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ACCESSION OF LEAST DEVELOPED COUNTRIES INTO THE WORLD TRADE ORGANISATION: THE PERSPECTIVE OF SOUTH SUDAN

Mini thesis submitted in partial fulfillment of the requirements for the award of the LLM degree in International Trade and Investment Law (Mode II)

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BAKADI SANNAH OLIVER

(Student Number: 3281234)

SUPERVISOR: Prof Patricia Lenaghan

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DECLARATION

I, **BAKADI SANNAH OLIVER**, declare that the work presented in this Mini-dissertation is my own work. It has never been presented to any other university or institution and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed.....

Date.....

Signed Supervisor: Prof P Lenaghan

Signed.....

Date.....

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LIST OF ABBREVIATIONS

AoA	Agreement on Agriculture
DC	Developing Countries
DSB	Dispute Settlement Body
FDI	Foreign Direct Investment
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GoSS	Government of South Sudan
LDCs	Least Developed Countries
MFN	Most Favoured Nation
MoFTR	Memorandum of Trade Regime
OECD	Organisation of Economic Cooperation and Development
SDT	Special and Differential Treatment
TPRM	Trade Policy Review Mechanism
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

KEY WORDS

Market access

This means the tariff and non-tariff conditions agreed by countries for the entry of specific goods and services into their markets.

Trade Liberalisation

The removal or reduction of trade obstacles which inhibit the free flow of goods and services from one country to another; It includes dismantling both tariff and non-tariff barriers.

Trade protection (Protectionism)

The imposition of duties, tariffs or quotas on imported goods and services to protect the domestic industry from foreign competition

WTO

Refers to the world organisation for trade

WTO Accession

This refers to joining and becoming a member of the WTO

WTO Commitments

Refers to the legally binding exchange of promises between the acceding member and the WTO in the areas of both goods and services

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CHAPTER 1

INTRODUCTION

1.1 Background

There is an emerging consensus that trade, if well managed, can play an important role of promoting sustained economic growth and development and it is this that has provided an impetus to development oriented international trade and economic integration.[1] It is in this context that the role of the World Trade Organisation (WTO) has been deemed crucial in helping countries integrate beneficially into the international trading system.[2]

The WTO is the leading global international organisation that seeks to unify the world's vast and divergent economies, political and legal systems through trade.[3] It creates a level field through which all its members can benefit from international trade and it provides for transparency, predictability and stability in terms of market access and other international trade issues.[4] The Organisation relies on negotiations and trade agreements to liberate multilateral trade and to eliminate trade imbalances, such as, discrimination and favouritism.[5] It has a system of rules and regulations which set out a predictable legal regime for the regulation of trade agreements and the resolution of disputes among its members.[6]

The WTO's goal of liberating multilateral trade is not an end in itself and neither does it exist in a vacuum devoid of other requirements set out in the Marrakesh Agreement.[7] In the preamble of

[1] Spanu V 'Liberalisation of the International Trade and Economic Growth: Implications for both Developed and Developing countries' (published final paper, Harvard Kennedy School of Government 2003) 1. (Hereafter Spanu V 'Liberalisation of the International Trade and Economic growth', 2003). Available at http://www.cid.harvard.edu/cidtrade/Papers/Spanu.pdf (accessed on 22/05/2013).

[2] Basu R S 'Does WTO accession affect domestic policy making and institutions?' (Working paper by the United Nations Committee on Trade and Development (UNCTAD) 2003) 3.

[3] Marrakesh Agreement Establishing the World Trade Organisation of 1994. (Hereafter The WTO Agreement of 1994).

[4] Adhikari R, Dahal N and Pradhanga M 'Ensuring Development Supportive Accession of Least Developed Countries to the World Trade Organisation; Learning from Nepal' (Published paper by the International Institute for Sustainable Development, 2008) 5. (Hereafter Adhikari R, Dahal N & Pradhanga M Learning from Nepal, 2008).

[5] Adhikari R, Dahal N and Pradhanga M 'Learning from Nepal' (2008) 5.

[6] The WTO Agreement of 1994.

[7] Nguyen N 'WTO Accession at Any Cost? Examining the Use of WTO-Plus and WTO-Minus Obligations for Least Developed Country Applicants.'(2009) 22 *Temple International and Comparative Law Journal* 243-247, 243. (Hereafter Nguyen N 2009).

the Agreement establishing the WTO, it is clearly stated that parties to this Agreement while in the process of attaining their economic and trade endeavours should do so with a view to raising standards of living, to ensuring full development, full employment and a steadily growing volume of income and effective demand, to expanding the production of and trade in goods and services and to allow for maximum use of the world's resources in accordance with the aim of sustainable development.[8] The belief that these benefits will be bestowed upon those who become members has been the propelling force enticing countries to accede to this multilateral trading system.[9] However, achieving this depends on supportive terms of accession.

1.2 Problem statement

Countries acceding to the WTO negotiate accession based on the knowledge of what their comparative advantages and disadvantages are.[10] They pick winners or industries that they hope to protect but also try to gain access for their competitive industries. Had countries been permitted to only relax import controls and not gain greater market access, few would actively pursue membership.[11] Market access refers to the openness of a country's market to foreign goods and services,[12] and the WTO specifically requires that members reduce import barriers as well as any other measures that may act as obstacles to trade.[13] In the case of countries acceding to the WTO, obtaining specific favourable market access is to all intents and purposes the *quid pro quo* for adopting commitments at their highest levels to introduce reforms in domestic policies, including border measures.[14]

However, in recent years, the WTO accession process for Least Developed Countries (LDCs) has been fraught with a number of difficulties and delays. This is mainly so because incumbent WTO members in a bid to obtain favourable market access terms exert immense pressure on

[8] The WTO Agreement of 1994.
[9] Jackson J H *The World Trading System: Law and Policy of International Economic Relations* 2ed (1989) 9.
[10] Lacey S 'WTO Accession from the Perspective of WTO members. The View from the Other Side of the Table' (Published paper by Leiden Law School, 2006)3. (Hereafter Lacey S 'WTO Accession from the Perspective of WTO Members' 2006).
[11] Lacey S 'WTO Accession from the Perspective of WTO Members' (2006) 3.
[12] Definition of 'market access' available at http://www.businessdictionary.com/definition/market-access.html (accessed on 05/06/2013).
[13] Definition of 'market access' available at http://www.businessdictionary.com/definition/market-access.htm l (accessed on 05/06/2013).
[14] Evenett S J, Gage J & Kennett M 'WTO membership and market access: Evidence from the accessions of Bulgaria and Ecuador'. Available at https://www.alexandria.unisg.ch/publications/22175/L-it (accessed on 30/04/2013).

acceding LDCs to undertake commitments that go beyond those stipulated in the General Agreement on Tariffs and Trade (GATT) and WTO agreements. They also exert immense pressure on LDCs to take up commitments which do not take into account the handicapped level of trade and development challenges faced by most LDCs. Hence, in recognition of these particular challenges, the WTO membership made accession of LDCs a priority. In the 2001 Doha Ministerial Declaration, the WTO members agreed that they would facilitate and accelerate negotiations with acceding LDCs.[15] To put this ambition into practice, members of the General Council adopted a series of measures to facilitate and accelerate accession of LDCs to the WTO through simplified and streamlined accession procedures, with a view to concluding these negotiations as quickly as possible.[16] Members were requested to give more consideration to the specific needs of acceding countries particularly in the areas of market access, the WTO rules process, trade related assistance, and capacity building.[17]

Unfortunately, the 2002 accession guidelines failed to achieve the objectives for which they had been created, *viz* to help limit to a greater extent the possibility of imposing unfair condition on the LDCs. It was in this light therefore that the 2002 accession guidelines for LDCs were reaffirmed at the Eighth Ministerial Conference in Hong Kong, in July 2012.[18] According to these new guidelines, WTO members were yet again called upon to exercise restraint when seeking concessions and commitments on trade in goods and services taking into account the same levels undertaken by existing WTO LDC members and levels that were commensurate with their individual development, financial and trade needs.[19] These guidelines, however, face a fair share of criticism as being likely to do LDCs more harm than good.[20] It is submitted that they do not ameliorate the accession conditions of LDCs because they still fail to address the onerous obligations placed on the new applicants by incumbent members of the WTO. According to the market access benchmark on goods, LDCs are required to bind their tariff rates at levels lower

[15] Paragraph 42 of the WTO, Doha Ministerial Declaration (2001; WT/MIN (01) DEC/1.
[16] Paragraph 1 of the *General Council Decision on LDC accession* adopted on 10 December 2002, WT/L/508. (Hereafter WTO document WT/L/508).
[17] WTO document WT/L/508.
[18] World Trade Organisation, Accession of Least-Developed Countries, decision of 17 December 2012, WT/L/846 (Dec. 19, 2012), available at
http://www.wto.org/english/thewto_e/minist_e/min11_e/official_doc_e.htm.
(accessed on 07/02/2013). (Hereafter the WTO Accession of Least Developed Countries WT/L/846).
[19] The WTO Accession of Least Developed Countries WT/L/846.
[20] 'New accession guidelines may harm LDCs' published in SUNS #7420 dated 27 July 2012. Available at http://www.twnside.org.sg/title2/wto.info/2012/twninfo120803.htm (accessed on 13/05/2013).

than those of existing LDCs and original members of the WTO.[21] At the other end of the spectrum, the benchmark on services reiterates the very same principles that were enshrined in the 2002 guidelines but which have not applied.[22] They fail to provide a distinct level or extent to which LDCs may liberalise their services sectors and subsectors and LDCs are therefore still being forced to make commitments far more extensive than those of incumbent members.

Consequently, it has been observed that the failure of the multilateral trading system over the past decade to adequately deliver concrete positive results as far as market access commitments are involved has detrimental implications for most LDCs.[23] It obstructs their efforts to achieve greater participation in world trade and to boost trade led development, poverty reduction and economic diversification.[24] This is so because the economic prosperity of these countries is structured around, but not limited to, the following main factors: policy space to promote infant industries, the ability to restrict an influx of poor and substandard imports into their markets, as well as the ability to use the trade revenues derived from their existent tariff levels to boost their economies. The curtailment of all these three factors are some of the main adverse implications likely to arise as a result of the adoption of the market access benchmarks on both goods and services in the accession guidelines for LDCs.

There is therefore a need to scrutinise these resulting implications in greater details from the perspective of a new independent African LDC like South Sudan.

1.3 Significance of the study

South Sudan, the newest country of the world, is also among the poorest with a very fragile and underdeveloped economy.[25] Its history of conflict and its current challenges make it the most vulnerable, country too.[26] It has limited market access and a very archaic agricultural sector and is greatly dependent on imports from neighbouring countries, including, Sudan, Kenya and

[21] The WTO Accession of Least Developed Countries WT/L/846.
[22] The WTO Accession of Least Developed Countries WT/L/846.
[23] Birkbeck D C & Jones E 'Beyond the Eighth Ministerial Conference of the WTO: A forward looking agenda for development' (Published paper by Oxford University, 2011) 4. (Hereafter Birkbeck D C & Jones E 2011).
[24] Birkbeck D C & Jones E (2011) 4.
[25] Tadesse D 'Post Independence: South Sudan: The challenges ahead.'(ISPI Working Paper, 2012) 3.
[26] The World Bank country overview, South Sudan available at .http://www.worldbank.org/en/country/southsudan/overview (accessed on 15/03/2013).

Uganda.[27] In order for South Sudan to meet its aim of sustainable economic development, trade liberalisation and improvement of the welfare and livelihood of its citizens, membership of multilateral, regional and bilateral trade agreements are essential instruments for increased trade.[28]

South Sudan is a landlocked country bordered by Sudan to the north, Ethiopia to the east, Uganda and Kenya to the southeast, Democratic Republic of Congo to the southwest and Central African Republic to the west.[29] It has an estimated population of 8.2 million.[30] Its total area of 644329 square kms consists of Savannah and arable woodland in the centre, north and south-east.[31]

On 9 July 2011 the Republic of South Sudan became an independent state following a peaceful referendum in January 2011.[32] The referendum was part of the 2005 Comprehensive Peace Agreement (CPA) signed by the central government of Sudan and the then southern based rebel group, the Sudan People's Liberation Movement (SPLM), to end the two decades of conflict.[33] As a new nation without a history of formal institutions, rules or administration accepted as legitimate by its society, independence presented South Sudan with an opportunity to embark on development efforts to address these devastating effects of a war-torn past and poverty.[34]

[27] South Sudan economy profile 2012. Available at .*http://www.indexmundi.com/south_sudan/economy_profile.html* (accessed on 13/03/2013).

[28] A 'multilateral trade agreement' refers to an agreement between two or more countries who wish to regulate the trade between them whereas a 'bilateral trade agreement' is an economic contract between two countries. A 'regional trade agreement', on the other hand, refers to free trade among a number of nations in a specified area or region. Available at *http://www.ehow.com/about_6516635_definition-bilateral-trade-agreement.html* (accessed on 10/10/2012).

[29] Government of South Sudan official website available at *http://www.gossonline.org/magnoliaPublic/en/about/history.html* (accessed on 23/05/2013).

[30] Government of South Sudan official website available at http://www.gossonline.org/magnoliaPublic/en/about/history.html (accessed on 23/05/2013 0.

[31] Government of South Sudan official website available at *http://www.gossonline.org/magnoliaPublic/en/about/history.html* (accessed on 23/05/2013).

[32] The World Bank country overview, South Sudan available at .*http://www.worldbank.org/en/country/southsudan/overview* (accessed on 15/03/2013).

[33] The struggle for liberation continued for several years, even after Sudan obtained independence in 1956. Thirty-seven of the past 56 years have been wasted on major civil conflicts; the first from 1955-1972 and the second from 1983 to 2005 when the (CPA) was signed. In fulfillment of a provision of the CPA, South Sudanese voted for total independence during the January 2011 referendum. South Sudan was declared a sovereign state on 9 July 2011. South Sudan Government portal available at *http://www.goss-online.org/magnoliaPublic/en/about/history.html* (accessed on 24/05/2013).

[34] South Sudan economy profile 2012. Available at

Presently, industry and infrastructure in this landlocked country remains severely underdeveloped and poverty is still widespread with a high rate of unemployment because the formal sectors are yet to develop and there are limited options for alternative employment.[35] Core administrative structures and mechanisms of political representation are only beginning to emerge and the government still struggles to provide basic services to the population. Outside a few oil enclaves, South Sudan remains a relatively undeveloped, subsistence economy.[36]

South Sudan is not a member of the WTO but its independence as a country presents it with an opportunity to consider membership. It is likely to face the same challenges and obstacles as other developing countries, but it might be in a better position to adopt the WTO's consistent policies now than to adopt a change in the existing policies in the future. However, it must be understood that in as much as the WTO may be the eventual resort for obtaining sustainable economic development but it may not necessarily at present be the instrument needed for South Sudan to attain that goal. This study seeks to stimulate a debate that will help the people of South Sudan to understand the benefits and challenges of being a sovereign state in a globalised world.

Studying the accession process, the potential benefits of WTO membership, as well as the issues and challenges of tariff adoption and policy reforms from a South Sudan perspective, is not only a worthwhile pursuit and of relevance to policy makers and negotiators in South Sudan, but may also be of importance to other parties interested in acceding, as well as the acceded countries. This is so because the issues that will be examined in this study may arise in other countries. This study hopes to be a unique contribution in this field by identifying the major area of reforms and articulating the challenges ahead for such reforms. It will also provide a contribution to the literature on the subject of accession to the multilateral trading system from LDCs and in particular a South Sudan perspective.

1.4 Research questions

a) What are the legal requirements for South Sudan to accede to the WTO?
b) What kind of market access commitments are requested of LDCs on accession?

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http://www.indexmundi.com/south_sudan/economy_profile.html (accessed on 13/03/2013).

[35] The National Baseline Household Survey of 2009 found that more than 50% of the populations are in one way or another underemployed, and only 12% hold formal employment. See South Sudan National Bureau of Statistics (NBS) 2012- *National Baseline Household Survey of 2009 Report for South Sudan.*

[36] South Sudan economy profile 2012. available at .http://www.indexmundi.com/south_sudan/economy_profile.html (accessed on 13/03/2013).

c) What are the potential implications of these market access commitments for LDCs/
d) What are the potential implications of these market access commitments for the development of trade in South Sudan?
e) How can these implications be averted to match the trade and development needs of South Sudan?

1.5 Scope of the research

The subject area under consideration is very broad and therefore a limited but refined scope has been adopted. The study will be limited to the effects of the accession process, with specific reference to what market access commitments in goods and services an applicant LDC member has to undertake. This research will attempt to present an overview of these market access commitments and highlight the contending lines of thought.

A detailed assessment and discussion of the potential implications of South Sudan's accession to the WTO on its economy and trade can hardly be achieved in this thesis owing to the time and space limitations. Therefore this study neither extends to a commodity by commodity or sector by sector analysis nor purports to quantify the possible costs and benefits of the accession. It is limited to the general implications of the WTO's market access commitments in the light of the principal WTO guidelines regulating market access.

1.6 Methodology

The study is desktop based and coupled with internet based research which has been employed extensively in looking for information in different sources, such as, books, relevant journals articles, working papers, and reports on accession.

This study examines the market access commitments in both goods and services in the case of six recently acceded countries in a systematic manner. The case studies are conducted in the same manner and highlight the same information for each of the six applicants. Each case study includes an examination of the WTO produced documents regarding the applicant's market access commitments as well as material published about the same by academic sources.

In examining the implications that WTO accession has had on a country, past studies have examined a large range of areas from market access, government budget, structural reforms, trade and investment, institutional governance and corruption to macroeconomic management and have come to the conclusion that each accession is unique and largely governed by unwritten rules. In order to begin making some order out of this seemingly chaotic process without clear rules, this comparison will highlight the similarities and differences between the six recently acceded LDCs versus incumbent WTO members as well as the WTO accession guidelines for LDCs and develop a categorisation of accession capacity for a LDC like South Sudan and the likely outcomes thereof.

In the context of market access in goods, each recently acceded LDC applicant is assessed by examining the level of tariffs to which it bound itself on accession. This is then compared and contrasted with those of the other recently acceded LDC and incumbent WTO members, as well as the WTO accession guidelines. This is examined using WTO working reports and schedule of commitments, existing reports, and articles.

Consequently, there is an examination of the extent of the six recently acceded LDCs' services commitments undertaken on accession. To understand the amount of pressure and influence incumbent WTO members exerted on the acceding LDCs, the total number of concessions and commitments made out of the total number of services sectors and subsectors as classified under the WTO are compared to those of incumbent WTO members and the accession guidelines. Each of the service sectors will be examined by looking at what commitments were made in each of the four trade modes: Mode 1 (cross-border supply), Mode 2 (consumption abroad), Mode 3 (commercial presence), and Mode 4(presence of natural persons).

Consequently there is an examination of the implications for South Sudan meeting the WTO market access commitments. The arguments advanced in this section emanates from literature review related to recently acceded LDCs and reports, internet sources, development plans and legislation enacted by South Sudan.

1.7 Chapter outline

Chapter 2 looks at the WTO framework and its principles and the accession process, and briefly introduces the debate on the decision to expedite LDC accession to this organisation. It finally

examines the rationales for LDCs seeking to accede to the WTO and the arguments to the contrary.

Chapter 3 examines whether the WTO incumbent members have lived up to their promise, as stated in the accession guidelines for LDCs, to exercise restraint while seeking market access commitments from six of the recently acceded LDCs. This is best understood by systematically examining the six recently acceded WTO members and incumbent WTO members' market access commitments through the same lens and making a comparison of the results.

Chapter 4 answers the main questions of this research. It looks at the implications of lowering tariffs, and the excessive commitments for South Sudan in light of the difficulties experienced by other recently acceded LDCs to the WTO.

Chapter 5 covers the general conclusion on the findings and provides recommendations on how these implications may be averted by South Sudan.

CHAPTER TWO

ACCESSION TO THE WORLD TRADE ORGANISATION

2.1 Introduction

In general, accession is a formal legal commitment by the acceding country to comply fully with multilateral trade rules in order to benefit from gains resulting from previous rounds of multilateral trade negotiations. It is the first step in the long, challenging and costly process of full integration of least developed countries (LDCs) into the multilateral trading system (MTS). The end of this process marks the beginning of the enforcement of commitments and concessions as well as compliance with World Trade Organisation (WTO) rules for the acceding member.[37]

It has been observed that the WTO accession process is becoming more demanding in terms of market access commitments and there is a growing concern that the price of joining the WTO includes commitments that go beyond the General Agreement on Tariffs and Trade (GATT) and WTO agreements.[38] Moreover, there is the added concern that this process takes limited account of the specific circumstances of applicant countries or their needs for special and differential treatment (SDT).[39] It is further observed that LDCs are poorly equipped in terms of national institutions and human and financial resources; hence their leverage to influence the outcome of trade negotiations and their capacity to implement commitments and concessions

[37] Mussie D 'Accession to the World Trade Organisation: Challenges and prospects for the Least Developed Countries' (2005) 6 *The Estey Center Journal of International law & Trade Policy* 181-209, 192. (Hereafter Mussie D 'Accession to the World Trade Organisation', 2005).

[38] For instance, LDCs, such as, Vanuatu, Cambodia and Nepal, were forced to agree to other WTO plus conditions during their accession process. Nepal and Cambodia were asked to join the International Union for the Protection of New Varieties of Plants (UPOV). Nepal was further asked to bind other duties and charges (ODCs) at zero and make a commitment to phase them out over a two to 10 year period although the GATT itself says only to bind them at existing levels but not to reduce them. Vanuatu was asked by the USA to join the Agreement on Government Procurement, which is a plurilateral agreement.

[39] The SDT provisions are a set of agreed rights and privileges that are not part of legally binding commitments (except in the case of the Trade Related Aspects of Intellectual Property). They grant favourable market access, access to technology and longer implementation periods for the Uruguay Round Agreement. They therefore constitute a strategic interest for developing and least-developed countries in multilateral trade negotiations, previously in the framework of the GATT, and now in the WTO, and are the result of increased participation of developing countries in the MTS.

are severely limited.[40] Regardless of the challenges above which are responsible for the unbalanced outcome of accession negotiations for LDCs, they continue to embark on the accession process while weighing the benefits versus the costs of this decision.

The questions to be answered in this chapter are the following. Firstly, what is the accession process? Secondly, what are the key issues and challenges affecting LDCs while embarking on this? Thirdly, have the new accession guidelines been of any help whatsoever in hastening the accession of LDCs into this Multilateral Trading System (MTS)? Finally, what are the rationales for LDCs accession to the WTO?

In order to answer these questions, the section first looks at the WTO and its key principles and agreements; the second section looks at the accession process; the third section includes the WTO accession guidelines for LDCs; and lastly, there is an examination of the rationale for WTO accession by LDCs.

2.2 The WTO and its key principles

Before the establishment of the WTO, the GATT was the only multilateral framework for administering international trade.[41] However, the WTO now incorporates and administers the GATT and its provisions.[42] The Uruguay Round gave rise to two new multilateral agreements including the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which deal with forms of trade and issues that were previously beyond the scope of the GATT.[43] Agreements covering government procurement, trade in civil aircraft, trade in bovine meat, and trade in dairy products are also known as plurilateral agreements.[44] The Marrakesh agreements also consist of several other

[40] Rolf J L and Matthias L 'WTO Accession and Negotiation Issues for Vulnerable Economies'. (2000) 1.
[41] The WTO Agreement of 1994.
[42] The GATT 1994 is composed of the provisions originally found in the GATT 1947 (including subsequent amendments, protocols, decisions, and understandings, as well as the Marrakesh Protocol to GATT 1994). It is now incorporated into Annex 1 of the WTO Agreement. The other multilateral agreements annexed to the WTO cover a wide range of areas, including: TRIPS; Trade Related Investment Measures (TRIMS); and Sanitary and Phytosanitary measures (SPS Agreement). For the complete annex see http://www.org.wto.org/english/doc_e/legal_e/legal_e.htm#finalact
[43] Hoekman B 'Proposals for WTO Reform: A Synthesis and Assessment' (2011) 20 *Minnesota Journal of International Law.* 324-364, see generally.
[44] A plurilateral agreement is binding only on countries that sign the agreement whereas multilateral agreements are binding on all countries who agree to be members of the WTO.

agreements and understandings annexed to it,[45] and any acceding state will be required to commit itself to all the multilateral agreements administered under the WTO, and all at the same time. These agreements are thus referred to as forming what it is known as a 'single undertakings' package that allows no room to select that which one desires.[46]

Most of the WTO agreements are the result of the 1986-94 Uruguay Round negotiations, and were signed at the Marrakesh ministerial meeting in April 1994.[47] The primary responsibilities of the WTO are: to provide a forum for multilateral trade negotiations and a framework for their implementation, to administer the Trade Policy Review Mechanism, (TPRM), and to administer the Dispute Settlement Procedures (DSPs).[48] The TPRM is both a function and a set of procedures that enable the WTO to monitor the trade policies of member countries.[49] The dispute settlement function is a set of procedures that detail how a WTO member can initiate a complaint against the trade practices of another member and how this dispute is to be processed and ultimately resolved.[50]

All the above WTO laws are based on certain core principles and rules. Three of the key principles underlying the WTO are those of non-discrimination, predictability, and transparency. Non-discrimination is ensured through the following two core principles: most favoured nation (MFN) treatment and national treatment.

