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Outreach to Outcasts?**

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Impressum

Kai-Oliver Knops, Marita Körner, Karsten Nowrot (Hrsg.)
Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie

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Heft 24, April 2019

Bibliografische Information der Deutschen Bibliothek
Die Deutsche Bibliothek verzeichnet diese Publikations in der
Deutschen Nationalbibliografie;
detaillierte bibliografische Daten sind im Internet unter
<http://dnb.dnb.de> abrufbar.
ISSN 2366-0260 (print)
ISSN 2365-4112 (online)

Reihengestaltung: Ina Kwon
Produktion: UHH Druckerei, Hamburg
Schutzgebühr: Euro 5,-

Die Hefte der Schriftenreihe „Rechtswissenschaftliche Beiträge der
Hamburger Sozialökonomie“ finden sich zum Download auf der
Website des Fachgebiets Rechtswissenschaft am Fachbereich
Sozialökonomie unter der Adresse:

[https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/
koerner/fiwa/publikationsreihe.html](https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/koerner/fiwa/publikationsreihe.html)

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A. Introduction: On the (Political) Abnormality and (Economic) Normality of Non-Recognized Territorial Entities*

Irrespective of how one answers the question as to the necessary elements and prerequisites of statehood under public international law in general¹ – and whether they are fulfilled in a given case – as well as notwithstanding how one positions oneself on the side of, or in fact potentially also somewhere between, the so-called “constitutive theory” and/or the “declaratory theory” in the in principle age-old and still ongoing discussion about the legal relevance and effects of the recognition of states in particular,² the incontrovertible fact remains that for the time being – and probably for quite some time to come – non-recognized autonomous territorial entities are, at least if viewed from a political perspective, clearly more of an abnormality in an international system comprising mostly of recognized states.³ Moreover, and again seen from a political standpoint, they are not only an anomaly, but often even perceived as something like “irritants” in the global community, considering the potential threat to international peace and security resulting from the existence of these territorial entities,⁴ also referred to as, among others, non-recognized states, quasi-states, state-like entities, entities short of statehood or stabilized de facto regimes,⁵ whose origins not infrequently lie in former (and currently inactive)

* The contribution is based on a presentation given by the author at the conference “The Legal Position of Non-Recognized States in the Post-Soviet Space under International Trade Law, Private International Law and International Civil Procedure”, organized by the Institute of East European Law at the Faculty of Law of the Christian-Albrechts-University of Kiel/Germany in Bordesholm and Kiel on 12 to 14 July 2018.

1 Generally on the elements of statehood from the perspectives of general theory of the state and of international law see for example *Jellinek*, Allgemeine Staatslehre, 394 *et seq.*; *Crawford*, The Creation of States, 37 *et seq.*; *Verdross/Simma*, Universelles Völkerrecht, §§ 378 *et seq.*; *Krajewski*, Völkerrecht, 136 *et seq.*; *Craven/Parfitt*, in: Evans (ed.), International Law, 177 (190 *et seq.*).

2 For a more in-depth treatment of the issue of recognition of states including the relevance of the declaratory and constitutive theory of recognition see, e.g., *Crawford*, Brownlie’s Principles of Public International Law, 144 *et seq.*; *Talmon*, British Yearbook of International Law 75 (2004), 101 *et seq.*; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/1, 185 *et seq.*; *Grant*, The Recognition of States, 19 *et seq.*; *Henriksen*, International Law, 63 *et seq.*; *Hillgruber*, European Journal of International Law 9 (1998), 491 *et seq.*; *Epping*, in: Ipsen/Epping/Heintschel von Heinegg (eds.), Völkerrecht, § 7, paras. 160 *et seq.* Concerning the inconsistency of state practice relating to the legal effects attributed to the recognition of states see also for example *Jennings/Watts*, Oppenheim’s International Law, Vol. I, Introduction and Part 1, 129 (“state practice is inconclusive and may be rationalised either way”); *Shaw*, International Law, 331 (“Practice over the last century or so is not unambiguous [...]”); *Klabbers*, International Law, 82; and *Warbrick*, in: Evans (ed.), International Law, 205 (249) (“it is conceded that the practice is not amenable completely to one explanation or the other, though each points to certain pragmatic conclusions which, ironically, may commend it to practitioners who otherwise resist grand theory”). Specifically on the role and relevance of recognition in the context of secessions see, e.g., *Oeter*, in: Walter/von Ungern-Sternberg/Abushov (eds.), Self-Determination and Secession in International Law, 45 *et seq.*, with further references.

3 See, e.g., *Caspersen*, in: Caspersen/Stansfield (eds.), Unrecognized States in the International System, 73 (78) (“More widespread recognition is needed for these entities to function as normal entities in the international system of sovereign states; [...]”); as well as specifically with regard to Taiwan *Charnovitz*, Asian Journal of WTO and International Health Law and Policy 1 (2006), 401 (423) (“Taiwan is an anomaly in international relations. It is a self-governing, stable, prosperous nation whose identity is sharply contested.”). Generally on the perception of the international system as still being primarily an inter-state system see for example *Shaw*, International Law, 4 *et seq.*; *Craven/Parfitt*, in: Evans (ed.), International Law, 177 (178); *von Arnault*, Völkerrecht, 20; for a more cautious view emphasizing the increasing importance of other actors in the international system see, however, already, e.g., *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/1, 2 *et seq.*

4 On this perception see, e.g., *Bakke*, in: Caspersen/Stansfield (eds.), Unrecognized States in the International System, 90 *et seq.*; *Kolsto/Blakkisrud*, in: Caspersen/Stansfield (eds.), Unrecognized States in the International System, 110 *et seq.*

5 Specifically on the concept of stabilized de facto regimes and their status under public international law see in particular *Frowein*, Das de facto-Regime im Völkerrecht, 1 *et seq.*; *Frowein*, De Facto Regime, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 12

internal or international armed conflicts and/or only semi-successful secessionist movements that often result in situations of so-called “frozen conflicts”⁶.

These findings most certainly also apply to the at present comparatively large number of non-recognized territorial entities in the post-Soviet realm, prominently among them the Republic of Abkhazia,⁷ the Republic of Artsakh (more commonly known as Nagorny-Karabakh),⁸ the Donetsk People’s Republic, the Luhansk People’s Republic, the Republic of South Ossetia,⁹ as well as the Pridnestrovian Moldavian Republic (more commonly known as Transnistria or Pridnestrovie)¹⁰ with the territorially affected recognized countries being Georgia, the Republic of Azerbaijan, Ukraine, and the Republic of Moldova.

Nevertheless, in many other ways, and in particular also when viewed from an economic perspective, these non-recognized territorial entities usually present themselves as rather normal political communities; meaning: they are in the average not more abnormal than the quite diverse members of the global community of recognized states. In order to support this perception, attention might for example be drawn to the reasons that speak in favor of also integrating these territorial regimes into the global economy and its legal order. In order to illustrate the arguments for a preferably close, because in principle mutual beneficial relationship between non-recognized territorial entities on the one hand as well as the international economic system and its transboundary normative framework on the other hand, it seems useful to briefly highlight two main aspects or dimensions in this regard.

First, viewed from the external economic perspective of other territorial players in the international system, among them in particular recognized states, and their private business actors, non-recognized territorial entities, including their populations and natural, human as well as other resources, not infrequently provide for valuable business opportunities, for example in the form of additional consumers and thus market demands for imported products and services as well as in the form of places to profitably undertake foreign investments. Moreover, and

March 2019); as well as for example *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/2, 294 *et seq.*; *Schoiswohl*, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law*, 206 *et seq.*; *Krajewski*, *Völkerrecht*, 144 *et seq.*

- 6 Generally on the phenomenon of frozen conflicts see for example *Grant*, *Cornell International Law Journal* 50 (2017), 361 *et seq.*; *Grant*, *German Yearbook of International Law* 59 (2016), 49 (64 *et seq.*).
- 7 For further details on this territorial entity see, e.g., *Nußberger*, *Abkhazia*, paras. 1 *et seq.*, in: *Wolfrum* (ed.), *Max Planck Encyclopedia of Public International Law*, available under: <www.mpepil.com/> (accessed on 12 March 2019); *Nußberger*, *Göttingen Journal of International Law* 1 (2009), 341 (360 *et seq.*); *Mirzayev*, in: *Walter/von Ungern-Sternberg/Abushov* (eds.), *Self-Determination and Secession in International Law*, 191 *et seq.*; *Markedonov*, in: *Bebler* (ed.), “Frozen Conflicts” in Europe, 71 *et seq.*; *Wolff*, in: *Caspersen/Stansfield* (eds.), *Unrecognized States in the International System*, 147 *et seq.*
- 8 Concerning the situation and context of Nagorny-Karabakh see for example *Sterio*, *German Yearbook of International Law* 59 (2016), 81 *et seq.*; *Melnyk*, *Nagorny-Karabakh*, paras. 1 *et seq.*, in: *Wolfrum* (ed.), *Max Planck Encyclopedia of Public International Law*, available under: <www.mpepil.com/> (accessed on 12 March 2019); *Krüger*, in: *Walter/von Ungern-Sternberg/Abushov* (eds.), *Self-Determination and Secession in International Law*, 214 *et seq.*
- 9 On the Republic of South Ossetia see for example *Nußberger*, *Göttingen Journal of International Law* 1 (2009), 341 (351 *et seq.*); *Nußberger*, *South Ossetia*, paras. 1 *et seq.*, in: *Wolfrum* (ed.), *Max Planck Encyclopedia of Public International Law*, available under: <www.mpepil.com/> (accessed on 12 March 2019); *Luchterhandt*, *Archiv des Völkerrechts* 46 (2008), 435 (436 *et seq.*); *Waters*, in: *Walter/von Ungern-Sternberg/Abushov* (eds.), *Self-Determination and Secession in International Law*, 175 *et seq.*, each with further references.
- 10 For additional details on the situation and context of Transnistria/Pridnestrovie see for example *European Parliament, Study: The Transnistrian Issue: Moving Beyond the Status-Quo*, by *Stefan Wolff*, EP/EXPO/B/AFET/FWC/2009-01/Lot1/41, October 2012, 6 *et seq.*; *Bowring*, in: *Walter/von Ungern-Sternberg/Abushov* (eds.), *Self-Determination and Secession in International Law*, 157 *et seq.*; *Borgen*, *German Yearbook of International Law* 59 (2016), 115 *et seq.*; *Borgen*, *Oregon Review of International Law* 9 (2007), 477 (494 *et seq.*); *Wolfschwenger*, in: *Bellak/Devdariani/Harzl/Spieker* (eds.), *Governance in Conflict*, 65 *et seq.*; *Hightower*, in: *Franke/Guttieri/Civic* (eds.), *Understanding Complex Military Operations*, 46 *et seq.*; *Büscher*, in: *Fischer* (ed.), *Not Frozen!*, 25 *et seq.*; *Molcean/Verständig*, in: *Cornell/Jonsson* (eds.), *Conflict, Crime, and the State in Postcommunist Eurasia*, 129 *et seq.*; *Belitser*, in: *Bebler* (ed.), “Frozen Conflicts” in Europe, 45 *et seq.*; *Finck*, in: *Hohmann/Joyce* (eds.), *International Law’s Objects*, 162 *et seq.*

