001), at 66.

<sup>17</sup> G. Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques* (1965), at 36.

its centrally planned economy.<sup>18</sup> The accession of Poland, and later of Romania, therefore included an obligation to raise imports, in the case of Poland by a specified amount, and in the case of Romania the commitment was couched in terms of rates comparable to imports from other sources (in other words, comparable imports from GATT and COMECON members).

This measure, while trivial in comparison to contemporary terms of accession for transitional economies, nonetheless dealt with the concern of the GATT members that the state monopoly on imports would suppress the quantity of imported products, such that tariff protection would be insignificant. In the political environment of the time, the presence of Poland on the side of the West was important enough that this limited concession was seen as sufficient. Some commentators, such as Polouektov, have even described the conditions imposed upon Poland as ‘the most rigid and inquisitorial set of special accession terms of all’,<sup>19</sup> although they seem very minimalistic in comparison to contemporary WTO accession conditions.

Even more remarkable is the case of Hungary. Hungary’s protocol of accession unusually included a commitment by the European Communities to increase their imports of consumer goods from Hungary. This is a commitment without any comparison in the subsequent accessions under the WTO, and another indication of the flexibility in the GATT era towards accommodating these ‘defecting’ members. Similarly, the Report of the GATT Working Party on the Accession of Hungary produced a report of only seven double-spaced pages, and contains very few commitments, and remarkably restrained language. For example, the Report of the Working Party evidences some discussion about the restrictions on imports into Hungary, the Hungarian system for import licensing, and the prohibitions on direct contracting with Hungarian enterprises. However, the only observation made by the Working Party was of ‘the desirability of improved opportunities for direct commercial contacts between enterprises of contracting parties and Hungarian end-users’.<sup>20</sup> The contrast between these accessions and contemporary accessions are striking, to say the least, even accounting for the added complexity of the WTO Agreements.

Finally, Japan’s accession was of great concern to many GATT members, who feared opening their markets to Japanese imports. However, the United States pushed through the accession, convinced that the political benefits of supporting this bulwark against communism in the Asia-Pacific would overshadow the potential harm to the integrity of the GATT system. Accordingly, the accession was pushed through, and instead of negotiating multilateral concessions on controversial issues such as Japanese textiles, the United States satisfied its domestic constituency by accepting a voluntary export restraint instead of tariffs.<sup>21</sup>

<sup>18</sup> L. Haus, *Globalizing GATT: The Soviet Union’s Successor States, Eastern Europe and the International Trading System* (1992), at 25–29.

<sup>19</sup> A. Polouektov, ‘The ‘Non-Market Economy’ Issue in International Trade in the Context of WTO Accessions’, United Nations Conference on Trade and Development Working Paper UNCTAD/DITC/TNCD/MISC.20, (2002), at 12.

<sup>20</sup> Accession of Hungary: Report of the Working Party, 20 July 1973, GATT Document L/3889, at 19.

<sup>21</sup> H. R. Friman, ‘The Eisenhower Administration and the Demise of GATT: Dancing with Pandora’, (1994) *AJES* 53(3), at 257. For a different perspective, see R. Komiya and M. Itoh, ‘Japan’s International Trade and Trade

By the 1990s, the changed political environment and the vast number of accessions strengthened the resolve of the existing GATT members that there should be no lowering of the terms of accession simply to expand the organization.<sup>22</sup> Thus, the accessions under the WTO are fundamentally of a different character to those under the GATT.

#### 4. ACCESSION TRENDS UNDER THE WTO

At the beginning of 2012, twenty-six accessions had been completed, and twenty-nine accessions were at various stages of completion.<sup>23</sup> Empirical analysis conducted by Kennett, Evenett, and Gage demonstrates the increasing duration and complexity of the accession process,<sup>24</sup> and accessions completed since that study confirm this general trend. The most lengthy accession process was for China, which took just under fifteen and a half years, and the Kyrgyz Republic's accession was the shortest, but still took nearly three years. Implementing WTO commitments is also extremely costly for states to administer, with one study estimating the accession process to cost over USD\$150 million in relation to the implementation of just a small number of the total WTO agreements.<sup>25</sup> WTO Secretary-General Pascal Lamy has himself acknowledged that the entry barrier for WTO membership is progressively being raised.<sup>26</sup>

While other trade issues tend to overshadow issues relating to accession, the rising cost of accession has regularly been raised by developing countries and non-governmental organizations as a concern. For example, the Zanzibar Declaration by the Ministers of Trade of Least Developed Countries noted their concerns in 2001 that no LDC had acceded to the WTO under Article XII, and called on the Ministerial Council to reform the accession process for LDCs and ensure that acceding LDCs were not required to agree to more onerous conditions than incumbent LDC members.<sup>27</sup> NGOs such as Oxfam have also addressed terms of accession as a development issue, criticizing the costliness of the process and a perceived lack of a development

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Policy, 1955–84' in T. Inoguchi and D. Okimoto (eds.), *The Political Economy of Japan, Vol. 2: The Changing International Context* (1988), at 173.

<sup>22</sup> Management of Accession Negotiations – Statement by the Chairman of the Council, 16 November 1994, GATT Document C/COM/4, BISD 41S, Vol1/32–3, at 1.

<sup>23</sup> World Trade Organization, Protocols of Accession for New Members since 1995, including Commitments in Goods and Services, available online at <[http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm)> (visited 28 April 2012) and Summary Table of Ongoing Accessions, available online at <[http://www.wto.org/english/thewto\\_e/acc\\_e/status\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/status_e.htm)> (visited 28 April 2012).

<sup>24</sup> M. Kennett et al., *Evaluating WTO Accessions: Legal and Economic Perspectives* (2005).

<sup>25</sup> J. M. Finger and P. Schuler, 'Implementation of the Uruguay Round Commitments: The Development Challenge', (2000) 23(4) *World Economy* 511, at 525. This figure represented implementation of WTO obligations concerning customs reform, intellectual property, and sanitary and phytosanitary measures. These represent only a small proportion of the total commitments that a country is required to make. See also J. M. Finger, 'Implementing the Uruguay Round Agreements: Problems for Developing Countries', (2001) 24(9) *World Economy* 1097.