The Most Favoured Nation(MFN) principle obligates contracting parties to accord immediately and unconditionally benefits and privilege to like products originating from, or destined for the

[45] See The WTO Agreement of 1994. Other agreements and understandings annexed thereto include:
Annex -1A Multilateral Agreements on Trade in Goods: GATT 1994, Agreements on: Agriculture, Sanitary and Phytosanitary Measures, Textiles Clothing (terminated on 1 January 2005), Technical Barriers to Trade, Trade-Related Investment Measures(TRIMs), Anti-dumping (Article VI of GATT 1994), Customs valuation (Article VII of GATT 1994),Preshipment Inspection, Rules of Origin, Import Licensing, Subsidies and Countervailing Measures, Safeguards;
Annex- 1B General Agreement on Trade in Services (GATS);
Annex-1C Trade-Related Aspects of Intellectual Property Rights (TRIPS);
Annex- 2 Dispute Settlement Understanding;
Annex- 3 Trade Policy Review Mechanism; and
Annex- 4 Plurilateral Trade Agreements.
[46] Michalopoulos C 'WTO Accession' in Hoekman B, Mattoo A & English P (eds.) *Development, Trade and the WTO: A Hand Book* (2002) 65.
[47] WTO- Learning Guide 'Trade and Development' (2012) 15.
[48] The WTO Agreement of 1994.
[49] The Trade Policy Review Mechanism (TPRM) Agreement.
[50] The WTO Agreement of 1994.

territories of all other contracting states.[51] It ensures non-discrimination between trading partners. The MFN principle refers to any country and not only to WTO members. In other words, the advantages not only concern those granted by WTO members to other members, but also those granted to non-WTO members.[52] The MFN principle applies to like products; a concept which is fundamental to the principle. This means that different or unlike products may be treated differently.[53]

National treatment requires that foreign goods, once inside the borders of a country, be treated the same as domestically produced goods.[54] Hence this principle ensures non-discrimination between domestic and foreign products, services or nationals.[55] For trade in goods, it prohibits a Member from favouring its domestic products over the imported like products of other Members once imported products have entered the domestic market.[56] The objective of the national treatment principle is to provide equality of competitive conditions for imported products and limit the use of domestic policies that restrict trade.

The principle of predictability in the WTO is achieved through the basic ethos of binding and enforceable commitments. Liberalisation commitments and agreements to abide by certain rules of the game are of little value if they cannot be enforced. The WTO ensures that when countries open their markets to goods on the basis of the concessions they offer, they are bound by their commitments. The member concerned can therefore not unilaterally choose to change its commitments or concessions without negotiating compensation with the other principal suppliers of the products concerned. The MFN rule further ensures that such compensation, which is usually in the form of reductions of other tariffs, extends to all WTO members, raising the cost of such reneging actions. Predictability is further enhanced by the WTO DSPs that are available to members to bring any disputes against members who fail to abide by their commitments and violate the WTO disciplines.

Lastly, there is the principle of transparency which is a basic pillar of the WTO. It is a legal obligation provided in the WTO legal texts.[57] It requires WTO members to publish their trade regulations, establish and maintain institutions that review their administrative decisions

[51] The Legal Texts of the World Trade Organisation, Art 1(1) GATTS 1994.
[52] The GATT Art 1 of 1994.
[53] The GATT Art 1(1) of 1994.
[54] The GATT Art III of 1994.
[55] The GATT Art III of 1994.
[56] The GATT Art III (2) of 1994.
[57] The GATT Art X, GATS Art III, TRIPS Art 63.

affecting trade. Moreover, members are required to respond to requests for information by other members and notify changes in trade policies to the WTO.[58] These internal transparency requirements are supplemented by multilateral surveillance of trade policies by WTO members, facilitated by periodic country specific reports that are prepared by the WTO Secretariat and discussed by the WTO General Council. The external surveillance also fosters transparency, both for citizens of the countries concerned and for trading partners. It reduces the scope for countries to circumvent their obligations, thereby reducing uncertainty regarding the prevailing policy stance; and the legitimacy of the WTO is further enhanced when citizens access information and know what it does.

2.3 The WTO accession process

Accession is governed by Art XII of the Marrakesh Agreement establishing the WTO, which defines in highly general terms the rules for accession to the WTO.[59] It states:

> 'Any state or customs territory possessing full autonomy in the conduct of its external commercial relations [...] may accede to [the WTO...] on terms agreed between it and the WTO.'[60]

The accession process is the same for all countries, no matter what their development status.[61] However, the specific terms of accession must be negotiated between the WTO members and the applicant country because each accession is a negotiation between the WTO members and a particular country with typically different economic conditions. Hence each accession is unique.

The WTO Secretariat, in consultation with WTO members, has drawn up a set of procedures for accession which are closely modeled on those followed by contracting parties to the GATT.[62] These procedures require the following steps discussed below.

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[58] The GATT Art X, GATS Art III, TRIPS Art 63.
[59] Article XII of the WTO Agreement of 1994.
[60] Article XII of the WTO Agreement of 1994.
[61] Hawthorne H 'Acceding to the Norm: Accession to the WTO by LDCs' (2009) 4 *The Hague Journal of Diplomacy* 7-35, 26. (Hereafter Hawthorne H 'Acceding to the Norm: Accession to the WTO by LDCs', 2009).
[62] WTO Secretariat, *Accession to the World Trade Organisation*, *Procedures for Negotiations under Article XII*, WT/ACC/1 (Mar. 24, 1995). Available at http://www.wto.org (accessed on 20/03/2013).
(Hereinafter *WTO Accession Procedures*).

An applicant must send a communication to the director general of the WTO indicating its desire to accede to the WTO under Art XII.[63] Once the acceding country has made a formal request and the WTO members have accepted the request, a working party, which would facilitate the accession of that particular country, is established.[64] The accession process involves four main phases.

The first phase is submission of a memorandum of foreign trade regime (MOFTR), which explains the acceding country's trade related laws and policies.[65] If the working party is satisfied with the content and explanations of the MOFTR, it will initiate bilateral trade negotiations between the acceding country and individual WTO members, which then becomes the second phase in the accession process. [66]

The negotiations would essentially be about market access concessions and commitments. The market access in goods includes the negotiation of concessions in the area of trade in goods mainly in the form of reduced and bound import tariffs.[67] These negotiations are carried out bilaterally with the main trading partners who are the principal and substantive suppliers to an acceding country. These concessions are extended on an unconditional MFN basis to all other WTO members, including commitments in agriculture, such as, market access, export subsidies, and domestic support.[68]

Market access in the services track involves the negotiation of commitments on trade in services, which are also conducted bilaterally and result in a schedule of specific commitments which are annexed to the Protocol of Accession.[69]

The WTO Agreements and other multilateral trade agreements are not subject to negotiations as they constitute what is called 'single market access negotiations' which would lead to the

[63] The WTO Agreement of 1994.
[64] WTO Accession: Explanation on how to become a member of the WTO.
Available at http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (accessed on 28/01/2013).
[65] WTO Accession: Explanation on how to become a member of the WTO.
Available at http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (accessed on 28/01/2013).
[66] It is understood that fact-finding work on the foreign trade regime and the negotiating phase can overlap and proceed in parallel.
[67] Handbook on the accession to the WTO: Chapter 4. Available at
http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s1p1_e.htm (accessed on 20/03/2013).
[68] Handbook on the accession to the WTO: Chapter 4. Available at
http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s1p1_e.htm (accessed on 20/03/2013).
[69] Handbook on the accession to the WTO: Chapter 4. Available at
http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s1p1_e.htm(accessed on 20/03/2013).

third phase of the accession process, the drafting of the terms of the membership in the Protocol of Accession and Schedule of Commitments.[70]

The fourth and final phase of the accession process is the decision stage.[71] The decision to admit an applicant to the WTO lies with the Ministerial Conference or the General Council, and it shall be made by consensus, or failing such, by a two-thirds majority vote.[72] If the decision is in favour of the applicant state, the applicant will become a fully-fledged member of the WTO within 30 days after the acceding country ratifies the Protocol of Accession.[73]

2.3.1 Accession process for developed countries and LDCs

Although the procedure to be followed during accession looks fairly straightforward, acceding countries have often complained about the long, drawn-out process of accession.[74] The WTO accession process has been considered problematic for several reasons as indicated below.

First is the constructive ambiguity in the legal provision dealing with the accession process. As is stated in Art XII of the GATT, WTO accession is indefinitely open to any state or customs territory possessing full autonomy in the conduct of its external commercial relations and other matters provided for in the WTO Agreement.[75] This provision, however, fails to lay down a clear guideline as to the terms of WTO accession, which leaves an acceding country at the mercy of the incumbent members. In relation to this, international trade analysts, such as Evenett and Braga, have therefore stated:

> 'Paradoxically for rules based organisation, the WTO has no clear rules for the price of membership. Article XII of the Marrakesh Agreement, the legal instrument covering the WTO accession process, merely states that new members may join the WTO on terms

[70] Handbook on the accession to the WTO: Chapter 4. Available at http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s1p1_e.htm(accessed on 20/03/2013).
[71] Handbook on the accession to the WTO: Chapter 4. Available at http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s1p1_e.htm (accessed on 20/03/2013).
[72] In practice, however, a decision is adopted on the basis of consensus. In GATT or WTO, there have been no cases of voting on accessions. See Art XII (2) of the WTO Agreement of 1994.
[73]Hawthorne H 'Acceding to the Norm: Accession to the WTO by LDCs' (2009) 4 *The Hague Journal of Diplomacy* 7-35, 27.
[74] Pandey P R, Adhikari R & Wagle S 'Nepal's Accession to the WTO' (United Nations Department of Economic Social Affairs' Policy and Research paper 2011) 6. (Hereafter Pandey P R *et al* 'Nepal's accession to the WTO', 2011). Available at http://www.sawtee.org/Research_Reports/R2011-03.pdf (accessed on 12/05/2013).
[75] Article XII of the WTO Agreement of 1994.

to be agreed.[76]This sparse guidance leaves the door wide open to encompass both an expedited hassle-free accession process and a drawn-out, decade-long, and burdensome accession experience.'[77]

Secondly, WTO coverage has expanded since the conclusion of the Uruguay Round of negotiations to consist of the 'single undertaking'[78] and the inclusion of agriculture, services and intellectual property rights.[79] The acceding countries are now being requested to provide information on all laws pertaining to these new issues as well as the older areas, and are also being required to show their institutional and legal capacities to conduct international trade in a manner that will meet their commitments.[80] This includes ensuring that their government trading agencies operate transparently without special monopoly rights.[81]

Thirdly, there are few rules for the accession process. This is so because the accession process has developed since the GATT days, with countries now required to submit information to the WTO about their trade regime, as well as to take part in both multilateral and bilateral negotiations. It is argued that the lack of rules in the accession process, combined with multilateral and bilateral negotiations, have consequently made the accession process power based rather than rules and law based.[82]

Fourthly, incumbent countries pressure acceding countries to take on commitments which go beyond their WTO treaty obligations and they are also compelled to liberalise their markets

[76] Article XII of the WTO Agreement of 1994.

[77] Evenett J S & Primo-Braga A C 'WTO Accession: Lessons from Experience' (published paper, World Bank Group 2005)2. Available at http://www.agri-peri.ir/AKHBAR/anserson/WTO%20Accession-Braga0405.pdf (accessed on 03/03/2013). (Hereafter Evenett J S & Primo-Braga AC WTO Accession 2005).

[78] According to the 'single undertaking' approach, adopted during the Uruguay Round, all Multilateral Trade Agreements concluded during a negotiation round shall be adopted as a whole (i.e. as a single package). As a result, these Agreements have binding effects on all WTO Members.

[79] Bosworth R & Duncan R 'Current status of the WTO accession process and the experience of ESCAP acceding countries'. Available at https://www.google.co.za/search?q=Bosworth+R+%26+Duncan+R+Current+status+of+the+WTO+accession+process+and+the+experience+of+ESCAP+acceding+countries (accessed on 11/10/2012).

[80] Bosworth R & Duncan R 'Current status of the WTO accession process and the experience of ESCAP acceding countries'. Available at https://www.google.co.za/search?q=Bosworth+R+%26+Duncan+R+Current+status+of+the+WTO+accession+process+and+the+experience+of+ESCAP+acceding+countries (accessed on 11/10/2012).

[81] WTO agreements do not explicitly require a fundamental market economy, members are imposing this requirement de facto on acceding countries as part of their leverage in the accession process

[82] Nguyen N (2009) 243.

more than the current members.[83] This is regardless of the stage of development and capacity of the applicant country.[84] It is suggested that acceding countries should accede on terms that are broadly comparable both for applicant countries among themselves and in comparison with incumbent members, although this is not the case in practice.[85] For instance, there is pressure on new members to sign all plurilateral agreements without properly addressing the question of whether this practice serves the interests of the acceding country or not. In reporting on discussions in the General Council, Naray noted:

> 'A number of developing countries delegations recalled that in the accession process reasonable conditions were required of and imposed on, applicants because developed country members had requested that acceding countries accept more stringent conditions and a higher level of commitment than was required from members themselves. For example, the requirement to adhere to several plurilateral agreements, to guarantee full transparency and objectivity and that markets access commitments should be about the same as those made by countries at similar level of development.'[86]

In addition to the frequently extensive trade liberalisation requested of potential members, it is argued that the time taken to finalise accession packages can become lengthy due to the unwillingness on the part of applicants to make sufficiently liberal commitments and the dissatisfaction of some members with the level of commitments made by the applicant.[87]

Lastly, acceding members are often encouraged to agree to shorter implementation periods than existing WTO members.[88] For example, Cape Verde and Vanuatu waived the transition period for the Agreement on Trade Related Investment Measures (TRIMs).[89] Transitional periods have not been automatically extended to DCs and LDCs are required to meet WTO requirements on accession.[90] It was in light of the above hardships experienced by LDCs that

[83] Pandey P R *et al* 'Nepal's Accession to the WTO' (2011) 7.
[84] This situation is known as 'WTO-plus', with acceding members made to liberalise markets more than existing WTO members.
[85] Pandey P R *et al* 'Nepal's Accession to the WTO' (2011) 7.
[86] Naray P *Russia and the World Trade Organisation* (2001) 4.
[87] Hawthorne H 'Acceding to the Norm: Accession to the WTO by LDCs' (2009) 25.
[88] Both Nepal and Cambodia committed themselves to fully implementing the Agreement on Trade-Related Investment Measures (TRIMs), waiving the seven-year transition period allowed for LDCs under it.
[89] WTO, Cape Verde Working Party Report, document no. WT/ACC/CPV/30, 2007, 39; and WTO, Vanuatu Working Party Report, document no. WT/ACC/VUT/ 13, 2001, 22.
[90] Bosworth R & Duncan R 'Current status of the WTO accession process and the experience of ESCAP acceding countries'. Available at

the WTO members agreed to create special guidelines for LDCs that would expedite their accession process.

2.3.2 Decision to expedite the accession of LDCs to the WTO

In recognising the special needs of LDCs, the Doha Declaration of 2001 called for the facilitation and acceleration of the accession negotiations with LDCs, and in December 2002, the General Council adopted Guidelines on the Accession of LDCs for simplified and streamlined accession procedures with a view to concluding negotiations as quickly as possible.[91] The Guidelines were also intended to help to limit to a greater extent the possibility of imposing unfair conditions on LDCs. However, since acceding countries have little or no leverage over existing WTO members, it is submitted that there is not much that they can do to make sure that all these promises are fulfilled. According to the Guidelines, WTO members have to give more consideration to the specific needs of acceding LDCs particularly in the following areas: market access, WTO rules process, trade related assistance, and capacity building. These same considerations should also be given after accession.[92]

However, in the three years between the adoption of the 2002 Accession Guidelines and the Hong Kong Ministerial Conference in 2005, only two LDCs, Cambodia and Nepal, acceded to the WTO. At the Hong Kong Ministerial Conference, ministers once again reaffirmed their commitment in para 47 of the Declaration:

> 'We agree to facilitate and accelerate negotiations with acceding LDCs based on the accession guidelines adopted by the General Council in December 2002. We commit to continue giving our attention and priority to concluding the ongoing accession proceedings as rapidly as possible'.[93]

After the eighth Hong Kong Ministerial Conference in 2005, four more LDCs, Cape Verde, Samoa, Laos and Vanuatu, acceded to the WTO, while nine more are still negotiating to join the

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https://www.google.co.za/search?q=Bosworth+R+%26+Duncan+R+Current+status+of+the+WTO+accession+process+and+the+experience+of+ESCAP+acceding+countries (accessed on 11/10/2012).

[91] Handbook on accession to the WTO; chapter 2.Accessed from *www.to.org/english/thewto_e/acc_e/cbt-course_e/c2s4p1_e.htm* (accessed on 28/01/2013).

[92] WTO document WT/L/508 of January 20, 2003.

[93] Handbook on the accession to the WTO: Chapter 4. Available at *http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s1p1_e.htm* (accessed on 20/03/2013).

WTO.[94] Pleas and declarations have continually been made since then for WTO members to fully and faithfully adhere to the letter and spirit of the WTO Accession Guidelines adopted by the General Council.[95]

Thus, with a view to further strengthening the 2002 LDC Accession Guidelines, new accession guidelines were agreed upon in July 2012. But these 2012 Guidelines have been perceived to do more harm than good to LDCs based on the fact that they still fail to address the onerous obligations placed on new applicants by incumbent members. The various concerns hinge on the following areas; benchmarks for goods, transitional periods, services, special and differential treatment, and accession rules, and technical assistance.[96]

Seen in the light of the experience of the LDCs which have acceded to the WTO,[97] the arguments posed by the 2012 Guidelines are regarded as being extremely optimistic speculations, as some commentators such as Adhikari and Dahal concluded after observing that, LDCs' accession process continues to be highly protracted, politically demanding and frustrating.[98]

This slow progress and lack of visible reforms have garnered great cynicism around the accession process, and in fact Grynberg and Joy argue that it is the extraordinarily naïve who would believe that the system of accession will eventually be reformed.[99] True to this view, it is submitted that, there has been a lack by the GATT/WTO, over the years since its formation to exert seriousness and urgency to strengthen and implement the special and differential status of the LDC in the multilateral trading regime. Moreover, despite their plights there has been a failure to conduct negotiations for accession in a way that ensures that the interest of the LDC is best served. Unless these initiatives come to pass, it is hardly impossible not to share in

[94] These are Afghanistan, Bhutan, Comoros, Equatorial Guinea, Ethiopia, Liberia, Sao Tome and Principe, Sudan, and Yemen

[95] LDC Trade Ministers' declarations were made in Dhaka (in 2003), Maseru (in 2008) and Dar Es Salam (in 2009),

[96] Accession of Least Developed Countries; WTO WT/COMTD/LDC/21 6 JULY 2012 (12-3621).

[97] It took LDCs: Nepal 14 years, Cambodia almost 9 years, and Vietnam about 12 years to complete their WTO accession. As will be considered later, neither are their terms of accession do not seem to have been driven by the spirit of the differential treatment purported by the above Declaration and decision. Out of the 48 LDCs save for the 30 original members that joined prior to 1995, only 6 have acceded to the WTO whereas eight more remain in the process of accession.

[98] Adhikari R & Dahal N 'Least Developed Countries Accession to the WTO: Learning from the cases of Nepal, Cambodia and Vanuatu' Published by the South Asia Watch on Trade, Economics & Environment (SAWTEE) available at *http://www.un-ngls.org/SAWTEE.doc*. (accessed on 23/10/2012).

[99] Grynberg R & Mickey J R 'The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System' In Grynberg R (ed) *WTO at the Margins: Small states in the Multilateral Trading System*. (2006) 693-714, see generally.

Grynberg and Joy's cynicism towards the WTO. They further assert the following reasons for their cynicism. First, those countries that are in the process of accession are outside the WTO system and hence play no part in reforming the process.[100] It is argued that they therefore instead resort to engaging in negotiating specific terms with incumbent members knowing that a general debate is unlikely to lead to an agreed result that would ease the burden on them as aspirant member countries.[101] Secondly, they submit that since those inside the system stand to gain little, they are unlikely to be willing to expend the scarce political capital available in soliciting for reforms of the system.[102] Finally, it is further feared that once the aspirant countries join the WTO, they may seek to exercise their new-found power and demand concessions from other acceding countries, and this is something that the incumbent countries do not desire.[103]
It is therefore argued that the major fault line lies in the fact that, the principal objectives of trade negotiators is to extract concessions from their trading partners and they are less likely to abandon this by following the Guidelines of the General Council, which can be viewed as nothing but a set of best endeavour clauses.[104]

2.4 Rationales for joining the WTO

In spite of the obstacles mentioned, there are several good reasons for LDCs to join the WTO and for current WTO members to support this process. Among the most important five reasons that will be discussed below are the following: accession to the WTO will enhance economic development in LDCs, increase Foreign Direct Investment (FDI), encourage market access, enhance dispute settlement, and encourage effective domestic policy making and institutions.

2.4.1 The WTO accession and economic development

Trade liberalisation is undoubtedly one of the things expected to come out of the WTO accession process. Economists continue to argue about, and conduct research into, the connection between trade liberalisation and economic growth, but no concrete and clear answer has been given so far to the question whether trade liberalisation leads to economic growth.[105] For the WTO, however, it is noted that the answer to this question is in the affirmative. Accession encourages trade liberalisation, and this in turn stimulates economic growth which is

[100] Pandey P R *et al* 'Nepal's Accession to the WTO' (2011) 4.(Hereafter Pandey P R *et al* 2011).
[101] Williams P J 'A Handbook on Accession to the WTO' (2008) 50.
[102] Pandey P R *et al* (2011) 4.
[103] Pandey P R *et al* (2011)4.
[104] Pandey P R *et al* (2011) 4.
[105] Spanu V 'Liberalisation of the International Trade and Economic growth (2003) 2.

good news for employment.[106] Achieving higher living standards, full employment and sustainable development are the aims of the WTO's member governments, as expressed in the WTO's founding Marrakesh Agreement. The means through which these are achievable is by opening up countries' trade markets through a substantial reduction of tariffs and other obstacles to trade.[107]

An open market policy will enable a country to exploit its position of comparative advantage. Ricardo showed that when countries are encouraged to each specialise in what they are good at and in what they produce and export at comparatively lower costs, all parties end up benefiting.[108] Specialisation through international trade, as every country finds some export activities to earn the foreign currencies needed to pay for necessary imports.[109] It is further noted that this rationale of specialisation and international trade is more beneficial to small economies because exporting to world markets increases opportunities to trade and allows them to benefit from economies of scale which then boosts economic growth.[110] Economic theory and evidence underline the importance of export led growth. Such growth is most effective when it concentrates on sectors in which the country has a competitive advantage, meaning that it can produce those goods at relatively lower opportunity costs than its trading partners.[111]

[106] See the 7th benefit of the '10 benefits of the WTO' available at http://www.wto.org/english/res_e/doload_e/10b_e.pdf (accessed on 01/03/2013).
Moreover it is noted that one of the overriding principles of the WTO is to promote the liberalisation of trade by encouraging non-discriminatory treatment in international trade by the creation of a level field for all members, and for the reduction and possible elimination of trade barriers

[107] See 10 things the WTO can do. Available at https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi03_e.htm (accessed on 02/04/2013).