particularly highlighting the in principle given desirability to integrate also the respective non-recognized territorial entities into the international economic legal order, these transboundary business prospects by other countries and their economic actors should, from their perspective, preferably also be secured and stabilized on the basis of international legal rules applying to transnational trade and investment transactions in order to, among others, facilitate a reduction of transaction costs.¹¹

These expectations for example refer to, and look at, the transnational normative framework dealing with foreign investments; already in light of the fact that the promotion as well as protection of foreign investments and thus the intention to create favorable conditions for investments and to stimulate private initiative on the basis of a stable, predictable and secure normative environment is among the primary purposes pursued by this transboundary legal regime.¹² However, they most certainly also first and foremost include the legal order of the World Trade Organization (WTO), that is well-known to be fundamentally aimed at ensuring legal certainty in international trade as a necessary prerequisite “to create the predictability needed to plan future trade”¹³ and for the optimal allocation of economic resources by its at present already 164 members as well as in particular also by private business actors to achieve the welfare-creating effects of international economic relations.¹⁴

Second, looking at the present issue from the internal economic – and, equally important, in fact also political – perspective of the public authorities and the population of the non-recognized territorial entities in question, it seems appropriate to recall that a functioning – and preferably prosperous – economy is of paramount importance in order to achieve and provide public services and other welfare gains for the population as well as to foster the social stability of the political community as a whole.¹⁵ While this finding most certainly applies in principle

- 11 Generally thereto, e.g., *Jackson*, *Journal of International Economic Law* 1 (1998), 1 (5) (“They [the legal rules of world trade and investment law] may provide the only predictability or stability to a potential investment or trade-development situation. Without such predictability or stability, trade and investment flows might be even more risky and therefore more inhibited than otherwise.”).
- 12 See thereto as well as on other purposes pursued by international investment law for example *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, paras. 161 *et seq.*; *Siemens v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, para. 81; *Dolzer/Schreuer*, *Principles of International Investment Law*, 22 (“Thus, the purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide stability and predictability in the sense of an investment-friendly climate.”).
- 13 GATT Panel, *United States – Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted on 17 June 1987, L/6175 - 34S/136, para. 5.2.2; see in this regard also, e.g., GATT Panel, *The United States Manufacturing Clause*, Report of the Panel adopted on 15/16 May 1984, L/5609-31S/74, para. 39 (“The Panel further noted that one of the basic aims of the General Agreement was security and predictability in trade relations among contracting parties.”); WTO, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel of 11 December 1999, WT/DS152/R, para. 7.75 (“Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators.”); *Jackson*, *Journal of International Economic Law* 1 (1998), 1 (5); *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 3, paras. 14 *et seq.*; as well as Article 3.2 Dispute Settlement Understanding of the WTO: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”).
- 14 Specifically on the interests of private economic actors as mirrored in the purposes pursued by the WTO legal order see for example WTO, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel of 11 December 1999, WT/DS152/R, para. 7.73 (“However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market place. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.”); *Tietje/Nowrot*, *European Business Organization Law Review* 5 (2004), 321 (327 *et seq.*), with further references.
- 15 On this issue specifically in the context of non-recognized territorial entities see for example *Kolstø/Blakkisrud*, *Europe-Asia Studies* 60 (2008), 483 (493 *et seq.*); *Caspersen*, in: *Caspersen/Stansfield* (eds.), *Unrecognized States in*

equally to both recognized countries and stabilized de-facto regimes, striving for economic stability and prosperity appears to be of particular importance for territorial entities that potentially suffer from “economic costs of non-recognition”,¹⁶ are still in the phase of seeking recognition by the international community of states and, in the course of this endeavor as well as to enhance their chances of success, often engage in imitating effective statehood, thereby conveying the message to the world that they have created viable and sustainable territorial entities with state-like and stable organizational structures worthy of international recognition.¹⁷

In addition, establishing and maintaining political and legal conditions for a prosperous economy might also have the desirable effect of reducing the economic dependence of the territorial regime in question on its respective patron state(s); the existence of which is – within and far beyond the post-Soviet realm – a quite common feature of non-recognized entities in frozen conflict situations.¹⁸ Considering furthermore that economic activities and relations are today first and foremost – if not even by now almost inherently – also international and thus transboundary in character,¹⁹ with a stable and prosperous business environment in political communities therefore also being dependent upon a closer integration into the international economic system, it becomes obvious that the category of territorial actors here at issue – most certainly including their private commercial players – normally also have a strong interest in establishing and intensifying trade and investment relations with other countries; again preferably on the more secure basis of international normative regulations in the realm of global trade and investment law, with the additional (political and economic) “bonus” of a potential elevation of their international status that follows for non-recognized entities from entering into respective transboundary treaty arrangements.

Against this background, the remaining parts of this contribution are intended to describe and evaluate the normative approaches adopted by the central multilateral regime in the area of international trade law, namely the legal order established by the WTO, in order to address and cope with the factual and legal challenges arising in connection with non-recognized states and other more peculiar territorial entities. Thereby, in order to illustrate these approaches, the present contribution will primarily focus on four aspects that seem to be among the particularly relevant – and revealing – regulatory issues in the present context. In the first part, an assessment will be given of how the issue of state succession with regard to membership in international organizations is currently addressed in the WTO, including a brief historical overview of the respective practice under the former General Agreement on Tariffs and Trade (GATT 1947) (B.). The subsequent second section is devoted to an evaluation of the comparatively “liberal” WTO rules as well as practice on membership and their relevance in the present context, in particular the option also granted to separate customs territories to accede to the WTO Agreement under its Article XII:1, including some of the challenges resulting from this more inclusive approach (C.).

In the third part, attention will be drawn to the possibility for invocations under Article

the International System, 73 (79); *Isachenko*, *The International Spectator* 44 (No. 4, 2009), 61 *et seq.*

16 *Pegg*, *International Society and the De Facto State*, 43. See in this connection also specifically with regard to potential reservations on the side of foreign investors *Caspersen*, in: *Caspersen/Stansfield* (eds.), *Unrecognized States in the International System*, 73 (82) (“Their lack of recognition and precarious position makes them [unrecognized states] highly unattractive to foreign investors [...]”); as well as by *Kolsto/Blakkisrud*, *Europe-Asia Studies* 60 (2008), 483 (505) (“foreign investors will be wary of dealing with the separatists”).

17 On this phenomenon or strategy see for example already *Caspersen*, in: *Caspersen/Stansfield* (eds.), *Unrecognized States in the International System*, 73 *et seq.*

18 See thereto, e.g., *Caspersen*, in: *Caspersen/Stansfield* (eds.), *Unrecognized States in the International System*, 73 (82 *et seq.*); *Kolsto/Blakkisrud*, *Europe-Asia Studies* 60 (2008), 483 (507).

19 On this perception see, e.g., *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 1, paras. 19 and 58 *et seq.*

XIII of the WTO Agreement with regard to the non-application of multilateral trade agreements of the WTO legal order between individual WTO members with particular emphasis on the relevance of this provision in the context of non-recognized territorial entities (D.). Finally, in the fourth section, the contribution attempts to address, from the perspective of WTO law, some of the legal issues potentially arising from the not infrequently uncertain and quite strained relations between a secessionist non-recognized territorial entity and the country from which it has – or tries to – withdraw(n). Among them are questions of attribution to the country (and WTO member) in question with regard to acts adopted by authorities in secessionist non-recognized territorial entities that contravene obligations under WTO law as well as related options to take recourse to the WTO dispute settlement mechanism (E.).

B. Looking for an Easy Way In: Is There Any “Automatism” with Regard to WTO Membership?

Bearing in mind that, ever since the global processes of decolonization came (largely) to an end,²⁰ most new recognized as well as unrecognized states have emerged in recent years and decades as a result of a secession from, or dissolution of,²¹ another country, one of the first questions that might arise in connection with the position of non-recognized territorial entities in the post-Soviet space from the perspective of WTO law concerns the issue whether there is under public international law any “automatism” with regard to WTO membership for these actors, at least as far as the respective other territorial affected country – like in the present context for example currently in the case of Georgia, Moldova and Ukraine – happens or happened to be itself a member of this international organization. Measuring the treatment that this issue receives under current public international law appears to be of particular importance also to the relevant non-recognized territorial actors, considering the fact that it is generally recognized that “gaining membership [in an international organization] is seen as a device for affirmation and legitimacy in the international community”.²²

In order to approach this question in a more systematic way, it seems useful to distinguish initially between two main scenarios. The first of them assumes that the respective territorial entities in the post-Soviet space have not (yet) acquired statehood and thus also as of today continue to form a part of the respective country from whom they have intended to secede. Despite the in principle quite inclusive approach to membership as a notable characteristic of the WTO,²³ there seem to be no mechanisms and concepts available in the realm of public international law that would allow under this first scenario for an automatic or quasi-automatic entitlement to membership in circumvention of the formal accession process in accordance with Article XII WTO Agreement²⁴. To the contrary, the second scenario presupposes that, based on the declaratory theory of recognition, at least some of the territorial entities in question have

20 See thereto for example *Khan*, Decolonization, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 12 March 2019), with further references.