<sup>26</sup> P. Capella, 'WTO Gives Green Light To "Rising Star" Vietnam', *Vietnam Business News*, 8 November 2006.

<sup>27</sup> Zanzibar Declaration of the Meeting of the Ministers Responsible for Trade of the Least Developed Countries, 6 August 2001, WTO Doc. No. WT/L/409.

orientation.<sup>28</sup> Some authors contend that problems faced by developing countries in their accession process are in fact symptomatic of broader problems, including a failure of the WTO to engage with the needs of developing countries.<sup>29</sup>

Of the concerns about the accession process, the most serious relates to the expanding number of obligations that deviate from those rights and obligations specified in the WTO Agreements. Most protocols of accession since the establishment of the WTO have included obligations on the acceding state to also accede to the plurilateral Agreement on Government Procurement, or to at least engage in negotiations regarding that agreement, despite Article XII of the Marrakech Agreement explicitly stating that the accession of plurilateral agreements is a separate matter.

In its Technical Note, the Secretariat catalogues commitments made by acceding countries that have no clear basis in the WTO Agreements, although it does not identify them as ‘WTO-Plus’ or (perhaps understandably) comment upon them in any detail.<sup>30</sup> Similarly, the Secretariat documents’ concerns that various types of special and differential treatment benefits were not being accorded to acceding states in accession negotiations (these correspond to Charnovitz’s category of applicant WTO-minus provisions). These WTO-minus provisions occur particularly in relation to transitional periods, the de minimis exception in agricultural subsidies, consultations on balance of payments issues, and agreement not to apply the Decision on Net-Food-Importing Governments.

Comprehensive cataloguing of WTO-plus and WTO-minus obligations in accession agreements is agreed by authors in the field to be an extremely useful exercise, although in practice very difficult and time consuming. Likewise, it is not the intention of this article to conduct such analysis, although in the text below, reference will be made to various WTO-plus and WTO-minus commitments made in the case of Vietnam, and comparisons drawn with those of China. Rather, this paper attempts to look behind the substantive commitments to show how actors outside the WTO’s process construct a way of thinking about acceding countries that makes WTO-plus and WTO-minus commitments possible, and how those ways of thinking permeate the accession negotiations. The following section explains how discourse analysis provides a mechanism to undertake this type of inquiry.

<sup>28</sup> See, generally, Oxfam International, *Make Extortion History – The Case for Development-Friendly WTO Accession for the World’s Poorest Countries* (2005), available online at <<http://www.oxfam.org/en/policy/bp79-make-extortion-history>> (visited 28 April 2012). See also, in relation to Vietnam, Oxfam International, *Extortion at the Gate* (2004), available online at <<http://www.oxfam.org/en/policy/bp-041004-Viet-Nam>> (visited 28 April 2012), in relation to Tonga, Oxfam International, *Blood from a Stone* (2005), available online at <<http://www.oxfam.org/en/policy/bno51215-tonga-bloodfromastone>> (visited 28 April 2012), and in relation to Afghanistan, Oxfam International, *Getting the Fundamentals Right: The Early Stages of Afghanistan’s WTO Accession Process* (2007), available online at <[www.oxfam.org/en/policy/briefingpapers/bp92\\_afghanistan\\_wto\\_accession\\_0706](http://www.oxfam.org/en/policy/briefingpapers/bp92_afghanistan_wto_accession_0706)> (visited 28 April 2012).

<sup>29</sup> United Nations Economic and Social Council, *The Future WTO Agenda and Developing Countries – Studies in Trade and Investment* No. 41 (2000), at 60 (2000).

<sup>30</sup> World Trade Organization, *Technical Note on the Accession Process*, 28 November 2005, WTO Doc. No. WT/ACC/10/Rev.3, at 164–7.



## 5. THE ROLE OF EPISTEMIC COMMUNITIES

Conventional analysis of documents such as working party reports clearly shows that certain structures and processes in an acceding state are deemed to be consistent with the WTO and others inconsistent, but there is little indication as to how these judgments are made, and how certain issues become the subject of negotiation. In this paper, I refer to 'epistemic communities' as groups of actors outside the formal accession negotiations who nonetheless create and perpetuate ways of engaging with the accession process, and 'discourse' when describing ways of speaking about accession requirements. Each of these terms is explained, briefly, below.

The WTO Agreements cross an extraordinarily wide range of highly technical subject matter. In addition, accession negotiations with a potential new member call for a detailed knowledge of the domestic situation of the potential new member, including very specific knowledge about trade-inhibiting practices that may be inconsistent with the WTO Agreements, and detailed knowledge of legal and political processes in the country. For the members of the working party, this generally means relying on external experts of many kinds. Haas identified that, while the increasing importance of expertise is clear, the role of experts in forming and modifying outcomes and expectations has been traditionally overlooked in state-centric literature.<sup>31</sup>

In response, Haas built on earlier work undertaken by Ruggie, who used the term 'epistemic communities' to explain how groups of experts share, and are bound by, a particular viewpoint, and in doing so, 'delimit ... the proper construction of social reality'.<sup>32</sup> Thus, an epistemic community is a network of experts with an authoritative claim to policy-relevant knowledge within their issue area. At the heart of an epistemic community are not the qualifications, backgrounds, or disciplines of its members but rather their common role in the production of knowledge. Epistemic communities are defined by their shared episteme (world view), which includes shared normative beliefs about the policy actions necessary to produce desired outcomes, criteria for assessing valid knowledge within their field of expertise, and a shared goal of influencing policy. Haas focuses on how epistemic communities of experts represent and define policy issues, and the way in which these experts in turn contribute to the formulation of policy and concepts of state interest by decision-makers (in this case, the negotiators on the Working Party). While Haas does not deny the importance of domestic or structural constraints and influence, he focuses instead on the supra-national networks of technical experts who frame the issues and suggest solutions, and in doing so, cause state actors to formulate concepts of state interest.<sup>33</sup>

For example, Drake and Nicolaidis study the impact of epistemic communities in the evolution of the GATS, demonstrating how an ontological shift led to diverse

<sup>31</sup> P. M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination', (1992) 46(1) *Intl Organization* 1, at 1.