[108] Ricardo D *On the Principles of Political Economy and Taxation* 3rd Ed (1821).see generally.

[109] Wiemann J, Ashoff V, Grad M *Laos on its Way to WTO Membership: Challenges and opportunities for developing high agricultural exports*. (2009) 17. (Hereafter Wiemann J, *et al Laos on its Way to WTO Membership* 2009).

[110] Smith A *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) see generally, stressed that economic growth depended upon specialisation and the division of labour.

[111] Tuchmand M 'The Systematic Environmental Externalities of Free Trade: A Call for Wiser Trade Decision-Making' (1995) 83 *Georgetown Law Journal* 2099 – 2102 see generally.

2.4.2 The WTO accession and secure market access

The second rationale for acceding to the WTO is that governments are able to obtain an improved access to markets for their exports.[112] The MFN rates of the acceding countries' trade partners are not affected by accession, but rather that the acceding countries are able to benefit from all commitments made by signatories to the WTO Agreements in future trade negotiations.[113]

WTO membership may urge LDCs to liberalise market access for imports, although they are not necessarily required to do so as a result of the special and differential treatment extended to them. It is argued that reducing the implicit tax on exports will also stimulate export diversification and boost FDI inflows.[114]

It is argued that by staying outside the WTO, discriminatory tariffs would be applied by the countries' trade partners against the non-members and the non-members would further be exposed to the undue negotiating strengths of their partners bilaterally or regionally when negotiating border measures.[115] As far as the interests of small countries are concerned, the MTS plays a significant role, for these countries have a limited power to exploit their small size to improve their terms of trade.[116] Their impact on terms of trade maybe enhanced if terms of trade are negotiated at a multilateral level.[117]

Moreover, as far as accessing other members' markets is concerned, LDCs have been granted preferential access to developed country markets under such schemes as the Generalized System of Preferences (GSP),[118] the African Growth and Opportunity Act (AGOA),[119] and The

[112] Bacchetta M & Drabek Z 'Effects of WTO Accession on Policy Making in Sovereign States: Preliminary Lessons from the Recent Experience of Transition Countries' (Working Paper by the WTO, 2002) 10. (Hereafter Bacchetta M & Drabek Z 'Effects of WTO Accession on Policy Making in Sovereign States' 2002).

[113] In practice, countries have often benefited from reductions of MFN rates even if they remained outside the GATT/WTO. In such situations the main benefit of joining the WTO would be the certainty and predictability of such benefits, which are by no means guaranteed for outsiders.

[114] Langhammer R J & Matthias L 'Broadening WTO Membership: key accession issues' In: Speyer G K, & Bernhard (Ed.): *The World Trade Organisation millennium round* (2001) 262- 274. See generally. Available at http://www.econstor.eu/bitstream/10419/2543/1/langhammer_wtomembership.pdf (accessed on 20/02/2013).

[115] Bacchetta M & Drabek Z 'Effects of WTO Accession on Policy Making in Sovereign States' (2002) 10.(Thereafter Bacchetta M & Drabek Z 2002).

[116] Bacchetta M & Drabek Z (2002) 10.

[117] Bacchetta M & Drabek Z (2002) 10.

[118] The General System of Preference (GSP) is a scheme by which developed countries give more favourable treatment to products from developing countries on non-reciprocity basis as an exception to the general MFN treatment. The product coverage and extent of such treatment varies from one preference giver to another.

European Union's (EU) Everything but Arms (EBA) initiative which provides the LDCs' products duty free and quota free access to some of the most lucrative markets of the EU except arms and ammunitions, without any quantitative restrictions. It may therefore be argued that LDCs accession to the WTO may not bring about major changes in terms of bolstering access to such markets after all.

A question that arises is what then is the relevance of LDCs acceding to the WTO if there is the option of the preferential market access? In an attempt to answer this, it has been noted that these preferential schemes bear unfavourable characteristics, such as, being time limited and unpredictable in that they can be unilaterally changed without the country doing so being in violation of any legal norms except for bilateral treaties if any exist.[120] This undoubtedly projects an unfavorable image to anyone wishing to do business within such a country.[121] But on the other hand, WTO commitments are more legally binding and any breach could result in legal consequences.[122] Such legal certainty and the threat of dispute settlement provided by the WTO therefore guarantee secure market access. The gains therefore, are rather in the transparency, stability and security of these market access conditions.

2.4.3 The WTO accession and domestic policy making and institutions

Acceding countries are required to put in place a set of norms and institutions, which support the liberalisation of markets, increase transparency, and promote the rule of law, contract enforcement and the evolution of an independent judicial system. In principle, nothing would prevent governments from putting in place these norms and regulations on a unilateral basis. But the role the WTO plays is to facilitate the introduction of effective reforms not only by reinforcing the credibility of the government's trade policies but also by helping to introduce

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[119] The African Growth and Opportunity Act (AGOA) was enacted in 2000 and is part and parcel of the Trade and Development Act of the United States. It provides reforming African countries with the most liberal access to the US market entitling a total of 48 countries in sub-Saharan Africa (SSA) to trade substantially all their export items on the US market free of duty and without quota restrictions. Available at http://www.agoa.gov/agoalegislation/index.asp. (accessed on 07/09/2013).

[120] Onguglo F B 'Developing countries and unilateral trade preferences in the new international trading system' available at http://www.wto.org/english/tratop_e/devel_e/sem01_e/ongugl_e.doc (accessed on 25/03/2013).

[121] Desta G M 'Ethiopia on the Road to WTO Membership: Reflections following the adoption of the 2010 Growth and Transformation plan' in Birhanu F M & Krawjeski M (Eds) *Acceding to the World Trade Organisation from a Least Developed Country perspective: The case of Ethiopia* (2011) 246. (Hereafter Desta G M 'Ethiopia on the Road to WTO Membership' 2011).

[122] Checkol A A 'Accession to the WTO: Brightening the prospects for investment? A least developed country's perspective'. (Published LLM Thesis University of Dundee, 2002) 7.

policies that are based on best practice and that must be harmonized.[123]This is illustrated by evidence that acceding economies' trade regimes vary considerably, as many have established regimes with relative low tariffs and no significant formal non-tariff barriers. For such countries therefore, WTO membership provides the opportunity to lock in these regimes to assume legally binding obligations regarding tariff levels. This not only permits them to enjoy the benefits of liberal trade but also gives them a first line of defense against the domestic protectionist pressures that are present in all market economies.

2.4.4 The WTO accession and FDI

The question most frequently asked is what role WTO membership and consequent trade liberalisation plays on the flow of FDI. It is argued that locking in trade liberalisation through bound tariffs and domestic support stabilises expectations and reduces the uncertainty associated with unexpected changes in policy.[124] This then creates a favourable regulatory environment which sends a positive signal to foreign investors about a country's commitment to open up its economy.[125] The role that the WTO plays is as an insurance mechanism for the investors through its transparency and nondiscriminatory[126] principles enshrined in the WTO legal texts and its Trade Policy Reviews which further help to minimize trade policy induced uncertainty.[127] Such uncertainty is associated with lower investment and growth rates and with a shift in resources toward non-tradeables.[128] This, in turn, encourages the inflow of foreign investment and technological know-how.

2.4.5 The WTO accession and securing enforcement

It is submitted that all the four arguments mentioned above cannot render the required outcomes on LDCs seeking accession if the WTO members could free ride and easily renege on their WTO commitments. As soon as a country does not abide by WTO rules, the expected

[123] Bacchetta M & Drabek Z (2002) 11.
[124] Voituriez T 'WTO Entry and Beyond: Accession Benefits and the Costs of Membership. A preliminary Analysis in the case of Vietnam'. (2011) 5. Available at *http://agents.cirad.fr/pjjimg/tancrede.voituriez@cirad.fr/paper_TV1.pdf* (accessed on 25/03/2013.) (Hereafter Voituriez T 'WTO Entry and Beyond, 2011).
[125] See DG Pasca Lamy's speech at the University of Addis Ababa; 'WTO accession is an "investment" in future competitiveness.' 11th May 2012. Available at *www.wto.org* (accessed on 16/03/2013).
[126] See GATT Article I, III; GATS Art II through to VI; TRIPS Article III, IV.
[127] See Annex 3 of the WTO legal texts on Trade Policy Review Mechanism.
[128]Voituriez T *WTO Entry and Beyond* (2011)5.

gains from joining the WTO as well as the expected gains from abiding by the rules both become moot. Protectionist pressures may resume, investors may be deterred, and expected gains turn into losses. But the WTO's DSB, by securing enforcement and deterring free ride behaviour by countries, limits these behaviours and secures the expected gains for any member.[129]

Access to an impartial and binding dispute settlement mechanism whose decisions have a significant chance of being enforced is one of the most important potential benefits from WTO accession for smaller and weaker countries.[130] This is so because there are very few effective vehicles to resolve international trading disputes apart from commercial arbitration, and those that exist seldom rule in favour of small and vulnerable trading nations. The WTO dispute settlement mechanism provides a uniquely fair, accessible and effective opportunity for each WTO member.

However, despite these positive reasons to join the WTO, there still appears to be dissent concerning the cost of accession for DCs and LDCs as discussed next.

2.5 Dissent over the real costs of accession

The above arguments provide reasonable assumptions as to why LDCs may decide to join the WTO. However, before such a decision is made, the assumptions still need to be carefully examined; indeed, they present an uneven picture when confronted with an empirical assessment of the record of LDCs once accession has occurred. Some of the expected effects may culminate or even disappear. The dissenting views on four of the most important effects already introduced above, *viz*, economic development, securing market access, foreign direct investment, and dispute settlement enforcement, are now examined.

2.5.1 Economic development

The most contentious argument is whether WTO membership does indeed promote economic growth and development among LDCs. It is argued that WTO membership does not

[129] It is argued that the ultimate test of international trade law is to be seen in the extent to which international commitments make government behaviour more stable and easier to predict, both for private investors and for other governments.
[130] Michalopoulos C 'WTO Accession for countries in transition' (World Bank policy research working paper 1998) 5.

automatically guarantee that the benefits of multilateral trade will be apportioned equitably, especially with respect to DCs or LDCs. Furthermore, parts of the GATT/WTO package have the potential to directly undermine the development objectives of LDCs.[131] The flawed design of the GATT historically and the birth of the WTO with new instruments damaging to the development objectives of poor countries are listed as reasons for this argument.[132]

Over the lifetime of the GATT/WTO, there have been notable responses to address the plight of developing countries and to try and fill the *lacunae* in development. First, there was the amendment of GATT Article XVIII by the1954-55 GATT Review Session which was aimed at the relaxation of the conditions under which developing countries could take measures for infant industry protection as well as for balance of payments purposes.[133] Its aim was to provide flexibility for developing countries to assist in their economic development. Secondly, in 1964, there was the addition of Part IV to the GATT by the Committee on Trade and Development which recognised the special needs of developing countries in the trading system, but much of the language was in 'best endeavours' terms.[134] Thirdly, there was the introduction of the Generalised System of Preferences(GSP) in 1971 on the basis of a temporary waiver from the MFN principle, which was later put on a permanent legal foundation as the Enabling Clause as part of the Tokyo Round agreements in 1979.[135] The clause established the principle of differential and more favourable treatment, reciprocity, and fuller participation of developing countries. It provided for: (i) the preferential market access of developing countries to developed country markets on a non-reciprocal, non-discriminatory basis; (ii) 'more favourable' treatment for developing countries in other GATT rules dealing with non-tariff barriers; (iii) the introduction of preferential trade regimes between developing countries; and (iv) the special treatment of LDCs in the context of specific measures for developing countries.

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[131] Desta G M 'Ethiopia on the Road to WTO Membership' (2011) 232.

[132] Dam K W *The GATT: Law and International Economic Organisation* (1970) 17. (Arguing that "[t]he General Agreement was in its origin an agreement on tariffs, and it is fair to say that the GATT has had its primary significance in the field of tariff negotiations.").

[133] Jackson J H *World Trade and the Law of the GATT* (1969) 235.

Article XVIII, paragraph II of the GATT states:

'The contracting parties recognize further that it may be necessary for those contracting parties (contracting parties the economies of which can only support low standards of living and are in the early stages of development), in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement'.

[134] Part IV of the GATT, when adopted, merely led observers to conclude that LDCs "obtained a great deal of verbiage and very few precise commitments" and that it failed to address substantive trade issues of preferences, agricultural products, and import surcharges. See Jackson J H (1969)237-241.see generally.

[135] See the GATT of 1980.

This process continued with the establishment of the WTO whose objectives include: raising living standards, full employment, steadily growing real income and effective demand, expanding production and trade in goods and services, and allowing optimal use of the world's resources in accordance with sustainable development.[136] The WTO members also further indicated their intention to fulfill these objectives in a manner consistent with the respective needs and concerns of the parties taking into account their different levels of development. In addition, the WTO Agreement recognises the need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development.[137]

However, while trade and development objectives appear central to the objectives of the WTO and the means by which it seeks to fulfill those objectives, in practice many of the specific provisions are couched in 'best endeavours' terms that have little legal force.[138] This is one of the main reasons for the disillusionment that many developing countries have manifest in relation to the results of the Uruguay Round. Most notably they have argued that the expected benefits were not realized. For instance the back loading or the application of special safeguards, rules of origin and anti-dumping measures in the Agreement on Textiles and Clothing have offset the promised gains.[139] They argue that inadequate account was taken of the time, cost and capacity required to meet WTO commitments for example in Customs Valuation or TRIMS. The Dispute Settlement Mechanism (DSM) is expensive and requires considerable expertise to use, and controversy has been stirred by certain decisions of the DSB and Appellate Body. The TRIPS agreement is widely recognised to have posed a considerable burden on developing countries while protecting the interests of developed countries.[140] Developing countries agreed to the TRIPS in exchange for developed country commitments to liberalise agriculture and textiles but the result is instead a regime that strives to keep developing countries at a state of economic subjection.[141] Despite the eight rounds of

[136] See preamble of the WTO Agreement of 1994.
[137] See preamble of the WTO Agreement of 1994.
[138] Laird S, Turrini A & Safadi R 'The WTO and Development' 2001 *The Political Economy of Policy Reform* 221-262; 223. (Hereafter Laird S *et al* 'The WTO and Development', 2001)
[139] Laird S *et al* 'The WTO and Development' (2001) 223.
[140] As Finger puts it, intellectual property came into the Uruguay Round agenda 'At the insistence of developed country industries…Few delegates or analysts appreciated the size of the liability TRIPS would create for intellectual property users.' Finger M 'Review essay' (2007) 6 *World Trade Review* 139.
[141] Templeman L S 'Intellectual Property' (1998) *Journal of International Economic Law* 603-606,605. Moreover N. Birdsall, *et al* argue: 'Currently, the developed world uses international trade agreements to impose costly and

multilateral negotiations, tariff and non-tariff barriers remain heavily stacked against the exports of the developing countries. In short, there is a view that, despite the stated objectives, the WTO is systemically biased against development.[142]

2.5.2 Securing market access

Some of the sharpest criticisms of DCs and LDCs target the trade policies of developed countries. The areas of concern in this regard relate to tariff peaks and escalation in both industrial and agricultural sectors, the erosion of special preferences for LDCs, and growing threats from standards and technical barriers.[143]

The main obstacles to the exports of sub-Saharan African countries and LDCs appear to be in the non-tariff areas of sanitary and Phytosanitary (SPS) and technical barrier to trade (TBT) measures.[144] Both the WTO agreements in these areas, though designed in good faith to ensure food safety and animal and plant health protection,[145] and the arbitrary use of these measures by developed countries have resulted in an increase in restrictions to trade.[146] Developed countries, due to the availability of resources and superior technology, are able to enhance their product standards and tend to fix stringent and high SPS and TBT standards. On the other hand, LDCs, due to the scarcity of public resources to finance compliance with these stringent standards, find that market access of their products in developed countries' markets has become restricted.[147]

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onerous obligations on poor countries. The most egregious example has been the [TRIPS Agreement]. TRIPS will make the prices of essential medicines significantly greater, and this at a time when poor countries are being ravaged by one of the worst health epidemics ever known—HIV/AIDS. The price increase means that money from the citizens of poor countries will be transferred directly to wealthy pharmaceutical companies. […] An international community that presides over TRIPS and similar agreements forfeits any claim to being development-friendly.' See Birdsall N, Rodrik D & Subramanian A 'How to Help Poor Countries', (2005) 84 *Foreign Affairs* 136-152 see generally.

[142] Laird S *et al* 'The WTO and Development' (2001) 223.

[143] Olarreaga M & Francis N 'Tariff peak and Preferences' in Hoekman B, Mattoo A & English P (eds.) *Development, Trade and the WTO: A Hand Book* (2002) 105.

[144] Voituriez T 'WTO Entry and Beyond' (2001)7.

[145] The WTO SPS and TBT agreements.

[146] The UNCTAD Report UNCTAD/ALDC/2008/1 – *Export competitiveness and development in LDCs: policies, issues and priorities for least developed countries for action during and beyond UNCTAD XII.* (2008) 10.

[147] The North South Institute 'The reality of Trade: WTO and Developing countries' (2002)12. Available at *http://www.nsi-ins.ca/wp-content/uploads/2012/10/2002-The-Reality-of-Trade-the-Uruguay-Round-and-Developing-Countries.pdf* (accessed on 18/07/2013).

These SPS and TBT measures are amongst the most common non-tariff barriers that have been identified as restricting market access of LDCs' products, whilst tariff peaks and escalation have been identified as some of the tariff barriers that do the same. 'Tariff peaks' are defined as exceptionally high tariffs imposed on certain products, especially those that the government considers as sensitive, with intent to protect an importing country's industry.[148] Such tariffs on a country's vital exports could negatively impact that country's international trade, as such higher tariffs in developed countries denies access of LDCs' goods or allows access at relatively higher costs.[149] 'Tariff escalation' on the other hand, is a situation where a country levies low duties on materials imported for use by a domestic industry and high duties on imports equivalent to that industry's finished products. This has the potential of reducing demand for processed imports from developing countries and hampering diversification into higher value-added exports, thus compelling them to continue to heavily depend on primary goods.[150]

As stated above in section 2.4.2 developing countries and LDCs currently have practically duty free access to European and North American markets under the GSP regimes, but their main concern is that multilateral liberalisation will cause the erosion of these special preferences.[151] The MFN trade reforms at unilateral or at multilateral levels play the role of lowering market access barriers and other protection measures for exports from the LDCs' competitors, thereby reducing the advantages of the preference receiving countries over their competitors.[152] In addition, MFN trade reforms by large trading countries generally push up world market prices, thereby hurting net food importing countries, including many of the African LDCs.[153]

[148] Understanding the WTO: Peaks and escalation: what are they? Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm (accessed on 02/04/2013).

[149] It is noted that extremely high and often prohibitive peak tariffs of 100-900% continue to be applied by many developed countries for such major agricultural products as sugar, rice, cereals, dairy products, and meat as well as for food industry products and footwear. See Supper E. *Is There Effectively a Level Playing Field for Developing Country Exports?* Policy Issues in International Trade and Commodities Study Series, UNCTAD, 2001.

[150] Understanding the WTO: Peaks' and 'escalation': what are they? Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm (accessed on 02/04/2013).

[151] For a further discussion on preference erosion see Francois J, Hoekman B & Manchin M 'Preference erosion and multilateral trade liberalisation' (2005) available at http://www.ycsg.yale.edu/focus/gta/preference_erosion.pdf (accessed on 02/04/2013).

[152] Yu W 'Preference erosion, the Doha round and African LDCs' in Case study 9-10 of the program *Food Policy for developing countries: The role of government in the global food system* (2007) 2.

[153] Yu W 'Preference erosion, the Doha round and African LDCs' in Case study 9-10 of the program *Food Policy for developing countries: The role of government in the global food system* (2007) 2.

2.5.3 Foreign direct investment

The role of WTO membership and consequent trade liberalisation on the flow of FDI is at best unclear and controversial, as arguments have been advanced that a country can attract FDI whether or not it is a member of the WTO.[154] Plenty of empirical evidence suggests that one of the main reasons for companies investing in a foreign country is to avoid that foreign country's import barriers by producing within its borders.[155] Bypassing protectionist measures in the protectionist countries and being able to establish facilities within the protecting country were in fact noted in a WTO Secretariat report as one of the oldest reasons for FDI.[156] From the above, one may conclude that higher import tariffs attract more FDI.[157] However, economists explain that higher and lower barriers may both attract FDI but of different types. For instance, protected markets attract FDI which takes the form of stand-alone production units aimed at domestic markets, whereas lower trade barriers especially on intermediate goods are more favourable to vertical FDI attracted by the fundamental advantages of the host country, such as, lower labour costs, natural resources and generally favourable economic conditions.[158]

There is an assertion that WTO membership will enhance the pace and scope of economic integration amongst its members and will, *inter alia*, help attract investment, which in turn is considered to be a potent tool in achieving economic growth.[159] Paradoxically, empirical research conducted on the subject tends to suggest that FDI has a negligible role, if any, to play in the economic growth of a country.[160] Moreover, there is no evidence that a WTO investment agreement will necessarily lead to greater foreign investment for the poorest and most marginalised countries, let alone that they will be the ones to benefit the most.[161] This conclusion supports evidence already gathered in relation to investment flows arising from the GATS. Foreign investment in services accounts for half of the world total of FDI flows, and

[154] Horscroft V 'Small Economies and Special and Differential Treatment: Strengthening the Evidence, Countering the Fallacies', in Grynberg, R. (ed.) *WTO at the Margins: Small States and the Multilateral Trading System* (2006) 227-278. See generally. (Hereafter Horscroft V *WTO at the Margins* 2006).
[155] Desta G M *Ethiopia on the Road to WTO Membership* (2011) 244. (Thereafter Desta G M 2011).
[156] The Relationship between Trade and Foreign Direct Investment: *Note by the Secretariat*, WTO Doc. WT/WGTI/W/7, 18 September 1997, para. 62.
[157] Desta G M (2011) 245.
[158] Desta G M (2011) 245.
[159] Michalopoulos C *Developing countries in the WTO* (2001) 117.
[160] Horscroft V *WTO at the Margins* (2006)227-278. See generally.
[161] World Bank *Global Economic Prospects and the Developing Countries report 2003- Investing to Unlock Global Opportunities* (2003) 133.

developing countries have been assured in the past that making GATS commitments would increase the level of FDI they would receive in future. Yet this signalling has not brought additional FDI flows to host countries as they had been led to believe.[162] It is thus argued that even without any GATS commitments;[163] there is nothing to prevent a country inviting the kind of investment that will help it to achieve its development goals.[164] The assertion that foreign companies will only invest in a country if they know that their interests are protected by commitments such as those imposed under the GATS, is again refuted by many, including United Nations Committee on Trade and Development (UNCTAD) who state that there is no empirical evidence to link any significant increase in FDI flows to developing countries with the conclusion of the GATS.[165]

2.5.4 Dispute settlement enforcement

With regard to the counter-argument on the DSM and its effective use by developing and small economies, evidence collected shows that developing countries have been increasing their participation in the world trading system and also the DSPs of the GATT/WTO.[166] Compared to the 1974-1994 GATT period, there have been more disputes with developing country complainants and respondents initiated since the WTO's inception in 1995.[167] It is argued that some of this increase is merely a reflection of the growth of developing country membership; nevertheless, the increase in complainant activity is attributable to the idea that some trade barriers to dispute initiation have been reduced. On the other hand, the increase in respondent activity suggests that some developing countries have increased their market access

[162] World Development Movement and Friends of the Earth 'Investment and the WTO: Busting the Myths' (2003)8. Available at www.foe.co.uk/resource/briefings/invesment_and_the_wto_bust.pdf (accessed on 07/03/2013).