21 On the distinction between secession and dissolution/dismemberment see, e.g., *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I, Introduction and Part 1, 219 *et seq.*; *Dumberry*, *Journal of International Dispute Settlement* 6 (2015), 74 (77).

22 *Mathias/Trengove*, in: Cogan/Hurd/Johnstone (eds.), *The Oxford Handbook of International Organizations*, 962 (984).

23 See thereto *infra* under C.

24 On this accession process see also *infra* under C.

in the meantime acquired statehood and thus the status of countries under public international law. Adopting this second perspective opens up the opportunity to consider a potential “automaticism” with regard to WTO membership by taking recourse to the international normative regime on the succession of states in respect of treaties.

And indeed, already in light of the fact that the agreement establishing the WTO undoubtedly constitutes an international multilateral treaty, it seems appropriate to start with the observation that the continuation of treaty rights and obligations – and the membership in an international organization founded on the basis of an agreement under international law can very well be regarded first and foremost also as a bundle of treaty rights and obligations – on the occasion of a succession of states, understood as the replacement of one country by another in the responsibility for the international relations of territory,²⁵ is in principle not only conceivable, but in fact even considered to be the general rule in accordance with Article 34 (1) lit. a of the 1978 Vienna Convention on Succession of States in respect of Treaties in situations of secessions. Furthermore, its Article 4 lit. a explicitly foresees that this Convention in principle also applies to treaties that are the constituent instrument of an international organization such as the WTO.

Despite these – at least from the perspective of some interested non-recognized states in the post-Soviet space – probably at first sight rather encouraging findings, however, there seems to be no less than four reasons to assume that caution is warranted when considering the possible existence of an automatic or quasi-automatic entitlement to membership by way of state succession. First, it should be recalled that a broad consensus exists among international legal scholars that, already in light of relevant state practice, the general rule of automatic succession with regard to multilateral and bilateral treaties as enshrined in Article 34 of the 1978 Vienna Convention on Succession of States in respect of Treaties does currently not reflect customary international law²⁶ and is even considered to be one of the reasons for the comparatively low number of ratifications of this normative ordering treaty²⁷. Second, and aside from these more overarching observations, the wording of the already mentioned Article 4 lit. a itself appears to acknowledge a special situation and character of those treaties that serve as founding instruments of international organizations by stipulating that the application of the 1978 Vienna Convention on Succession of States in respect of Treaties is “without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization”.²⁸

In line with this stipulation, and this is the third consideration that needs to be taken into account also in the present context, there is a quite general agreement to be found in the scholarly literature on public international law that, due to its rather “personal” character,²⁹ membership in an international organization has to be considered as a special category of

25 See Article 2 (1) lit. b of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, reprinted in: 1946 U.N.T.S. 3. See also, e.g., *Crawford*, *Brownlie’s Principles of Public International Law*, 423.

26 See thereto for example *Crawford*, *Brownlie’s Principles of Public International Law*, 438 *et seq.*; *von Arnould*, *Völkerrecht*, 46; *Tams*, *ICSID Review – Foreign Investment Law Journal* 31 (2016), 314 (326); *Aust*, *Modern Treaty Law and Practice*, 321 *et seq.*; *Klabbers*, *Leiden Journal of International Law* 11 (1998), 345 (348 *et seq.*).

27 On this perception see, e.g., *Vagts*, *Virginia Journal of International Law* 33 (1993), 275 (287-288); *O’Connell*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 39 (1979), 725 (733); *Tams*, *ICSID Review – Foreign Investment Law Journal* 31 (2016), 314 (326).

28 See thereto also, e.g., *Bühler*, *State Succession and Membership in International Organizations*, 30 *et seq.*

29 On this perception see, e.g., *Jenks*, *British Yearbook of International Law* 29 (1952), 105 (134) (“The membership of an international organization has a personal quality and it is both reasonable and psychologically sound and wise that a new member of the international community should be required to apply for membership, [...]”); *Zemanek*, *Recueil des Cours* 116 (1965), 181 (253) (“Membership of international organizations is a personal right to which, in principle, succession is not possible.”); *Crawford*, *Brownlie’s Principles of Public International Law*, 443 (“a state’s membership of an international organization is personal in character”).

treaty participation, the position and continuation of which is exclusively determined by the specific provisions of the constituent document of the individual organization in question and the practice of its competent organs.³⁰ Admittedly, there are a (very limited) number of international organizations that provide in their statutes for the possibility of new states to acquire membership by succession.³¹ Furthermore, also a number of other respective actors, among them the United Nations and some international financial institutions have on certain occasions in the past been guided in their relevant practice by more flexible approaches³² based on “political pragmatism”³³. However, viewed from an overarching perspective, the incontrovertible fact remains that most international organizations have at least most of the time followed the “orthodox” approach precluding state succession to membership.

Fourth, this last-mentioned finding in particular also applies to the practice of the WTO whose constituent treaty does currently not foresee the option of membership by state succession. In addition, ever since that international organization has legally emerged on 1 January 1995, also in practice on no occasion has membership for new states automatically or quasi-automatically been granted on the basis of succession. Consequently, even assuming that some of the respective non-recognized territorial entities in the post-Soviet realm have by now acquired statehood, these actors would not enjoy the more “easy”, quasi-automatic option of membership in the WTO based on state succession and thus could not avoid the formal accession process in accordance with Article XII WTO Agreement.

That said, it seems nevertheless appropriate to at least briefly recall in the present context that the respective situation of, and legal venues for, accession used to be slightly different under the former General Agreement on Tariffs and Trade as adopted on 30 October 1947 and in effect since 1 January 1948 (GATT 1947). In addition to the standard accession procedure as outlined in Article XXXIII GATT 1947 that was in principle quite comparable to the current process under Article XII WTO Agreement,³⁴ the former GATT 1947 also provided in its Article XXVI:5 lit. c for a mechanism that allowed, in case all of the conditions stated in this provisions were fulfilled, for the right to an automatic accession³⁵ to this multilateral trade regime in a quasi-succession context. This provision stipulated that “[i]f any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed

30 See for example *Crawford*, *Brownlie’s Principles of Public International Law*, 442 *et seq.*; *von Arnould*, *Völkerrecht*, 46; *Jenks*, *British Yearbook of International Law* 29 (1952), 105 (133 *et seq.*); *Zemanek*, *Recueil des Cours* 116 (1965), 181 (253); *Krajewski*, *Völkerrecht*, 152; *Tams*, *ICSID Review – Foreign Investment Law Journal* 31 (2016), 314 (321 *et seq.*); *Schermers/Blokker*, *International Institutional Law*, § 114; *Zimmermann*, *State Succession in Treaties*, para. 16, in: *Wolfrum* (ed.), *Max Planck Encyclopedia of Public International Law*, available under: <www.mpepil.com/> (accessed on 12 March 2019); *Mathias/Trengove*, in: *Cogan/Hurd/Johnstone* (eds.), *The Oxford Handbook of International Organizations*, 962 (972); *Verdross/Simma*, *Universelles Völkerrecht*, §§ 994 *et seq.*; see thereto also, e.g., *Bühler*, *State Succession and Membership in International Organizations*, 32 *et seq.*, with additional references.

31 For a more details evaluation see, e.g., *Bühler*, *State Succession and Membership in International Organizations*, 26 *et seq.*, with further references.

32 See thereto for example *Williams*, *International and Comparative Law Quarterly* 43 (1994), 776 *et seq.*; *Bühler*, *State Succession and Membership in International Organizations*, 37 *et seq.*; *Tams*, *ICSID Review – Foreign Investment Law Journal* 31 (2016), 314 (322-323); *Klabbers*, *International Organizations Law*, 99 *et seq.*; *Schermers/Blokker*, *International Institutional Law*, §§ 103 *et seq.*; *Zimmermann*, *State Succession in Treaties*, para. 16, in: *Wolfrum* (ed.), *Max Planck Encyclopedia of Public International Law*, available under: <www.mpepil.com/> (accessed on 12 March 2019).

33 *Bühler*, *State Succession and Membership in International Organizations – Legal Theory versus Political Pragmatism*, 307 *et seq.* and *passim*.

34 See *Davis/Wilf*, in: *Martin* (ed.), *The Oxford Handbook of the Political Economy of International Trade*, 380 (390).

35 See Analytical Index of the GATT, Article XXVI, p. 920, available under: <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm> (accessed on 12 March 2019).

to be a contracting party”. Article XXVI:5 lit. c GATT 1947 thus allowed the covered customs territories to automatically become contracting parties to this agreement solely on the basis of a sponsorship by their former “motherlands” as well as – arguably – the acceptance of the territorial actor in question³⁶ on those terms and conditions that the respective sponsoring contracting party has originally accepted on their behalf, without, unlike the accession process under Article XXXIII GATT 1947, having first to negotiate and undertake potentially more far-reaching concessions and obligations itself.³⁷

This mechanism proved to be of notable relevance in the processes of decolonization by enabling a considerable number of newly independent states that were former colonies to quasi-automatically become contracting parties of the GATT 1947 upon sponsorship of the former colonial power in question. In order to illustrate its practical importance, let it suffice here to recall that of the 128 contracting parties of the former GATT 1947 as of 1 January 1995, no less than 63 of them in fact succeeded to this legal status on the basis of Article XXVI:5 lit. c GATT 1947.³⁸ Nevertheless, ever since the entry into force of the WTO Agreement on 1 January 1995, this provision has ceased to be applicable,³⁹ being replaced by the single formal accession process in accordance with Article XII WTO Agreement that, as indicated above, does not provide for any alternative, quasi-automatic option of membership in the WTO based on state succession or related concepts.