<sup>32</sup> J. G. Ruggie, 'International Responses to Technology: Concepts and Trends', (1975) 29(3) *Intl Organization* 557, at 570.

<sup>33</sup> See *supra*, note 33, at 2.

industries such as management consulting, telecommunications, construction, and finance becoming known as ‘the services sector’. This community of experts was able to lobby and reconfigure governments’ understandings about the nature and value of services, and the principles by which services should be regulated.<sup>34</sup> The authors then explain the way in which the epistemic community transformed the popular understanding of the concept of a service from an invisible transaction of only marginal value to understanding services as ‘value-adding’. The shift in perception led directly to the introduction of negotiations on trade in services in the Uruguay Round, and the cause of ‘services’ was elevated to a global policy level. Conversely, the new services agenda confronted the WTO’s delegates with their absence of information, uncertainty about the nature of their own national interests and an inadequate conceptual framework about the nature of this new subject matter. Thus, bureaucrats needed to turn again to the epistemic community to assist them in formulating their policies, and to define their negotiating positions. Epistemic communities provide a service to WTO members, but equally they rely on members to advocate their interests in a forum, which is unique in the way it can use the promise of membership as leverage to extract reform commitments from the acceding state.

Similarly, although without referring specifically to the concept of an epistemic community, Sell and Drahos each chronicle in their work the politics behind the genesis of the TRIPS Agreement, and the way in which powerful lobby groups in developing states created a framework agreement that became ‘a structure that actors now either try to expand or resist’, and no longer a negotiable frame of reference.<sup>35</sup> The shared values and patterns of reasoning of these experts created knowledge and discourse with the effect that the ‘new issues’ were a proper subject of debate in the Uruguay Round.

Discourse analysis studies the production of meanings and their status in society, and is a technique derived from a rich and diverse set of traditions. This paper adopts primarily Foucaultian methods, in part because Foucault’s methods are the most widely known, but also because Foucault’s development of the concept of epistemes is a foundation for the concept of epistemic communities, explored in the 1990s by Haas and discussed below. Discourse analyses identify the emergence of meaning, ‘from the interplay between individuals’ cognitions; actions and intentions; and historical, social, and institutional resources and constraints’. These patterns of communication become the subject of discourse analysis, with the analysis focusing not just on the content, but also on ‘who has the right to produce discourse and who does not, and ... the ways in which discourse either privileges or suppresses meanings’.<sup>36</sup> Foucault deals with the capacity of discourse to make certain statements

<sup>34</sup> W. Drake and K. Nicolaidis, ‘Ideas, Interests and Institutionalization: “Trade in Services” and the Uruguay Round’, (1992) 46(1) *Intl Organization* 36, at 38.

<sup>35</sup> S. K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003), at 173–4; P. Drahos, ‘Developing Countries and International Intellectual Property Standard Setting’, Commission on Intellectual Property Rights of the United Kingdom Working Paper 8 (2002).

<sup>36</sup> R. Iedma, ‘Discourse Analysis’, in S. R. Clegg and J. R. Bailey (eds.), *International Encyclopedia of Organizational Studies* (2008) 389, at 389.

'possible' and others 'impossible' in certain institutional contexts. For example, within the WTO context, discourse has created a situation where certain types of demands are within contemplation, regardless of their sometimes tenuous link with the WTO Agreements. In contrast, other demands would remain unthinkable, despite their inherent attractiveness. For example, it is no longer conceivable that existing members could be asked to undertake to expand their volume of imports from Vietnam, as the EC did in relation to Hungary under the GATT.

At any particular time, some types of discourse have more support and momentum than other discourses, a phenomenon described by Foucault as the 'order of discourse'. In other words, some types of discourse have more support and momentum than other discourses. In the WTO context, for example, there is greater support for the acceptance of WTO-plus obligations, despite academic criticism of these obligations undermining the coherence of the WTO's single undertaking. Discourse is important because it 'builds objects, worlds, minds and social relations. It doesn't just reflect them.'<sup>37</sup> As the remainder of the paper will illustrate, epistemic communities, through their discourse, create and perpetuate expectations of how the accession process ought to function, and what types of concessions are satisfactory as terms of accession. There is no single truth about what is appropriate – instead, it is the subject of a messy, at times heavily contested, dialogue. It is a dialogue that occurs at many levels, only a few of which are reflected in the official reports of the accession process.

However, as the following examination of the Vietnamese accession shows, the most influential epistemic communities are those that support the use of the accession process as a means of leverage to lock in a wide range of liberalizing legal and economic reforms. This approach is predicated upon the value of liberalization for foreign investors and for the development of the acceding country as a whole. Because most of these experts come from outside the WTO system, they (not unreasonably) accord far less value (if any) to the integrity of the WTO system for its own sake. It is primarily the community of international economic law scholars who place value on the integrity of the system, and in accession negotiations their discourse is of a lower order than that of discourses from other epistemic communities.

The broad view of the accession process receives wide support. From the WTO Director General to the average Vietnamese interviewed in the street, there is an overwhelming sense that accession is connected to, rather than dislocated from, broader economic reforms. For example, Pascal Lamy commented that 'WTO membership will help Viet Nam firmly anchor these reforms and use trade opening as an engine for economic growth and development.'<sup>38</sup> This is a sentiment that was echoed in Vietnamese newspaper articles – 'when Vietnam joins the WTO, it means we can upgrade the whole society and achieve a higher standing in the world', and foreign

<sup>37</sup> M. Wetherell et al., *Discourse Theory and Practice: A Reader* (2001), at 16.