[163] The GATS is not expressly an investment agreement, but many of its most fundamental provisions relate to the conditions under which foreign capital can enter a country's services sector. This is the same for the WTO's TRIMS & TRIPS agreements whose provisions create conducive regulatory atmosphere that act as pool factors for foreign investment.

[164] Bosworth M *Nepal's Long-term Direction in Global and Regional trade policy* (Report by United Nations Social and Economic Commission for Asia and the Pacific, 2011) 36.

[165] A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations. (Paper published by UNCTAD, 2000).see generally.

[166] Leitner K & Lester S 'WTO Dispute Settlement 1995-2006: A Statistical Analysis' (2007) 8 *Journal of International Economic Law* 165-179. See generally. (Hereafter Leitner K & Lester S 'WTO Dispute Settlement 1995-2006: A Statistical Analysis' 2007) 165-179.

[167] Leitner K & Lester S 'WTO Dispute Settlement 1995-2006: A Statistical Analysis' (2007) 165-179.

commitments to a level where trading partners increasingly find such commitments valuable enough to spend resources to defend them.[168]

There are two major factors that have, however, so far been identified as hindering effective and broader participation of DCs and LDCs in DSPs: first, the DSP is often too costly for a poor country to use;[169] and secondly, the fact first even the final benefits of winning a case could amount to nothing. It is estimated that an amount of more than half a million dollars in legal fees may be required to litigate a WTO dispute which can last up to three years, and may need a significant time commitment by government officials who may already be severely under-resourced.[170] However, such efforts may be for nothing, for there is no assurance that a ruling will be affirmative or that the respondent will comply in a manner that leads to market access.[171] The WTO dispute settlement system envisages two types of remedies: compensation, which takes the form of reduction of trade restrictions in sectors where the winning party has a particular interest; or retaliation, that takes the form of withdrawal by the winning party of proportionate trade concessions in sectors of particular interest to the offending party.[172] Retaliation is often considered most counterproductive to the interests of the winning party, as the cost of imposing these measures is simply too high and developing countries feel that given the small size of their markets, retaliation will never put sufficient pressure on larger, more developed members.[173] In addition to the above there is the threat that DCs, despite legally winning a case, could face a bad economic outcome should the respondent decide to engage in retribution outside of the WTO system.[174] This could be done, for instance, through the reduction of bilateral assistance or of preferential access under the GSP or another preferential trade agreement. These factors taken together contribute to unwillingness on the part of DCs to invoke dispute settlement against larger and richer trading partners and to engage in potential dispute settlement activity related to their market access interests, hence diminishing their effective gains.

[168] Bown C P & Hoekman B 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8 *Journal of International Economic Law* 861-890.see generally.
[169] Shaffer G C & Nordstrom H 'Access to Justice in the World Trade Organisation: The Case for a Small Claims Procedure?' (2008) 7 *World Trade Review* 587-640. See generally. (Hereafter Shaffer G C & Nordstrom H 'Access to Justice in the World Trade Organisation (2008) 587-640.
[170] Shaffer G C & Nordstrom H 'Access to Justice in the World Trade Organisation (2008) 587-640.
[171] Shaffer G C & Nordstrom H 'Access to Justice in the World Trade Organisation (2008) 587-640.
[172] Bronckers M & Van den Broek N 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement' (2005) 8 *Journal of International Economic Law* 101-126.see generally.
[173] Voituriez T 'WTO Entry and Beyond' (2001) 9.
[174] Voituriez T 'WTO Entry and Beyond' (2001) 9.

2.6 Conclusion

In this chapter the WTO and its key principles as well as the accession process was explained. In addition, the challenges that are faced by LDCs while embarking on this process have been alerted to and emphasis was laid particularly on both the procedural and substantive aspects of the accession process. Procedural aspects were based on the constructive ambiguity of the article XII which is the legal provision dealing with the accession process while substantive aspects hinged on the extensive trade liberalisation demands requested by incumbent members from acceding applicants. Moreover, the aims of the WTO Guidelines for the accession of LDCs have been briefly introduced and discussed as well.

Furthermore, the literature on WTO accession conveys various arguments and disputed evidence on LDCs WTO membership gains. This chapter endeavored to show the arguments in favour of and those against. At least five distinct rationales were identified as reasons why LDCs join the Organisation as well as the underlying WTO principles. A close examination was made of the following rationales: economic development, increasing and securing market access, FDI, effective domestic policies and institutions, and finally the cross-cutting accountability effected through binding commitments and securing enforcement mechanisms. However, while the above rationales indicate that WTO accession is in principle for the benefit of LDCs not all seem to share this optimism. Thus the dissenting views concerning the cost of accession were discussed with regards to economic development, securing market access, foreign direct investment as well as dispute settlement enforcement.

CHAPTER 3

A COMPARATIVE ASSESSMENT OF THE MARKET ACCESS COMMITMENTS OF SIX LEAST DEVELOPED COUNTRIES WHICH HAVE RECENTLY ACCEDED TO THE WORLD TRADE ORGANISATION

3.1 Introduction

As indicated in the preceding Chapter 2, section 2.4, least developed countries (LDCs), driven by the heralded pledge that membership to the World Trade Organisation (WTO) will, *inter alia*, facilitate economic growth and development, increase foreign investment, secure predictable and transparent market access, enhance domestic policy making and institutions, and increased access to dispute settlement, have launched a bid to join the WTO and have succeeded. Such is the case of the following recently acceded LDCs; Nepal and Cambodia in 2004, Tonga in 2007, Samoa and Vanuatu in 2012 and Laos in 2013.[175] The question that arises is whether reasons that motivated these countries to seek membership of the WTO may be sufficient to motivate South Sudan to accede to the WTO?

To satisfactorily confirm the validity or otherwise of these assertions and provide an answer to the question posed above, an examination of each of the countries' profiles before and after joining the WTO is required. However, due to a lack of tangible evidence and limited studies carried out on the direct effects of joining the WTO as regards each of these recently acceded countries, a proper assessment is not viable at present.[176] Hence this research proposes the following different approach which has been formulated to answer both questions posed. The approach is to examine the market access commitments in both goods and services of the six recently acceded LDCs and compare and contrast them against those undertaken by incumbent WTO members as well as the LDCs accession guidelines. The main aim of this approach is to assess whether or not, LDCs are being ushered into the WTO on a level playing field and whether or not, it is as equal trading partners, based on the kind of market access commitments

[175] WTO accessions at *www.wto.org* (accessed on 25/04/2013).

[176] This was identified by looking at empirical studies on impact of WTO accession on acceding countries as well as World Trade Policy reviews and reports on LDCs. Available literature pointed out the fact that at present, few accession LDCs have five or more years of post-accession data to begin identifying or quantifying the effect of WTO accession and therefore the available evidence here is very limited.

LDCs have made. This approach poses the queries, whether or not there is any strand of substantive fairness in the accession process. Further on, what commitments should be expected of LDC applicant countries in the light of their development priorities and their economic capacity?

The profound potential impacts of the WTO stem, it is argued, directly from the extensive commercial and rule commitments that a country undertakes on its accession. However, it has been noted that incumbent countries have always exerted pressure on acceding countries to make commitments that go way beyond their development capacities. Overall, it appears that recently acceded countries have made extensive liberalisation commitments that go beyond those made by existing members during the Uruguay Round. Furthermore, each newly acceding country is expected to make commitments that go beyond those of its predecessor. The WTO's General Council therefore agreed on Guidelines to facilitate and ease the process of the accession of LDCs to the WTO. Have the accession guidelines yielded the very objectives for which they were created? Have LDCs received the special recommendations as promised?

In answering these questions, the chapter will focus on the most significant of the WTO commitments specifically in the areas of market access undertaken by these six LDCs. Further on, it will examine the weaknesses and strengths of the accession guidelines in light of the experience of each of these countries, and analyse these commitments in terms of their compatibility with general development objectives that are supposed to underpin the accession of LDCs to the WTO.

To achieve the above, the chapter proceeds as follows. It briefly gives a general introduction as to the reasons why each of these six countries joined the WTO and at the nature and scope of each of the six countries' market access commitments in the areas of goods and services. Thereafter follows a comparative assessment of the extent of the commitments a) amongst themselves and b) amongst the original WTO members. The research then briefly discusses whether the accession guidelines have achieved their intended objectives. Through this same lens there is a further critical analysis of the acceding LDCs' commitments with reference to the requirements of the new WTO accession guidelines, and their implications for these countries.

3.2 Nature and scope of the six LDCs' WTO commitments as regards market access

3.2.1 Nepal

In its quest to move along with global economic development, the Nepalese government realised that it could not remain aloof from the waves of globalisation. Consequently, it applied for membership of the GATT in May 1989. In that year, Nepal's bilateral trade and transit agreements with India, a major trading partner, were terminated and remained stalemated thus creating uncertainty for Nepal's foreign trade. It was against this backdrop that Nepal realised the essence of GATT membership in ensuring predictable and stable trade relations with its partners, including protection under GATT Article V on transit rights.[177] Nepal later acceded to the WTO in 2004 as the 147th member of the multilateral trade body and as the first LDC to have joined the institution through the process of accession.[178]

Nepal had a dire need to integrate into the global trading system and to gain the advantages of global trade, and therefore commenced the accession process for membership.[179] For a poor, landlocked and donor dependent country such as Nepal, membership of the WTO was necessary as it would ensure an alternative means of protection as part of the global mainstream and less vulnerability.[180] Apart from achieving broad based growth, the government of Nepal envisaged using WTO membership for disciplining its trading partners, achieving enhanced market access, benefiting from the special and differential treatment (S&DT) within the WTO system for LDCs, and securing transit rights to the sea.[181] Nepal's important market access commitments in goods and services under the WTO are discussed below.

[177] Article V of GATT states that there will be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, as well as traffic in transit to or from the territory of other contracting parties.
[178] WTO accessions; available at *www.wto.org* (accessed on 13/04/2013).
[179] Pant B 'Nepal and WTO: Industry and Trade' in Khatiwada R *WTO and Nepal* (2002)38.
[180] Thopa B 'World Trade Organisation and its impact to Nepal' (published Working Paper by SSRN 2007)1. Available at*http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1621756* accessed on 26/02/2013.
[181] Adhikari R, Dhahal N, & Pradhanga M 'Ensuring Development-supportive Accession of Least-developed Countries to the WTO: Learning from Nepal' (Paper published by the International Institute for Sustainable Development (IISD), 2008) (Hereafter Adhikari R *et al* 'Learning from Nepal' (2008) 1.

3.2.1.1 Bound tariffs

With reference to agricultural goods, Nepal bound its agricultural tariffs at an average of 42 percent.[182] Nepal bound 99.3 percent of its tariff lines for its non-agricultural products,[183] with the exception of a few tariff lines, such as, petroleum products, and cement, arms and ammunition, and it bound its industrial tariff at an average of 23.7 percent.[184] In terms of tariff peaks, Nepal's maximum duty is at 200 percent.[185]

3.2.1.2 Services

In the area of services, Nepal opened up all 11 services sectors and 70 subsector out of the 160 WTO subsectors.[186] The 11 service sectors comprised: business services; communication services; construction and related engineering services; distribution services; educational services; environment services; financial services; health and related social services; tourism and travel-related services; recreational, cultural and sporting services: and transport services.[187] Nepal had initially been asked to open all services sectors in which it had made a commitment, for 100 percent equity participation by foreigners within a period of five years but instead agreed to 80 percent foreign equity participation.[188]

3.2.2 Cambodia

The Royal Government of the Kingdom of Cambodia applied for membership of the WTO in 1994.[189] Following the Doha Declaration of November 2001 that eased membership conditions for LDCs, Cambodia's membership was finally approved in September 2003 at the Cancun Ministerial Conference.[190] However, its membership did not become effective until a year later

[182] Nepal Schedule of goods commitments. (2004) WT/ACC/NPL/16 Add 1. (Hereafter WT/ACC/NPL/16 Add 1).
[183] WTO,ITC & UNCTAD World Tariff Profiles 2012 available at http://www.wto.org/english/res_e/booksp_tariff_profiles12_e.pdf accessed on 07/05/2013 (Hereafter *World Tariff Profiles 2012*).
[184] WT/ACC/NPL/16 Add 1.
[185] Adhikari et *al* 'Learning from Nepal' (2008) 34.
[186] Nepal Schedule of specific commitments. (2004) WT/ACC/NPL/16 Add 2. (Hereafter WT/ACC/NPL/16 Add 2).
[187] WT/ACC/NPL/16 Add 2.
[188] Pandey R P (2011) 12.
[189] WTO accessions available at www.wto.org (accessed on (13/04/2013).
[190] WTO accessions available at www.wto.org (accessed on 13/04/2013).

because an internal political deadlock in Cambodia after the July 2003 elections delayed ratification.[191]

Cambodia acknowledged the role of international trade in alleviating poverty and accelerating economic growth and development, and initiated ambitious preliminaries to becoming a member of the Association of South East Asian Nations (ASEAN) and the WTO.[192] It filed an official WTO application on 8 December 1994.[193] Accession to the WTO was seen as a necessary means to achieve economic growth.[194] In the words of the Cambodian chief negotiator:

> 'In a time of harsh and fierce global competition, the survival of our country depends on our ability to capture the right opportunities and at the right time. We believe the entry to the WTO is such a case'.[195]

As an acceding member, Cambodia was obliged to make the market access commitments discussed below.[196]

3.1.2.1 Bound tariffs

Cambodia agreed to bind 100 percent of its tariff lines, which effectively set ceilings on the tariff rates of all imported products.[197] This prevents it from increasing tariff rates on imported goods above the tariff rate to which it has committed.[198]

In particular, the overall average bound duty rate that Cambodia agreed to, was 19.1 percent.[199] For agricultural products, Cambodia agreed to a simple average bound rate of 28.1 percent.[200]

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[191] Povarchuk R 'Cambodia's WTO Accession' (2004) 13 *Pacific Rim Law& Policy Journal of Association* 645-671, 646. (Hereafter Povarchuk R 'Cambodia's WTO Accession', 2004).

[192] Chae S & Hach S 'Cambodia's Accession to the WTO: Fast Track Accession by a Least Developed Country' In *Managing the Challenges of WTO Participation Case study 8.* (WTO working Paper, 2005) 120-133.see generally.

[193] WTO accessions available at *www.wto.org* (accessed on 13/04/2013).

[194] Povarchuk R 'Cambodia's WTO Accession' (2004) 646.

[195] Siphana S *Lessons from Cambodia's Entry into the World Trade Organisation* (2005)17. (Hereafter Siphana S 2005).

[196] Details on commitments on goods, services, and WTO rules can be found in the following WTO documents: Goods Schedule (WT/ACC/KHM/21/Add.1), Service Schedule (WT/ACC/KHM/21/Add.2), and Working Party Report (WT/ACC/KHM/21).

[197] See Cambodia's World Trade Organisation Accession protocol (WT/MIN/03/18).

[198] Siphana S (2005) 44.

[199] (WT/ACC/KHM/21/Add.1).

[200] (WT/ACC/KHM/21/Add.1).

Peak bound rates for the most sensitive agricultural products were 60 percent and the lowest bound rate was 5 percent.[201]

For industrial products, the average bound rate was 17.7 percent and peak bound rates were 50 percent, and the lowest rate was 0 percent.[202] In addition to setting bound tariffs, Cambodia also agreed that it would not introduce, re-introduce, or apply quantitative restrictions or other nontariff barriers on imports, such as licensing, quotas, prohibitions, bans, and other restrictions having equivalent effects that could not be justified under the provisions of the WTO agreements.[203]

3.2.2.2 Services

Cambodia undertook market access commitments in at least one subsector under each of 11 different services headings of the WTO classification. These are: business services; communications services; construction and related engineering services; distribution services; education services; environmental services; financial services; health related services; tourism and travel services; recreational services; and transport services.[204] It scheduled commitments in a total of 94 subsectors.[205]

3.2.3 Tonga

The kingdom of Tonga applied for WTO membership in 1995 and it became the 151st member in July 2007.[206] Economic factors have been identified as the main motivation for Tonga's application to join the WTO. The kingdom's economy is characterised by a heavy economic concentration in migration, remittances, and dependence on foreign aid donors. Its most significant and strategic bilateral partners and aid donors include Australia, New Zealand, Japan and China.[207] It is submitted that due to severe dependence on the willingness of multilateral organisations and these bilateral partners to offer it foreign aid, Tonga's policies and governmental actions are largely influenced by provisions found in the respective aid contracts

[201] (WT/ACC/KHM/21/Add.1).
[202] (WT/ACC/KHM/21/Add.1).
[203] Siphana S (2005) 44.
[204] Siphana S (2005) 44.
[205] Siphana S (2005) 44.
[206] See http://www.wto.org/english/thewto_e/acc_e/a1_tonga_e.htm accessed on 11/07/2013
[207] Langaoi P 'China's Diplomatic Relations with the Kingdom of Tonga' in Smith W T & Porter A S (eds) *China in the Oceania: Reshaping the Pacific*.(2010)164 -178, 166.

and conditions attached to the aid packages.[208] Hence, following their own rational interests and having much to gain from Tonga, the aid donors as WTO members encouraged Tonga to join the Organisation and might have played a crucial role in its accession.[209] Moreover, it is submitted that the only way that this small country could elevate itself onto a level playing field with powerful trading nations having equal rights and opportunities in a system based on rules instead of power and gaining much needed market access for its exports was by it acceding to the WTO.[210]

3.2.3.1 Bound tariffs

Tonga's accession deal required it to bind all tariffs, both agricultural and industrial, at either 15 percent or 20 percent.[211] Tonga was allowed up to a maximum bound rate of 17.6 percent tariff on all products. It bound agricultural products at an average bound rate of 19.2 percent and non-agricultural products at a binding average rate of 17.3 percent.[212] It agreed to a binding coverage of 100 percent on all its products.[213] Tonga had wanted to secure a bound tariff level of 35 percent or higher but pressure from its Working Party resulted in the low tariff bindings of 15 to 20 percent across all products. This reflects the general trend of acceding countries binding their tariffs at lower and lower levels.

3.2.3.2 Services

On services, Tonga also made fairly extensive commitments, including in sectors, such as, health, education, financial, transport, and telecoms.[214] It undertook commitments in nine out of the 11 service categories and undertook commitments in 36 subsectors out of a total of 53 subsectors.[215]

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[208] Wallis J 'Friendly islands' in an unfriendly system: Examining the process of Tonga's WTO accession' (2010) 53 *Asia Pacific Viewpoint* 262-277. 263.
[209] Wallis J 'Friendly islands' in an unfriendly system: Examining the process of Tonga's WTO accession' (2010) 53 *Asia Pacific Viewpoint* 262-277. 263.
[210] Benjamin M 'Small island developing states: Globalised trade systems: Tonga and the WTO' (Published thesis by the university of Twente 2011) 19.
[211] Report of the working Party on the accession of Tonga; Goods schedule, WT/ACC/TON/17 Add 1 and Services schedule WT/ACC/TON/17 Add 2.
[212] WT/ACC/TON/17 Add 1.
[213] WT/ACC/TON/17 Add 1.
[214] Oxfam Briefing Note 'Blood from a Stone' (Oxfam Working Paper 2005)6.
[215] WT/ACC/TON/17 Add 2.

3.2.4 Samoa

For Samoa, accession to WTO membership would provide major benefits in terms of protection from discriminatory treatment, protection of its intellectual property rights, transparency and consistency in government policies, provision of technical assistance, and long-term economic welfare gains including FDI inflows.[216] Of huge importance was the protection of Samoa's legitimate rights. Samoa's exports were often subject to unfair trade practices relating to the arbitrary application of quarantine measures, arbitrary imposition of import fees and charges, and the use of the Samoan trade mark and geographical indication by other countries.[217]

3.2.4.1 Bound Tariffs

In its market access for goods, Samoa agreed to bind 100 percent of its tariffs and to apply a simple average final bound rate of 21.1 percent for all its goods.[218] Samoa agreed to bind at 0 percent all other duties and charges in its schedule of concessions and commitments.[219] Agricultural products were bound at an average rate of 19.6 percent and at 22.3 percent for non-agricultural products with a binding coverage of 100 percent on all products.[220]

3.2.4.2 Services

With regard to market access for services, Samoa has made specific commitments on 10 out of 11 broad range of services sectors, including, professional, computer and other business services, communication services, construction, and private educational, environmental, financial and tourism services, and in a total of 81 subsectors.[221]

3.2.5 Vanuatu

[216] UNCTAD 'Challenges and Opposition arising from Samoa's accession to the World Trade Organisation' (Paper prepared for the National Conference on WTO Accession and preparation for the Fourth WTO Ministerial Conference. 2001) 5.
[217] UNCTAD 'Challenges and Opposition arising from Samoa's accession to the World Trade Organisation' (Paper prepared for the National Conference on WTO Accession and preparation for the Fourth WTO Ministerial Conference. 2001) 5.
[218] The *World Tariff Profiles 2012*
[219] The *World Tariff Profiles 2012*
[220] Proposal for a council decision establishing the European Union position within the relevant instance of the WTO on the accession of Samoa to the WTO available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0732:FIN:EN:HTML (accessed on 12/07/2013).
[221] The *World Tariff Profiles 2012.*

The explicit impetus for Vanuatu's accession to the WTO was drawn from its structural adjustment package known as the Comprehensive Reform Programme (CPR).[222] The goals of this set of reforms were to enhance the role of the private sector, improve governance, increase economic growth, and further liberalise the economy. But as part of this last process the programme was directed at reducing trade barriers within the context of WTO membership.[223] It has been submitted that an additional reason for accession by Vanuatu was the fact that all of its neighbours and principal trading partners (Fiji, the Solomon Islands, Papua New Guinea, Australia and New Zealand) were WTO members.[224] As a result therefore, Vanuatu believed that its trade relations would be better enhanced within the WTO framework.

Being among the first LDCs to apply to the WTO immediately after its formation, it was expected to be the first to accede.[225] However, the accession negotiations proved to be difficult for it, and the rights that the LDC WTO members are entitled to were largely denied to Vanuatu.[226] The country was subjected to strong pressure to make sweeping liberalisation commitments, and in particular it had disagreements with the United States over a range of issues, including, the broad parameters of the goods offer, the extent of services commitments, and several crucial protocol issues pertaining to the transition periods of LDCs.[227] By the end of the 1990s accession negotiations were stalled. Vanuatu and the United States resumed negotiations in 2001 but even then its accession process was again put on hold until 2011.Vanuatu officially joined the WTO in 2012 and made the following market access commitments.[228]

3.2.5.1 Bound tariffs

[222] Gay D 'Vanuatu's suspended accession bid: Second thoughts?' in Managing the challenges of WTO participation; Case study 43 available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case43_e.htm (accessed on 17/05/2013). (Hereafter Vanuatu's suspended accession bid: Second thoughts?).

[223] Gay D 'Vanuatu's suspended accession bid: Second thoughts?' Available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case43_e.htm (accessed on 17/05/2013).

[224] Gay D 'Vanuatu's suspended accession bid: Second thoughts?' Available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case43_e.htm (accessed on 17/05/2013).

[225] Michiko H 'Arrested Development: Vanuatu's Suspended Accession to the WTO' (Case Study Prepared for the International Commercial Diplomacy Project 2003) 2.

[226] Michiko H 'Arrested Development: Vanuatu's Suspended Accession to the WTO' (2003) p5

[227] Gay D 'Vanuatu's suspended accession bid: Second thoughts? Available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case43_e.htm (accessed on 17/05/2013).

[228] Vanuatu on the verge of membership' available at http://www.wto.org/english/news/_e/news11_/e/acc_vut_02may11_e.htm (accessed on 06/05/2013).