C. “Let the Non-Recognized Territorial Entities Come to Me”: The Inclusive Approach to WTO Membership

The analysis in the previous section has revealed, that there apparently exists neither under general public international law nor under the applicable specific WTO law any “automatism” with regard to membership in this international organizations for non-recognized territories in the post-Soviet space.⁴⁰ Nevertheless, this finding should not lead to the conclusion that also a potential application by these entities for WTO membership based on the currently available accession procedure in accordance with Article XII WTO Agreement necessary presents itself in principle as a futile undertaking.

Whereas the clear majority of international organizations at the global and regional level

36 See thereto *Fabbricotti*, in: Wolfrum/Stoll/Hestermeyer (eds.), WTO – Trade in Goods, Article XXVI GATT, para. 16; Analytical Index of the GATT, Article XXVI, p. 921 *et seq.*, available under: <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm> (accessed on 12 March 2019); *Kunugi*, *American Journal of International Law* 59 (1965), 268 (285) (“Succession to membership in GATT is not automatic in the sense of an automatic succession regardless of the intention of a new state.”); see also in this connection Article 10 (2) of the 1978 Vienna Convention on Succession of States in respect of Treaties: “If a treaty provides that, on the occurrence of a succession of States, a successor State shall be considered as a party to the treaty, that provision takes effect as such only if the successor State expressly accepts in writing to be so considered.”.

37 *Fabbricotti*, in: Wolfrum/Stoll/Hestermeyer (eds.), WTO – Trade in Goods, Article XXVI GATT, paras. 15 and 21.

38 See Analytical Index of the GATT, Article XXVI, p. 919, available under: <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm> (accessed on 12 March 2019).

39 See also *Fabbricotti*, in: Wolfrum/Stoll/Hestermeyer (eds.), WTO – Trade in Goods, Article XXVI GATT, para. 17; *Davis/Wilf*, in: Martin (ed.), *The Oxford Handbook of the Political Economy of International Trade*, 380 (390); *Schorkopf*, in: Wolfrum/Stoll/Kaiser (eds.), WTO – Institutions and Dispute Settlement, Article XII WTO Agreement, para. 1.

40 See thereto *supra* under B.

still only allow for membership by states,⁴¹ thus excluding all other actors in the international system, the WTO is – in the same way as the former GATT 1947 – guided by a considerably more inclusive approach in this regard. WTO membership is not contingent upon statehood. Not only is the supranational organization of the EU considered to be one of the original members of the WTO pursuant to Article XI:1 WTO Agreement.⁴² Rather, and of particular interest for the respective territorial actors in the post-Soviet realm, the composition of the current and future membership of the WTO also includes and is open to separate customs territories possessing full autonomy in the conduct of their external commercial relations in accordance with Article XII:1 WTO Agreement.

There are currently three WTO members that belong to this last-mentioned category of separate customs territories, all of them being geographically and politically situated in what might be referred to as the broader “Chinese realm”. The first one is Hong Kong, China, which became a contracting party of the former GATT 1947 upon sponsorship of the United Kingdom already on 23 April 1986 in accordance with Article XXVI:5 lit. c GATT 1947⁴³ and subsequently emerged on 1 January 1995 as one of the original WTO members pursuant to Article XI:1 WTO Agreement.⁴⁴ Furthermore, and with basically the same legal and political background, Macao, China acquired the status of a contracting party of the former GATT 1947 upon sponsorship of Portugal on 11 January 1991, again originally on the basis of Article XXVI:5 lit. c GATT 1947 and, since 1 January 1995, in accordance with Article XI:1 WTO Agreement.⁴⁵

The third separate customs territory is the Republic of China, more commonly known as Taiwan,⁴⁶ which has been a member of WTO since 1 January 2002 under the name “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”, following a decades-long odyssey on a long and winding road that bore witness to, among others, China under the Nationalist government being one of the original contracting parties of GATT 1947 only to terminate its participation in March 1950 after the withdrawal of the forces under *Chiang Kai-shek* to Taiwan, followed by an application by Taiwan for observer status in 1965; a status that was initially granted, but subsequently revoked in November 1971 as a consequence of the recognition of the government of the People’s Republic of China as the legitimate representative of this country by the United Nations. Taiwan’s ultimately successful application for membership as a separate customs territory itself dates from January 1990 and was based on the then ordinary accession procedure under Article XXXIII GATT 1947.⁴⁷

41 On this finding see, e.g., *Schermers/Blokker*, International Organizations or Institutions, Membership, paras. 2 and 24, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 12 March 2019); *Schermers/Blokker*, International Institutional Law, §§ 66 and 71.

42 See thereto for example *Tietje*, in: Tietje (ed.), Internationales Wirtschaftsrecht, § 3, para. 24; *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 115 *et seq.*; *Herdegen*, Principles of International Economic Law, 203.

43 On the previous relevance of this provision see already *supra* under B.

44 Generally on the international legal position of Hong Kong see for example *Sun*, Chinese Journal of International Law 7 (2008), 339 *et seq.*; *Malanczuk*, Hong Kong, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 12 March 2019), with further references.

45 Concerning the historical and international legal background of Macao see, e.g., *Kugelmann*, Macau, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 12 March 2019), with additional references.

46 Generally on the background and international legal status of Taiwan see for example *Ahl*, Taiwan, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 12 March 2019), with additional references.

47 On the history of China/Taiwan in the GATT 1947 and its subsequent application for membership in January 1990 see for example *Fisler Damrosch*, Columbia Business Law Review 1992, 19 (21 *et seq.*); *Feinerman*, Columbia Business Law Review 1992, 39 (40 *et seq.*); *Chan*, Indiana Journal of Global Legal Studies 2 (1994), 275 (276 *et seq.*), with further references.

The case of this last-mentioned actor seems to be particularly noteworthy, not the least from the perspective of non-recognized territorial entities in the post-Soviet realm, since Taiwan is apparently – ever since the provisional application of the GATT 1947 from 1 January 1948 onwards until today – the only separate customs territory that has been admitted on the basis of Article XXXIII GATT 1947 as well as, subsequently, Article XII WTO Agreement, and thus without direct sponsorship by its former “motherland” or colonial power under Article XXVI:5 lit. c GATT 1947.⁴⁸

That said, it should not be left unmentioned that the membership in the WTO of Taiwan – and in the future potentially other non-recognized territorial entities – also gives rise to certain challenges. To mention but one example, it is well-known that a considerable number of provisions enshrined in the WTO legal order establish normative ties to international standard-setting organizations and, in this regard, encourage or even require WTO members to participate in the work of these organizations.⁴⁹ Article 3.4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), for example, stipulates that “[m]embers shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures”. The General Agreement on Trade in Services (GATS) provides in paragraph 7 lit. a of its Annex on Telecommunications that “[m]embers recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization”. These as well as numerous other provisions of the WTO legal order pose a challenge to actors like Taiwan because the respective international standardization organizations and other bodies referred to in these regulations normally do not foresee a membership or other comparable participatory options for non-recognized territorial entities. Apparently, the necessary synchronization between these provisions and the special situation of non-recognized WTO members has never been contemplated in the drafting and negotiation phase of the WTO Agreement during the Uruguay Round.⁵⁰

However, and despite the undeniable challenges that non-recognized territorial entities as WTO members are potentially faced with, the equally incontrovertible fact remains that the question as to the existence of a realistic membership perspective in the WTO appears to be of particular relevance also for the respective actors in the post-Soviet realm. This is not only due to the generally shared perception that acquiring membership in a global international governmental organizations like the WTO can be considered as notably enhancing the political and legal status of the actor in question in the international community.⁵¹ Rather, it also reflects

48 On this observation see also already *Charnovitz*, *Asian Journal of WTO and International Health Law and Policy* 1 (2006), 401 (405).

49 Generally thereto *Tietje*, *German Yearbook of International Law* 42 (1999), 26 (40 *et seq.*); *Tietje*, *Internationalisiertes Verwaltungshandeln*, 253 *et seq.* and *passim*; *Nowrot*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 2, paras. 88 *et seq.*

50 On this issue see also already *Charnovitz*, *Asian Journal of WTO and International Health Law and Policy* 1 (2006), 401 (414 *et seq.*).

51 See thereto already briefly *supra* under B. Specifically with regard to Taiwan’s accession to the WTO see also, e.g., *Hsieh*, *Journal of World Trade* 39 (2005), 1195 (1220) (“As a non-recognized state, Taiwan’s accession into the WTO is a major diplomatic and economic breakthrough; this is especially true since it was ousted from the United Nations and

and supports a new reconceptualized understanding of sovereignty in the international system⁵² that applies in principle to recognized states and non-recognized territorial entities alike and has been, with regard to its conceptual core, quite vividly expressed and summarized already more than two decades ago by *Abram Chayes* and *Antonia Handler Chayes*: “It is that for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.”⁵³

Consequently, in order to assess the current options and chances for non-recognized territorial entities in the post-Soviet space such as Nagorny-Karabakh or Pridnestrovie to acquire membership in the WTO, it seems, if viewed from a legal perspective, in a first step appropriate to take a closer look at the requirements that a respective actor has to fulfill in order to qualify as a separate customs territory possessing full autonomy in the conduct of its external commercial relations in the sense of Article XII:1 WTO Agreement.⁵⁴ The term “customs territory” is defined in Article XXIV:2 GATT 1994 as “any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories”. Concerning the additional prerequisite of “full autonomy in the conduct of external commercial relations”, the text of the WTO Agreement and its Annexes does not provide for any comparable clarification. Nevertheless, it can legitimately be inferred from the accession of Taiwan to the WTO that this condition does not presuppose an international legal recognition of the respective autonomy by the territorially affected country or third states. Rather, the existence of a *de facto* autonomy in the conduct of external economic relations seems to be sufficient to fulfill this criterion; undoubtedly an in principle encouraging finding for interested non-recognized territorial entities in the post-Soviet realm.⁵⁵

That said, it should not be left unmentioned that the exact legal definition of the term “separate customs territory possessing full autonomy in the conduct of its external commercial relations” in accordance with Article XII:1 WTO Agreement is ultimately only of rather limited importance when assessing the chances of a future WTO membership for the territorial entities here at issue. After all, the WTO legal order does not provide for any judicial or quasi-judicial review procedure that would allow for an authoritative determination of whether a respective territorial actor fulfills the prerequisite stipulated in this provision.⁵⁶ Furthermore, and closely

its affiliated organizations in the 1970s.”).