<sup>38</sup> Welcome Address by the Director-General to Viet Nam at the General Council Meeting of 7 November 2006, World Trade Organization Press Release, Geneva, 7 November 2006.

newspapers echoed similar sentiments.<sup>39</sup> Statements by members of the European Parliament also echoed the prestige theme, although also framing Vietnam's WTO accession as both an incentive and a reward for Vietnam's efforts in liberalization, usually in the context of democratization and human rights.<sup>40</sup> For its own part, the Vietnamese government recognized the opportunity to use the WTO process to entrench the existing program of reform within the country, and particularly as a means to help secure the compliance of the fragmented central and provincial structures, and facilitating better governance of the country.<sup>41</sup> These statements convey a belief (and create a reality) that there are no boundaries between accession negotiations and other political processes, and the reform activities of other international organizations. As a closer study of the Vietnamese accession shows, this is true also in practice.

## 6. EPISTEMIC COMMUNITIES IN THE VIETNAMESE ACCESSION

Vietnam officially became the 150<sup>th</sup> member of the WTO on 11 January 2007, and this was ratified in Vietnam by Resolution 71/2006/QH11 of the Government Department *Ratifying the WTO Protocol of Accession of the Socialist Republic of Vietnam* (29 November 2006). While the Vietnamese accession was a somewhat less lengthy process than that of China, it was the culmination of a long period of negotiations that had commenced at the creation of the WTO in 1995. The accession package to which Vietnam ultimately agreed bears a strong resemblance to the Chinese accession commitments in a number of areas. It appears that the drafters of the Vietnamese package have made a conscious decision to keep the actual Protocol of Accession concise (in the Vietnamese case only two pages as opposed to more than one hundred for China). Instead, the substantive text is contained in a particularly long Working Party Report spanning (without annexes) 530 paragraphs and 132 pages. The Working Party Report on Vietnam notes 70 commitments within its text, only slightly less far-reaching than the 82 commitments in the Chinese report. The subsequent documents for Ukraine's accession follow a similar pattern, highlighting the cumulative precedential value of accession commitments.<sup>42</sup>

<sup>39</sup> Quote from a 91-year-old Vietnamese man in Don Lee, 'Eyeing WTO Membership, Vietnam Girds for Change', *Vietnam Business News*, 21 August 2006. See also 'Vietnam Hopes WTO Entry Will Turn It into "Little China"', *Khaleej Times*, 5 November 2006.

<sup>40</sup> Statement by M. Matsakis in Debate CRE 12/07/2007 – 11.3 of the European Parliament, 12 July 2007. In the US context, see D. R. Dillon and D. Markheim, 'The Case for Permanent Normal Trading Relations with Vietnam', available online at <[www.heritage.org/Research/AsiaandthePacific/wm1152.cfm](http://www.heritage.org/Research/AsiaandthePacific/wm1152.cfm)> (visited 28 April 2012): 'And while no trade agreement, no matter how comprehensive, can itself install democracy or solve a country's human rights problems, trade agreements can force governments to enforce the rule of law ... [W]ithout Vietnam's active pursuit of WTO membership, it would still be locked in North Korea-like despotism'.

<sup>41</sup> General Council Approves Viet Nam's Membership, World Trade Organization Press Release No. 455, 7 November 2006.

<sup>42</sup> Accession of Ukraine: Decision of the General Council of 5 February 2008, 13 February 2008, WTO Doc. No. WT/L/718; Report of the Working Party on the Accession of Ukraine to the World Trade Organization, 25 January 2008, WTO Doc. No. WT/ACC/UKR/152. The Report of the Working Party notes 63 commitments in para. 512.

Of particular interest for the purposes of this article is not a comprehensive analysis of Vietnam's commitments, but rather a illustration of the effects of epistemic communities on the accession process. For that purpose, two types of actor are worth considering – first the WTO Secretariat as the physical embodiment of the WTO as an entity, and second, the role of actors functionally separate from the WTO but affiliated with Members of the Working Party, such as technical assistance projects and business associations.

### 6.1. The role of the WTO Secretariat

The terms of accession are not really agreed between the acceding state and 'the WTO', but between the acceding state and the existing members, both jointly and severally. Nonetheless, there is still a powerful discourse created by 'the WTO' as an entity, through the publications of the Secretariat, the technical assistance work that it carries out, and the manner in which it acts. The Secretariat maintains the WTO website, which is the primary way in which information on the accession processes and the WTO generally is disseminated. It is the first port of call for negotiators from acceding states, who, being new to the WTO system, turn to the Secretariat for advice and assistance. As such, the staff of the Secretariat could be said to form part of the epistemic community that informs the acceding state about the accession process.

Even the most fundamental administrative tasks of the Secretariat generate discourse. The Secretariat is literally the gatekeeper of the WTO, producing the definitive summaries of meetings, controlling access to meeting rooms (thereby deciding what types of meetings are official WTO meetings and which are not), and disseminating information through the website. As one developing country member observed, 'it is difficult to tell in some instances where the Secretariat ends and the powerful Northern countries begin.'<sup>43</sup> The Secretariat publishes several different explanations of the intended accession process for different audiences, ranging from general explanations for the public through to technical notes describing to acceding members the type of information required in the accession negotiations. It is the bureaucracy of the WTO, and it creates an extra-discursive reality of the WTO, both explicitly and by implication. It also receives, cites, and publishes information from academic and consultant authors, who in turn are recognized by others as experts due to their having been endorsed by the WTO. These are the individuals who are then in demand as consultants on technical assistance projects.