Vanuatu agreed to apply an average final bound rate of 39.7 percent for all its products.[229] Its final offer for average bound tariff rates was 43.6 percent on agricultural goods.[230] This is a little higher than Nepal's final bound rates and much higher than Cambodia's but still low for an LDC. It agreed to a simple average bound rate of 39.1 percent for industrial products.[231] All Vanuatu's tariffs are bound and 85 percent of tariff lines are either at 35 percent or 40 percent.[232]

3.2.5.2 Services

On trade in services, Vanuatu has made specific commitments on 10 services sectors and on 72 subsectors, such as, accounting, architectural services, engineering, telecommunications, audio visual, hospital and social services, tourism and travel, and air transport.[233]

3.2.6 Laos

To the key question as to why Laos applied for WTO membership, the government provided a number of different answers. Laos' motivation was the need to be part of the global community and share the benefits of WTO membership instead of being left out as the only country of the ASEAN that was not a WTO member.[234]

Its main goal was not market access as such but the need to push forward reforms and bring laws and regulations into compliance with international standards in order to facilitate business development and trade which would in turn have a positive impact on Laos' exports.[235] The advantage of accessing the WTO's DSP and the technical and financial assistance associated with the accession process were regarded as an opportunity for Laos to learn from the international community in terms of capacity building.[236]

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[229] Vanuatu on the verge of membership' available at http://www.wto.org/english/news/_e/news11_/e/acc_vut_02may11_e.htm (accessed on 06/05/2013).
[230] Vanuatu on the verge of membership' available at http://www.wto.org/english/news/_e/news11_/e/acc_vut_02may11_e.htm (accessed on 06/05/2013).
[231] Vanuatu on the verge of membership' available at http://www.wto.org/english/news/_e/news11_/e/acc_vut_02may11_e.htm (accessed on 06/05/201.3).
[232] Vanuatu on the verge of membership' available at http://www.wto.org/english/news/_e/news11_/e/acc_vut_02may11_e.htm (accessed on 06/05/2013).
[233] Vanuatu on the verge of membership' available at http://www.wto.org/english/news/_e/news11_/e/acc_vut_02may11_e.htm (accessed on 06/05/2013).
[234] Wiemann J, Ashoff V, Grad M *et al* 'Laos on its Way to WTO Membership (2009)58. (Thereafter Wiemann J *et al* 2009).
[235] Wiemann J *et al* (2009) 58.
[236] Wiemann J *et al* (2009) 58.

3.2.6.1 Bound tariffs

Laos agreed to bind its tariffs at an average of 18.8 percent for all goods, with an average bound rate of 19.3 percent for agricultural goods, and an average bound rate of 18.7 percent for all other non-agricultural products.[237]

3.2.6.2 Services

In services, Laos made market access commitments in 10 sectors, covering 79 subsectors. It made market commitments in the area of services, specifically in business services, courier and telecoms services, construction, distribution, private education, environmental services, insurance, banking and other finances, private hospital services, tourism, and air transport.[238]

3.3 Comparative assessment amongst the recently acceded LDCs and comparison with current member states

An examination of the market access commitments made and agreed to by the six countries indicates the extent to which the decision by the WTO General Council on the Guidelines has been respected. And as will be shown below, the overall assessment indicates that this is not fully the case.

3.3.1 The recently acceded LDCs

3.3.1.1 Bound tariffs

The simple average agricultural bound tariff rates for the six countries were 43.6 percent for Vanuatu, 41.5 percent for Nepal, 28.1 percent for Cambodia, 25.8 percent for Samoa, and 19.3percent for Laos, 19.2 percent for Tonga respectively. The corresponding figures for industrial tariff rates were 39.1 percent for Vanuatu, 23.7 percent for Nepal, 20.4 percent for Samoa, 18.7 percent for Laos, 17.7 percent for Cambodia, and 17.3 percent for Tonga.

While the WTO Agreement on Agriculture requires all members to bind all agricultural tariff lines,[239] the level of binding coverage in industrial goods varies among the recently acceded LDCs. Except for Nepal which has bound 99.3 percent of its NAMA tariff lines, all the other five

[237] Working Party report for Laos Goods schedule WT/ACC/LAO/45 Add 1.
[238] Working Party report for Laos Service schedule WT/ACC/LAO/45 Add 2.
[239] Agreement on Agriculture in the GATT 1994.

agreed to a 100 percent binding coverage each.[240] Tariff peaks and minimal rates for agricultural products were 75 percent and 0 percent for Vanuatu, 60 per cent and 5 percent for Cambodia, and 200 percent and 10 percent for Nepal.[241] The commitments of the 30 founding LDC members are at an average of 79 percent and tariff peaks of 130 percent.[242] For industrial products the corresponding rates were 75 percent and 0 percent for Vanuatu, 50 per cent and 0 per cent for Cambodia, and 130 percent and 0 percent for Nepal.[243]

This observation goes on to indicate that recent joiners of the WTO are always making excessive commitments. For both agricultural and non-agricultural goods the average tariff binding that acceding countries were allowed is falling over time and is now at levels well below those agreed by WTO members.

3.3.1.2 Services

Both Nepal and Cambodia made specific commitments in all the 11 sectors of the WTO services sectors, whereas Samoa, Laos and Vanuatu made 10 sector specific commitments and Tonga made the same commitments in only 9 sectors. Although the total number of subsectors committed varied across all these countries, it is noted that Cambodia, Nepal, Samoa, Vanuatu and Laos made substantially greater liberalisation commitments. Cambodia, Nepal, and Samoa undertook commitments in 94, 99 and 81 subsectors, respectively,[244] whereas Laos, Vanuatu and Tonga undertook them in 79, 72 and 36 subsectors, respectively.

With regard to horizontal limitations and commitments, there is no noteworthy difference among these six countries. The six countries made substantial liberalisation offers in the areas of financial, professional, distribution, educational and environmental services and kept Mode 4 unbound for all the services scheduled. Mode 1 (cross-border supply) and Mode 2 (consumption

[240] The UNCTAD and WTO Tariffs profile 2012. Available at http://unctad.org/en/PublicationsLibrary/wto2012_en.pdf (accessed on 07/05/2013). (Hereafter WTO Tariffs profile 2012).

[241] Dahal N, Adhikari R & Baumuller H 'Making WTO membership work for LDCs: Lessons from Nepal and Cambodia' (Working Paper by the International Institute of Sustainable Development, 2008) 6. Available at *http://www.iisd.org/publications/pub.aspx?id=1014* (accessed on 19/07/2013). (Hereafter Dahal *et al* 'Making WTO membership work for LDCs', 2008).

[242] 'Make extortion history' (Oxfam Briefing Paper, 2005) 22. Available at *http://www.oxfam.org/sites/www.oxfam.org/files/bp79_extortion_history_0.pdf* (accessed on 30/09/2013). (Hereafter Make extortion history 2005).

[243] Dahal N *et al* 'Making WTO membership work for LDCs' (2008) 6.

[244] WTO, Accession of Least-Developed Countries to the WTO. Note by the Secretariat (WT/COMTD/LDC/W/44), 10 March 2009; Evenett J S & Primo Braga C A (2005) see generally.

abroad) usually had no restrictions. For Mode 3 (commercial presence) restrictions on equity participation were occasionally scheduled.[245]

Other limitations scheduled included the obligation by the foreign investors to train and promote local staff. This was scheduled by both Samoa and Tonga.[246] All except Tonga scheduled the right to provide subsidies, including that for research and development, and limited it only to domestic service providers, while those available to natural persons were to be given only to its citizens. Moreover Foreign Service suppliers and foreign nationals in all the six countries cannot own, but may only lease, land. As a matter of fact, the Civil Code of Nepal prohibits anyone from selling, mortgaging, gifting, endowing or disposing any real property to a foreign individual.[247] Nepal also scheduled limitations on the approval requirements for commercial presence and foreign exchange restrictions and fees.[248] As additional commitments, Nepal scheduled its offer to make decisions on approval of commercial presence within 30 days and to guarantee entitlement for repatriation.[249]

Notably, a typical collective request from the incumbent members of the WTO was to make demands from the acceding LDCs, targeting sectors, such as, finance, telecommunications, construction, energy, educational, environment services, computer and related services, maritime transport and architectural and engineering services. All of these are of vital importance to LDCs.[250] All requests involved far-reaching demands, especially for Modes 1, 2 and 3. With regard to Mode 3, the LDCs were typically requested to permit maximum freedom to foreign firms and operators to engage in trade and investment while affording them national treatment.

These fairly extensive commitments raise questions about the kind of implications that would result for access by the poor to affordable services should foreign suppliers decide to compete in the market. It is claimed that the entry of foreign suppliers, in the absence of appropriate regulations and institutions which is a characteristic of most LDCs, may result in cherry-picking,

[245] Services schedules, WT/ACC/NPL/16Add2, WT/ACC/LAO/45Add2, and WT/ACC/TON/17Add2 and WT/ACC/KHM/21 Add2.
[246] The Tonga Foreign Investment Act requires foreign investors to invest into the Kingdom of Tonga.
[247] WT/ACC/NPL/16 Add 2.
[248] A foreign investor re-investing earnings in Nepal is required to obtain the permission of the Department of Industry and all foreign investments, except for Financial Services, require approval by the Department of Industry.
[249] WT/ACC/NPL/16 Add 2.
[250] Cali M, Ellis K & Willem te Verde D 'Contribution of Services to development and role of Trade Liberalisation and Regulation' (Overseas Development Institute Working Paper, 2008) 3. (Hereafter Cali M, Ellis K & Willem te Verde D 2008).

crowding out of local suppliers, and an increase in the cost of services that the government and local suppliers initially provided.[251] As is submitted by Ellis and Willem te Verde, the major challenge that this ultimately presents to the LDCs is how to protect their services sectors and prevent entry into their services markets by developed countries.[252]

3.3.2 Comparison with current WTO member states

While the comparison of the six countries with one another highlights the fact that the different countries reached agreement about accession on relatively different terms, a further comparison of the commitments of these six countries with those of current WTO members reveals that the six LDCs made commitments that significantly exceed commitments made by current WTO members. This is discussed below.

3.3.2.1 Bound tariffs

The level of commitments undertaken by the30 original LDC members to the LDCs that joined the WTO more recently, both for agricultural and non-agricultural market access products, on average, are 47.2 and 21.4 percentage points lower, respectively.[253] The commitments of Nepal, Cambodia, Vanuatu, Laos, Samoa and Tonga to both agricultural and non-agricultural goods are much lower than those of other LDC members of the WTO. Vanuatu has thehighest bound average rate on all products for the above- mentioned LDCs with an average bound tariff rate of 39.7 percent. This figure is still considered very low for a LDC compared to the tariff level of the existing WTO Members, including incumbent LDC members. The average bound tariff rates for other LDC members of the WTO, such as, Bangladesh, Tanzania and Zambia are 169.3 percent, 120 percent and 106.5 percent respectively. They all have average bound tariff rates of more than 100 percent.[254] Both India and Cameroon, other DC members, also have higher average tariff rates of 48.7 percent and 97.5 percent respectively.[255] The recently acceded countries have had to liberalise more and agree to open their markets more than the earlier WTO joiners.

[251] Manduna C 'A review of the results of the 5th WTO Hong Kong Ministerial Conference: Consideration for African Caribbean and Pacific countries.'(Tralac working paper 2006) 35. Available at http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3482.pdf (accessed on 06/05/2013).
[252] Cali M, Ellis K & Willem te Verde D (2008)3.
[253] The WTO Accession Guidelines for LDCs WT/L/508
[254] The *WTO Tariffs Profile 2012.*
[255] The *WTO Tariffs Profile 2012.*

Similarly, while the recently acceded LDCs have agreed to bind 100 percent of their tariff lines, other countries that are already members of the WTO have bound a much smaller share thereof. Only nine incumbent LDCs have a 100 percent binding coverage, while over half of the LDCs have bound less than 50 percent of their tariff lines.[256] For example, Tanzania, Mozambique and Bangladesh, all original GATT contracting members and LDCs, have a binding coverage of 13.4 percent, 13.6 percent and 15.5 percent, respectively.[257] Furthermore, when compared to Cameroon and India, both DCs which have a binding coverage of 13.3 percent and 73.8 percent, respectively, and to Australia, a developed WTO member, which has a binding coverage of 99.7 percent,[258] these recently acceded LDCs have undoubtedly made excessive commitments.

While Cambodia's bound rates are as high as 60 percent for sensitive agricultural products and Nepal's bound rates are as high as 200 percent for selected agricultural goods, LDC members of the WTO, such as Myanmar, have bound rates on agricultural goods as high as 550 percent.[259] Other DC members of the WTO, like Egypt have bound tariff rates on agricultural goods above 1,000 percent and developed country members of the WTO such as the United States, have bound tariff rates on agricultural goods as high as 350 percent.[260] Moreover, while Cambodia and Nepal have bound tariff rates on non-agricultural goods at a maximum level of 50 percent and 130 percent, respectively, LDC members of the WTO have bound their tariffs in the same category as high as 550 percent for Myanmar and 300 percent for the Maldives, while Romania, a DC member of the WTO, has bound them as high as 220 percent.[261] Developed country members of the WTO having significantly well-developed industrial sectors, such as Australia, have bound their tariff rates at a maximum level of 48 percent.[262]

[256] International Center for Trade and Sustainable Development (ICTSD) information note. 'An analysis of the WTO accession guidelines for Least Developed Countries' (2012) 4. Available at http://ictsd.org/downloads/2012/11/an-analysis-of-the-wto-accession-guidelines-for-least-developed-countries.pdf (accessed on 19/07/2013).
[257] The *WTO Tariffs Profile 2012.*
[258] The *WTO Tariffs Profile 2012.*
[259] The *WTO Tariffs Profile 2012.*
[260] The *WTO Tariffs Profile 2012.*
[261] The *WTO Tariffs Profile 2012.*
[262] The *WTO Tariffs Profile 2012.*

A further comparison of the commitments made by the six LDCs, on the one hand, with commitments made by the Quad countries,[263] on the other hand, shows these six LDCs were expected to make some commitments in the accession process that even exceed the commitments that have been made by some of the most advanced countries who are the largest importers of products from LDCs.[264] Both the European Union and the United States have a binding coverage of 100 percent, and Canada and Japan have a binding coverage of over 99.7 percent.[265]

The Quad countries have reserved the right to apply high tariffs to some of their products. As a matter of fact, in the agricultural goods sector, all the Quad countries have peaks in tariff bindings that exceed those of Cambodia, while both Canada and the United States also have peaks in tariff bindings that exceed those of Nepal. The tariff bindings in this sector are as high as 350 percent for the United States, followed by 238.4 percent for Canada, 74.9 percent for the European Union, and 61.9 percent for Japan.[266] In the non-agricultural goods sector, the peaks in tariff bindings of all Quad countries are lower than those of Cambodia and Nepal with the United States tariff bindings in this sector as high as 48 per cent, followed by 30 percent for Japan, 26 percent for the European Union and 20 percent for Canada.[267]

3.3.2.2 Services

The story is similar concerning service commitments. Looking at the number of services subsectors committed to by incumbent WTO members, the recently acceded LDCs have made substantially more extensive commitments than the former, regardless of their development status.

Research points out that at the most aggregate level, WTO members have on average taken out some kind of commitment in 6 sectors out of a maximum of 11.[268] The comparable figures

[263] The Quad countries are Canada, the European Union, Japan and the United States
[264] The *WTO Tariffs Profile 2012.*
[265] The *WTO Tariffs Profile 2012.*
[266] United Nations Conference on Trade and Development (UNCTAD).*The Least developed countries Report 2004-Selected Recent Trends: Accession of LDCS to the WTO* (2004)61. (Hereafter The UNCTAD report on *Selected Recent Trends: Accession of LDCS to the WTO 2004*).
[267] The UNCTAD report on *Selected Recent Trends: Accession of LDCS to the WTO* (2004) 61.
[268] Grynberg R, Ognivtsev V & Razzaque A M *Paying the price for joining the WTO: A comparative assessment of services sector commitments by WTO members and acceding countries.* (2002) See generally. (Hereafter Grynberg R *et al Paying the price for joining the WTO*) 2002.

for the six most recently acceded LDCs are 10, as indicated above. At a more detailed or disaggregated level, acceding countries have commitments in 103 sectors on average as against 42 for existing members. The recently acceded LDCs, (Nepal, Cambodia, Samoa, Tonga, Laos and Vanuatu) have all committed to liberalise almost all their sectors and over 70 subsectors except for Tonga that has liberalised 36 subsectors out of 53 which is still considered to be excessive. By comparison, Bangladesh also a LDC member of the WTO, has only liberalised two sectors and 11 subsectors, the Solomon Islands 4 sectors and 6 subsectors and Fiji only 1 subsector.[269] The DCs in the WTO, such as, India and Pakistan, have only committed to liberalise six sectors and 37 subsectors and five sectors and 47 subsectors, respectively.[270]

In summary, the above clearly confirms that the recently acceded LDCs have committed to much more than they would have had to if they were already WTO members, and to more than the average of existing WTO members. Although authors, such as, Evenett and Braga, rightly point out that the number of services sectors committed to by an acceding state is a crude measure of the price of accession, it is argued that it nevertheless shows that founding members and accession countries at the same development status are treated differently.[271]

3.4 The WTO's Guidelines for the accession of LDCs, and its weaknesses

The decision of the General Council dated 10 December 2002 on streamlining accession of LDCs states:

> 'WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDCs' Members." and "Acceding LDCs shall offer access through reasonable concessions and commitments on trade in goods and services commensurate with their individual development, financial and trade needs, in line with Article XXXVI.8 of GATT 1994, Article 15 of the

[269] Grynberg R and Joy R M 'The Accession of Vanuatu to the WTO' (2000) 34 *Journal of World Trade*; 159-173,170.
[270] Adhikari R 'LDCs in the Multilateral Trading System' in Macrory P F J, Appleton A, Arthur E & Plummer M G (eds.) *The World Trade Organisation: Legal, Economic and Political Analyses*. (2005) 1933-1973. See generally.
[271] Evenett J S & Braga C A 'WTO Accession' (2005). See generally. Furthermore, on measuring services commitments in a more detailed way the authors' results confirmed the finding that acceding countries' commitments in services are not only more extensive in terms of sector coverage but also deeper in terms of removal of barriers to market access.

Agreement on Agriculture, and Articles IV and XIX of the General Agreement on Trade in Services'.[272]

However, whilst the lofty objectives enshrined in these guidelines are indeed encouraging, the facts on the ground speak otherwise. Drawing from the above comparisons and evidence of the six recent WTO acceded LDCs' market access commitments in both goods and services, it can be argued that they made more stringent commitments than many of the developing countries and even more stringent commitments than some of the developed countries, including the Quad countries, which are the LDCs' most important export markets.[273] This poses the question, why is it that the LDCs that newly acceded to the WTO are not allowed to bind at the same levels as the original LDC members of the WTO or make commitments that are commensurate with their own levels of economic and financial capacities? This research submits that there is no significant difference between the LDCs who joined then and those who joined last in terms of their economic and development capacities. They are all still categorised as LDCs characterised by low per capita income, dependent on a small number of export goods, mostly raw materials, and are all crippled by issues of food insecurity.[274] Looking at the Central Intelligence Agency (CIA) world reports, Nepal, Tonga, Vanuatu, Laos, Samoa and Cambodia are all largely dependent on subsistence agriculture for their economic growth and are undergoing the same amount of economic and development paralysis.[275] And these characteristics are still the same even for the original LDCs in the WTO. In a nutshell, there is no reason why incumbent LDC members of the WTO should have more favourable market access terms than the applicant LDC members.

Cambodia's and Nepal's accession in 2004 had particular significance because they represented the first two LDCs to accede to the WTO since its creation in 1995.[276] It was expected that their terms of accession would reflect the General Council's decision on the accession of LDCs. However this was not the case. This even led the then Minister of Commerce of Cambodia to comment:

[272] WTO Accession Guidelines for LDCs WT/L/508.
[273] WTO Accession Guidelines for LDCs WT/L/508.
[274] Langhammer R J & Matthias L 'WTO Negotiations and Accession Issues for Vulnerable Economies' (2000) 1.
[275] See 2013 CIA World fact book available at http://theodora.com/wfbcurrent/countryeconomyhtml (accessed on 03/04/2013).
[276] See WTO accession website at www.wto.org accessed on 18/05/2013.

'This is a package of concessions and commitments that goes far beyond what is commensurate with the level of development of an LDC like Cambodia'.[277]

Similarly, Vanuatu, Samoa, Laos and Tonga's accession commitments were not at all any different, but if closely compared to those of Cambodia and Nepal, it is sad to note that they were even much more stringent.[278] This confirms that acceding members are making more extensive commitments than their predecessors.

The findings of the above comparisons can therefore be summarised in one short sentence: the WTO members have failed to live up to the market access promises they made to the LDCs in 2002.They have failed to exercise restraint in seeking market access commitments and concessions that go beyond those undertaken by the existing WTO LDC members and beyond those that are commensurate with their individual development, financial and trade needs.[279]

Furthermore, in answering the question posed as to whether LDCs are being ushered into the WTO on a levelled playing field and as equal partners, the answer is not in the affirmative. It is evident that the concept of fairness in the accession process of the WTO is violated by the lack of coherence and consistency in the kind of concessions requested from acceding LDCs.

3.5 Critical analysis of the 2012 WTO Guidelines for the accession of LDCs

At the Eighth WTO Ministerial Conference in December 2011, trade ministers decided to further strengthen, streamline and operationalise the 2002 LDC accession Guidelines with the inclusion of benchmarks, particularly in the area of goods and services, which take into account the level of commitments undertaken by existing LDC members.[280] The discussion below only looks at the criticisms advanced regarding the benchmarks on goods and services, as the discussion of the six recently acceded LDCs mainly focused on these two aspects.

[277] Speech by H.E. Mr. Cham Prasidh, Minister of Commerce and Chief Negotiator for Cambodia's Accession to the WTO at the Fifth WTO Ministerial Conference (Item 3 of the Agenda: Accession of Cambodia), Cancun, Mexico, 11 September 2003.
[278] Oxfam International Briefing Note 'Blood from a Stone (2005)1. Available at http://oxfam.qc.ca/sites/oxfam.qc.ca/files/2005-12-15_blood.pdf (Accessed on 05/05/2013).
[279] WTO Accession Guidelines for LDCs WT/L/508.
[280] World Trade Organisation 'Accession of Least Developed Countries' WT/L/508 Add.1 Formally approved by the General Council on 25 July 2012.(here after WT/L/508 Add.1).