- 52 Generally on the reconceptualized understanding of sovereignty in current public international law see for example *Delbrück*, *Indiana Journal of Global Legal Studies* 9 (2002), 401 *et seq.*; *Delbrück*, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 11 (2001), 1 (31 *et seq.*); *Jackson*, *American Journal of International Law* 97 (2003), 782 *et seq.*; *Ruffert*, *Globalisierung als Herausforderung*, 48 *et seq.*; *Schachter*, in: MacDonald (ed.), *Essays in Honour of Wang Tieya*, 671 *et seq.*; *Nowrot*, *Das Republikprinzip in der Rechtsordnungsgemeinschaft*, 632 *et seq.*; *Fassbender*, in: Walker (ed.), *Sovereignty in Transition*, 115 *et seq.*
- 53 *Chayes/Handler Chayes*, *The New Sovereignty*, 27; see also, e.g., *Delbrück*, in: Alexy/Laux (eds.), *50 Jahre Grundgesetz*, 65 (83); *Peters*, *Elemente einer Theorie der Verfassung Europas*, 138; *Tietje*, *Deutsches Verwaltungsblatt* 118 (2003), 1081 (1095 *et seq.*); *Slaughter*, in: Held/Koenig-Archibugi (eds.), *Global Governance*, 35 (64) („sovereignty is relational rather than insular, in the sense that it describes a capacity to engage rather than a right to resist“); *Nowrot*, *Global Governance and International Law*, 19 *et seq.*; *Besson*, in: Kreis (ed.), *Die Schweizer Neutralität*, 95 (97 *et seq.*); *Röben*, *Außenverfassungsrecht*, 184 *et seq.*; *Ruffert*, in: Möllers/Voßkuhle/Walter (eds.), *Internationales Verwaltungsrecht*, 395 (415 *et seq.*).
- 54 On this issue see also for example *Schorkopf*, in: Wolfrum/Stoll/Kaiser (eds.), *WTO – Institutions and Dispute Settlement*, Article XII WTO Agreement, paras. 4 *et seq.*
- 55 See in this connection also concerning a possible WTO membership of the Turkish Republic of Northern Cyprus the finding by *Tani*, *Asper Review of International Business and Trade Law* 12 (2012), 119 (140) (“Still, the ambiguity of the term suggests a potential solution to the TRNC, since it was the key to bringing about separate membership within the international community without requiring recognition as a sovereign state [referring to the case of Taiwan].”).
- 56 See thereto also already *Charnovitz*, *Asian Journal of WTO and International Health Law and Policy* 1 (2006), 401 (405).

related to this finding, it is well-known that – in the same way as with other international and supranational organizations – no legal entitlement of accession to the WTO exists for countries or separate custom territories, even if they fulfill the requirements *ratione personae* under Article XII:1 WTO Agreement. Whether or not to grant membership in the WTO to an applying recognized state or non-recognized territorial entity presents itself in the end as a question, the answer to which depends primarily upon a political decision by the existing WTO members.

This last-mentioned observation already serves as a clear indication for the importance, also in the present context, of the specific decision-making procedures governing the WTO accession process. In light of the way the issue of accession and in particular individual applications are dealt with, it has already rightly been emphasized that acquiring the status of a WTO member is often “not an easy matter”.⁵⁷ And indeed, the accession process, often said to be divided into four different phases,⁵⁸ presents itself for many applicants as not infrequently a quite lengthy and complex undertaking, in particular since – as already indicated by the wording of Article XII:1 WTO Agreement⁵⁹ – the applying country or separate customs territory is expected to negotiate the specific terms of accession concerning, among others, market access for trade in goods and services with all of the existing WTO members. For that purpose, a specific WTO working party is established by the General Council that is open to all interested members of the WTO. In general, the terms of reference of these WTO working parties are “to examine the application for accession to the WTO under Article XII and to submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession”.⁶⁰ Aside from the discussions taking place in the WTO working party, the accession process also involves bilateral negotiations between the applicant government and individual WTO members with the aim to identify and agree on concessions and commitments on market access for goods and services; a process that can at times be quite demanding and, as a result of that, rather time-consuming.⁶¹

In addition to the challenges frequently arising in connection with the negotiations during the accession process itself, another important issue – for various reasons in particular also for non-recognized entities intending to become a member of the WTO – concerns the question as to who ultimately has to agree to, and thus can potentially also prevent, the successful accession of a country or separate customs territory to the WTO. Article XII:2 WTO Agreement stipulates in this regard that “[d]ecisions 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”. However, as early as in 1995 the General Council, who is also competent to take decisions on accessions already in light of Article IV:2

57 *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 118; see also, e.g., *Matsushita/Schoenbaum/Mavroidis/Hahn*, The World Trade Organization, 13 („Accession to the WTO is a difficult and time-consuming process.“).

58 See thereto the description and information provided by the WTO under: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm#join> (accessed on 12 March 2019); *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 119 *et seq.* The four phases are termed by the WTO as the “tell us about yourself” phase, the “work out with us individually what you have to offer” phase, the “let’s draft membership terms” phase as well as finally the “decision” phase.

59 Article XII:1 WTO Agreement: “may accede to this Agreement, on terms to be agreed between it and the WTO”.

60 See WTO, Accession to the World Trade Organization, Procedures for Negotiations under Article XII, Note by the Secretariat, WT/ACC/1 of 24 March 1995, para. 5.

61 For a more detailed description and assessment of the WTO accession process see, e.g., WTO, Accession to the World Trade Organization, Procedures for Negotiations under Article XII, Note by the Secretariat, WT/ACC/1 of 24 March 1995; *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 118 *et seq.*; *Schorkopf*, in: Wolfrum/Stoll/Kaiser (eds.), WTO – Institutions and Dispute Settlement, Article XII WTO Agreement, paras. 10 *et seq.*; *Hilf*, in: Hilf/Oeter (eds.), WTO-Recht, § 6, paras. 45 *et seq.*; *Herrmann/Weiß/Ohler*, Welthandelsrecht, paras. 162 *et seq.*; *Qureshi/Ziegler*, International Economic Law, 331 *et seq.*

WTO Agreement,⁶² decided to clarify (or in fact partially modify) the operation of this provision by stating that also in matters of accession “the General Council will seek a decision in accordance with Article IX:1” WTO Agreement.⁶³ This provision stipulates in its practically relevant parts that the WTO “shall continue the practice of decision-making by consensus followed under GATT 1947”. Furthermore, it should be recalled that the respective WTO working party that examines the individual application for accession adopts its decisions on the working party report and the draft protocol of accession in principle on the basis of the decision-making process provided for in Article IX:1 WTO Agreement.⁶⁴

A footnote to Article IX:1 WTO Agreement specifies with regard to the requirements arising from “consensus” that “[t]he body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision”. While this decision-making by consensus, which is in practice always taken recourse to in matters of accessions to the WTO,⁶⁵ imposes less stricter requirements than “consent”,⁶⁶ it nevertheless grants every individual WTO member the possibility to exercise a kind of right to “veto” and thus to prevent the adoption of a decision. Consequently, at least for those non-recognized territorial entities in the post-Soviet realm that have seceded, or are attempting to secede, in a more or less non-consensual process from a country that is now a WTO member, and that applies at present to the clear majority of these actors, the current chances for WTO membership seem to require, already in light of the respective decision-making processes, a rather sober assessment. In light of this finding, one feels tempted to add that the accession of Taiwan to the WTO in 2002 was surely to a certain extent facilitated by the fact that the People’s Republic of China was at the time, when the decision was taken in November 2001, not yet a member of the WTO.⁶⁷

62 The relevant part of Article IV:2 WTO Agreement stipulated: “In the intervals between the meetings of the Ministerial Conference, its functions shall be conducted by the General Council.” On the competence of the General Council to decide on matters of accession see also, e.g., *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 3, para. 26; *Van den Bossche/Zdouc*, *The Law and Policy of the World Trade Organization*, 120.

63 WTO, *Decision-Making Procedures under Article IX and XII of the WTO Agreement*, Statement by the Chairman as agreed by the General Council on 15 November 1995, WT/L/93 of 24 November 1995.

64 *Charnovitz*, *Asian Journal of WTO and International Health Law and Policy* 1 (2006), 401 (406).

65 See thereto, e.g., *Van den Bossche/Zdouc*, *The Law and Policy of the World Trade Organization*, 120; as well as with regard to the decision-practice of the WTO in general *Krajewski*, *Wirtschaftsvölkerrecht*, para. 235; *Ehlermann/Ehring*, *Journal of International Economic Law* 8 (2005), 51 (55).