One function that warrants particular comment is the role of the Secretariat in issuing information and press releases about the process of accession and the pace of negotiations. For example, the WTO website highlights the concessions that acceding states make:

[W]hen the Working Party has made sufficient progress on principles and policies, parallel bilateral talks begin . . . these talks cover tariff rates and specific market access commitments, and other policies in goods and services. . . . in other words, the talks

<sup>43</sup> F. Jawara and A. Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (2003), at 202–11.

determine the benefits (in the form of export opportunities and guarantees) other WTO members can expect when the new member joins.<sup>44</sup>

In describing the accession process in these terms the Secretariat is normalizing the idea that the accession process will essentially be a one-way street (the benefits that the existing members can expect) and not allowing for the idea that acceding members could consider making their own demands at these talks. Similarly, these statements cast the Working Party as the arbiter of what constitutes sufficient progress, and condition the acceding member to expect that the bilateral negotiations be on 'policies' rather than merely 'market access' (as the technical notes on the access process would suggest). Press releases are a particularly interesting form of communication as they pass judgment on the quality of the acceding members' engagement in the process. For example, Laos is both disciplined and encouraged over its 'modest start', while Vietnam is described as showing 'true grit' in making the concessions necessary to progress the accession deal.<sup>45</sup>

The discourse of the WTO Secretariat therefore clearly communicates the idea that the acceding country should be passive and compliant in the sense of receiving and accepting reform suggestions. By terming accession not as a mutual exchange of benefits but as a process where the acceding country needs to reach a level and the characteristics set by the Working Party, the consequence is that acceding members are conditioned to accept WTO-plus obligations. The Secretariat passes judgment on the progress of the negotiations, using press releases to define the negotiations as being 'encouraging', 'disappointing', 'difficult', 'praiseworthy', 'on track', or 'lagging'.<sup>46</sup> For example, during 2003 and 2004, Secretariat press releases cautioned that a 'quantum jump' would be needed for Vietnam to accede, warning that 'Vietnam is not yet where it needs to be'. The press release concluded that '[w]hether or not Vietnam meets its target will be up to Vietnam itself.'<sup>47</sup> This contrasts with statements by Vietnam at the time that

we really expect negotiators to show more understanding and sympathy with the low-level developing economy and the modest trade of Vietnam but demonstrating flexibility, allowing preferential treatment and necessary transition periods as applied for in our action plans and offers.<sup>48</sup>

## 6.2. The role of donors, technical assistance projects, and industry groups

A major characteristic of the Vietnamese accession process is the significant involvement by foreign actors, particularly of UN agencies, of foreign aid-funded projects

<sup>44</sup> World Trade Organization, 'Members and Accessions: Becoming a Member of the WTO', available online at <[www.wto.org/english/thewto\\_e/minist\\_e/mino5\\_e/brief\\_e/brief20\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mino5_e/brief_e/brief20_e.htm)> (visited 28 April 2012).

<sup>45</sup> Viet Nam Joins WTO with Director-General's Tribute for True Grit, WTO Press Release, Geneva, 11 January 2007.

<sup>46</sup> See the WTO archive of press releases concerning accession negotiations on the WTO website, available online at <[www.wto.org/english/news\\_e/archive\\_e/acc\\_arc\\_e.htm](http://www.wto.org/english/news_e/archive_e/acc_arc_e.htm)> (visited 28 April 2012). See also *Lamy: APEC Ministers Call for Rapid Restart of the Negotiating Engines*, World Trade Organization Press Release, Geneva, 15 November 2006, quoting Director General Pascal Lamy: 'I very much hope that the Russian side will now devote much needed attention to the multilateral part of its accession process which is still lagging behind'.

<sup>47</sup> Viet Nam Starts Its 'Quantum Jump' but Still Some Way to Go, World Trade Organization Press Release, 12 December 2003.

<sup>48</sup> *Ibid.*

and of lobbying by foreign investors. Most of Vietnam's modern legal system was built on a 'donor edifice',<sup>49</sup> dating back to the earliest reform efforts in which foreign technical assistance projects provided the funding and technical expertise crucial for the creation of new laws. Foreign assistance provided much needed skills-based expertise, such as legislative drafting skills, but they also imported into Vietnam their own legislative and regulatory models, based on liberal rather than socialist principles. As economic liberalization continued and the accession effort intensified, multilateral and bilateral donor activity increased further. According to the WTO's Trade Capacity Building Database, Vietnam has been the recipient of the greatest number by far of technical assistance projects, over 475 discrete projects in the course of the accession process, with a cumulative value of USD \$159,000,000.<sup>50</sup> The projects are funded by a variety of donors and implementing agencies, including APEC, the ADB, the International Development Agency, the IMF, UNDP, the World Customs Organization, and the WTO itself. The major bilateral donors represented by these projects are the European Commission, the United States, Japan, the Republic of Korea, Thailand, France, Australia, and Canada.

The execution of technical assistance is typically contracted out to private consulting firms and administered by the donor agency. Wedel reports that the projects were mainly awarded to the 'big six' management consulting firms, who became known colloquially in Eastern Europe as the 'Marriot Brigade', and whose expertise was simply flown from Latin America to Africa to Central Europe and then to Eastern Europe and Asia.<sup>51</sup> Their work was conceptually supported by the 'econlobbyists' whose economic work underscored the necessity of liberal interventions, and whose research in turn was mutually endorsed and supported by the 'Marriot Brigade'. Thus, technical assistance projects are also business enterprises, administered by expatriates employed by mainly US and European consulting companies. They establish local project offices and employ a small number of permanent staff, and typically a high number of consultants to undertake small parts of the training and advice work.

The project office typically partners with the Vietnamese Government, and works with counterparts in relevant ministries to provide training and advice. In doing so, the projects' officers and consultants become well known to the acceding government, and part of the epistemic community of experts whose advice is used and relied upon. Yet, the project is typically financed by a government that, within the accession negotiations, is pushing for the broadest market access commitments possible and the greatest extent of liberalization, regardless of whether those commitments are contained in the WTO Agreements or are WTO-plus. As Newton observes in the US context, 'USAID and its consultants often seemed as much to be lobbying the

<sup>49</sup> M. Sidel, 'Understanding Foreign Donor Support for Legal Reform in Socialist Transitional States: The Changing Nature and Continuing Dilemmas of Legal Reform Assistance in Vietnam' (paper presented to the W. G. Hart Lecture at the School of Oriental and African Studies, University of London, 2003), at 5.