3.5.1 Goods benchmarks

In terms of the benchmark on goods, acceding LDCs are required to bind all agricultural tariff lines at an overall average rate of50 percent,[281] while the average level of the original 30 LDCs is 78 percent and that of the recently acceded LDCs is at 32 percent.[282] With regard to non-agricultural products, the accession decision provides for the following two options. First, acceding LDCs shall bind 95 percent of their non-agricultural market access lines at an overall average rate of 35 percent whilst having the flexibility to retain 5 percent of their industrial tariff lines unbound although the specific lines would need to be negotiated.[283] Secondly, they may also undertake more comprehensive binding coverage and be afforded proportionately higher overall average rates than provided for when they undertake lesser comprehensive binding.[284] In such a case, the acceding LDCs shall be entitled to transition periods of up to 10 years for up to 10 percent of their tariff lines.[285]

In favour of these Guidelines, it is argued that by exempting 5 percent of tariffs from binding, newly acceding LDCs will be able to protect their vital economic interests due to the fact that a significant share of all acceding LDCs' trade will be covered by this exempted tariff percentage.[286] The proposals for average bindings further require LDCs to bind at 50 percent for agricultural goods and at 35 percent for non-agricultural goods, and they can be applauded for this because these rates are much higher than the 32 percent and 23 percent, respectively, for the same goods required of recently acceded LDCs.[287] However, they are still not at the levels required of the original WTO LDC members whose agricultural tariff lines are bound at an overall average rate of 78 percent, and 44.4 percent for NAMA.[288]

[281] See par 5 WT/L/508 Add.1.
[282] See 'An analysis of the WTO accession guidelines for Least Developed Countries' (2012) 4. Available at http://ictsd.org/downloads/2012/11/an-analysis-of-the-wto-accession-guidelines-for-least-developedcountries.pdf (accessed on 19/07/2013).
[283] See par 7(ii) WT/L/508 Add.1.
[284] See par 7(i), (ii) WT/L/508 Add.1.
[285] See par 7(i), (ii) WT/L/508 Add.1.
[286] See 'GC decision on LDCs accession: progress on goods and missed opportunities on services and transparency' available at http://www.ideascentre.ch/documents/IDEASCentreassessmentofGCdecision.pdf (accessed on 13/05/2013).
[287] See par 7(i), (ii) WT/L/508 Add.1.
[288] See 'An analysis of the WTO accession guidelines for LDCs' (2012) 5. Available at http://ictsd.org/downloads/2012/11/an-analysis-of-the-wto-accession-guidelines-for-least-developedcountries.pdf (accessed on 19/07/2013)

This benchmark, however, is not without its criticisms. Tariffs play a vital role in countries' economies, especially those of LDCs.[289] The income derived from tariffs provides governments with a source of tax revenue,[290] and they are also a policy tool used to protect domestic industries by changing the conditions under which goods compete in such a way that competitive imports are placed at a commercial disadvantage.[291] In summary, the following have been identified as the negative impacts of tariff reduction:(a) they may lead to a surge in imports, thereby forcing domestic competitors out of business and resulting in increased unemployment in developing countries;(b) tariff cuts can result in a reduction of government revenue, leaving the government with fewer resources for fighting poverty and for other social programmes; and finally, (c) tariff reductions may undermine industrialization policies in developing countries by exposing industries to competition before they are strong enough to compete in the world.[292]

With regard to the new Guidelines, it is therefore submitted that an increase in the binding coverage to about 95 percent or over100 percent effectively closes the door to the use of tariffs as a trade policy tool to leverage industrial development, further squeezing the policy space.[293] Capping industrial tariff lines below 35 percent as has been done by the above recently acceded LDCs, (Cambodia, Nepal, Laos, Samoa, and Tonga) and as will be required for those wishing to accede, will mean a substantial loss of government revenue which perhaps can only be replaced by conditionality bound International Monetary Fund (IMF),and World Bank loans.[294] Binding tariffs at such lower rates close to these acceding LDCs' applied rates may reduce policy options for acceding countries in the future as well as sharply curtail their ability to use infant industry protection to industrialise and protect domestic jobs the way that developed countries did.[295] With the sole exception of Hong Kong China, no other country has been able to

[289] Gibbs M 'Trade Policy' (Published paper by the United Nations Department for Economic and Social Affairs 2007) 18.
[290] Tariffs available at *http://www.meti.go.jp/english/report/data/qCT9904e.html* (accessed on 14/05/2013).
[291] Tariffs available at *http://www.meti.go.jp/english/report/data/qCT9904e.html* (accessed on 14/05/2013). 254.
[292] Gibbs M 'Trade Policy' (Published paper by the United Nations Department for Economic and Social Affairs 2007)20.
[293] Otoo I 'Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries: Results of a Product by Product Simulation Using the Swiss Formula'; 20-57, 36. (Hereafter Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries. available at *http://www.global-labour-university.org/fileadmin/Papers_Wits_conference_2007/B4/otoo_paper.pdf* (accessed on 10/05/2013).
[294] Otoo I 'Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries' 36.
[295] Mashayekhi M, Onguglo B & Ito T 'Developments and issues in the Doha Work Programme of priority interest to African countries, particularly LDCs.' (2007)15 and 'New accession guidelines may harm LDCs' published in SUNS #7420 dated 27 July 2012. Available at

industrialise without going through the infant industry protection phase.[296] Tariffs appear to be the only potent tool available to LDCs in their bid to protect their nascent industries and avoid massive unemployment that has accompanied unbridled liberalisation.[297]

It is further argued that the ability to raise or lower applied tariffs is essential to the quest for the diversification of the economies of LDCs.[298] The necessity for LDCs to diversify away from reliance on a few primary products in the wake of massive declines in the terms of trade that have characterised their participation in world trade, is hardly controversial.[299] Notably, industrialisation development remains a viable strategy to actualise the dream of diversification into more dynamic sectors, but the ability to build a durable industrial base in these countries may depend on their ability to shield infant industries from unsustainable import competition by raising tariffs in response to external factors, and even to meet revenue needs.[300] Preserving this policy space is therefore important for social and economic development.

According to the IMF, a significant number of LDCs rely on tariff revenue for more than 76 percent of their government revenue. This is in contrast to countries in the Organisation for Economic Co-operation and Development (OECD) where tariff revenues represent on average 1 percent or less of government revenue.[301] For instance, a country like Guinea derives about 76 percent of its tax revenues from tariffs, Uganda 49.8 percent, Lesotho 47.7 percent' and Gambia 42.8percent.[302] According to the IMF economists, if LDCs cut their tariffs to such levels, low income countries are at best likely to recover 30 percent or less of this lost tariff revenue from other taxation sources.[303] They note that a value added tax is not proven to make up for the lost revenue from lowered tariffs. It is therefore submitted that the loss of government revenue that will follow the tariff reduction will constrain the ability of governments to maintain or increase social spending that benefits the poor.

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http://www.twnside.org.sg/title2/wto.info/2012/twninfo120803.htm (accessed on 13/05/2013).

[296] Trade World Network (TWN) Briefing Paper for LDC-IV 'Brief analysis of the likely impact of the WTO's Doha Round on LDCs' available at www.twnside.org.sg (accessed on 19/07/2013) 4.

[297] Otool 'Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries' 36.

[298] Otoo I 'Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries' 37.

[299] Otoo I 'Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries'37.

[300] Otoo I 'Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries'37.

[301] Laird S, Vanzetti D & Fernandez de Cordoba S 'Smoke and Mirrors: Making sense of the WTO industrial Tariff negotiations' (Policy Paper by UNCTAD, 2006) 7. (Hereafter Laird S *et al Smoke and Mirrors*).Available at http://unctad.org/en/Docs/itcdtab31_en.pdf (accessed on19/07/2013).

[302] Laird S *et al Smoke and Mirrors* (2006) 7.

[303] Baunsgaard T& Keen M 'Tax Revenue and (or?) Trade Liberalisation' (IMF Working Paper WP/05/112 2005)20. (Hereafter *Tax Revenue and (or?) Trade Liberalisation*).

3.5.2 Services benchmarks

It is submitted that the agreed text does not contain benchmarks, but rather a repetition of principles which already exist and are enshrined but have largely not been applied.[304] According to the Guidelines, incumbent WTO members agreed to take into account the serious difficulties of acceding LDCs in undertaking commitments, bearing in mind their special economic situation and their individual development, financial and trade needs.[305] Acceding members are afforded the flexibility to select the sectors in which they wish to undertake commitments, fully or partially, and the conditions attached thereto.[306] Furthermore, the incumbent WTO members are to exercise restraint in seeking commitments in trade and services from acceding members.[307] They will not require the acceding LDCs to undertake commitments in services sectors and subsectors that exceed those undertaken by the current WTO members or in sectors and subsectors that do not correspond to their individual development and trade needs.[308]

However, unlike the goods benchmarks, these new Guidelines have fallen short of establishing measurable and clearly enforceable benchmarks.[309] As a matter of fact, it is argued that this benchmark that states that there should be no commitments in services sectors and subsectors that exceed what has been committed to by existing WTO LDC members, could actually be dangerous for the development interests of LDCs and could negatively reflect on their negotiating processes.[310] This is because this Guideline does not clearly and precisely define the extent to which LDCs should liberalise. This is likely to have the effect of opening the floodgates for an extensive interpretation, such as, giving the WTO members the discretion to request the maximum commitment of each LDC in the various sectors and subsectors. Alternatively, this decision may give full freedom to incumbent WTO members to impose more

[304] See 'GC decision on LDCs accession: progress on goods and missed opportunities on services and transparency' available at
http://www.ideascentre.ch/documents/IDEASCentreassessmentofGCdecision.pdf
(accessed on 13/05/2013).
[305] See par 10 of WT/L/508 Add.1.
[306] See par 11 of WT/L/508 Add.1.
[307] See par 12 of WT/L/508 Add.1.
[308] See par 12 of WT/L/508 Add.1.
[309] See 'An analysis of the WTO accession guidelines for Least Developed Countries'. (2012) 10.
[310] See 'GC decision on LDCs accession: progress on goods and missed opportunities on services and transparency' available at
http://www.ideascentre.ch/documents/IDEASCentreassessmentofGCdecision.pdf
(accessed on 13/05/2013).

stringent commitments on newcomers which go way beyond what other countries have done.[311] It is thus feared that the proposed text would do little to prevent WTO members from seeking disproportionate services commitments from acceding LDCs.

3.6 Conclusion

The 2002 accession Guidelines for LDCs certainly did not contain much of what the LDCs wished for. It merely reflected their wishes but not much was put into practice. The incumbent WTO members were requested in the Guidelines to exercise restraint when seeking concessions and commitments from acceding LDCs. As a result of the failure to act as per the Guidelines, at the Eighth Ministerial Conference in Hong Kong, the 2012 accession Guidelines were adopted to further strengthen, streamline and operationalise the failed 2002 accession Guidelines. Certain provisions have been trumpeted as positives in the new Guidelines, but once subjected to closer scrutiny are bound to be revealed as nothing more than hollow victories. As has been shown above using the case studies of the six LDCs, recently acceded LDCs have indeed undertaken commitments that certainly go well above and beyond the levels of concessions and commitments undertaken by the existing 30 WTO LDC members and other WTO members.

The fact that, except for the option of leaving 5 percent of tariff lines unbound, binding the remaining 95 percent implies that there is no single kind of goods in respect of which these countries can raise tariff rates without facing an upper limit. The fact that many tariff rates are bound at relatively low levels implies that there are only very few goods in respect of which these countries can raise tariff rates to high levels. The combination of these factors effectively limits the ability of these countries to use tariffs in the future as an instrument to promote economic development.

The experience of these six LDCs shows that, rather than being integrated into the multilateral trading system on terms that are more favourable, weaker countries are integrated into that system on terms that are at best equal to those of other developing countries and at worst less favourable than those of more advanced member states. It cannot be expected that relatively underdeveloped countries will become the equals of the more advanced members of the multilateral trading system by encouraging them to make the same or even higher commitments.

[311] See 'An analysis of the WTO accession guidelines for Least Developed Countries'. (2012) 10.

The outcomes of the market access commitments in goods and services of LDCs currently in the process of accession have not yet been finalised, but drawing from the above, the standards have already been set by the incumbent WTO members. Their fate will undoubtedly not be anything different to that of the preceding recently acceded LDCs. The question then arises: what are the potential implications of binding tariffs at such lower levels, extensive services liberalisation, and loss of policy space would be on a LDC like South Sudan. Should South Sudan accede to the WTO? This is discussed further in chapter 4.

CHAPTER 4

THE POTENTIAL IMPLICATIONS FOR SOUTH SUDAN OF THE WORLD TRADE ORGANISATION'S MARKET ACCESS COMMITMENTS

4.1 Introduction

Any country wishing to accede to the World Trade Organisation (WTO) is required to purchase its membership ticket by making binding commitments in both the areas of goods and services. However, as was noted in the previous chapter 3, a closer examination of the nature of the bound commitments and services sectors committed by the least developed countries (LDCs) that have recently acceded to the WTO revealed that these countries undertook excessive market access commitments in comparison to the original WTO members. What this undoubtedly means is that any applicant country envisaging accession will have to make such comprehensive commitments or more. With this in mind, it is inevitable that the following question will arise: to what extent will compliance with the WTO's market access commitments affect acceding LDCs and in particular South Sudan?

It is submitted that incumbent WTO members seeking ambitious tariff reductions and requiring acceding LDCs to bind at such low levels will result in several consequences, including but not limited to the following. First, it is a constraint on LDCs' policy space in general. Secondly, it will curtail the LDCs ability to use industry protection to industrialise. Thirdly, the services commitments will make it difficult for LDCs to protect domestic jobs and services sectors from foreign domination. Fourthly, LDCs will lose a significant amount of government revenue.[312] Fifthly, it will cause food insecurity in LDCs. Sixthly it will cause a failure of LDCs to rectify existent trade deficits. Lastly, tariff reduction will negatively influence the common external tariffs of customs unions. The first four implications have been considered important and have undoubtedly also been envisaged for South Sudan and are discussed below.

This chapter goes into a deeper assessment of how the WTO market access commitments impact on the above four factors as well as various contending opinions and evidences regarding the same. The examination of the implications of undertaking these commitments in

[312] World Bank *Financing Global Sharing Report 2012- Protect Import Tariffs* (2012) 160.

South Sudan in light of its history of conflict, current trade and development prospects are also made but they are limited to the data available on the country.[313]

4.2 The WTO's market access commitments as a constraint on policy space

In this section the term 'policy space' is defined and the contending views as to whether or not the WTO market access commitments do indeed constrain LDCs' policy space are reviewed.

It has been submitted that while countries engage in international interactions it is important for them to retain some room for national policy formulation that is independent of the international commitments and serves their own specific development needs.[314] Much of the current debate on the role of national policies in economic development concerns the concept of policy space and focuses on the tension between international economic integration and the autonomy available to nation states to pursue policies that effectively support their economic development.[315] As noted by Cooper, this tension culminates as a consequence of the dilemma of how to keep the manifold benefits from extensive international economic interaction free of crippling international restrictions while at the same time preserving a maximum degree of freedom for each nation to pursue its legitimate economic objectives.[316] This degree of freedom accorded to each government to pursue its legitimate economic objectives is defined as 'policy space'. It is the room that allows governments to manoeuver and develop their own policies.[317]

The term policy space, in its current meaning appeared in about 2002 in the United Nations Conference on Trade and Development (UNCTAD) documents and acquired its first official status in the São Paulo Consensus of 2004. It was defined by the UNCTAD as:

[313] It is important to note that South Sudan has just gained its independence recently in 2011, and there is not a sufficient wealth of information or academic research on the topic of market access in South Sudan. The discussion is therefore based on the limited trade data available and on the experiences of the other six recently acceded LDC members of the WTO whose circumstances are similar to those of South Sudan.

[314] Hamwey M H 'Expanding National Policy Space for development: Why the Multilateral Trading System Must Change.' (Working Paper by South Centre, 2005) available at *www.gina.gov.gy/.../TRADE-RELATED%20AGENDA%2025.pdf* (Accessed 15/06/2013).

[315] Mayer J 'Policy space: What, for what and where?' (2009) 4 *Development Policy Review* 373-395; 373.

[316] Cooper R N *The Economics of Interdependence: Economic Policy in the Atlantic Community* (1968)5.

[317] Page S 'Policy space. Are WTO rules preventing development?' (Briefing paper by the Overseas Development Institute 2007) 1. (Hereafter Page S 'Policy space. Are WTO rules preventing development?', 2007)

> 'The scope for domestic policies, especially in the areas of trade, investment and industrial development which might be framed by international disciplines, commitments and global market considerations' [318]

This mini thesis strongly contends that the WTO through its market access accession guidelines has undoubtedly ushered in a new policy regime that continues to expand both the scope and the enforcement of the accession obligations for LDCs. There is no question that the adoption of these guidelines constricts the policy space that LDCs' governments have, due to the fact that they have to adhere to these obligations and later have no option of reversing them without dire consequences. As Bacchetta and Piermartini both assert, the problem is not with the question of binding as binding has its own discretionary benefits.[319] This research therefore asserts that the problem lies in the terms of the accession commitments to which the LDCs are compelled to bind that leave them with no freedom to manoeuver. This consequently inhibits and fails to support their economic development.

The major concern among international observers continues to be that international rules are inhibiting developing countries' policy space which prevents these countries from pursuing their developmental policies.[320] Rodrick, for one, identifies the WTO rules as an example of such rules.[321] He cautions that developing countries must resist the need to constrain their policy space by adopting encroaching WTO principles. Similarly, UNCTAD's 2006 Trade and Development Report argued that the international trading regime's rules and commitments restrict the de jure ability of developing countries to adopt a national development policy.[322] According to the UNCTAD Report:

> 'The increasing interdependence of national economies in a globalizing world and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and

[318] Sao Paulo Consensus adopted at UNCTAD XI held in Sao Paulo 13-18 June 2004. UNCTAD (2004) *São Paolo Consensus*, UNCTAD TD/410 available at http://unctad.org/en/Docs/td412_en.pdf (accessed on 15/06/2013).
[319] Bacchetta M & Piermartini R 'The Value of binding' (WTO Working Paper, 2011) see generally.
[320] Page S 'Policy space. Are WTO rules preventing development?' (2007) 1.
[321] Rodrik D 'How to make the trade regime work for development' (2004) see generally.
[322] United Nations Conference in Trade and Development (UNCTAD) *Trade and Development Report.* (2006) 167.

> the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments.'[323]

On the contrary, however, other observers, such as Azevedo and Razeen, do not share this view that WTO disciplines irremediably constrain countries' policy space. They argue that the GATT/WTO disciplines do not act as a substitute for national governance in trade policy, but rather act as an additional help to good national governance.[324] This is so because the characteristics of the WTO rules are generally not of an absolute one-size-fits-all nature. Rather, they reflect rules that aim to protect individuals' and businesses' aspirations of being able to engage in international trade on a level playing field, on one hand, while, on the other hand, preserving the ability of governments to promote economic growth and development in diverse ways but which are also in line with their national goals and policies.[325]

In the same light, Milner further points out that the rules and disciplines of the WTO were not created to limit policy space but were instead ultimately directed to create a freer international trading regime.[326] He argues that the main principles of transparency, non-discrimination and reciprocity were specifically formulated so as to bind tariffs, encourage the lowering of tariffs, and constrain national governments' ability to discriminate between domestic and foreign traders and between foreign and domestic producers and products.[327] He further argues that the rules seek to encourage predictability and fairness by rejecting the use of particular trade policy instruments, encouraging the use of tariffs rather than non-tariff measures including but not limited to voluntary export restraints, and constraining the use of export subsidies that may distort trade.[328]

[323] Par. 8 of the Sao Paulo Consensus adopted at UNCTAD XI held in Sao Paulo 13-18 June 2004.
[324] Azevedo R 'Industrial Policy' in Meléndez-Ortiz R (ed) *Global Challenges and the Future of the WTO* (Published paper by ICTSD Programme on Global Economic Policy and Institutions, 2013)12. (Hereafter Azevedo R 'Industrial Policy' 2013). Available at http://ictsd.org/publications/latest-pubs/dg2013/ (accessed on 17/06/2013).
[325] Azevedo R 'Industrial Policy' (2013) 12.
[326] Milner C 'Constraining and Enhancing Policy space: The WTO and adjusting to globalisation' (2009) 3*The Journal of International Trade and Diplomacy* 127-154,129. (Hereafter Milner C 'Constraining and Enhancing Policy space, 2009).
[327] Milner C 'Constraining and Enhancing Policy space' (2009) 130.
[328] Milner C 'Constraining and Enhancing Policy space' (2009) 130.

Shadlen then argues that despite general tariff reduction, the GATT/WTO rules still leave considerable room for local industrial development.[329] He submits that the GATT/WTO do not compel tariffs to be eliminated or reduced, but require members to bind their tariffs, fixing a maximum level as a ceiling beyond which countries will be obliged to compensate injured parties. However since countries usually bind their tariffs at much higher levels than those actually applied, he contends that enough policy room is thus left at their disposal to adjust tariffs in support of their domestic objectives, like industrial development.[330] This mini thesis however, strongly disagrees with the above and contends that the above argument is true only in the case of the majority of the WTO founders and incumbent members who have set and bound their tariffs at relatively higher levels and even kept some of their tariffs unbound.[331](See section 3.2). Shalden's optimism is not shared, especially when it assesses the kind of commitments that acceding LDCs are required to undertake as set out in the new accession guidelines. It is contended that the guidelines do not provide LDCs with the room to manoeuvre and adjust their commitments beyond the levels to which they are already bound on accession, and this thus limits considerably the space for their development. By pressing LDCs to accept commitments to reduce their tariffs to very low levels, incumbent WTO members are trying to take away the policy space needed by these countries especially that required to protect and nurture their infant industries in order to industrialise.

The general justification that is often given for driving such a hard bargain with applicants for accession is that the benefits of the liberalisation demands sought on behalf of the commercial interests of the working party members will also inevitably accrue to the acceding countries, by forcing them to become more efficient and to abandon areas of their economies that are not internationally competitive.[332] However it is further submitted that such argument may only have considerable validity when applied to fully developed economies which seem willing to bolster

[329] Shadlen K 'Exchanging development for market access: Deep integration and industrial policy under multilateral and regional-bilateral trade agreements' (2005) 12 *Review of International Political Economy,* 750-775,756. (Hereafter exchanging development for market access 2005).

[330] Shadlen K 'Exchanging development for market access' (2005) 757.

[331] For example, the United States' tariff on crude petroleum, Japan's on fish and paper products and petroleum oils, and Canada's on petroleum oils and minerals, are unbound.

[332] Submission of Oxfam New Zealand to the Ministry of Foreign Affairs on the WTO negotiations of Samoa (2005)10. Available at *http://www.oxfam.org.nz/imgs/whatwedo/MTF/ONZ%20on%20Samoa%20WTO%20accession.pdf* (Accessed on 13/08/2013)

inappropriate industries indefinitely.[333] However, it is flawed when applied to LDCs seeking ways to enhance their own development.

It is notable, however, that other than the disciplines and commitments provided for in the WTO, the policy space of WTO members may further be limited, modified and enhanced through other unilateral actions, such as, structural adjustment loan induced programs attached to the World Bank; through bilateral agreements, such as economic partnership agreements (EPAs); and regional trade agreements.[334] These additional and substantive influences on developing countries' trade policy space, although invariably subject to WTO rules and disciplines, are not in general imposed or required by WTO membership.[335] These influences fall beyond the scope of this research and are therefore not considered. The following section looks at how the WTO market access commitments curtail the ability of the LDCs to use infant industry protection to industrialise.

4.3 The WTO's market access commitments as a curtailment of the use of tariffs for infant industry protection

In technical terms, infant industry protection is understood as a solution to the problems of knowledge transfer and learning.[336] Time and, more importantly, investment in technological capabilities are needed for firms in LDCs to absorb advanced technologies. It is submitted that without an initial period of protection they are not going to survive international competition.[337] Presented with such a situation, infant industry protection is meant to provide the relevant firms the time and the resources by providing them with a variety of support programs for the industrial sector, including protection against import competition, special tax concessions, low tariff rates for imports of machinery and equipment, subsidised credit, guarantees, or rents, which can be reinvested and which are necessary for their knowledge upgrading process.[338]

The legitimacy of infant industry protection for developing countries has been accepted ever since the creation of the GATT/WTO. Article XVIII of the WTO Agreement, provides for the

[333] An example is given of beet production in Europe.
[334] Page S 'Policy space. Are WTO rules preventing development?' (2007)3.
[335] Milner C 'Constraining and Enhancing Policy space' (2009)138.
[336] Chang H 'why developing countries need tariffs: How NAMA Negotiations would deny developing countries right to a future.' (Working paper by the South Centre, 2005) 10. (Hereafter Chang H 'Why developing countries need tariffs, 2005).
[337] Chang H 'Why developing countries need tariffs' (2005) 10.
[338] Chang H 'Why developing countries need tariffs' (2005) 10.

possibility of a wide range of government actions to help protect and encourage infant industries, subject to reasonable requirements to consult and notify WTO members and offer them compensatory adjustments where necessary.[339] But the use of subsidies to support local production of new products or new modes of production is severely curtailed by the WTO. Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM) outlaws the use of export subsidies and local content subsidies because they distort trade or make other countries refuse to open up their markets.[340] According to Shafaeddin, what this Article implies is that a country cannot support its infant industries, whether or not for exports, either across the board or on a selective basis, when the subsidy is tied to export performance. Ironically though, this was a common practice until recently, particularly in East Asian countries.[341] Article 8 of the ASCM permits subsidies which are of a more generalised character, such as, subsidies for R&D or infrastructural development, as opposed to directly selected industries.[342] But it is submitted that these subsidies, apart from their appropriateness, are beyond the financial means of many developing countries.[343] Thus, having proscribed the use of subsidies as a trade policy tool to protect infant industries, the role of tariffs acquires great significance.