66 On the difference between consent and consensus and the importance as well as implications of the decision-making by consensus in the work of the WTO see for example *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 3, para. 31; *Tietje*, in: *Dicke/Fröhlich* (eds.), *Wege multilateraler Diplomatie*, 12 *et seq.*; *Qureshi/Ziegler*, *International Economic Law*, 322 *et seq.*; *Krajewski*, *Wirtschaftsvölkerrecht*, paras. 233 *et seq.*; *Tijmes-Lhl*, *World Trade Review* 8 (2009), 417 *et seq.*; *Ehlermann/Ehring*, *Journal of International Economic Law* 8 (2005), 51 *et seq.*; *Hilf*, in: *Hilf/Oeter* (eds.), *WTO-Recht*, § 6, paras. 34 *et seq.*; *Van den Bossche/Zdouc*, *The Law and Policy of the World Trade Organization*, 146 *et seq.*; as well as generally *Wolfrum/Pichon*, *Consensus*, paras. 1 *et seq.*, in: *Wolfrum* (ed.), *Max Planck Encyclopedia of Public International Law*, available under: <www.mpepil.com/> (accessed on 12 March 2019), with additional references.

67 For a discussion of some of the issues and challenges arising in connection with the current WTO membership of both the People’s Republic of China and Taiwan in the WTO, in particular also as far as the relations between these two actors are concerned, see, e.g., *Hsieh*, *Journal of World Trade* 39 (2005), 1195 *et seq.*; *Kong*, *Journal of International Economic Law* 5 (2002), 747 *et seq.*; *Mo*, *Chinese Journal of International Law* 2 (2003), 145 *et seq.*, each with further references.

D. “I Won’t be a Party to That”: Possible Reactions by Individual WTO Members under Article XIII WTO Agreement

Although the analysis undertaken in the previous section has revealed, in particular in light of the decision-making processes governing the practice of accession processes under Article XII WTO Agreement, only a comparative gloomy prospect for WTO membership of most, if not all, non-recognized territorial entities in the post-Soviet space in the foreseeable future,⁶⁸ there might nevertheless be something like a small “glimpse of hope” for these actors in the form of Article XIII WTO Agreement.

This provision concerns one of the legal options available to an individual WTO member who intends, for whatever reasons, to react rather reluctant and unfavorably to the accession of a country or a separate customs territory by providing for the possibility to invoke the non-applicability of the multilateral trade agreements of the WTO legal order in the bilateral relations between these two actors. Article XIII:1 WTO Agreement stipulates in this regard that the WTO Agreement itself as well as the multilateral trade agreements enshrined in Annex 1A foreseeing the respective agreements on trade in goods, in Annex 1B (GATS), in Annex 1C containing the Agreement on Trade -Related Aspects of Intellectual Property Rights (TRIPS) as well as in Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) “shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application”.

The regulatory content of this provision thus foresees that no substantive treaty rights and obligations as normally arising under the WTO legal order exist between the two WTO members concerned.⁶⁹ Thereby, Article XIII:2 and XIII:3 WTO Agreement make sufficiently clear, that Article XIII:1 cannot be invoked against, and thus the normative consequences associated with this provisions cannot take effect between, existing WTO members, but – in the same way as the historical predecessor to Article XIII WTO Agreement, the provision of Article XXXV GATT 1947 – remain confined to the context of accessions of new members. In this connection, Article XIII:3 WTO Agreement further specifies from a procedural perspective that an invocation of Article XIII:1 WTO Agreement against an applicant country or separate customs territory by an existing WTO member is only valid if the respective member “has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference”.⁷⁰ In recent decades, the practical relevance of this provisions in the overall normative framework of the multilateral trading systems seems to be decreasing. Whereas the predecessor of Article XIII WTO Agreement, the regulation of Article XXXV GATT 1947, was indeed invoked on more than eighty occasions before 1995,⁷¹ the mechanism under Article XIII WTO Agreement has – from 1995 until today – only been invoked on twelve

68 See *supra* under C.

69 Concerning the applicability of the institutional and procedural normative framework of the WTO between the two respective members see, e.g., *von Bogdandy/Wagner*, in: Wolfrum/Stoll/Kaiser (eds.), *WTO – Institutions and Dispute Settlement*, Article XIII WTO Agreement, para. 12.

70 See thereto also, e.g., *von Bogdandy/Wagner*, in: Wolfrum/Stoll/Kaiser (eds.), *WTO – Institutions and Dispute Settlement*, Article XIII WTO Agreement, para. 7 (“The norm is thus designed to give notice to all Members that another Member does not consent to the application of the WTO Agreement and the Annex 1 and 2 agreements between it and a new Member prior to the accession, and thus contributes to ensuring transparency during the accession process.”).

71 For details see Analytical Index of the GATT, Article XXXV, p. 1034 *et seq.*, available under: <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm> (accessed on 12 March 2019).

instances, ten of which were subsequently withdrawn. As of January 2018, only two invocations were still in force; the one initiated by Turkey against Armenia in November 2002 as well as the invocation by the United States against Tajikistan of December 2012.⁷²

Originally, the predecessor to Article XIII WTO Agreement, the provision of Article XXXV GATT 1947, was introduced into this multilateral legal regime governing transboundary trade relations in 1948 in order to meet concerns arising in connection with the possibility of accessions for new contracting parties under Article XXXIII GATT 1947 “merely” requiring a two-thirds majority and thus no unanimous agreement among the existing parties.⁷³ In particular, it was “then pointed out that as a result of this amendment it would be possible for two-thirds of the contracting parties to oblige a contracting party to enter into a trade agreement with another country without its consent”.⁷⁴ In order to remedy such a scenario, likely considered to be unduly restricting the sovereignty of existing members with regard to the design of their external economic relations,⁷⁵ the decision was taken by the contracting parties to introduce the bilateral “opting-out”-mechanism in accordance with Article XXXV GATT 1947.

While the scenario underlying this original motivation has, as of today, become largely theoretical in light of current WTO practice, in particular the practice of decision-making by consensus that also applies to accession processes under Article XII WTO Agreement,⁷⁶ the option granted to individual existing WTO members pursuant to Article XIII WTO Agreement might nevertheless exercise a potentially important steering function by facilitating the process of reaching a consensus on the admission of a country or separate customs territory; an effect that in principle actually has been visible from the very beginning of the 1947 GATT regime onwards.⁷⁷ Against this background it appears probably not too far-fetched to assume that, as of today, also the prospects of WTO membership for at least some of the non-recognized territorial entities in the post-Soviet space might potentially, and under certain circumstances, at least slightly be enhanced by the existence of the regulatory option made available to existing – and in this context for a variety of reasons possibly rather skeptical and disinclined – WTO members under Article XIII WTO Agreement.

72 See thereto WTO Analytical Index: Guide to WTO Law and Practice, Article XIII WTO Agreement, available under: <https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_e.htm> (accessed on 12 March 2019).

73 For further details see for example GATT, Application of Article XXXV to Japan, Origins of Article XXXV and Factual Account of its Application in the Case of Japan: Report by the Executive Secretary, GATT Doc. L/1466 of 11 May 1961, p. 1; *von Bogdandy/Wagner*, in: Wolfrum/Stoll/Kaiser (eds.), WTO – Institutions and Dispute Settlement, Article XIII WTO Agreement, para. 2; *Kunugi*, American Journal of International Law 59 (1965), 268 (283).

74 GATT, Application of Article XXXV to Japan, Origins of Article XXXV and Factual Account of its Application in the Case of Japan: Report by the Executive Secretary, GATT Doc. L/1466 of 11 May 1961, p. 1.

75 See in this connection also already, e.g., *von Bogdandy/Wagner*, in: Wolfrum/Stoll/Kaiser (eds.), WTO – Institutions and Dispute Settlement, Article XIII WTO Agreement, para. 2 (“the provision [Article XXXV GATT 1947] can be said to be founded on respect for national sovereignty”).

76 See thereto already *supra* under C.

77 See in this connection for example Analytical Index of the GATT, Article XXXV, p. 1033, available under: <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm> (accessed on 12 March 2019) (“In 1951, Cuba declared that it was voting for the accession of several countries but invoking Article XXXV against them. Also in 1951, the United States voted in favour of the accession of the Philippines while invoking Article XXXV. Although 14 of the 33 contracting parties in 1955 invoked Article XXXV with respect to Japan, Japan obtained a two-thirds majority in favour of its accession.”).

E. WTO Law Meets Semi-Successful Secessionist Movements: Some Thoughts on Certain Pertinent Legal Issues

Although identifying and assessing the legal options and chances of WTO membership undoubtedly presents itself as an important issue in the present context, it is most certainly not the only pertinent aspect. Measuring the position of, and normative challenges arising in connection with, non-recognized territorial entities in the post-Soviet space from the perspective of WTO law surely also suggests, among others, to address a number of related legal questions actually or at least potentially arising in connection with the not infrequently uncertain and often, if not even regularly, quite strained political and security relations between a secessionist non-recognized territorial entity that does not happen to be a WTO member on the one hand and the recognized country (and WTO member) from which this entity has – or attempts to – withdraw(n).

Thereby, in order to reduce also in this regard the existing factual and legal complexities by way of systemization,⁷⁸ it seems useful to basically distinguish between two main perspectives or dimensions. The first of them concerns the legality under WTO law of measures adopted in such a context by the WTO member facing a respective secessionist movement. Georgia, for example, has adopted domestic legislation prohibiting or restricting third-party economic activity by foreign nationals in the territories of Abkhazia and South Ossetia. The same applies, to mention but one additional example, to Ukraine with regard to the territories of the Donetsk People's Republic as well as the Luhansk People's Republic.⁷⁹

If we confine our assessment of applicable WTO law here to the normative regime on trade in goods, it seems appropriate to recall the conclusions legitimately to be drawn from the systematic interplay and connection between the obligation to grant most-favoured-nation treatment under Article I:1 GATT 1994, the national treatment rule pursuant to Article III GATT 1994 as well as the prohibition of quantitative restrictions in the form of border measures under Article XI GATT 1994. These provisions already indicate that WTO members are in principle entitled to adopt any regulatory measure, as long as, first, it does not violate the principle of non-discrimination and thus applies equally to domestic and foreign economic actors from all countries as well as, second, the measure does not present an obstacle to cross-border trade, in particular by resulting in a complete closing of the WTO member's border for imports.⁸⁰ In light of these findings, the compatibility with WTO law in the realm of trade in goods of the above-mentioned domestic measures adopted for example by Georgia and Ukraine seems in principle to be undisputable, provided that the respective requirements stipulated in particular by Article I:1, Article III, and Article XI GATT 1994 are met by the legislative and administrative acts in question.