<sup>50</sup> World Trade Organization, Trade Capacity Database, available online at <<http://tcbdb.wto.org/>> (visited 28 April 2012). It is difficult to obtain a clear overview of these projects in any detail, due in part to their sheer volume, and in part to the lack of detail contained in the database.

<sup>51</sup> J. Wedel, *Collision and Collusion: The Strange Case of Western Aid to Eastern Europe* (1998), at 27 and 45–6.

Government for desired legislative changes as providing neutral technical assistance'.<sup>52</sup> A similar point is made by Howse, who questions whether technical assistance on WTO negotiations is designed with a view to

“training” officials to implement the “law” in its maximally trade-liberalizing version or interpretation? Or is the emphasis on their equal or greater emphasis on interpretations and legal strategies that would maximize the flexibilities and limiting dimensions of trade-liberalizing obligations, where necessary to ensure that domestic regulators have sufficient scope to address developed needs . . . Who are the experts communicating the meaning of the law? Do they represent diverse perspectives, rather than belonging to an epistemic community that still tends to regard trade liberalization (rather than improving standards of living for all and achieving sustainable development) as the telos, or end, in light of which the law is to be understood?<sup>53</sup>

Howse goes on to ask whether the experts themselves represent diverse perspectives. Anecdotally, the answer is that they do not. Again, in interviews with foreign consultants, they noted the closely knit inner circle of donor funding, commenting that there is a strong disincentive to provide controversial advice. There is a general feeling that facilitating assertiveness on the part of the acceding government, for example by providing advice and training on resisting demands for WTO-plus concessions, would not be supported by donors, and, ultimately, prevent individuals from securing future consultancies.<sup>54</sup> As a consequence, technical assistance projects and international donors generally tend to create and perpetuate a discourse that supports the status quo within the WTO, including a discourse that views wide-ranging accession negotiations as acceptable.

US bilateral assistance in the Vietnamese context serves to illustrate this point. The United States and Vietnam entered into a wide-ranging Bilateral Trade Agreement (the BTA) in 2001. The BTA followed the US' template for bilateral agreements and directly or indirectly incorporated most of the key WTO standards.<sup>55</sup> To support the implementation of the BTA's obligations, the United States Aid Agency funded a multi-million dollar project known as Support for Trade Acceleration and Reform ('STAR Project'), with the stated aim of supporting the implementation of BTA and WTO obligations, but also more broadly 'promot[ing] the legal and economic governance reforms needed for the creation of a market economy'.<sup>56</sup> DAI, the implementing consultancy firm for the project, described STAR's activities as

<sup>52</sup> S. Newton, 'Post-Communist Legal Reform: The Elision of the Political', in J. Hatchard and A. Perry-Kessaris (eds.), *Law and Development: Facing Complexity in the 21st Century* (2003), 161 at 176.

<sup>53</sup> United Nations Economic and Social Council Secretariat, Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, UN Doc. E/CN.4/Sub.2/2004/17, at 11 (9 June 2004).

<sup>54</sup> Interview carried out in Baku in 2005 with a local employee of a technical assistance project.

<sup>55</sup> For a more detailed explanation of the BTA, see L. Toohey, 'Stepping Stones and Stumbling Blocks: Vietnam's Regional Trade Arrangements and WTO Accession', in R. Buckley et al. (eds.), *The Challenge to Globalization: Regional and Preferential Trade Agreements* (2008) 65, at 77–8. In a number of instances, the BTA contained WTO-plus provisions, particularly in relation to intellectual property and investment.

<sup>56</sup> United States Aid Agency, Data Sheet: Regional Development Mission-Asia (2005), available online at <[www.usaid.gov/policy/budget/cbj2007/ane/pdf/rdma\\_486-002.pdf](http://www.usaid.gov/policy/budget/cbj2007/ane/pdf/rdma_486-002.pdf)> (visited 14 April, 2008).



encompassing advice on reform of:

institutional and administrative systems . . . in the areas of trade in goods and services, commercial dispute settlement, intellectual property rights protection, development of foreign direct investment, and transparency and the right to appeal. These reforms are partnered with extensive educational programs that include training for officials, lawyers, judges, and business leaders; revision of university curriculums and capacity development; and media-based public education campaigns.<sup>57</sup>

Throughout the accession process, STAR Project worked closely with non-government organizations such as the US–Vietnam Trade Council and maintained a detailed analysis of the consistency of Vietnamese laws with BTA (ultimately WTO) obligations. STAR Project and USVTC also employed US consultants to conduct training sessions, and organized extensive study tours to the US. While all of these activities had an explicit WTO focus, none was limited solely to the content of the WTO Agreements. For example, much of the project’s work had a general rule of law or governance focus, as well as a strong focus on the enforcement of intellectual property rights and legislative transparency.

The members of the Working Party also receive advice from epistemic communities that favour a broad-ranging accession debate. This includes the technical assistance projects described above, as well as the business enterprises and their professional advisers, and business associations, which are a very powerful sector of the NGO community in trade matters. As Dezalay and Garth observe, business associations are a ‘key agent and product of the Americanization of the legal landscape’.<sup>58</sup> In both China and Vietnam, business associations such as the chambers of commerce are major producers of knowledge and opinion about the local business environment. This is communicated in the form of reports and seminars, which tend to focus on the deficiencies of the business structures in their host country. They harness the power of their network connections to relay this information back through embassies to their home governments, who use this information as a source of knowledge in the accession negotiations.

In the case of the Vietnamese accession, non-government organizations such as the USVTC and the American Chamber of Commerce in Vietnam (‘AMCHAM’) provided a point of liaison between US enterprises active in Vietnam and the US negotiators. They did so by providing documentation and advice on trade barriers in Vietnam, and maintaining an extensive website that includes information on the viewpoints of US industries, previous accession commitments of other transitional economies, and updates on Vietnamese legislative amendments along with assessments on their consistency with the WTO Agreements.<sup>59</sup>

AMCHAM actively lobbied throughout the accession process to have its particular concerns about WTO commitments incorporated into the agenda of the US

<sup>57</sup> DAI, Vietnam – Support for Trade Acceleration Project, available online at <[http://www.dai.com/work/project\\_detail.php?pid=55](http://www.dai.com/work/project_detail.php?pid=55)> (visited 11 June 2008).