The difference between the bound and applied tariffs provides the policy space needed for industrial development.[344] The WTO does not stipulate that members' applied tariff levels be frozen, but the bound rates define the extent of the flexibility to vary the applied rates upward in response to particular economic circumstances.[345] There is a gap between the levels of bound rates and applied rates of the LDC members of the WTO and it may be argued, as some scholars such as Page and Shadlen have, that because these countries have not taken advantage of the flexibility created by the space between their bound and applied rates, that it would suggest that they do not want to use tariffs for development policy.[346] Therefore the major loss of potential policy space has already occurred and there would be no actual constraint on policy space by asking these countries to bind their tariffs at further lower levels. This argument

[339] See Art XVIII of the WTO Agreement of 1994.
[340] See Art 3 of the subsidies and countervailing measures (SCM) in the WTO Agreement of 1994.
[341] Yen G H & Khor M 'The WTO Negotiations on Non Agricultural Market Access: A development perspective'. (Trade World Network (TWN) Trade and Development series, 2006) 25. (Hereafter Yen G H & Khor M 'The WTO Negotiations on Non Agricultural Market Access, 2006).
[342] See Art 8 of the SCM in the WTO Agreement of 1994.
[343] Yen G H & Khor M 'The WTO Negotiations on Non Agricultural Market Access' (2006) 25.
[344] Page S 'Policy space. Are WTO rules preventing development?' (2007) 3.
[345] Page S 'Policy space. Are WTO rules preventing development?' (2007) 3.
[346] Milner C 'Constraining and Enhancing Policy space' (2009)248; Page S 'Policy space. Are WTO rules preventing development?' (2007)2.

is flawed, however, when applied to recent events, such as, the global financial and economic crises and the resultant current state of play in LDCs, such as, the poor levels of economic and infrastructure development, as well as when applied to LDCs that are still in the early stages of their development and industrialisation process.[347] They still need to retain their policy space as they seek ways to enhance their own development, including industrial growth and food security.[348]

Evidently enough, policy space is a tool that was used extensively by developed countries for their own industrialisation.[349] Virtually all of today's successfully industrialised economies, whilst trying to catch up with the more advanced economies, used tariffs and other measures of protection, such as subsidies, in order to protect and foster their infant industries until they were able to withstand full competition.[350] For example, the European countries, the US, and Japan, all employed high tariffs extensively to protect their infant industries in the early phases of their development.[351] Although the precise form of protection varied considerably from one country to another, there are no examples of countries which liberalised first and successfully industrialised later.[352] The proceeding discussion precisely discusses the extent to which the need of tariffs to protect the growth of infant industry may be relevant to South Sudan.

4.3.1 Relevance of the infant industry protection argument to South Sudan

This research submits that this argument on the protection of infant industry, however, may to a certain extent have an air of unreality when applied to the current state of South Sudan. This is so because it is a very poor and a newly independent African LDC that may at present struggle to find any export industries or goods sectors in which it may have a comparative advantage,

[347] 'LDCs in the early stages of their development' refers not only to those who have just started their economic development but also to those whose economies are undergoing a process of industrialisation to correct an excessive dependence on primary production in the same context referred to in the GATT. See *Ad* Art. XVIII of the GATT of 1994.

[348] Meyer M 'LDCs Trade and Investment challenges' (Working Paper by ICTSD, 2011) See generally.

[349] Kumar N & Gallagher P K 'Relevance of policy space for development. Implications for Multilateral trade negotiations' (Working Paper by the ICTSD 2006)13. (Hereafter Kumar N &Gallagher P K 'Relevance of policy space for development.2006).

[350] Kumar N & Gallagher P K 'Relevance of policy space for development' (2006)13.

[351] Kumar N & Gallagher P K 'Relevance of policy space for development' (2006)13.

[352] Chang H, 'Kicking Away the Ladder--Development Strategy in Historical Perspective'(2002) *Post-autistic economics review* available at http://www.btinternet.com/~pae_news/review/issue15.htm(accessed on 13/08/2013).

due to the adverse effects of years of conflict.[353] The economy of South Sudan is characterised by a high dependence on a depleting oil resource, limited domestic production, and a high reliance on imports.[354] The oil sector is the largest contributor to gross domestic product (GDP), both in terms of direct value-added and associated investment and support to the services industry.[355] South Sudan derives nearly 98 percent of its budget revenues from oil,[356] and almost all foreign exchange earnings, thus making the South Sudanese economy extremely vulnerable to changes in oil prices and oil production levels.[357] As a matter of fact, the drop in oil prices following the global economic crisis of 2008-2009, as well as the continuous dispute over oil transit fees between Sudan and South Sudan, has demonstrated the vulnerability of an oil dependent and undiversified economy.[358] According to the South Sudan was Development Programme (SSDP) of 2011- 2013, the government as a result of the above unable to meet its spending commitments, including, paying salaries, state transfers and investment in social service delivery.[359] Presently, therefore, the focus of the government has been to adopt policies and strategies aimed at diversifying the economy and diminishing the oil dominance,[360] to non-oil sectors including but not limited specifically to agriculture, mining, forestry and manufacturing industries.[361]

Most of these industries, although barely developed and characterised by production on a small scale subsistence level, they have been identified as having the potential to boost South Sudan's economy.[362] The contribution of these industrial sectors to the GDP of South Sudan

[353] Most of all of South Sudan's industries and infrastructures have been destroyed during the war and hence have to be built from scratch.
[354] Government of South Sudan-*South Sudan Development Plan of 2011-2013*. (2011) 24.
[355] South Sudan - African Economic outlook (2012) 3. Available at http://www.africaneconomicoutlook.org/en/countries/east-africa/south-sudan/ (accessed on 13/03/2013).
[356] South Sudan economy profile 2012. Available at *http://www.indexmundi.com/south_sudan/economy_profile.html* (accessed on 13/03/2013).
[357] Government of South Sudan- *South Sudan Development Plan of 2011-2013*. (2011) 10.
[358] Tadesse D 'Post Independence: South Sudan: The challenges ahead.'(ISPI Working Paper, 2012)15.
[359] The loss of oil revenues created large deficits in the budget and in the balance of payments, which has to be met by cuts in imports and public expenditure, in addition to alternative sources of financing. See South Sudan approved budget (2012-2013)1.
[360] These include: fiscal policies, monetary policies, trade policies, etc. See list of policies adopted in African Economic outlook of 2012.
[361] South Sudan - African Economic outlook (2012) 3. Available at http://www.africaneconomicoutlook.org/en/countries/east-africa/south-sudan/ (accessed on 13/03/2013).
[362] In its latest outlook, the IMF said South Sudan had sizeable economic potential due to oil, livestock, fishery, agricultural and forestry reserves. *http://english.ahram.org.eg/NewsContent/3/12/55477/Business/Economy/South-Sudan-faces-major-challenges-to-unlock-econo.aspx* (accessed on 19/04/2013), ADBG.SS Interim Strategy paper 2012-2014.7.

may be very minimal but this contribution in terms of employment and export earnings can help ease the problems of unemployment and a negative trade balance for this import and oil dominated economy.[363] Therefore, South Sudan will need to be able to protect itself from external competition as these industries are still in their infancy stages, particularly from its bordering countries whose industries are far more advanced. The only available option to do so upon accession to the WTO would be through tariffs; but binding at any low tariff rates undoubtedly entails the risk of not being able to accomplish this in the future.

Various examples are given of sectors in the six LDCs that recently joined the WTO and that are now bearing the brunt of making extensive tariff reductions.[364] The nascent dairy sector in Samoa which has been in existence for less than a decade now, provides an excellent emphasis for the above argument. Samoa's dairy farming, despite still being on a small scale level is already providing this poor country with the desperately needed rural employment opportunities and sound nutritional input for its population, while decreasing the balance of trade deficit and saving foreign exchange by replacing some milk imports.[365] Presently this sector occupies a tiny niche in Samoa's economy, but has been identified as having the potential to grow and supply a considerable amount of the country's dairy needs. However it may not be able to grow beyond its current niche if it is forced to compete without sufficient tariff protection with imports from much larger scale, super-efficient dairy production of New Zealand or Australia.[366] Had Samoa been able to maintain its initial applied rates for agricultural products at 50 percent, this would have enabled it to raise the tariffs on dairy products once it becomes necessary to do so to foster further growth of this industry. Unfortunately though, the rate at which Samoa was asked to bind at, which was way less than 50 percent, deprives it of the policy space it needs to make this possible.[367]

[363] The African Economic Outlook on South Sudan's recent Economic Developments & Prospects. Available at http://www.africaneconomicoutlook.org/en/countries/east-africa/south-sudan/ (accessed on 29/07/2013).
[364] Few examples include the beef industry in Samoa, Kava production in Vanuatu and Tonga etc.
[365] Submission of Oxfam New Zealand to the Ministry of Foreign Affairs on the WTO negotiations of Samoa (2005)10. Available at http://www.oxfam.org.nz/imgs/whatwedo/MTF/ONZ%20on%20Samoa%20WTO%20accession.pdf (Accessed on 13/08/2013).
[366] Submission of Oxfam New Zealand to the Ministry of Foreign Affairs on the WTO negotiations of Samoa (2005) 10. Available at http://www.oxfam.org.nz/imgs/whatwedo/MTF/ONZ%20on%20Samoa%20WTO%20accession.pdf (Accessed on 13/08/2013)
[367] Submission of Oxfam New Zealand to the Ministry of Foreign Affairs on the WTO negotiations of Samoa (2005)10. Available at

It is in light of the above, therefore, that the market access commitment on tariffs is seen as likely to impact on the policy space for the growth of infant industries.

4.4 The WTO's market access commitments and LDCs' inability to protect domestic jobs and services sectors from foreign domination

This subsection looks at how making the market access commitments in services is likely to impact on the acceding countries' service sectors. It concludes by briefly expressing the major concern for South Sudan with regards to its domestic job markets should the country accede to the WTO.

The General Agreement on Trade in Services (GATS) represents a first step towards the liberalisation in international trade in services.[368] It is an agreement that aims to reduce the barriers faced by foreign companies in providing services, generally in the form of restrictions on investment, preferences for national service providers, or government regulation. [369] It recognises the rights of developing countries to make fewer commitments, open fewer sectors, liberalise fewer types of transactions, progressively extend market access in line with their development situation, and attach conditions when making access to their markets available to foreign service suppliers.[370] However, WTO members have been disregarding these provisions and systematically demanding more services commitments from acceding countries than is the case for WTO members at a similar stage of development.[371] (See section 3.2 above).[372] LDCs have particularly been vulnerable to the pressure and consequences of making full commitments and therefore been unable to place effective limits on foreign ownership, market share, and number of service suppliers in vital sectors, including, education, health, construction, wholesale, retail, telecommunications and financial services. These are sectors for

http://www.oxfam.org.nz/imgs/whatwedo/MTF/ONZ%20on%20Samoa%20WTO%20accession.pdf (Accessed on 13/08/2013)

[368] The GATS preamble in the WTO Agreement of 1994.

[369] The GATS in the WTO Agreement of 1994.

[370] Art XIX & Art VI of GATS in the WTO Agreement of 1994.

[371] Grynberg R *et al* Paying *the Price for Joining the WTO* (2002). See generally.

[372] See chapter 3 section 3.2 of this mini thesis.

which governments have public policy objectives, such as, equity, universal service obligations, and consumer protection.[373]

The justification that has been given for demanding that LDCs liberalise their services sectors is that it could be beneficial to them in the following various ways. It will be instrumental to expanding LDCs' access to basic services.[374] In addition, imports of services will significantly improve performance by bringing greater competition, international best practice, better skills and technology transfer, employment creation, transparency, and predictability in trade and investment capital.[375] Furthermore the entry of foreign service providers will yield better services for domestic consumers, and improve the performance and competitiveness of domestic firms.[376] However, it is submitted that these benefits are nonetheless far from automatic, and that there may instead be a trade-off for LDCs' national sovereignty, on one hand, and their social, developmental, and equity goals, on the other.[377] This is so because pressures to open up these vital sectors may result in corporate takeovers by foreign multinationals, privatisation of LDCs' service sectors, and to the ultimate erosion of government control.[378] Moreover the absence of strong, effective regulations and a supervisory environment which are characteristics of most LDCs present a serious obstacle to imposing restrictions on the establishment of foreign companies or to monitoring their operations.[379] Consequently, this could lead to severe consequences in the sectors liberalised. It is submitted that in the absence of effective regulatory regimes, service provision by a dominant supplier in a small market is likely to result in poor quality. In addition, the equal and affordable access to basic services by the general population may be undermined and the brunt felt by the poor majority who cannot afford to pay the increased cost of services.[380]

[373] Chanda R' GATS and its implications on developing countries: Key issues and concerns' (Working Paper of the United Nations Department of Economic and Social Affairs (UNDESA), 2002)12. (Hereafter Chanda R 'GATS and its implications on developing countries' UNDESA Working Paper, 2002).

[374] Majluf L A & Zarilli S 'Challenging Conventional Wisdom: Development Implications of Trade in Services Liberalisation' (UNCTAD working papers, 2007)9. (Hereafter Majluf L A & Zarilli S 'Challenging Conventional wisdom' 2007).

[375] Majluf L A & Zarilli S 'Challenging Conventional wisdom' (2007)9.

[376] Ewing 'Why Freer Trade in Services is in the interests of Developing Countries.' (1985) 19 *Journal of World Trade Law* 147-159; 157.

[377] Walraven K 'Looking for facts in the GATS Attack: Impacts on Social Services Sovereignty' (2006) 17 *Journal of International Public Affairs*, 151-168; 155. (Hereafter Walraven K 'Looking for facts in the GATS Attack: Impacts on Social Services Sovereignty' 2006).

[378] Chanda R 'GATS and its implication for developing countries' (UNDESA Working Paper, 2002) 12.

[379] Mashayekhi M & Kidane M J 'Integrating Developing countries into the global services economy'. Available at http://ictsd.org/downloads/2008/06/mashayekhi_kidane.pdf (Accessed on 08/08/2013).

[380] Chanda R 'GATS and its implications on developing countries' (UNDESA Working Paper, 2002)12.

However, proponents of the GATS argue that such fears are groundless and show a misconception of the GATS provision on progressive liberalisation.[381] This, they argue is mainly so because of the voluntary and flexible nature of the commitment process in which a member may modify, suspend, or withdraw commitments; the non-specificity of most of the GATS provisions; and the discretion of imposing limitations in the commitment schedules.[382] They assert that there is no compulsion on member countries to open up a particular sector or subsector or a particular mode of supply if there are sensitivities and concerns involved about the potential impact.[383] In addition, they assert that the terms of accession to the WTO do not directly require an acceding country to privatise or prevent it from maintaining public sector services or statutory corporations.[384] In this regard, therefore, they submit that the GATS commitment structure strikes a balance between the commercial interests, on the one hand, and regulatory concerns and public policy objectives on the other, of the acceding members.

The above arguments are in the least bit compelling as the accession experiences to the WTO of the six recently acceded LDCs, and those of Tonga and Vanuatu in particular, suggest otherwise. The accession of Tonga resulted in making huge commitments in its services sectors, more far reaching than all the six recently acceded LDCs. Although the WTO accession agreement does not directly call for privatisation, Tonga ended up privatising sensitive sectors, such as education.[385] Furthermore, Vanuatu's accession package called for extensive liberalisation of its education, retail, distribution, health, sanitation, and telecommunication sectors, and this ended up negatively impacting Vanuatu.[386] The experiences of these recently acceded LDCs and the grueling resultant effects (which cannot be examined in detail due to time and space limitations of this mini-thesis) contrast starkly with those in favour of the GATS.[387] It accentuates the reasons why an LDC like South Sudan should not consider joining the WTO. Moreover, South Sudan's services sectors are largely unregulated, and it is submitted that a premature accession to the WTO and the GATS now may lead to South Sudan

[381] Walraven K 'Looking for facts in the GATS Attack: Impacts on Social Services Sovereignty' (2006) 155.
[382] Walraven K 'Looking for facts in the GATS Attack: Impacts on Social Services Sovereignty' (2006)155.
[383] Chanda R 'GATS and its implication for developing countries' (UNDESA Working Paper, 2002) 6.
[384] But the provisions of the GATS make it difficult for governments to maintain public services or state owned entities providing services.
[385] See Report of the Working Party on the accession of Tonga: Schedule of Specific commitments in Services WT/ACC/TON/17/Add.2.
[386] Lennon, S 'Make extortion history' (Oxfam Briefing Paper, October 2005) 13-18.
[387] Lennon, S 'Make extortion history' (Oxfam Briefing Paper, October 2005) 13-18.

giving up substantial powers to regulate its services sectors.[388] This could as a result hurt the country's domestic job markets which needless to say is the situation already being evidenced at present. It has been noted that due to the lack of an effective regulatory system, South Sudan is experiencing an influx of thousands of skilled and unskilled workers from Kenya and Uganda, who are competing with an army of unemployed locals and displacing their jobs.[389] This is crippling the country's efforts of resuscitating the economy.

4.5 Implications of WTO's market access commitments for import tariffs

4.5.1 The role of import tariffs in developing countries (DCs) and LDCs

Whereas import tariffs account for less than 1 percent of government revenue in rich countries, many DCs heavily rely on them to help fund their state budgets.[390] They draw at least part of their government revenue from customs tariffs, with some relying on duties for more than 30 percent of revenue collections.[391] This is mainly attributed to the fact that import duties are among the easiest to collect and less costly to administer than other forms of taxation, which is especially important for countries with a large informal sector and less administrative capacity.[392] It has been observed that for some poor countries with little diversification in their economies, such as, Bangladesh, Namibia and Senegal, a third of their entire state budgets is financed through trade tariffs.[393] Further examples listed by the South Center include the Dominican Republic, Guinea, Madagascar, Sierra Leone, Swaziland, and Uganda where tariff revenues comprise more than 40 percent of all government revenues.[394]

However, it is submitted that rapid liberalisation can have an extremely harmful impact on low and middle-income countries, mainly because the reduction in import tariffs significantly reduces

[388] South Sudan economy profile 2012. available at http://www.indexmundi.com/south_sudan/economy_profile.html (accessed on 13/03/2013).
[389] Green A & Laessing U 'Analysis- South Sudan's Kiir faces growing dissent as new state stumbles' *Reuters*. Available at http://www.reuters.com/article/2013/09/15/us-southsudan-politics-analysis-idUSBRE98E03A20130915 (accessed on 15/09/2013).
[390] Wise T A & Gallagher P K 'Doha Round and Developing Countries: Will the Doha deal do more harm than good?'(Research and Information Systems (RIS) Policy Briefs, 2006) 3.
[391] World Bank *Financing Global Sharing Report 2012- Protect Import Tariffs* (2012) 161.
[392] Emram M S & J Stiglitz 'On Selective Indirect Tax Reform in Developing Countries' (2004) 89 *Journal of Public Economics* 599-623.See generally.
[393] World Bank *Financing Global Sharing Report 2012- Protect Import Tariffs* (2012) 161.
[394] African Economic Outlook - Public Resource Mobilisation and Aid, 2010. Available at http://www.africaneconomicoutlook.org/en/in-depth/public-resource-mobilisation-and-aid/ accessed on (01/08/2013).

essential government revenue.[395] Some free trade advocates, however, argue that the loss of income is relatively minimal. For example, in a special study carried out by the WTO on 'Adjusting to Trade Liberalisation', the WTO quotes evidence that the impact of liberalisation on developing countries' tax revenues has not necessarily been adverse.[396] Gallagher, Wise and Kowalski submit that government revenue losses should not be an obstacle to liberalisation as a reduction in tariffs helps broaden the tax base.[397] This has also been the position of the International Monetary Fund (IMF) which particularly recommends the replacement of income with value added and sales taxes.[398] They all submit that these other taxes easily compensate for the countries' tariff income losses.[399]

However, further research conducted on the impacts of liberalisation on developing countries contradict the above arguments and have shown to a greater extent that tariff losses for developing countries are significant and can far outweigh the benefits of liberalisation.[400] Empirical studies suggesting that tariff revenues forgone from trade may be replaced by revenue from domestic sources, such as value added tax (VAT), sales or consumption tax has not proved to be the case.[401] A more comprehensive research by the IMF itself now demonstrates that low-income countries have only been able to recoup around 30% of what they have lost from reduced import taxes since the early 1980s.[402] The results of the IMF research seem to be further supported by Aizenman and Jinjarak as well as Baunsgaard and Keen who examine whether low income countries can recover their trade revenues lost as a

[395] IMF 'Dealing with revenue consequences of tariff reform' (Background paper for review Fund Work on Trade, 2005)3. Available at https://www.imf.org/external/np/pp/eng/2005/021505.pdf accessed on (01/08/2013).
[396] Bacchetta M & Jansen M 'Adjusting to Trade Liberalisation: The role of policy, institution and WTO disciplines.'(WTO special studies, 2003)6.
[397] This consists of a shift away from trade taxes towards other forms of taxation, such as, income, consumption, sales, or value added taxes.
[398] WTO, *Liberalising Trade and Safeguarding Public Revenues*, Communication from the IMF, WT/TF/COH/16, February 2003; See generally.
[399] Wise T A& Gallagher P K 'Doha Round and Developing Countries: Will the Doha deal do more harm than good?'(RIS Policy Briefs, 2006)3; P Kowalski 'Impact of Changes in Tariffs on Developing Countries' Government Revenue' (Organisation for Economic Cooperation and Development (OECD) Trade Policy Working Papers, 2005) 15.
[400] Caliari A 'The fiscal impact of trade liberalisation', in Kohonen M & Mestrum F (Eds) *Tax Justice: Putting Global Inequality on the Agenda* (2009)134.
[401] Barsha K & Rao J M 'Fiscal Faux Pas? An Analysis of the Revenue Implications of Trade Liberalisation' (2002)30 *World Development*1431-1444; 1435.BhagwatiJ N 'Directly Unproductive Profit-Seeking Activities' (2002) 90 *Journal of Political Economy*, 988–1002; see generally.
[402] Baunsgaard T & M Keen, Tax Revenue and (or?) Trade Liberalisation, IMF Working Paper WP/05/112, June 2005. See generally.

result of trade liberalisation by reverting to domestic tax revenues.[403] The results confirm that the degree of revenue recovery is extremely minimal. When compared to import tariffs, VAT, as well as the other suggested forms of taxation, have been found particularly ineffective at raising government revenues in countries with large informal sectors, due to the challenges involved in their collection, mainly, the sophisticated administration process required and the costs involved which are beyond the means of many poorer countries.[404] Moreover, it is submitted that a change from import tariffs to a consumption tax usually has the effect of loading more of the tax burden onto the poor.[405]

A case in point is Nepal which faced institutional and policy challenges while trying to mobilise domestic resources to make up for lost revenue from trade taxes as a result of WTO accession. [406] There was low tax compliance, misuse of discretionary power, lack of infrastructure for efficient tax administration, as well as low tax elasticity.[407] Tonga which has historically been heavily dependent on tariffs and the port and services tax for a major portion of government revenue is another case in point.[408] Until they were abolished in 2005, across the board import taxes of 25 percent were in place.[409] On top of the 25 percent, import tariffs of up to 330 percent were imposed depending on the nature of the goods.[410] As part of its accession process, Tonga had to undertake a major restructuring of its tax system which saw the introduction of a consumption tax of 15 percent to offset the tariffs that would be lost from binding at levels below 15 percent and 20 percent.[411] But the impact on government as a result of the tariff reductions has been severe and according to a recent report by Oxfam, it was noted that the consumption tax has been ineffective in replacing the lost revenue.[412]

[403] Aizenman J &Jinjarak Y 'Globalisation and Developing Countries: A Shrinking Tax Base?'(National Bureau of Economic Research Working Paper, 2006) See generally.
[404] Gallagher P K 'Putting Development back in the Doha Round' 2007 *Yale Journal of International Affairs*113-122; 117. (Hereafter Gallagher P K 'Putting Development back in the Doha Round' 2007).
[405] Proposed WTO Accession: Key issues for Tonga Available at http://www.oxfam.org.nz/report/tonga-proposed-wto-accession-key-issues-for-tonga (accessed 01/08/2013).
[406] Pandey R P *et al* (2011) 9.
[407] Pandey R P *et al* (2011) 9.
[408] Proposed WTO Accession: Key issues for Tonga Available at http://www.oxfam.org.nz/report/tonga-proposed-wto-accession-key-issues-for-tonga (accessed 01/08/2013).
[409] Oxfam Briefing Note 'Blood from a Stone' (Oxfam Working Paper 2005) 4.
[410] Examples of tariffs as of 2004 are: petroleum 35%, vehicles 45%, foodstuffs 15-25%, alcohol 200% and tobacco 330%
[411] Proposed WTO Accession: Key issues for Tonga Available at http://www.oxfam.org.nz/report/tonga-proposed-wto-accession-key-issues-for-tonga (accessed 01/08/2013).
[412] Cordemans D 'Tonga questions WTO membership amid global recession' *Epoch Times* 6 March 2012. Available at

Likewise, Vanuatu derived the biggest single share of government revenue from import duties but was forced by the Asian Development Bank (ADB) to make changes to its tax system as this was seen as essential for Vanuatu to be in a position to join the WTO, including the replacement of import tariffs by a VAT of 12.5 percent.[413] When the consumption tax was then later introduced in Vanuatu, it resulted in a sharp increase in the price of basic commodities in rural areas.[414] It took Vanuatu's tax base ten years to recover from the resulting loss of revenue.[415] In addition to the above, Samoa also expressed concern over the shock its revenue base would suffer as a result of being asked to bind its tariff levels at either the then existing low applied rates or much lower than that. It was submitted that it was bound to have major implications for the country's revenue base.[416] All the above countries are some of the WTO recently acceded countries that were discussed in chapter 3.[417] Specific reference is made to them in order to further emphasise the negative implications on the import tariffs that may likely result in the case of any acceding LDC that is pressured to make reductions in its tariff bindings.