78 Generally on this underlying purpose pursued by approaches of systemization or categorization see, e.g., *Luhmann*, *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 19 (1967), 615 (618 *et seq.*); as well as already *Bruner/Goodnow/Austin*, *A Study of Thinking*, 12 (“A first achievement of categorizing has already been discussed. By categorizing as equivalent discriminable different events, the organism *reduces the complexity of its environment.*”) (emphasis in the original).

79 On these two examples see already, e.g., *Kontorovich*, *Columbia Journal of Transnational Law* 53 (2015), 584 (626 *et seq.*).

80 Generally thereto see for example *Tietje/Wolf*, *REACH Registration of Imported Substances*, 55 *et seq.*; *Tietje*, *Normative Grundstrukturen der Behandlung nichttarifärer Handelshemmnisse*, 295 *et seq.*; *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 3, para. 86.

Moreover, and more specifically, these conclusions reveal that the WTO legality of such domestic measures is technically not depended upon, and thus does not require, an invocation of the notorious security exceptions in accordance with Article XXI GATT 1994.⁸¹ Finally, one should add from a more enforcement-oriented perspective that since we are dealing under this first scenario with domestic measures adopted by WTO members, any other member of this international organization, who questions the legality of these measures under WTO law, is most certainly entitled to initiate dispute settlement proceedings in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) enshrined in Annex 2 to the WTO Agreement.⁸²

The second main, and until now apparently less noted and discussed, perspective or dimension concerns the WTO legality of certain “domestic” measures adopted by public authorities of the non-recognized territorial entities in the post-Soviet space. It seems not too far-fetched to assume that at least some of these actors have already adopted, or are not unlikely to adopt in the future, legislative and administrative acts granting for example preferential treatment to their “domestic” products, thereby contravening the obligation of non-discrimination under Article III GATT 1994. Furthermore, to mention but one additional example, some of these entities might be tempted to legislate measures granting preferential treatment to imports from some other countries only, for example in order to accommodate the interests of, and demonstrate their close connection with, their respective patron state(s),⁸³ thus acting contrary to the duty of most-favoured-nation treatment under Article I:1 GATT 1994.

Assuming the existence of such a not purely hypothetical scenario of certain non-recognized territorial entities in the post-Soviet space adopting measures that are not compatible with the WTO legal order, the question obviously arises as to the options for other WTO members to remedy this situation, in particular to take recourse to the WTO dispute settlement mechanism. In this regard, three different categories of actors merit taking a closer look at. First, the possibility of initiating WTO dispute settlement proceedings directly against the secessionist territorial entity that has adopted the disputed measure, although at first sight probably the most natural option, is already precluded by the fact that the relevant provisions of the DSU only refer to WTO members and thus make it sufficiently clear that the dispute settlement mechanism is only open to them.⁸⁴ Since none of the respective entities in the post-Soviet realm has at present acquired membership in this international organization, they cannot act as respondents in WTO dispute settlement proceedings. Consequently, there is obviously at present no possibility for WTO members to initiate dispute settlement proceedings pursuant to the DSU directly against them.

81 For a more detailed evaluation of Article XXI GATT 1994 and the challenges potentially arising in connection with the interpretation and application of this provision see, e.g., *Hestermeyer*, in: Wolfrum/Stoll/Hestermeyer (eds.), *WTO – Trade in Goods*, Article XXI GATT, paras. 1 *et seq.*; *Boor/Nowrot*, *Die Friedens-Warte* 89 (2014), 211 (219 *et seq.*); *Hahn*, *Michigan Journal of International Law* 12 (1991), 558 *et seq.*; *Lindsay*, *Duke Law Journal* 52 (2003), 1276 *et seq.*, each with further references.

82 Generally on the WTO dispute settlement mechanism see for example *Van den Bossche/Zdouc*, *The Law and Policy of the World Trade Organization*, 164 *et seq.*; *Matsushita/Schoenbaum/Mavroidis/Hahn*, *The World Trade Organization*, 86 *et seq.*; *Tietje*, in: Ehlers/Schoch (eds.), *Rechtsschutz im Öffentlichen Recht*, § 3, paras. 1 *et seq.*; *Lowenfeld*, *International Economic Law*, 161 *et seq.*; *Hilf/Salomon*, in: *Hilf/Oeter* (eds.), *WTO-Recht*, § 7, paras. 1 *et seq.*; *Weiss*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 17, paras. 1 *et seq.*, each with additional references.

83 Generally on the phenomenon of patron states in the present context see already briefly *supra* under A.

84 See also, e.g., WTO, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body of 12 October 1998, para. 101; WTO, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, Report of the Appellate Body of 10 May 2000, para. 40; *Tietje*, in: Ehlers/Schoch (eds.), *Rechtsschutz im Öffentlichen Recht*, § 3, para. 47; *Krajewski*, *Wirtschaftsvölkerrecht*, para. 253; *Nowrot*, *Indiana Journal of Global Legal Studies* 18 (2011), 803 (814).

The second option potentially available to other WTO members in the present scenario and deserving closer attention concerns the possibility to initiate WTO dispute settlement proceedings against the WTO member that is territorially affected by the secessionist movement and entity that has adopted the disputed measure. This would apply for example to the WTO member Ukraine in cases involving the Donetsk People's Republic and the Luhansk People's Republic, to the WTO member Moldova in the context of Transnistria/Pridnestrovie, and to the WTO member Georgia in respective scenarios involving measures adopted by the Republic of Abkhazia and the Republic of South Ossetia. And indeed, it is well-known that according to the dominant perception of these unrecognized actors and their legal status in the international system, all of them continue to form a part of Ukraine, Moldova and Georgia respectively.⁸⁵

Admittedly, the WTO Agreement itself – contrary for example to many regional economic integration agreements – does not contain any provisions specifying its territorial scope of application. However, this finding merely indicates that the drafters of this multilateral treaty abstained from stipulating specific rules in this regard. It surely does not foreclose – quite to the contrary arguably even suggests – a recourse to applicable general public international law,⁸⁶ in particular the law of treaties; a normative regime that has indeed already been taken into account by WTO panels as well as the Appellate Body in different contexts.⁸⁷ Following this line of reasoning, it becomes apparent that, already in light of the presumption stipulated in Article 29 of the 1969 Vienna Convention on the Law of Treaties as well as corresponding customary international law⁸⁸ stating that a treaty is binding upon each contracting party in respect of its entire territory, it is in principle beyond any reasonable doubt that the WTO Agreement – giving rise to rights and obligations for the WTO members Ukraine, Moldova and Georgia – also applies, among others, to the territories of the Donetsk People's Republic, the Luhansk People's Republic, Transnistria/Pridnestrovie, the Republic of Abkhazia as well as the Republic of South Ossetia. Consequently, other WTO members would indeed be entitled to initiate WTO dispute settlement proceedings against the respective WTO member that is territorially affected by the secessionist movement and entity that has adopted the disputed measure.

Despite this conclusion, however, caution is warranted with regard to the chances of success for such a complaint on the merits. In particular, a valid – and indeed convincing – argument can be made that any measures adopted by public authorities of the respective non-recognized territorial entities in the post-Soviet space that allegedly violate a provision of WTO law are – under the international legal regime on state responsibility as in principle also

85 See for example concerning the status of Transnistria/Pridnestrovie the respective articulations in, e.g., UN GA Res. 72/282, Complete and Unconditional Withdrawal of Foreign Military Forces from the Territory of the Republic of Moldova, UN Doc. A/RES/72/282 of 26 June 2018; European Court of Human Rights, *Case of Sandu and others v. Moldova and Russia*, Application Nos. 21034/05 and seven others, Judgment of 17 July 2018, para. 34.

86 On this perception specifically in connection with the determination of the territorial scope of application of the WTO Agreement see also already, e.g., *Kennedy*, International and Comparative Law Quarterly 65 (2016), 741 (747 *et seq.*).

87 See for example concerning the applicability of the rules on the non-retroactivity of treaties WTO, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body of 21 February 1997, p. 15; WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, Report of the Appellate Body of 16 January 1998, para. 128; see thereto also, e.g., *Stoll*, in: Wolfrum/Stoll/Kaiser (eds.), WTO – Institutions and Dispute Settlement, Article 3 DSU, paras. 46 *et seq.*

88 Vienna Convention on the Law of Treaties of 23 May 1969, reprinted in: 1155 U.N.T.S. 331. On the status of Article 29 of this agreement as also reflecting customary international law see, e.g., *Sanum Investments Ltd. v. The Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction of 13 December 2013, para. 220; *von der Decken*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, Article 29 VCLT, para. 3; *Happ/Wuschka*, Journal of International Arbitration 33 (2016), 245 (256); *Kennedy*, International and Comparative Law Quarterly 65 (2016), 741 (747).

applicable in WTO dispute settlement proceedings,⁸⁹ in particular the rules concerning the (non-)attribution of conduct of insurrectional and secessionist movements to the state at issue as for example at least implicitly enshrined in Article 10 of the 2001 Articles on State Responsibility developed by the International Law Commission (ILC) and also reflecting customary international law⁹⁰ – not attributable to Ukraine, Moldova or Georgia respectively and thus cannot give rise to a successful complaint by other WTO members.