<sup>58</sup> Y. Dezalay and B. G. Garth, *The Internationalization of the Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002), at 198.

<sup>59</sup> USVTC, Catalogue of Legal Updates, available online at <<http://www.usvtc.org/updates/legal/>> (visited 28 April 2012).

government, and to convince the Vietnamese government that various structures and processes were harmful to continued foreign investment, trade, and economic growth in Vietnam. For example, AMCHAM produced a position paper setting out its concerns regarding WTO commitments on trading rights and distribution rights, which it actively circulated in Vietnam and abroad, through the embassy, commercial channels, and its website. The position paper presented AMCHAM's concern that commitments of the 2001 Bilateral Trade Agreement (BTA) had not been fully honoured in practice because of the tendency of trade officials to cause 'delays and complications in the implementation of important BTA undertakings' by 'interpreting its international commitments very narrowly', with the consequence that US negotiators should 'take extra care that commitments are unambiguous so that they will be honored in practice'.<sup>60</sup>

The Report of the Working Party contains numerous hints of the influence of organizations such as USVTC and AMCHAM. For example, Vietnam's land management system was criticized for having non-transparent methods of price calculation, with members complaining 'conditions on the right to use land remained inconvenient and insufficient for foreign investors, limiting the possibilities for investors to raise funds by mortgaging land'.<sup>61</sup> This clearly reflects information provided by industry groups such as the US–Vietnam Chamber of Commerce to the US Government during the negotiations. However, it reflects an interest in maximally protecting their interests in the country, rather than any concern of an inconsistency with the WTO Agreements as such. Once raised in the context of accession, it becomes necessary for the acceding state to identify that the basis of the concern is not an inconsistency with the WTO Agreements, and to seek to deflect the issue, often in the face of strong political pressure.

Likewise, concerns about the transparency of regulations repeatedly filtered through business associations, US government offices, and other channels were raised in the accession negotiations. The Vietnamese commitments on transparency are an expansionist interpretation of the transparency provisions in the WTO texts. For example, Article 63 of the TRIPS Agreement requires the publication of 'final judicial decisions', but only in relation to intellectual property, and only if publication is 'practicable'. On the other hand, Article X of GATT refers generally to the publication of judicial decisions, but only pertaining to certain subjects. Paragraph 518 incorporates requirements that are, by most analyses, consistent with the rule of law and best international practice, but nonetheless WTO-plus – such as the positive obligation to publish (without reference to practicality) all judicial decisions, regardless of subject matter, in specified journals and websites, and readily made available to stakeholders.<sup>62</sup>

<sup>60</sup> American Chamber of Commerce in Vietnam, Position Paper: Key Issues for WTO Accession, available online at <[www.amchamvietnam.com/?id=582](http://www.amchamvietnam.com/?id=582)> (visited 28 April 2012). See also AmCham Letter to USTR Schwab and Commerce Secretary Gutierrez, 6 October 2006, available online at <<http://www.amchamvietnam.com/1066>> (visited 28 April 2012).

<sup>61</sup> Report of the Working Party on the Accession of Viet Nam, 27 October 2006, WTO Doc. No. WT/ACC/VNM/48, 47.

<sup>62</sup> Report of the Working Party on the Accession of Vietnam, 27 October 2006, WTO Doc. No. WT/ACC/VNM/48, 518.

The transparency section of the Working Party Report displays the type of shopping list presented by foreign investors, and conveyed to the Vietnamese Government through various channels, including the WTO negotiations. For example, paragraph 505 of the Report refers to the desirability of a 'a single, authoritative journal and enquiry point' for all instruments of legal effect, national and sub-national, as well as all licensing and other requirements. There is no comparable requirement in the WTO Agreements, and in the end, the commitments made by Vietnam only partially fulfilled this request. On the other hand, the Working Party also gained commitments from Vietnam that effectively apply the transparency provisions of the SPS and TBT Agreements to all matters involving goods, services, or intellectual property, by requiring a 60 day period for comments to be made on legislative amendments. Vietnam also undertook to consider comments made under the consultation process. Further analysis of stakeholders' positions, Working Party negotiating stances, and the commitments ultimately reached reflect a similar pattern.

The descriptions above are merely a brief entrée into the complex dynamics of epistemic communities. The WTO Secretariat is just one example of an actor within the epistemic community that communicates a powerful discourse (both intentionally and unintentionally) about the parameters of the accession process. While members of the WTO Secretariat may be keenly aware of the dynamics of the accession negotiation at a country-specific and a systematic level, they are not at liberty to intervene or pass judgment on the process. Likewise, although members of the Working Party have a collective interest in the integrity of the WTO as a system, their primary role is as diplomatic representatives of their own country and within that role their task is to represent the interests of their stakeholders, which almost always involves seeking liberalization in the broadest possible terms. Once again, there is little, if any, scope to consider the systemic impact of WTO-plus commitments, leaving it a matter of concern primarily for academics, and as an issue that struggles to gain traction in a complex political agenda.

## 7. CONCLUSIONS

Graeco-Roman mythology provides us the evocative story of Charon, the boatman who ferries souls across the river Acheron. While he is, by all accounts, a horrendous character, and the journey terrible, those who wish to cross must pay the price and make the crossing. They do so because they fear the alternative, which is to wander aimlessly for a hundred years until, at last, they are 'wafted o'er'.<sup>63</sup> In the contemporary economic environment, there are very few states who would wish to wander aimlessly outside the WTO system, and for this reason most are willing to brave the difficult journey of accession. This article examines that process from a new perspective by relying on the sociological tool of discourse analysis to identify how actors outside 'the WTO' construct a very broad interpretation of appropriate

<sup>63</sup> Virgil, *The Aeneid*, Book VI, Trans. J. Dryden, open online source at <<http://classics.mit.edu/Virgil/aeneid.6.vi.html>> (visited 28 April 2012).

commitments to be made in WTO accession negotiations, and how those ideas are transmitted through networks to the negotiations with the WTO Working Party. Dialogue occurs at many levels and between many actors, primarily outside the formal framework of the WTO's processes.