4.5.2 The Doha Development Agenda and its impacts on import tariffs

It has been noted that in spite of the well documented harmful impacts of liberalisation on developing countries, the WTO still continues to impose severe limitations on their income from tariffs.[418] The Doha Development Agenda (DDA) is not discussed in this research in detail but it is seen as a case in point. It is submitted that the DDA if completed will present a considerable liberalising force for many poor countries.[419] Although currently at an impasse, many commentators believe that the DDA will nonetheless be concluded when the political conditions

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http://m.theepochtimes.com/n2/world/tonga-questions-wto-membership-amid-global-recession-200727.html (accessed on 05/08/2013.

[413] Lennon, S 'Make extortion history' (Oxfam Briefing Paper, October 2005) 7.

[414] Lennon, S 'Make extortion history' (Oxfam Briefing Paper, October 2005) 6.

[415] Proposed WTO Accession: Key issues for Tonga Available at http://www.oxfam.org.nz/report/tonga-proposed-wto-accession-key-issues-for-tonga (accessed 01/08/2013).

[416] Submission of Oxfam New Zealand to the Ministry of Foreign Affairs on the WTO negotiations of Samoa (2005) 10. Available at http://www.oxfam.org.nz/imgs/whatwedo/MTF/ONZ%20on%20Samoa%20WTO%20accession.pdf (Accessed on 13/08/2013)

[417] See chapter 3.

[418] See Data from World Bank, World Development Indicators 2011, which calculates selected countries losses of customs revenue since 1995 to 2009.

[419] Scott J 'Squeezing the state: Tariff revenue, state capacity and the WTO's Doha Round' (Brookes World Poverty Institute Working Paper, 2012)5.

are right.[420] Analyses of the impact of the DDA on developing countries abound in various areas, including but not limited to, agriculture, food security, poverty and services, but only to a limited extent on the impact of the proposed tariff cuts on developing countries' revenues. However, studies by researchers such as Kowalski, Gallagher and Valenzuela, all conclude that the proposed tariff cuts and reductions for both the agricultural and Non-Agricultural Market Access (NAMA) products of developing countries, could lead to losses in tariff revenues in these countries.[421] This is so mainly because once these tariff reductions are bound, they cannot be withdrawn or reversed without due compensation to those WTO members that will be affected by such action.[422] Hence, should these countries need to raise extra revenue through import tariffs; this option will not be available.[423] For example, as a result of Thailand's tariff reforms to reduce the average applied tariff rate from about 30 percent in 1994 to 17 percent in 1997, it is estimated that its collected import duties fell from 19 percent of government revenue in fiscal year 1994 to 13 percent in 1997.[424] According to calculations by the UNCTAD, a further projection made by them indicated that developing countries could lose up to $63.4bn through lost import tax revenues on NAMA goods alone as a result of the proposed tariff reduction levels.[425] This figure is thought to have increased significantly in recent years due to the growth in international trade volumes.[426] This sum is four times less than what the UNCTAD predicted these countries would lose in increased trade if the Doha Round of negotiations succeeds.[427]

Current LDCs in the WTO are not required to make any reductions in their agricultural tariffs under Article 15 of the Agreement on Agriculture but are required to bind all agricultural products.[428] They are also not required to make any tariff reductions in terms of the NAMA negotiations and their only required contribution is to substantially increase their binding

[420] Wilkinson R 'Of butchery and bicycles: the WTO and the death of the Doha Development Agenda' (2012) 83*The Political Quarterly*, 1-7. See generally.
[421] Kowalski P 'Impact of Changes in Tariffs on Developing Countries' Government Revenue' (OECD Trade Policy Working Papers, 2005), Valenzuela E., Anderson, K & Hertel T 'Impacts of trade reform: sensitivity of model results to key assumptions'(2008) 4*International Economic and Economic Policy*395-420. See generally
[422] Art XXVIII of the WTO Agreement of 1994.
[423] Caliari A 'The fiscal impact of trade liberalisation', in Kohonen M & Mestrum F (Eds) Tax Justice: Putting Global Inequality on the Agenda (2009)136.
[424] Ognivtsev V, Tang X & Yamaoka T 'WTO Accession Negotiations on Tariffs: Tariff Offers'. (WTO Accession development policies, 2001)182.
[425] See the proposed Swiss formula in the Simple guide to NAMA negotiations. Available at http://www.wto.org/english/tratop_e/markacc_e/nama_negotiations_e.htm (accessed on 02/08/2013).
[426] Gallagher P K 'Putting Development back in the Doha Round' (2007)117.
[427] World Bank *Financing Global Sharing Report 2012- Protect Import Tariffs* (2012) 163.
[428] Article 15 of the Agreement on Agriculture of the WTO Agreement of 1994.

coverage at levels in accordance with their needs and development.[429] This may be applauded on the ground that this flexibility will allow the participating LDCs to retain their import tariffs without fear of losing these revenues. However, when this provision on the flexibility and special consideration granted to LDCs currently in the WTO is juxtaposed with the same provisions in the WTO guidelines for acceding LDCs, calling upon incumbent WTO members to let applicant LDCs make commitments at levels that are commensurate with their needs and development, the same sentiments may not be shared. This is so because one of the development needs of the LDCs is not to lose their tariffs through acceding and binding at low tariff levels as incumbent members are requesting of applicant LDCs. Although evidence of LDCs' reliance on import tariffs as an additional source of government revenue or the impact of their loss thereof is not as widely documented as that for DCs, it may be safe to argue that the impact may not be any different or that it is likely be more adverse due to the differences in their levels of development.[430] The following discussion reviews the likely implications of tariff reduction for South Sudan.

4.5.3 Tariff reduction and its implication for revenue in South Sudan

It has been submitted that due to the historical economic marginalisation of Southern Sudan by the North and decades of armed conflict, trade in South Sudan has been highly localised and predominantly sourced from Kenya, Uganda and Sudan.[431] At present, there is neither sufficient domestic production for markets for agriculture products nor for production for export markets outside of oil; thus South Sudan is highly dependent on imports.[432] Limited trade data indicate that about 60% of imports from Uganda and Kenya are agriculture products, but in the capital city (Juba) and a few other economic centres, there are booming construction and service sectors. [433] South Sudan nonetheless relies on these taxes to help finance its public

[429] The LDCs are not required to make any reductions in agricultural tariffs. For non-agricultural tariff bindings the scenario calls for 50 percent cuts in developed countries, 33 percent in developing countries, and zero in the LDCs. See the proposed Swiss formula in the Simple guide to NAMA negotiations. Available at http://www.wto.org/english/tratop_e/markacc_e/nama_negotiations_e.htm (accessed on 02/08/2013).

[430] This is based on the evidence collected on the importance of import revenues in developing countries. The conclusion is drawn that because LDCs are at a much lower development status, that the impacts are likely to be more adverse.

[431] World Bank 'Sudan: The road toward sustainable and broad-based growth' (2009) 10.

[432] Government of South Sudan- *South Sudan Development Plan of 2011-2013*. (2011) 33.

[433] The vast majority of products sold in South Sudan are imported. Goods ranging from construction materials to food have to be imported from neighbouring countries. Sudan's 'Diagnostic Trade Integration Study' (DTIS) found that supplies of basic grains and flour, sugar, vegetables and fruit, as well as some fish, sold in markets such as Juba and Yei, are typically imported from Uganda and Kenya. See Schuler et al (2008) 'Revitalising Sudan's Non-oil exports: A diagnostic trade integration study prepared for the integrated framework programme.'

infrastructure and provide services necessary to support much-needed economic and social development. Initially according to s 87 of the Taxation Act of 2009, the tax rates applicable to all goods entering South Sudan were stipulated as follows; 2 percent for all food processed items, 4 percent for all other goods and 6 percent for vehicles of all kinds.[434] However, in terms of the Taxation Act (Amendment 2) provisional order 2012, the above tax rates no longer apply and s 87 has been deleted.[435] In terms of the provisional order a tax rate of 3 percent is chargeable on all imports into South Sudan.[436] Against this backdrop of having very little domestic production capacity to substitute for imports, the current trade policy of South Sudan can be considered as very liberal as one that seeks to impose little restriction on the movement of goods and labour across international borders.[437] It is submitted that such a trade regime is relevant for the absorptive capacity of the country as restrictions on the flow of goods will increase costs and create bottlenecks that are likely to negatively impact on its economic growth.[438]

However, for a resource rich and aid rich country like South Sudan which pays for all its imports entirely with oil revenue and foreign aid, both accruing to the government,[439] it is argued that the role of tariffs as an important source of government revenue may not at present be of great significance. This therefore presents an exception to the above argument. According to Collier and Venables, tariffs will reduce the domestic purchasing power of the oil revenues and the foreign aid, devaluing resource revenue and aid flow in real terms.[440] Thus what is seemingly gained in tariff revenue will be lost in terms of higher costs elsewhere in the economy.[441] However, it is noteworthy that oil is a perishable natural resource which may not be in production indefinitely and particularly that that of South Sudan has been estimated to only last for one more decade before the oil wells run dry.[442] Therefore, South Sudan undoubtedly will

[434] Republic of South Sudan Taxation Act of 2009.
[435] Republic of South Sudan Taxation Act (Amendment No.2) Provisional Order 26 of 2012. The purpose of which was to amend the Taxation Act, 2009 and to correct several small errors under that Act and to provide for related matters.
[436] S6 of Provisional Order 26 of 2012.
[437] Government of South Sudan- *South Sudan Development Plan of 2011-2013*. (2011) 33.
[438] Government of South Sudan- *South Sudan Development Plan of 2011-2013*. (2011) 33.
[439] The Oil revenue has financed those imports from Uganda as well as from elsewhere in the region and the world. Government of South Sudan- *South Sudan Development Plan of 2011-2013*. (2011) 33.
[440] Collier P & Venables A J 'Illusory revenues: Import tariffs in resource-rich and aid-rich economies' (2011) 94 *Journal of Development Economics*, 202-206; 202.
[441] Collier P & Venables A J'Illusory revenues: Import tariffs in resource-rich and aid-rich economies' (2011) 94 *Journal of Development Economics*, 202-206; 203.
[442] Government of South Sudan- South Sudan Development Plan of 2011-2013. (2011) 25.

have to resort to alternative and additional sources of generating revenue. Such non-oil revenue bases include trade tariffs. However, given the significance attached to import tariffs as a source of revenues in low income countries and the failure of being able to substitute the loss thereof by expanding domestic tax bases, it is submitted that if South Sudan accedes to the WTO now, such an alternative may be foreclosed. This is because the WTO accession deal will include a ceiling for tariffs and such bound rates are inflexible. South Sudan will not have the opportunity to use tariffs to raise revenue if the oil revenues cease to exist or if its alternative domestic tax base fails to offset such losses.

4.6 Conclusion

In view of the above, it can be argued that as a result of incumbent WTO members continuously pressuring acceding LDCs to make binding commitments which are not at the same levels of the incumbent WTO members or at levels which commensurate with the LDCs' levels of economic development; the following potential implications are envisaged. First, the extensive commitment to bind at very low tariff rates is a constraint on LDCs' policy space which is necessary to promote export diversification and industrial growth. South Sudan is already at an extreme disadvantage due to its history of war which destroyed its infrastructure. In addition, without the ability to use tariffs to establish 'infant industries', South Sudan will face even greater difficulties in being able to develop its local economy. Secondly, South Sudan lacks the effective domestic regulatory regime that may enable it to regulate foreign operations and monopoly within the country and ensure that even the poor afford basic services. Thirdly, it curtails the ability of LDCs the benefit to use import tariffs as an additional source of trade revenues. The important fiscal role of tariffs in LDCs militates against their reduction upon their accession to the WTO. Moreover, a closer study and examination of South Sudan has revealed its current limited export potential as well as the need to explore alternative options to offset the loss of revenues as a result of the depleting oil reserves. However, the option of using tariffs to achieve this may not be available if South Sudan accedes to the WTO now, due to the inflexibility of adjusting tariffs upwards once they have already been bound.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The objective of this research has been to analyse the accession to the World Trade Organisation (WTO) of least developed countries (LDCs) with a view to drawing attention to the possible implications of the WTO's market access commitments on these countries, but with the further emphasis on South Sudan. This was done in order to answer the question whether or not it would be in South Sudan's best interest to consider joining the WTO. To achieve this goal, the first task was to highlight and give a background of the WTO and its objectives as well as to briefly draw the *nexus* between the WTO accession process and the unfairness thereof towards LDCs, as evidenced by their consequent market access commitments to the WTO (discussed in section 3.2). [443] To further assist in answering this main question, the following three research questions were developed in chapter 1: first, what are the legal requirements for South Sudan to accede to the WTO?; secondly, what are the potential implications of the excessive market access commitments for the development of trade in South Sudan?; and thirdly, how can these implications be averted to match the trade and development needs of South Sudan? The answers to the above questions were given in the subsequent chapters of this research.

Chapter 2 began by briefly introducing the key principles of the WTO. It was shown that the WTO laws are based on certain core principles and rules which include but are not limited to the following; the principle of non-discrimination, predictability and transparency. [444] It then proceeded to examine the complexities involved in the accession of LDCs to the multilateral system and it was noted that even in spite of the more favourable terms of accession pledged to LDCs under the Doha Mandate, there is little evidence that such newly acceding countries are granted significant differential terms, and that the accession process is still lengthy and complex.[445] This chapter showed that accession is the first step to becoming a member of the WTO. It is a formal legal commitment by the acceding country to comply fully with multilateral trade and its rules.[446] Once a country decides to join the WTO, it will have to make an official

[443] See chapter 3 section 3.2 of this mini thesis.
[444] These principles are available in the legal texts of the WTO Agreement of 1994, Art (1), Art III, Art X of GATT, GATS Art III of GATS and Art III of TRIPS.
[445] See chapter 2 section 2.3 of this mini thesis.
[446] WTO Accession: Explanation on how to become a member of the WTO. Available at

application for membership and the end of this process will mark the commencement of the enforcement of commitments and concessions as well as compliance with WTO rules by it.[447] Article XII of the Marrakesh Agreement is the legal provision that governs the WTO accession process but it was specifically noted that the core of the accession negotiations lies in the determination of favourable terms of accession. As a matter of fact, the terms of accession contain the 'membership fee' that the acceding country will pay to be able to join the WTO. However, on closer scrutiny of Article XII, it was noted that it gives members *carte blanche* to impose unreasonable conditions on acceding countries, as it fails to specify the level of commitments, the scope and extent of demands that can be placed on them. Consequently this ambiguity puts the accession process in a strictly negotiating than rule-compliance context and the acceding countries bear the brunt of not receiving what they deserve but rather what they negotiate.

Chapter 2 further argued that the rationales for LDCs acceding to the WTO are tied to the benefits likely to accrue to them on membership. These include but are not limited to the orthodox propositions that WTO accession will promote economic development, increase market access, increase FDI, achieve effective domestic policy making institutions, and enhance dispute settlement in LDCs.[448] But on further scrutiny of these rationales, several dissenting views emerged. However, it was noted that the benefits of acceding to the WTO are neither automatic nor immediate and that there exists a deep dichotomy between the theory and reality of the benefits of WTO membership, most especially for LDCs. This research cautions that LDCs should not be hasty in acceding to the WTO, but rather first weigh the benefits versus the costs of this decision. It further asserts that the impact whether beneficial or adverse of WTO membership on any acceding LDC will ultimately depend on that LDC's ability to reconcile the mismatch between the perceived benefits of free trade and its limited ability as a LDC to reap those benefits.

Chapter 3 systematically examined the six recently acceded LDCs' market access commitments and compared them with those of the incumbent WTO members as well as with the guidelines for the facilitation of the accession of LDCs into the WTO. The aim of this assessment was to determine whether the WTO incumbent members have lived up to their promise as stated in the

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http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (accessed on 28/01/2013).

[447] WTO Accession: Explanation on how to become a member of the WTO. Available at http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (accessed on 28/01/2013).

[448] See section 2.4 of chapter 2 of this mini thesis.

Accession Guidelines for LDCs. These Guidelines required incumbent WTO members to exercise restraint when seeking market access commitments and to do so in a manner that is commensurate with the level of an applicant's economic development and not in excess of that of incumbent WTO members at the same level of economic development. However, this analysis only confirmed that incumbent WTO members have failed to live up to this promise and that the general trend in the WTO was to request LDCs to make ever-increasing market accession commitments, which go far beyond what is commensurate with their level of economic development, capacity and trade and financial needs.

Chapter 4 discussed the implications of lowering tariffs and the excessive commitments for South Sudan in light of the difficulties experienced by other recently acceded LDCs to the WTO. It analysed the concept of 'policy space' as well as the argument for infant industry protection, and this research submitted that the WTO market access commitments will remove the ability of LDCs' governments to pursue their legitimate economic objectives by using tariffs and to successfully industrialise as do current advanced economies which employed policy space to achieve their economic success. This chapter further analysed the services commitments and it was submitted that these commitments would render it difficult for LDCs to protect domestic jobs and services sectors from foreign domination. It also assessed the contribution of import tariffs to the government revenues of LDCs and concluded that LDCs stand to lose a significant amount of revenues as a resultant effect of these accession commitments. It was however acknowledged in this chapter that although South Sudan at present barely has advanced industries or services sectors due to its recent war-torn past that destroyed its infrastructures and institutions, acceding to the WTO now would not give render it any special treatment different to that of the six recently acceded LDCs that joined the WTO. The same commitments or even more commitments may be asked of this LDC as well. Thus the resulting implications would be none other than the ones expressed above.

In light of all the above, therefore, this research submits that WTO accession is a one-way process and not multilateral trade liberalisation, in which those that are already members of the Organisation exercise their privileged positions to extract as much concessions as they possibly can from the candidate countries. Needless to say, this is what renders the costs and benefits of WTO accession a bittersweet paradox.[449] This research bases its conclusion on the premise that on one hand, the WTO is expected to be a multilateral trading system that gives due

[449] Stebek E N 'WTO Accession in the Ethiopian Context: A Bittersweet paradox.' (2007) 1 *Mizan Law Review* 90-118; 115.

attention to the needs and aspirations of DCs and LDCs, but contrary to this, the process of WTO accession tends to proceed on highly mercantilistic terms, with WTO members aiming to extract the highest possible concessions from acceding candidates. The WTO incumbent members proceed to negotiate in this way with no particular concern either for the possible barriers that the acceding LDC countries face in their own markets or indeed for the average level of their own bound commitments.

5.2 Recommendations

In order to facilitate the accession of LDCs to the WTO, this research recommends first and foremost that the procedural steps for accession be strengthened, and that most especially the ambiguity of the rules governing the accession process should be done away with. It is of the view that Article XII of the Marrakesh Agreement should be specific in detail by establishing criteria for the accession 'terms to be agreed.'[450] In sharing the optimism of Grynberg, Dugal and Razzaque the specification of these terms might contribute to treatment of acceding developing countries (DCs) and LDCs which would be congruent to that of the special and differential treatment of developing and least developed members.[451]

Secondly, countries seeking accession should not be asked to commit to more than that of comparable economies that are already WTO members. There should be a yardstick regarding the degree of commitment expected from acceding countries. There is no stark contrast between this recommendation and that of the special and differential treatment provisions according to which developing countries are asked not to commit to more than they can handle according to their state of development and in line with their development goals. However, this recommendation goes a little further in providing criteria, by comparison with similar economies, for assessing the extent of commitments that could be expected from the acceding country. It should not be interpreted to mean that acceding countries should concede as little as possible and make these concessions only after ensuring that they are unavoidable, and try if possible to construe any commitments narrowly. Rather, that the commitments must originate from within the acceding country instead of being imposed by the WTO or its members. The acceding countries may however be warned of the difficulties of maintaining a particular policy measure

[450] Bienen D & Mihretu M E 'Principles of fairness and WTO accession: An Appraisal and Assessment of consequences' (Working Paper by the Society of International Economic Law, 2010) 27. (Hereafter Bienen D & Mihretu M E 'Principles of fairness and WTO accession' 2010).
[451] Grynberg *et al* 'An Evaluation of the Terms of Accession to the World Trade Organisation' (2006)53.

such as protectionist measures, but be allowed to maintain them if they wish as that would be a fair treatment as was evident in the past.[452]

Thirdly and in a bid to challenge both Grynberg's and Joy's cynicism that it is only the extremely naïve who believe that the accession process will reform,[453] one of the major aspects being emphasised by this research and that may serve as a recommendation as well, is the urgent need to translate into action the WTO members' commitment to simplify the accession process for LDCs. This research proposes that one way of making this possible is by converting the accession guidelines into a legally binding document, as opposed to being mere guidelines that impose no obligation or reprimand whatsoever upon the incumbent WTO members who fail to adhere to them. In particular, the proposed legal document should ensure that acceding LDCs are not asked to undertake higher levels of commitments than those made by the founding LDCs of the WTO. All acceding LDCs should only be required to implement specific commitments in services once the necessary domestic regulations are in place.

Lastly, this research submits that there are viable alternatives to joining the WTO. This research does not argue against unilateral, bilateral or regional trade liberalisation whenever the realities warrant so that LDCs can proceed at a pace based on their own particular economic realities. It however strongly opposes the untimely multilateral liberalisation under the WTO system and instead makes a recommendation for alternative forms of prudent liberalisation which DCs and LDCs can monitor and manage. In addition, this research contends that true liberalisation of a country's market does not necessarily require an international commitment as such and it can be done unilaterally.

Therefore, in answering the question as to whether or not South Sudan should join the WTO, this answer is clearly in the negative. This research recommends that in order to avert the potential adverse implications associated with WTO accession commitments, South Sudan should endeavour to first liberalise unilaterally before it considers joining the multilateral system. If South Sudan accedes to the WTO now, this will be a sealed deal which will effectively be impossible to undo. If WTO accession turns out to have the major negative implications envisaged in this research, it will be too late for South Sudan to withdraw from this Organisation.

[452] Bienen D & Mihretu M E 'Principles of fairness and WTO accession' (2010) 27.
[453] Grynberg R & Mickey J R 'The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System' In Grynberg R (ed) *WTO at the Margins: Small states in the Multilateral Trading System*. (2006) 693-714, see generally.

In theory, countries can withdraw from the WTO but none ever has, which means that South Sudan would be signing its own death sentence.

This research contends that South Sudan's economic future will inevitably be as a niche supplier to the regional community as well as the world economy at large, exporting agricultural products, industrial goods and various forms of services. This will require an active role by the government to adopt the right policies now, in order to promote and support the development of agriculture and new industries to fill the niches in South Sudan. By restricting what South Sudan's government could do to promote all the above, a decision not against WTO accession will not represent a missed opportunity.

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