Thirdly and finally, a further potential respondent of a complaint initiated pursuant to the WTO dispute settlement mechanism is another, quasi-third party WTO member; a WTO member that is – contrary to the second option – not territorially affected by the secessionist movement that has adopted the disputed measure but nevertheless, due to other reasons, bears a close relationship to the non-recognized territorial entity at issue. This constellation appears probably somewhat surprising to some readers; at least at first sight. Moreover, there has apparently, and admittedly, no respective case law yet emerged in the realm of the WTO dispute settlement system that might serve as precedent and support for such an approach. However, we may find respective inspiration by turning to related concepts and developments in other fields of public international law.

In particular in the area of human rights the approach that is referred to here as the third option is by now quite well-established; especially in the jurisprudence of the European Court of Human Rights and, above all, also in the present context of non-recognized territorial entities in the post-Soviet space. For example, it is well-known that the Strasbourg Court has – ever since its 2004 judgment in the case of *Ilascu and others v. Moldova and Russia* – consistently held that, first and factually, Transnistria’s “high level of dependency on Russian support provided a strong indication that the Russian Federation continued to exercise effective control and a decisive influence over the Transdnestrian authorities”⁹¹ as well as that, second and normatively, in light of these findings, and since the European Convention on Human Rights (ECHR) can also apply extraterritorially in cases where a contracting party exercises effective control over an area outside its national territory,⁹² applicants alleging a violation of one of their rights and freedoms under this human rights treaty taking place in Transnistria/Pridnestrovie are within the jurisdiction of Russia in the sense of Article 1 ECHR.⁹³ Never-

89 On the applicability of the international regime on state responsibility in WTO dispute settlement proceedings see, e.g., WTO, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, Report of the Panel of 31 May 1999, paras. 9.42 *et seq.*; Stoll, in: Wolfrum/Stoll/Kaiser (eds.), *WTO – Institutions and Dispute Settlement*, Article 3 DSU, paras. 48 *et seq.*; Tietje, *Normative Grundstrukturen der Behandlung nichttarifärer Handelshemmnisse*, 388 *et seq.* Specifically concerning the rules on attribution at issue in the present context, see for example WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, Report of the Appellate Body of 11 March 2011, paras. 305 *et seq.*; WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, Report of the Panel of 10 November 2004, para. 6.128; as well as the analyses by Villalpando, *Journal of International Economic Law* 5 (2002), 393 *et seq.*; Hodu, *Manchester Journal of International Economic Law* 4 (No. 3, 2007), 62 *et seq.*

90 See Draft Articles on Responsibility of States for International Wrongful Acts, with Commentaries, in: *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, 50 *et seq.*, with additional references.

91 European Court of Human Rights, *Case of Sandu and others v. Moldova and Russia*, Application Nos. 21034/05 and seven others, Judgment of 17 July 2018, para. 36; see also already in particular *Case of Ilascu and others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004, paras. 28 *et seq.*, 311 *et seq.*, 376 *et seq.*

92 Generally thereto *Schabas*, *The European Convention on Human Rights*, Article 1 ECHR, p. 100 *et seq.*, with further references.

93 European Court of Human Rights, *Case of Ilascu and others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004, paras. 311 *et seq.*, 376 *et seq.*; as well as subsequently for example *Case of Ivantoc and others v. Moldova and Russia*, Application No. 23687/05, Judgment of 15 November 2011, paras. 116 *et seq.*; *Case of Catan and others v. Moldova and Russia*, Application Nos. 43370/04, 8252/05, and 18454/06, Judgment of 19 October 2012, paras. 103 *et seq.*; *Case of Mozer v. Moldova and Russia*, Application No. 11138/10, Judgment of 23 February 2016, paras. 96 *et seq.*; *Case of Sandu and others v. Moldova and Russia*, Application Nos. 21034/05 and seven others, Judgment of 17 July 2018, paras. 36 *et seq.*

theless, this jurisprudence initially only allows for the conclusion that any person, nongovernmental organization and group of individuals in the sense of Article 34 ECHR in Transnistria/Pridnestrovie benefit from international legal protection under the ECHR, and are in this regard with certain chances of success entitled to initiate proceedings in Strasbourg against Moldova and in particular also Russia.

And indeed, one can already find suggestions occasionally made in the legal literature to take recourse to this approach of extraterritorial application also in the realm of international economic treaty law, in particular with regard to international investment agreements and specifically with a view to the – albeit in principle rather different – situation of Crimea in order to avoid an undesirable “legal vacuum” for investors.⁹⁴ However, it seems – already in light of a literal interpretation of the relevant provisions – at least doubtful whether this line of reasoning could also be taken recourse to in order to establish an extraterritorial scope of application of the WTO Agreement and its Annexes 1 and 2. Whereas the respective jurisprudence of the European Court of Human Rights is based on a broad reading of the phrase “within their jurisdiction” under Article 1 ECHR, the above-mentioned Article 29 of the 1969 Vienna Convention on the Law of Treaties employs the different and arguably considerably narrower term “territory”,⁹⁵ thus requiring a kind of territorial nexus between the disputed measure and the territory of the respondent WTO member and consequently excluding the possibility of an extraterritorial applicability of the WTO Agreement based on considerations of an alleged effective control over an area outside of the WTO member’s national territory.

Consequently, also the third option of initiating WTO dispute settlement proceedings in the present context against a patron state WTO member of a non-recognized territorial entity in the post-Soviet space, among them currently the Russian Federation and Armenia, appears to have, at best, rather marginal chances of success. In sum, under the assumed scenario of certain non-recognized territorial entities in the post-Soviet space adopting measures that are not compatible with the WTO legal order, there seem to be no effective options under WTO law for other WTO members to remedy this situation, in particular to successfully take recourse to the WTO dispute settlement mechanism.

94 See thereto *Happ/Wuschka*, *Journal of International Arbitration* 33 (2016), 245 *et seq.*

95 On this perception see also already, e.g., *Costelloe*, *International and Comparative Law Quarterly* 65 (2016), 343 (347) (“Indeed, the commentary to what became Article 29 strongly suggests that extraterritorial application falls outside the scope of this provision. Similarly, where a bilateral or multilateral treaty contains a clause specifying its applicability with respect to the ‘territory’ of one of the contracting states, the use of this term again appears to assume, in line with accepted principles of interpretation under the VCLT and general international law, that the reference is to territory to which the State can claim legal title.); *id.*, 358 (“Neither Article 29 nor its commentary mentions territory over which a State exercises *de facto* authority, yet which is not legally part of that State’s territory. However, the use of the term ‘territory of each party’ in Article 29 seems to reflect the understanding that only territory which is *de jure* part of a State is included. The same holds true for the term ‘territory of another State’ in Article 15 VCST. Here, too, the obvious implication is that the provision applies only to *de jure* territory. These unqualified provisions simply do not address a situation of extraterritorial application, though they do not exclude such a possibility. It would be straining the text to an impermissible extent to read into these provision an exception to the otherwise only *de jure* character of ‘territory’, since that term cannot by itself sustain a reading that includes annexed territory and, in fact, that is not what these provisions were designed for.”) (emphases in the original); *Dumberry*, *Journal of International Dispute Settlement* 9 (2018), 506 (515); *Karagiannis*, in: Hollis (ed.), *The Oxford Guide to Treaties*, 305 (318 *et seq.*); *von der Decken*, in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties, Article 29 VCLT*, paras. 34 *et seq.*

F. Conclusion

This contribution has started with an attempt to illustrate some of the reasons that speak in favor of also integrating non-recognized territorial entities, including those located in the post-Soviet realm, into the global economy and its legal order, including the multilateral regime of the WTO.⁹⁶ Furthermore, the analysis undertaken in the previous section has revealed that in the event of these actors, even if they are related to a territorial affected WTO member, adopting domestic measures that contravene obligations arising under the WTO Agreement, there appear to be no option for other WTO members to successfully take recourse to the WTO dispute settlement mechanism in order to remedy the situation;⁹⁷ a finding that might, with all due caution, potentially be interpreted as also indicating in principle the desirability to integrate these territorial entities into the WTO legal order.

Nevertheless, at the same time the assessment of the normative approaches available to the WTO in order to address and cope with the challenges arising in connection with these non-recognized entities in the post-Soviet space, among them in particular the design of the accession process and the possibility to invoke Article XIII WTO Agreement,⁹⁸ also allows for drawing the conclusion that the existing WTO members apparently have always intended, and continue to intend, to retain considerable “policy space” and thus a notable amount of flexibility, especially also when dealing with non-recognized territorial actors and their prospects for membership in this international organization. In fact, WTO membership of these entities – in the post-Soviet realm and beyond – continues to be rather the exception than the rule.

Some might at times deplore this finding at least in the context of some of these territorial actors. However, it is ultimately far from surprising or inconsequential. We should not forget that transboundary economic relations never develop – and as a consequence should never be considered – in isolation from, and thus uninfluenced by, the respective political and security relationships between the actors concerned.⁹⁹ And it is precisely this finding that brings us at last, at the end of this contribution, again to the perception introduced already at the very beginning of it. The political abnormality of non-recognized territorial entities, their frequent perception as something like “irritants” in the international system, on the one hand, and their economic normality on the other hand,¹⁰⁰ are two factors that should not be regarded as being entirely unconnected in the eyes of the other members of the international community. Quite to the contrary, the political and security challenges frequently associated with their existence in the international system most certainly also exercise – for better or for worse – a strong influence on the decisions by other actors whether and, in the affirmative how, to incorporate in particular also the non-recognized territorial entities in the post-Soviet space into the international economic system and its legal order; and this finding is also likely to make WTO membership for them, at best, a rather distant prospect.

96 See *supra* under A.

97 See *supra* under E.

98 See thereto *supra* under C. and D.

99 On this perception see also already *Meng*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 57 (1997), 269 (271 *et seq.*); *Nowrot*, *European Yearbook of International Economic Law* 8 (2017), 381 (383).

100 See *supra* under A.

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ISSN 2366-0260 (print) / ISSN 2365-4112 (online)

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