The concept of epistemic communities lends additional depth to previous legal analyses of the WTO, which have tended to conceptualize issues in terms of formal rights holders and obligation-bearers<sup>64</sup> In contrast, a focus on epistemic communities transcends this very limited world view by explaining the means by which policy decisions are reached. The epistemic community approach contrasts with the positivist approaches common to mainstream legal and international relations analyses, which both emphasize the role of states in the international system. While the concept of epistemic communities has its share of weaknesses, for which it has on occasion received harsh critique, it is nonetheless a useful analytical tool.

Certainly, in the context of the present study, looking at the role of states in the accession process through the documentation of the WTO tells us little about the nature of accession, and much less about how we can conceptualize the accession process. Viewing the accession as a broader dialogue about the role of law in the acceding country (in this case, Vietnam) illustrates how and why accession processes are increasingly complex, and why there is a cumulative propensity towards the extraction of WTO-plus obligations. Viewing accession in this way helps to articulate how and why WTO accession is such an important focal point for the entrenchment of broad liberalization activities, and why concessions increasingly go beyond the parameters of the WTO Agreements.

For transitional states such as Vietnam, the focus of the dialogue of accession becomes the extent to which legal processes and institutions should conform to Western liberal notions of good governance and market-supportive structures. Epistemic communities generate substantial and wide-ranging debate about the form and operation of the legal and political structures of a transitional economy. Some of this debate leads to reforms initiated by the transitional state, and some of the community's concerns are channeled through the representatives of the WTO Working Party and may find expression as commitments in the Protocols of Accession.

As Macrory, Appleton, and Plummer observe, accession places pressure on transitional economies to move towards liberal market, political, and legal structures for the simple reason that 'the easiest way to avoid problems associated with non-market economies is to encourage them to become market economies'.<sup>65</sup> There is no doubt that many of these commitments have a net welfare-increasing effect, flowing

<sup>64</sup> This is not to say that the issue has been completely ignored. For example, Jackson looks at the capacity of WTO players to bring a particular issue on to the negotiating table, and uses the term 'mantras' – see J. H. Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited' (2001) 4(1) *JIEL* 67. Similarly Howse refers to the 'metastructures' of the WTO – see R. Howse, 'Mainstreaming the Right to Development into International Trade Law and Policy' (paper presented to the Yale Law School Law and Globalization Conference, 2004), subsequently reproduced as United Nations Economic and Social Council Secretariat, *Mainstreaming the Right to Development into International Trade Law and Policy* at the World Trade Organization, UN Doc E/CN.4/Sub.2/2004/17 (9 June 2004).

<sup>65</sup> P. F. Macrory et al., 'Institutional Framework', in P. F. Macrory et al. (eds.), *The World Trade Organization: Legal Economic and Political Analysis* (2005), 1 at 77.

not just to the investors who most strongly advocated them, but also to the domestic populations as a whole. This is particularly the case in relation to transparency obligations such as pre-publication of laws, and it is also the case where liberalized trading rights will result in greater competition and price benefits for consumers. The fact that benefits flow from these reforms is not sufficient justification for the imposition of accession terms that exceed the obligations placed on the incumbent WTO members. This changes the WTO into an instrument for coercive reform that it was not intended to be.

WTO accession remains the subject of power politics rather than subject to the rule of law, and perhaps more acutely so than other aspects of the WTO's activity. The contemporary pattern of accession commitments suggest that the WTO is moving yet further from the Ruggie's 'embedded liberalism' of the GATT era, in which states had a large degree of autonomy in the way in which their domestic affairs were regulated, towards a very different type of liberal economic and political values, which become embedded through commitments made during accession.<sup>66</sup> Arising out of this conflation of circumstances are powerful forms of discourse that shape how a state should behave as a good international citizen and future WTO Member. This socialization and these expectations, particularly where the state seeking membership cannot point to any legal right to or any legal limitations upon entry, condition the state into acting in conformity with the expectations placed on it. The experience of Vietnam that this article portrays is illustrative of the experience of many of the recent accessions, and particularly that of developing and transitional economies such as Vanuatu, Samoa, Montenegro, and the Russian Federation.

At this point in time, there is little indication that the accession process will become a serious item on the WTO's reform agenda. The current negotiating agenda is replete with significant and contentious issues, and it is simply not realistic to expect existing members to turn their attention instead to the welfare of newcomers to the WTO club. There is insufficient incentive for those who have paid their entry price to forgo concessions that can be successfully demanded of a new entrant.

Nonetheless, the issue is, and must remain, of concern for those interested in the overall integrity of the WTO system. It is often said that the measure of a civilized society is the way it treats its most vulnerable members. In the WTO system, the most vulnerable are without doubt developing and transitional states trying to seek entry to the WTO. Within the wide-ranging dialogue that is the accession negotiation, consideration is not given to whether the reforms and concessions are consistent with the obligations placed on existing members, or even whether the demands are within the scope of the WTO Agreements. An organization such as the WTO, which aspires to create a rules-based trade system, must take seriously the rule of law at all levels, including at the point of entry.

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<sup>66</sup> J. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', in S. Krasner (ed.), *International Regimes* (1983), 195.

In the absence of a constitutional-type restraint on the limits of the accession process, it is both logical and rational for incumbent members to utilize the accession process to further their own interests, whether or not demands are within the scope of the WTO's mandate. Of course, in the present round of negotiations, it can hardly be suggested that accession reforms legitimately demand a high priority. Thus, until fortunes change, it remains the task of academics and other commentators to document and explain the issues and concerns that this practice presents. This article has sought to make a modest contribution to that task.